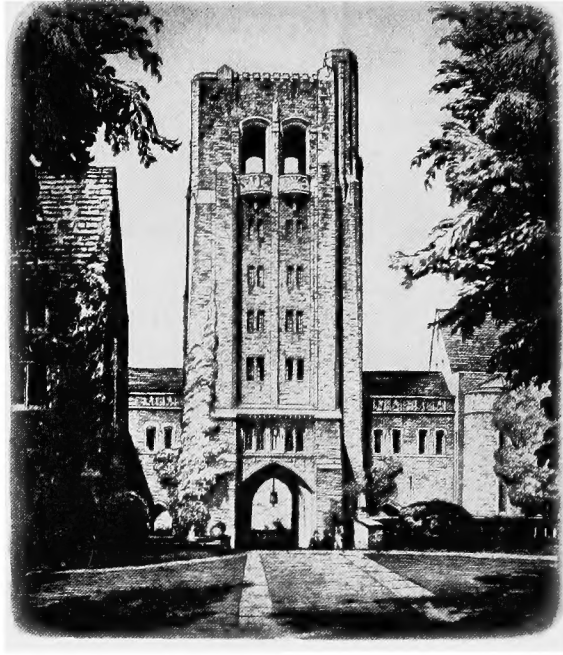


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THE LAW AND PRACTICE

IN

BANKRUPTCY

Under The National Bankruptcy Act of 1898

BY

WM. MILLER COLLIER

FOURTH EDITION BY WILLIAM H. HOTCHKISS

ELEVENTH EDITION

With Amendments of Statutes and Rules, and all Decisions
to June 1, 1917, Including Amendments to Bankruptcy
Act of February 5, 1903, June 15, 1906, June
25, 1910, and March 2, 1917

BY

FRANK B. GILBERT

Of the Albany Bar, Author of "Annotated (N. Y.) Code of Civil Procedure,"
Author "Commercial Paper," and Joint Editor of "Annotated
Consolidated Laws of New York," etc.



ALBANY, N. Y.
MATTHEW BENDER & COMPANY
INCORPORATED

1917

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PREFACE TO ELEVENTH EDITION.

Since the last edition of this work was published in 1914, more than two thousand bankruptcy cases have been decided in the Federal and State courts, and two important amendments have been enacted by Congress, materially affecting bankruptcy practice. Many of the cases are of great importance and have tended to dispose, finally, of controverted questions. These facts are sufficient in themselves to justify the publishers of Collier on Bankruptcy in continuing the well-established policy of publishing periodical editions of the work.

The work has been largely rewritten and many parts of it have been rearranged. The general scheme of retaining the sections of the Bankruptcy Act as the basis of the work, placing the discussion or treatise under the several sections, has been so well received by the profession that it has been deemed advisable to retain this method of treatment. The analysis of subject-matter under the section has been made more in detail—many headings having been inserted which were not in former editions. This will obviously make the great mass of the law more available for use.

The notes have been much amplified, by including therein copious extracts from decisions and findings of the courts on important matters. The cases which merely reiterate previous rulings have been cited in their appropriate connection.

The publishers and editor are much gratified at the favorable reception of this book through its numerous editions over a period of nearly twenty years. No other work on the subject has been published so often. Each has met with the approval of bench and bar. It is on this account with pardonable confidence that it is anticipated that this edition will meet the favor of bankruptcy practitioners and others interested in the subject.

The book has been reindexed. The increase in the size is occasioned by the ever-increasing number of bankruptcy cases. This increase may be noted by a comparison of the new table of cases in this edition with those in former editions. This edition includes citations of and quotations from all cases reported in the American Bankruptcy Reports, down to and including volume 38.

FRANK B. GILBERT.

October 1, 1917.

PREFACE TO TENTH EDITION.

The tenth edition of this work brings down to date the former edition, including all the recent reported cases on the subject. Many new and important questions have arisen since the last edition which have been considered and determined, and which must necessarily be treated to make the work complete and comprehensive. The changes in the law of bankruptcy are constant and varied. While the tendency has been toward definiteness, and many former inconsistencies and conflicts in the authorities have been eliminated by authoritative decisions of the United States Supreme Court, new difficulties have appeared which have produced a lack of harmony in the authorities. It has therefore been deemed advisable to continue the policy of publishing periodically a new edition of this work so that the thousands of lawyers and judges who are actively engaged in the consideration of questions arising in bankruptcy law may have constantly available the very latest authoritative expressions upon the subject.

This edition contains all the recent cases on bankruptcy decided by State and Federal courts, and includes citations and quotations from all cases reported in the American Bankruptcy Reports, down to and including volume 31.

JUNE 1, 1914.

FRANK B. GILBERT.

PREFACE TO NINTH EDITION.

It will be noticed, upon an examination of this edition of Collier on Bankruptcy, that the work has been greatly enlarged, and that the entire text and notes have been revised, and a large amount of new matter inserted. In preparing the work the method of treatment used in former editions has been followed. The matter in the text has been classified much more minutely than in former editions. The great volume of the law under the important sections of the Bankruptcy Act has necessitated more careful and complete analysis. The text has been amplified by more extensive discussion of many of the troublesome questions which have arisen to disturb the minds of both lawyer and judge. The notes have been increased in volume and number to give room for digests of cases supporting the text, and extracts of opinions of the courts relative to matters of importance discussed in the text.

Mr. Collier, the learned author of the first edition of this work, clearly stated his reasons for treating the law of bankruptcy as a branch of statutory law. He made the sections of the bankruptcy act the basis for his discussion. Each of the subsequent editors has adopted this method, so that Collier on Bankruptcy is now the only important work on bankruptcy which has so correlated the text of the bankruptcy act with the discussion thereon, as to recognize the principle that the act lies at the foundation of the law and practice in bankruptcy. Without the bankruptcy act there would be no bankruptcy law. The subject cannot be logically and effectually treated by relegating the act to an appendix. We have therefore retained the former arrangement of placing the sections of the act in their consecutive order, completing the discussion under each section, and uniting the related subjects by appropriate cross-references.

Many new forms have been added. The annotations of the General Orders are much more complete than in former editions. The entire work has been revised, increasing the size of the former edition more than one-third. It has been somewhat difficult, under our plan, to compass the subject within one volume. It was thought desirable to accomplish this, even at the expense of making the volume somewhat bulky.

The cases reported in the American Bankruptcy Reports to the end of volume 27, and in Federal Reporter, Volume 194, and in United States Supreme Court Reports, Volume 224, have been cited and discussed.

FRANK B. GILBERT.

ALBANY, N. Y., *August 15, 1912.*

PREFACE TO EIGHTH EDITION.

The eighth edition of this work is made necessary by the important amendments to the Bankruptcy Act by the Act of June 25, 1910. Nearly two years have elapsed since the publication of the former edition and in that period, about five hundred bankruptcy cases have been reported, many of them very important. The amendments of 1910 were prepared by acknowledged experts in bankruptcy law, for the purpose of settling many disturbing questions, in respect to which a number of controversies had arisen, and of obviating the confusion which had arisen because of divergent views as to the compensation of receivers and trustees. These amendments are far reaching in their effect. They completely nullify many decisions which were controlling in the several jurisdictions. In view of the many changes thus made in the law, the publishers, in furtherance of their policy of keeping this work abreast of the times, could not do otherwise than cause a new edition thereof to be prepared and published.

The cases included in this edition are those contained in the *American Bankruptcy Reports*, down to and including page 456 of volume 24, together with other cases of even date, not included in that series because not deemed properly within the scope thereof.

FRANK B. GILBERT.

ALBANY, N. Y., *October 1, 1910.*

PREFACE TO SEVENTH EDITION.

This new edition of Collier on Bankruptcy is published in pursuance of the publishers' policy of keeping the work abreast of the development of the law on the subject. In preparing this edition it has seemed necessary to entirely rewrite a large portion of the text. The method of treatment used in former editions has been followed in this, but the discussion under the several sections of the bankruptcy act has been reclassified and extended. The notes have been made more prominent; many of the new and important cases cited therein being digested and applied to the principles laid down in the text.

In recognition of the fact that the law of bankruptcy is based solely upon the Federal Bankruptcy Act, the several sections of that act have been clearly set forth at the beginning of each chapter. Such sections are cemented together by exhaustive cross references at the end of each section, and in the foot notes. The general orders containing correlative matter are quoted or referred to as the occasion demands. As in former editions, the text of the statute has thus been given its proper place in the work.

It is desirable to call attention to this feature of the work. To the editor's mind it is one of the things which has made this work a success. If it had been thought advisable, the so-called text-book method of treating the subject might have been adopted without additional labor or expense. The experience of lawyers and judges dealing with bankruptcy has shown the importance of keeping the several parts of the statute in their proper relation with the discussion to which they pertain. Every bankruptcy case relates to some particular provision of the Bankruptcy Act. The principle laid down in the case pertains to the application or discussion of such provision. It is not desirable to disassociate the case and the statute. We have therefore continued our former method of treating this important subject, and are firm in the belief that it is what the practitioner wants.

The general orders have been separately treated; all of the cases pertaining thereto having been grouped and considered thereunder. This is a new feature which will prove serviceable. A complete new index has been made covering the entire subject.

The cases included in this edition are those contained in the American Bankruptcy Reports down to and including the first three numbers of volume 21 thereof, together with such English cases and cases arising under the former bankruptcy acts as are applicable.

Much of the valuable matter contained in former editions of this work has been retained. The many important and trustworthy comments upon the law made by Mr. Hotchkiss in the Fourth Edition will still be found in their places, with such elaboration as seems necessary to conform with recent developments in the law.

FRANK B. GILBERT.

ALBANY, *May* 1, 1909.

PREFACE TO SIXTH EDITION.

Two years have elapsed since the former edition of this work was published. During this time nearly 600 cases involving the interpretation and application of the National Bankruptcy Act have been decided, all of which have been reported in volumes 13 to 16, and in the first three numbers of volume 17 of the American Bankruptcy Reports. Many of these cases conclusively settle disputed questions and are authoritative declarations of important doctrines. The character of these cases has required occasional modifications of the text of the former edition. In many instances new paragraphs and subdivisions have been inserted for the purpose of conforming the text to the trend of the judicial decisions.

The law of bankruptcy is based upon the Federal statute. Explanatory and illustrative cases are cited and commented upon in this edition, as in the former editions, for the purpose of clearly showing what the statute means and how it should be applied. It may be safely assumed that this important subject may not be properly treated in any other way. We have endeavored in this edition to bring before the practitioner first the statute and then the decisions in their legitimate relations without magnifying the importance of the one to the detriment of the other. It is suggested that in so doing the valuable results of former editions have been retained.

The constant and continued use of Collier on Bankruptcy by the courts and the profession, as evidenced by the frequent citations therefrom in the reported decisions, has more than justified a retention of the method of treatment adopted in former editions. All the recent cases are cited in their proper connection and are discussed and commented upon when deemed necessary. The commanding position which this work occupies among text-books upon this subject has brought home to the publishers the necessity of keeping it strictly up to date, and hence this new and revised edition. It is hoped that this edition, like its predecessors, will meet with the approval of the bench and the bar.

FRANK B. GILBERT.

ALBANY, N. Y., *April* 15, 1907.

PREFACE TO FIFTH EDITION.

The fourth edition of this work was written and published soon after the enactment of the important amendments of 1903 to the bankruptcy act.

Many important cases have been decided and reported during the two years which have elapsed since the publication of the fourth edition, many of them bearing directly upon the effect of the amendments of 1903. These cases have been referred to in their appropriate connection in this new edition. The text of the former edition has been rewritten wherever necessary to conform it to subsequent authorities, and much new matter has been added supplementing and amplifying its many valuable features.

The progress and ever increasing volume of the law of bankruptcy is evidenced by the number of cases reported during the two years intervening between this and the prior edition of this work. These cases run through volumes 9, 10, 11, and 12, and the first number of volume 13 of the American Bankruptcy Reports. All of these cases have been referred to or discussed and considered in this edition of this work. The many valuable notes in these reports are frequently used or referred to.

The number and importance of these cases and their instructive value as interpretations of the amended bankruptcy act of 1903 and the policy adopted by the publishers to keep this work in advance of every other work upon the subject render imperative this new and revised edition.

FRANK B. GILBERT.

ALBANY, N. Y., *February 1, 1905.*

PREFACE TO FOURTH EDITION.

The death of Mr. Eaton, the author of the third edition, made necessary the choice of a successor. Originally, the writer's purpose was merely to bring Mr. Eaton's edition down to date. The increasing importance of the federal bankruptcy system and the probability of important amendments, early caused the abandonment of that purpose, and the writing of the book anew. The result is a new work. The present author has, however, frequently drawn from his predecessors' conclusions, and gladly records his debt to them.

This rewriting has made possible some changes:

The cases referred to are cited in foot-notes, not in the body of the text; with, it is hoped, such completeness as to make the work a table of cases on the law of bankruptcy, as well as a text-book. The citations are largely to precedents under the present law, but those thought valuable under previous laws are also included. Reference is made, where possible, to both the American Bankruptcy Reports and the Federal Reporter, and, in the court of last resort, to the United States Reports.

Quotations from reported cases have been eliminated from the text.

Disputed points are not elaborately discussed, the work being intended for the practitioner who is perhaps unfamiliar with this branch of jurisprudence, rather than the student of or expert in it.

Through the "cross-references" at the head of each Section, all analogous provisions in the present law, as well as those in the former laws and the English Bankruptcy Acts of 1883 and 1890, are compacted into a few paragraphs, and the text and the statute thus webbed together. To a General Index, far more complete than in the earlier editions, has been added a system of short indices, called "Synopsis of Sections," at the head of each Section, by running which the investigator may quickly reach the paragraph pertinent to his quest. The General Orders, Official Forms, and Supplementary Forms have also been carefully indexed.

Much more space has been given to practice than in the previous editions, and, for convenience of reference, all paragraphs bearing on it have been indexed by sections under "Practice" in the General Index. The General Orders have also been annotated and criticised and the Official Forms cross-referenced.

A long list of "Supplementary Forms," based on the experience of a referee in bankruptcy and the daily inquiries of the profession, has been

added. These, while in no sense official, will, it is hoped, supply precedents for many of the papers needed in a bankruptcy proceeding. Where the Official Forms do not fit the law or the General Orders, new forms are offered as substitutes.

The abstracts of the exemption laws of the States, and the lists of the federal judges and clerks, and of the terms of court in the various districts, have been omitted.

The amendments of 1903 are indicated by italics, matter omitted from the original statute being placed in the foot-notes. The discussion of the amendments, themselves, is made as complete as possible — there being as yet no decisions construing them — and is based largely on the writer's knowledge of the purposes of the framers of the amendatory act and the genesis of the successive bills that resulted in that act.

The preparation of the work has stretched over more than a year, and it has been frequently revised to meet later decisions and changes in the then pending amendatory bill. For its errors in conclusion or statement, the writer asks the indulgence of all who recognize that to err is human. Such as it is, the work voices, doubtless imperfectly, the purpose of one who, recognizing that the bankruptcy system has now come to stay, earnestly desires to make its principles and procedure both clearer to the general practitioner and available even to the layman whose daily round is to give credit and collect his due.

The grateful acknowledgment of the writer is due to Washington A. Russell, Esq., of the Buffalo bar, for his preparation of the Table of Cases and his work in connection with the foot-notes; also to many of his brethren of the referees' courts for suggestions and encouragement.

Nor can the writer forbear to mention in this place the work in behalf of the amendatory bill of The National Association of Credit Men, and especially its tireless and resourceful Secretary, William A. Prendergast, of New York. Without the earnest and early advocacy of the Ray bill by that Association, its passage would have been doubtful, if not impossible. Without immediate remedial legislation, the law itself would have been repealed. This record of appreciation by one who believes that a permanent bankruptcy system is necessary to a credit-giving nation is, therefore, gladly made.

WILLIAM H. HOTCHKISS.

BUFFALO, N. Y., *March 16, 1903.*

PREFACE TO THIRD EDITION.

In his modest preface to the first edition of this book the author stated that his work was in the nature of a pioneer undertaking intended to "blaze the way" and aid in answering the questions which might arise before adjudications became plentiful. It is pleasant to know that Mr. Collier's scholarly and exhaustive book has not only assisted the practitioner to understand a complicated statute, the subject matter of which is new to most of the present generation, but has also helped greatly in the judicial construction and interpretation of that statute. It is gratifying, too, that the author's answers to many of the numerous questions which he foresaw would arise under this Act have proved to be correct.

In the two and a half years during which the Act has been in force and since the publication of the first edition of this book, most of the sections of the Act have been judicially construed. This fact alone makes a new edition at this time imperative. The bankruptcy decisions, under the law of 1898, have been collated in the present edition and their results set forth in rules of construction. The editor has quoted largely from the more important opinions because he believes that the bar will find it desirable to have the exact language of the court deciding the questions arising under the Act. It is not claimed that the book dispenses with the use of the reported cases but merely that this method guides the practitioner most surely and quickly to an intelligent knowledge of the effect of such decisions and where they may be found. All of Mr. Collier's work which has a permanent and historical value has been retained, while, at the same time, no effort has been spared to make the revision complete and to make the book a thoroughly up-to-date treatise on the principles of the bankruptcy law and guide to bankruptcy practice.

With the hope that this purpose has been fairly realized, the editor submits his work to the kindly indulgence of his professional co-laborers.

JAMES W. EATON.

ALBANY, N. Y., *November 17, 1900.*

PREFACE TO THE ENLARGED EDITION.

In presenting to the profession and to the public, an enlarged edition of my work on bankruptcy, it is but proper that the character and extent of the additions be explained. In this edition the forms which appeared in the original edition have been superseded by the official forms just promulgated by the Supreme Court; and the rules and orders in bankruptcy prescribed by the same court have been inserted. Not only is the full text of these rules and forms given, but an exhaustive index of them has been made, and they have been annotated and cross-referenced as far as their nature permits. The fact that by rule XXXVII it is provided that in proceedings in equity instituted for the purpose of carrying into effect the provisions of the bankruptcy act, or for enforcing the rights and remedies given by it, the rules of equity practice prescribed by the United States Supreme Court shall be followed, has led me to insert these rules; and a detailed index accompanies them.

A list of the judges of the United States District Courts and of the clerks thereof, and the addresses of the clerks, has been inserted for the convenience of attorneys.

The almost universal tendency on the part of practitioners,—in some cases enforced by local rulings of district courts—to withhold proceedings in bankruptcy until the promulgation of the official rules, has resulted in an almost complete absence of adjudications under the new law. Consequently the enlarged edition contains, besides the additions above mentioned, no changes in the text of the original edition except the correction of a few typographical errors, and the changing of the abstract of the exemption laws of Louisiana to correspond with a new statute of that state recently passed and to go into effect upon January 1, 1899. It is believed, however, that everything affecting the law and practice of bankruptcy is embodied in the book.

The marked favor shown to the work,—the original edition of which was exhausted on the day of issue and of which there have been already four reprints,—is a matter for which the author tenders his sincerest thanks. That the book,—now more full and complete than ever before and embracing, in one volume, the statute itself, the official rules, forms and orders, the exemption laws of all the states, the equity rules, exhaustive comment, and full citation of all authorities now applicable,—may be of further aid to the members of the profession and may assist them in the construction and application of the law and in practice under its provisions, is the wish of

THE AUTHOR.

AUBURN, N. Y., *November 29, 1898.*

PREFACE.

The Law of Bankruptcy is purely statutory both in its origin and in its development. Underneath it lies the one great fundamental principle that when a person's property is insufficient to pay in full all of his creditors, it shall be equitably divided *pro rata* among them; but there is probably no other principle which can be said to be fixed and permanent and fundamental. Even in England, where there has been a continuous system of bankruptcy for over three hundred years, that system has been developed rather by parliamentary legislation than by judicial decision; while in the United States so infrequent and spasmodic has been the exercise by Congress of its constitutional powers upon the subject that we can hardly claim that bankruptcy is a part of our system of jurisprudence. It has been, in the past, rather in the nature of fragmentary statutory legislation, the various enactments on the subject being separated by intervals of decades, and each presenting important features not appearing in those preceding it, and often the later acts containing provisions which evidenced a different purpose and policy than those of the earlier acts. So entirely unstable and unfixed is bankruptcy as a system of law that under the last two statutes, as will be seen by reference to the notes under section 12 of the present work, the courts have very frequently been called upon to determine what is a bankruptcy law, and what the "subject of bankruptcy" includes. The successive statutes have effected different classes of persons, have materially changed the manner of procedure, have differed radically as to the acts to be regarded as acts of bankruptcy and have at times enlarged and at other times restricted the rights of creditors, or the benefits conferred and the duties imposed upon bankrupts. Not only have there been changes, but the changes have not always tended toward any one end or indicated any fixed purpose. Like all laws of statutory creation the development of the American bankruptcy system has not been harmonious and symmetrical.

The study of bankruptcy, then, is a matter of statutory construction. The law must be considered and applied and enforced as it appears enacted, not as general notions of equity may seem to indicate as proper. The aim of the author of this book has been to study the bankruptcy act of 1898, to analyze its provisions and terms; in fine to ascertain the expressed will and intention of Congress. Following the general principle of the law of construction that each part of a statute or document is to be construed with reference to the whole, each section has been considered in connection with all others on the

same or kindred topics, and copious cross-references have been given under the various sections.

But it is not to be denied that the present bankruptcy act, though presenting many points of dissimilarity, is substantially like that passed in 1867, and also bears many resemblances to those passed in 1800 and 1841. The fact has not been overlooked that the adjudicated cases decided under those acts not only shed light on the meaning of terms and provisions of the present act, but that in very many cases they are indisputably clear authorities. In so far as these cases are applicable we have cited them, and for every legal proposition unqualifiedly stated, judicial authority is given. Many of the cases cited are now analogous rather than decisive; but it is believed they sustain the points made. The reader will, of course, bear in mind that when a case is cited upon a given point, it is by us claimed to be applicable or analogous only as to that particular point. Upon other matters, by reason of differences between the present and former acts, it may be entirely inapplicable and incorrect as an exposition of the present law. While an attempt has been made to give all applicable decisions, we have also endeavored to omit all that would mislead and confuse. To show to what extent the cases may still be considered authorities, special pains have been taken to point out the differences between the statutes, and with this aim in view under each section we give the analogous provisions in all the former acts, and as an appendix have inserted, for purposes of comparison, the full text of the act of 1867 with all amendments up to the time of its repeal.

While the authority of decided cases is cited for every legal proposition which is stated without qualification, we have felt that we would fail in properly performing the work undertaken if, because of the lack of adjudicated cases, no study should be given to and no comment made upon the great number of questions which spring up from the new and changed provisions of the act. In considering these we have not, however, always felt called upon to answer them dogmatically; but they have all been discussed and treated, and everything bearing upon them laid fully and fairly before the reader.

We take this opportunity of publicly extending our thanks to H. Noyes Greene, Esq., of the Troy, N. Y., bar, for assistance in preparing the index to this book and the table of cases; also to William H. Hotchkiss, Esq., of Buffalo, N. Y., referee in bankruptcy for Erie county, for his assistance in the preparation of the forms.

In presenting the work to the profession we do so with hesitancy. Of its shortcomings and failings few will be more keenly conscious than ourselves, but we ask that those who use it will bear in mind that the book is in the nature of a pioneer undertaking. It could without question be made more accurate, full and complete if its publication could be delayed until the courts should have construed the provisions of the statute and judicially answered

all the questions that might arise; and if then it were made a mere digest of their decisions. But the demand of the bar is for a work that will to some extent, at least, aid them in the solution of the questions that will arise in the early months of practice under the act, before adjudications are plentiful. This task of "blazing the way" is here undertaken, and in proportion to the difficulty of the task we ask the leniency of the critic.

WM. MILLER COLLIER.

AUBURN, N. Y., *September 10, 1898.*

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The Law And Practice In Bankruptcy

SECTION ONE

MEANING OF WORDS AND PHRASES

§ 1. **Meaning of Words and Phrases.**—*a* The words and phrases used in this act and proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: (1) “A person against whom a petition has been filed” shall include a person who has filed a voluntary petition; (2) “adjudication” shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed; (3) “appellate courts” shall include the circuit courts of appeals of the United States, the supreme courts of the Territories, and the supreme court of the United States; (4) “bankrupt” shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt; (5) “clerk” shall mean the clerk of a court of bankruptcy; (6) “corporations” shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association; (7) “courts” shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee; (8) “courts of bankruptcy” shall include the district courts of the United States and of the Territories, the supreme court of the District of Columbia, and the United States court of the Indian Territory, and of Alaska; (9) “creditor” shall include any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; (10) “date of bankruptcy,” or “time of bankruptcy,” or “commencement of proceedings,” or “bankruptcy,” with reference to time, shall mean the date when the petition was filed; (11) “debt” shall include any debt, demand, or claim provable in bankruptcy; (12) “discharge” shall mean the release of a bankrupt from all of his debts which are

provable in bankruptcy, except such as are excepted by this act; (13) "document" shall include any book, deed, or instrument in writing; (14) "holiday" shall include Christmas, the Fourth of July, the Twenty-second of February, and any day appointed by the President of the United States, or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving; (15) a person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts; (16) "judge" shall mean a judge of a court of bankruptcy, not including the referee; (17) "oath" shall include affirmation; (18) "officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and by any person authorized by law to perform the duties of such officer; (19) "persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations; (20) "petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named; (21) "referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or any one acting in his stead; (22) "conceal" shall include secrete, falsify, and mutilate; (23) "secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets; (24) "States" shall include the Territories, the Indian Territory, Alaska, and the District of Columbia; (25) "transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security; (26) "trustee" shall include all of the trustees of an estate; (27) "wage-earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year; (28) words importing the

masculine gender may be applied to and include corporations, partnerships, and women; (29) words importing the plural number may be applied to and mean only a single person or thing; (30) words importing the singular number may be applied to and mean several persons or things.

Analogous provisions. In U. S.: Act of 1867, § 48; R. S., § 5013.

In Eng.: Act of 1883, § 168.

Cross-references: Persons against whom petition may be filed, Bankr. Act, § 67-c. Adjudication, Id. §§ 18-e-g, 38-a(1). Appellate courts, Id. §§ 24, 25. Bankrupt, Id. all sections. Clerk, Id. §§ 51, 71. Corporations, Id. § 3-a (4). Courts, Id. § 39-a, and generally. Courts of bankruptcy, Id. § 2, and generally. Creditors, Id. §§ 55, 56, 57, 58, 59, 60. Debt, Id. §§ 17, 63, and generally. Discharge, Id. §§ 14, 15, 17, 29. Document, Id. §§ 21, 39, 47. Insolvency, Id. §§ 3, 60, 67. Officer, Id. §§ 2(3), 33, 51. Persons, Id. §§ 2(1), 3-a, 4. Petition, Id. §§ 18-a, 59-a-b. Referee, Id. §§ 33-43, 72, and generally. Secured creditor, Id. §§ 56-b, 57-e-h. States, Id. §§ 6, 23, 70-e. Transfer, Id. §§ 3-a-b, 14-b(4), 57-g, 60-a-b, 67-e, 70-a-e. Trustee, Id. §§ 44-50, 72, and generally. Wage-earner, Id. §§ 4-b, 64-b(4).

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MEANING OF WORDS AND PHRASES.

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I. CONSTRUCTION AND EFFECT OF BANKRUPTCY ACT.

a. Construction.—The general rules of statutory construction, applicable to all statutes, may be applied to the bankruptcy act. It should at all times be borne in mind that the act is remedial, and must be liberally construed with a view of carrying into effect its obvious purposes and intent.¹ The three fundamental purposes for which the act was enacted are: (1) That a debtor who has been unfortunate, and become unable to pay his debts, might be released therefrom, and be enabled to commence his business life anew, relieved of the burden, provided that he has not been guilty of fraudulent or other improper practices. (2) That, as the condition and price of being so released, he should turn over to his trustee, fully and unqualifiedly, all of his property which was subject to the demands of his creditors. (3) That this property should be applied equitably and ratably to the payment of his various debts.² The courts will at all times adopt the construction which tends to promote equity and equality in the distribution of the bankrupt's estate among his

1. Act is remedial.—The bankruptcy act is remedial and should be construed reasonably and according to the fair import of its terms with a view to effect its objects and to promote justice. *Southern Loan & Trust Co. v. Benbow* (D. C., N. Car.), 3 Am. B. R. 9, 96 Fed. 514.

In the case of *Brown v. Barker*, 8 Am. B. R. 450, 453, 68 N. Y. App. Div. 594, 74 N. Y. Supp. 43, the court says: "We may take judicial notice that the present bankruptcy act is the result of a long-continued agitation and discussion, and that it is our duty if possible, to so construe its provisions, liberally if necessary, as to secure the objects for which it was created, rather than by a narrow or technical construction, to defeat them."

See also *Botts v. Hammond* (C. C. A., 4th Cir.), 3 Am. B. R. 775, 99 Fed. 916 (holding that the act is remedial and should be interpreted reasonably and according to the fair import of its terms, with a view to effect its objects and to promote justice); *Blake v. Francis-Valentine Co.* (D. C., Cal.), 1 Am. B. R. 372, 89 Fed. 691 (citing *In re Muller*, Fed. Cas. 9,912; *Silverman's Case*, Fed. Cas. 12,855); *In re Scott* (D. C., Del.), 11 Am. B. R. 327, 331, 126 Fed. 981.

The bankruptcy act is remedial and should be interpreted reasonably and according to the fair import of its terms, with a view to effect its objects and to promote justice. In working out the objects of the bankruptcy act, the courts have not indulged in technicalities wherever a liberal procedure was consistent with the substantial rights of the parties in interest. *Emerson v. Castor* (C. C. A., 6th Cir.), 37 Am. B. R. 719.

2. Brown v. Barker, 8 Am. B. R. 450, 453, 68 N. Y. App. Div. 594, 74 N. Y. Supp. 43.

Objects of act.—There are two principles which lie at the foundation of the bankruptcy act: (1) That the debtor may be discharged from his provable debts; (2) that

his collectible assets may be divided equitably and ratably among his creditors. *Continental Nat. Bank v. Katz* (Super. Ct., Ill.), 1 Am. B. R. 19; *Reid, Murdock & Co. v. Cross*, 1 Am. B. R. 34.

It is the purpose of the bankruptcy act to convert the assets of the bankrupt into cash for distribution among creditors, and then to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes. *Williams v. U. S. Fidelity & Guaranty Co.*, 236 U. S. 549, 34 Am. B. R. 181.

The proper purposes of the bankruptcy act are: First (and this was its original purpose) to enable creditors to protect themselves by summary process against the frauds of their debtors in evading the payment of their debts; second, to distribute the assets of the debtor equally among his creditors; and, third, to relieve debtors from the burden of debts which, through business misfortune and otherwise, they have incurred and are unable to pay. *Leidigh Carriage Co. v. Stengel* (C. C. A., 6th Cir.), 2 Am. B. R. 383, 95 Fed. 637.

The object of the bankruptcy act is twofold—the benefit of the creditors and the relief of the bankrupt. It is not necessary that both objects shall be attainable in order to warrant proceedings in bankruptcy. In many, perhaps a majority of the cases, the relief to the bankrupt is the only question, for there are no assets to distribute, and in many other cases the benefit and relief of creditors is the only object. *MacDonald v. Tefft-Weller Co.* (C. C. A., 5th Cir.), 11 Am. B. R. 800, 806, 128 Fed. 381.

The equal and equitable distribution of the estates of insolvents and their discharge from the obligation of their debts are the ends sought by proceedings in bankruptcy. Bankruptcy without insolvency, actual or

creditors,³ and will protect the unsecured creditors against those who under state laws are given liens or priorities.⁴ But this construction should not minimize the equally important purpose of releasing an honest, unfortunate, and insolvent debtor from the burden of his debts and of his restoration to business activity, in the interest of his family and the general public.⁵ It is the duty of the court to carry into effect both of these purposes to the extent which the language of the act justifies, and to prevent schemes and artifices to avoid the letter and spirit of the law.⁶ The act must be construed, if the language will permit, so as to secure uniformity in the fullest measure, and to avoid an escape of its beneficial purposes by a dishonest tricky debtor.⁷ Where the language of the act is plain and unambiguous it should be given its ordinary meaning; an attempted judicial construction will only lead to doubt and confusion.⁸ The ultimate determination of the meaning of the provisions of the act rests with the Federal courts, and they are not bound by the interpretation of a State court.⁹

presumed, is almost inconceivable. Bankruptcy without discharge for the honest debtor is a contradiction in terms. In *re Forbes* (D. C., Mass.), 11 Am. B. R. 787, 790, 128 Fed. 137.

See also *Hicks v. Knost* (D. C., Ohio), 2 Am. B. R. 153, 155, 94 Fed. 625; *Ross v. Saunders* (C. C. A., 2d Cir.), 5 Am. B. R. 348, 105 Fed. 915; *Barton Bros. v. Texas Produce Co.* (C. C. A., 8th Cir.), 14 Am. B. R. 502, 504, 136 Fed. 355.

3. Distribution of assets.—The proceedings thereunder are equitable and should be conducted on broad lines to accomplish the ultimate purpose of distributing the assets of the estate pro rata among the bankrupt's creditors. In *re Faulkner* (C. C. A., 8th Cir.), 20 Am. B. R. 542, citing *Atchison, T. & S. F. Ry. Co. v. Hurley* (C. C. A., 8th Cir.), 18 Am. B. R. 396, 82 C. C. A. 453, 153 Fed. 503.

The enforcement of equality among creditors is as well the purpose of the bankruptcy act as the protection of the bankrupt from suits against him for the collection of debts, and in case of doubt as to the proper construction of provisions of the act, it is the duty of the court to adopt that construction which shall seem best adapted to promote that general purpose. In *re Adams* (Ref., N. Y.), 1 Am. B. R. 95; *Utah Assn. v. Boyle Furniture Co.* (Utah Sup. Ct.), 39 Utah 518, 31 Am. B. R. 488.

The bankruptcy act includes a large body of remedial legislation. It was designed to relieve unfortunate but honest debtors, and to secure a proper distribution of their assets among their creditors. The latter object is quite as important as the former. In *re Scott* (D. C., Del.), 11 Am. B. R. 327, 331, 126 Fed. 981.

As to purpose of equal distribution among creditors, see In *re Adams & Hoyt Co.* (D. C., Ga.), 21 Am. B. R. 161, 164 Fed. 489; *Coal Land Co. v. Ruffner Bros.* (C. C. A., 5th Cir.), 21 Am. B. R. 474, 165 Fed. 881, In *re Tindal* (D. C., So. Car.), 18 Am. B. R. 773, 783, 155 Fed. 456 (where the court said:

"The main object of the bankrupt act and one of its most beneficial results, was an equal distribution among his creditors of the estate of the bankrupt"); *Hurley v. Devlin* (D. C., Kans.), 18 Am. B. R. 627, 629, 151 Fed. 919; In *re Blount* (D. C., Ark.), 16 Am. B. R. 97, 101, 142 Fed. 263; In *re Forbes* (D. C., Mass.), 11 Am. B. R. 787, 790, 128 Fed. 137; In *re Swafford Bros. Dry Goods Co.* (D. C., Mo.), 25 Am. B. R. 282, 180 Fed. 549.

4. In *re Sabine* (Ref., N. Y.), 1 Am. B. R. 315.

5. *Hardie v. Swafford Bros. Dry Goods Co.* (C. C. A., 5th Cir.), 21 Am. B. R. 457, 165 Fed. 588; In *re Cohn* (D. C., N. Dak.), 22 Am. B. R. 761, 171 Fed. 568.

Discharge of bankrupt.—One of the main objects of the bankruptcy act is to protect unfortunate, but honest debtors. Fraudulent debtors are not intended to be protected, nor to escape payment of their just liabilities. In *re Harr* (D. C., Mo.), 16 Am. B. R. 213, 217, 143 Fed. 421.

The purpose of a voluntary proceeding in bankruptcy is in consideration that the bankrupt promptly surrender all of his nonexempt property to the Bankruptcy Court, to the end that all of his creditors, without preference or priority, may take share and share alike in percentage of the property thus surrendered; then the bankrupt is given an acquittance of such percentages of his debts not thus paid, and may commence his business life anew. *Baylor v. Rawlings* (C. C. A., 8th Cir.), 28 Am. B. R. 773, 200 Fed. 131.

6. In *re Blount* (D. C., Ark.), 16 Am. B. R. 97, 101, 142 Fed. 263; *Leighton v. Kennedy* (C. C. A., 1st Cir.), 12 Am. B. R. 229, 129 Fed. 737.

7. *Hills v. McKinniss Co.* (D. C., Ohio), 26 Am. B. R. 329, 332, 188 Fed. 1012.

8. *Swartz v. Siegel* (C. C. A., 8th Cir.), 8 Am. B. R. 689, 117 Fed. 13.

9. *New Jersey v. Anderson*, 203 U. S. 483, 17 Am. B. R. 63, 68.

b. Effect on State legislation.—The uniformity of the act throughout all the States is one of its essential features. The act applies alike in all the States and effectively nullifies all State laws which are in conflict with its terms.¹⁰ It follows that all such laws having for their purpose the disposition of the affairs of an insolvent debtor must yield to the paramount force of the bankruptcy act when the creditors invoke its aid.¹¹

c. Requirement as to uniformity.—It is not the purpose to discuss at this point the constitutionality of specific provisions of the bankruptcy act. Numerous cases have arisen where the validity of such provisions has been considered. Such cases will be cited and discussed under appropriate sections.¹² The United States constitution provides that Congress shall have power to establish “uniform laws on the subject of bankruptcies throughout the United States.”¹³ The provision confers comprehensive power on Congress to legislate upon this subject, and constitutes a relinquishment of all control thereof on the part of the States. The States, on surrendering such control, did so only if Congress chose to exercise it, and until this was done State laws were effective except so far as they transgressed the constitutional restriction that laws should not be passed “impairing the obligations of contracts.”¹⁴ The uniformity required in the enactment of bankruptcy acts is geographical and not personal, that is they must extend throughout all the States, and it has been held that the present system is, in a constitutional sense, uniform since under it the trustee takes in each State for distribution among creditors whatever would have been available to such creditors, if the bankruptcy act had not been passed.¹⁵ The act does not lack uniformity because of its recognition of State laws pertaining to exemptions, dower rights and priorities of payment.¹⁶ Nor because it makes a distinction between bankruptcies of individuals and corporations.¹⁷

d. Suspension of State insolvency laws.—(1) IN GENERAL.—No bankruptcy law since that of 1800 has contained any provision declaring the effect of such a law on analogous State laws. That law, § 61, provided as follows: “This act shall not repeal or annul, or be construed to repeal or annul, the laws of

10. In re Littlefield (C. C. A., 1st Cir.), 19 Am. B. R. 18, 155 Fed. 838; Matter of Heleker Bros. Mercantile Co. (D. C., Kan.), 33 Am. B. R. 503, 216 Fed. 963; Matter of Sage (D. C., Mo.), 35 Am. B. R. 436, 224 Fed. 525, holding that since the bankruptcy act confers upon courts of bankruptcy jurisdiction to adjudge private bankers bankrupt and to administer their property, this jurisdiction is not only paramount, but is exclusive, and State laws assuming to confer upon State officers or courts authority to administer the property of such bank are superseded and must give way when the bankruptcy act is properly invoked; In re Keith-Gara Co. (D. C., Pa.), 29 Am. B. R. 466, 203 Fed. 585, aff’d 213 Fed. 450.

11. In re Bruss-Ritter Co. (D. C., Wis.), 1 Am. B. R. 58, 90 Fed. 651; In re Empire Metallic Bedstead Co. (D. C., N. Y.), 1 Am. B. R. 137, 95 Fed. 957; In re Littlefield (C. C. A., 1st Cir.), 19 Am. B. R. 18, 155 Fed. 838; Matter of Heleker Bros. Merc. Co. (D. C., Kans.), 33 Am. B. R. 503, 216 Fed. 963.

12. See as to exemptions, under § 6, post;

as to incriminating questions on examination of bankrupt, under §§ 7 and 21, post; as to discharges, under § 14, post. See also Am. Bankr. R. Dig., §§ 2, 58, 942, 997.

13. United States Const., Art. 1, § 8, cl. 4.

14. Brown v. Smart, 145 U. S. 454, 457; Denny v. Bennett, 128 U. S. 498, where Mr. Justice Miller observed: “The objection to the extra territorial operation of a State insolvent law, is that it cannot, like the bankruptcy act passed by Congress under its constitutional grant of power, release all debtors from the obligation of the debt. The authority to deal with the property of the debtor within the state, so far as it does not impair the obligations of contracts, is conceded.”

15. Hanover Nat. Bank v. Moyses, 186 U. S. 181, 8 Am. B. R. 1; Leidigh Carriage Co. v. Stengel (C. C. A., 8th Cir.), 2 Am. B. R. 385, 95 Fed. 637.

16. Hanover Nat. Bank v. Moyses, 186 U. S. 181, 8 Am. B. R. 1; Thomas v. Woods (C. C. A., 8th Cir.), 23 Am. B. R. 132, 173 Fed. 585.

17. Leidigh Carriage Co. v. Stengel (C. C. A., 6th Cir.), 2 Am. B. R. 385, 95 Fed. 637.

any State now in force, or which may be hereafter enacted, for the relief of insolvent debtors, except so far as the same may affect persons who are or may be within the purview of this act." So far as it goes, the clause quoted is doubtless still the law. There was no need to insert it in the subsequent statutes, for ere the act of 1841 was passed, the Supreme Court had delivered two epoch-making decisions, which settled the law on the subject: (1) that, when Congress has exercised its constitutional power to enact a uniform bankruptcy law, all existing State insolvency laws applying to the same persons are suspended,¹⁸ but (2) that, this power not being exclusive, State laws are valid and continue operative so far as they do not conflict with the paramount Federal law.¹⁹ The prevailing rule seems to be that the operation of all laws enacted for the purpose of settling or winding up the estates and affairs of insolvent debtors, is suspended to the extent that the provisions thereof are conflicting.²⁰

(2) WHAT ARE INSOLVENCY LAWS.—It is not always easy to determine what laws are insolvency laws. There is some conflict among the authorities as to the operation of such laws, and as to whether or not proceedings thereunder may be instituted in State courts.²¹

It is obvious, however, that if a State law covers the same field as the bankruptcy act having for its purpose the relief of an insolvent debtor, by the distribution of his estate equally among his creditors, and his subsequent release from his debts, it is suspended, *in toto*, and no relief may be had thereunder.²² Laws regulating general assignments,²³ not being insolvency laws, are not

18. *Sturges v. Crowingshield*, 4 Wheat. 122.

19. *Ogden v. Saunders*, 12 Wheat. 213; *Singer v. National Bedstead Mfg. Co.* (N. J. Ch.), 11 Am. B. R. 276.

20. *In re Wright* (D. C., Mass.), 2 Am. B. R. 592, 95 Fed. 807.

Suspension of State insolvency acts, see *Carling v. Seymour Lumber Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 29, 113 Fed. 483; *Smith v. Mottley* (C. C. A., 6th Cir.), 17 Am. B. R. 863, 150 Fed. 268; *In re Pickens Mfg. Co.* (D. C., Ga.), 20 Am. B. R. 202, 158 Fed. 894; *Closser v. Strawn* (D. C., Pa.), 35 Am. B. R. 864, 227 Fed. 139; *Ketcham v. McNamara*, 72 Conn. 709, 6 Am. B. R. 160, 46 Atl. 146.

21. As to what constitutes an insolvency law, see *In re Weedman Stave Co.* (D. C., Ark.), 29 Am. B. R. 460, 199 Fed. 948; *Continental Bldg. & Loan Assn. v. Superior Court*, 163 Cal. 579, 28 Am. B. R. 873; *Closser v. Strawn* (D. C., Pa.), 35 Am. B. R. 864, 227 Fed. 139.

22. *Pitcher v. Standish* (Conn. Sup. Ct.), 37 Am. B. R. 456, 98 Atl. 93.

An act covering same field.—A State insolvency law which provides for proceedings on the part of the creditors of an alleged insolvent to have such insolvent so adjudged upon grounds specifically set forth in the act, and which provides for delivery by the insolvent of all his assets to the receiver, or to such assignee or additional assignees as may be selected at a meeting of creditors required to be called for that purpose, and which makes provision for the discharge of the insolvent from liabilities to those cred-

itors making claims to their share in the assets, except in respect to claims arising in certain cases, such as fraud, embezzlement, and for false oaths in reference to the settlement of the estate, is in the nature of a bankruptcy act. *Closser v. Strawn* (D. C., Pa.), 35 Am. B. R. 864, 227 Fed. 139.

State insolvency law defined.—A State statute, authorizing a general assignment, is an insolvent law when it permits a person of any class voluntarily to take advantage of its provisions by transferring his property in trust for the benefit of his creditors, and provides that, upon a due administration of his estate and a compliance with the requirements of the statute regulating the proceedings, he is thereby discharged from all liabilities on account of his debts which had been incurred at the time of making the general assignment. *Pelton v. Sheridan* (Sup. Ct., Ore.), 74 Ore. 176, 33 Am. B. R. 472, 144 Pac. 410.

23. *In re Sievers*, 1 Am. B. R. 117, 91 Fed. 366; *Duryea v. Guthrie*, 11 Am. B. R. 234 (Wis.). Contra: *In re Smith*, 2 Am. B. R. 9, 92 Fed. 135; *Matter of Karp* (D. C. Mass.), 36 Am. B. R. 414, 228 Fed. 798, holding that common law assignments are not outlawed by the bankruptcy act; but see *Mayer v. Hellman*, 91 U. S. 496. And compare *Thrasher v. Bentley*, 1 Abb. N. C. (N. Y.) 39, and *Beck v. Parker*, 65 Pa. St. 262.

The Oregon Act relating to assignments for the benefit of creditors is an insolvency act. *Pelton v. Sheridan*, 74 Ore. 176, 33 Am. B. R. 472, 144 Pac. 410; *Sabin v. Chrisman*, (Sup. Ct. Ore.), 36 Am. B. R. 372, 154 Pac. 908.

suspended. Likewise as to laws concerning the punishment of fraudulent debtors,²⁴ or for the settlement of the estates of deceased insolvents.²⁵ Nor does the existence of a Federal law preclude the passage of a State insolvency law; the latter merely remains inoperative while the former is in force.²⁶ A State statute relating to insolvency and providing for proceedings having the same object as the bankrupt act is absolutely inoperative as to the persons and property to which the bankrupt act applies.²⁷ The discharge feature seems not necessarily a part of an insolvency law, and State laws lacking it have been held suspended by a national bankruptcy law.²⁸

(3) **PARTIAL SUSPENSION; EXCEPTED CLASSES.**—State laws may be suspended in part only, as where they refer to a class expressly excepted by the bankruptcy law, in which case they continue operative as to that class.²⁹ Thus a State law under which persons engaged chiefly in the tillage of the soil may be proceeded against by their creditors for the purpose of throwing them into bankruptcy has been held not to be superseded by the bankruptcy act.³⁰ But a farmer is not deprived of the privilege of voluntary bankruptcy under the bankruptcy act, hence as to him a State act providing for voluntary bankruptcy is suspended.³¹ The exception relieving farmers, wage earners, and debtors owning less than \$1,000 from involuntary proceedings against them, leaves the way clear to creditors to proceed against them under State laws, if provision is made therefor.³²

24. *Berthelon v. Betts*, 4 Hill (N. Y.) 577; *Scully v. Kirkpatrick*, 79 Pa. St. 324.

25. *Hawkins v. Larned*, 54 N. H. 333.

26. *Palmer v. Hixon*, 74 Me. 447.

27. *Potts v. Smith Mfg. Co.*, 25 Pa. Super. Ct. 206, 12 Am. B. R. 392, in which case it was also held that since the Constitution has left in the States and in Congress concurrent power over bankruptcy, the exercise of such power by Congress precludes legislation by a State over the subject; *Harris v. Luxury Trust Co.*, 142 Ga. 67, aff'd 142 Ga. 866, 32 Am. B. R. 652, 82 S. E. 447; *Capital Lumber Co. v. Saunders*, 26 Idaho 408, 33 Am. B. R. 330, 143 Pac. 1178; *Pelton v. Sheridan*, 74 Ore. 176, 33 Am. B. R. 472, 144 Pac. 410.

28. *In re Smith*, 2 Am. B. R. 9, 92 Fed. 135; *Boese v. Locke*, 17 Hun (N. Y.), 270.

29. *Herron Co. v. Superior Court*, 8 Am. B. R. 492; *Maltbie v. Hotchkiss*, 38 Conn. 80. Compare *Fisk v. Montgomery*, 21 La. Ann. 446. See Am. Bank. Dig. § 8.

30. **Effect of exception as to farmers.**—A State law under which persons engaged chiefly in the tillage of the soil may be proceeded against by their creditors was not superseded by the Act of 1898. *Old Town Bank v. McCormick*, 96 Md. 341, 10 Am. B. R. 767, 53 Atl. 934. Compare *Closser v. Strawn* (D. C., Pa.), 35-Am. B. R. 864, 227 Fed. 139; *Herron Co. v. Superior Court*, 136 Cal. 279, 8 Am. B. R. 492, 68 Pac. 814.

31. *Rockville Nat. Bank v. Latham*, 88 Conn. 70, 32 Am. B. R. 247, 89 Atl. 1117.

32. **Effect of exceptions.**—In the case of *Pitcher v. Standish* (Conn. Sup. Ct.), 37 Am. B. R. 456, 98 Atl. 93, the court disapproved the apparent conclusions of the court in the case of *Closser v. Strawn* (D. C., Pa.), 35

Am. B. R. 864, 227 Fed. 139, and says: "He (the judge) seems to have assumed that what Congress has done as respects the insolvent condition of farmers, wage-earners, and small debtors, amounts to an exercise of control over that whole subject."

Cases either expressly or by plain implication holding a contrary doctrine include *Old Town Bank v. McCormick*, 96 Md. 341, 351, 10 Am. B. R. 767, 53 Atl. 934, 60 L. R. A. 577, 94 Am. St. Rep. 577; *Lace v. Smith*, 34 R. I. 1, 12, 82 Atl. 268, Ann. Cas. 1913E, 945; *Keystone Co. v. Superior Court*, 138 Cal. 738, 742, 72 Pac. 398; *Singer v. National Bedstead Co.*, 65 N. J. Eq. 290, 11 Am. B. R. 276, 55 Atl. 868; *Citizens' Nat. Bank v. Gass*, 29 Pa. Super. Ct. 125; *Rittenhouse's Insolvent Estate*, 30 Pa. Super. Ct. 468. The Maryland case above cited contains the most satisfactory and convincing discussion of the subject which has come under our notice, and with most of its reasoning we heartily concur.

It is undoubted law that the federal act does not suspend the operation of State laws in so far as the latter affect classes of persons who are expressly excepted from the operation of its provisions, or which those provisions do not reach. Such classes include municipal, railroad, insurance, and banking corporations which the act expressly excepts. *Sturges v. Crowninshield*, 4 Wheat. 122, 195, 4 L. Ed. 529; *Herron Co. v. Superior Court*, 8 Am. B. R. 492, 136 Cal. 279, 282, 68 Pac. 814, 89 Am. St. Rep. 124; *Old Town Bank v. McCormick*, 10 Am. B. R. 767, 96 Md. 341, 352, 53 Atl. 934, 60 L. R. A. 577, 94 Am. St. Rep. 577; *Simpson v. Savings Bank*, 56 N. H. 466, 22 Am. Rep. 491.

(4) DISSOLUTION OF INSOLVENT CORPORATIONS:—As to the effect of the bankruptcy act on a State law regulating the distribution of the assets of insolvent corporations there is much conflict. The weight of authority under the act of 1867 was that they were suspended.³³ It would seem that, if the proceeding be purely one of distribution and the corporation be amenable to bankruptcy under § 4 of the present law, the State law would be suspended; otherwise, not.³⁴ As stated by Chief Justice Fuller: "The operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations applying to be wound up under State statutes. The bankruptcy law is paramount, and the jurisdiction of the Federal courts in bankruptcy, when properly invoked in the administration of the affairs of insolvent persons and corporations, is essentially exclusive."³⁵

II. TERMS DEFINED IN GENERAL.

The definitions of the words and phrases contained in this section are to be used in construing the several provisions of the bankruptcy act and are to be applied when such words and phrases are used in proceedings under such act. Such definitions are controlling in the construction of the act unless the same be inconsistent with the context of the provision where the word or phrase is found. Several of these definitions are important. They often determine the scope and effect of the provision of the section in which they are found. In many instances, the definitions indicate wide departures from

Equally and for the same reasons, it must be true that whatever classes of cases are either expressly excepted from the operation of the Bankruptcy Act or lie outside of the reach of its provisions are left subject to State regulation. Such classes of cases and the conditions and situations which produce them are not within the field covered by the federal act, and legislative provisions concerning them by the States cannot be said to be in conflict in any way with the federal legislation. The power and jurisdiction of the States in the field of insolvency regulation is full and complete, except as federal legislation may invade and thereby limit it; and it is limited by such legislation only to the extent of that invasion. Wherever the field is not thus restricted, it must follow as a logical consequence that the power of the States remains. The field of restriction certainly cannot be broader than that of the operation of the federal statute. In other words, the test to be applied in determining whether or not the federal act suspends State laws is not one based upon a classification of persons, but upon a less arbitrary and more logical and just classification of cases, situations, and conditions in so far at least as they fall into clearly defined groups. Otherwise some portion of the proper field of bankruptcy and insolvency legislation is quite likely to remain unoccupied. *Sturges v. Crowninshield*, 4 Wheat. 122, 195, 4 L. Ed. 529; *Ex parte Eames*, 2 Story, 322, 326, Fed. Cas. No. 4237; *Singer v. Nat. Bedstead Co.*, 11 Am. B. R. 276, 65 N. J. Eq. 290, 294, 55 Atl. 868; *Herron v. Superior Court*, 8

Am. B. R. 492, 136 Cal. 279, 282, 68 Pac. 814, 89 Am. St. Rep. 124; *Lace v. Smith*, 34 R. I. 1, 12, '82 Atl. 268, Ann. Cas. 1913E, 945; *In re Macon Sash, etc., Co. (D. C., Ga.)*, 7 Am. B. R. 66, 112 Fed. 323, 331. The conclusion of the court was that, "We are of the opinion that Congress did not intend to bring the situation, created by the unwillingness of insolvent farmers, wage-earners, and small debtors to submit themselves of their own volition to the jurisdiction of the federal bankruptcy courts for the equal distribution of their estates among their creditors, within the purview of the Bankruptcy Act, or to cover the field created by that condition not unlikely to arise, and that the provisions of our State legislation regulating such situations and conditions are therefore not suspended and rendered inoperative by reason of the existence of the Bankruptcy Act."

³³ *Shylock v. Bashore*, 13 N. B. R. 481; *Thornhill v. Bank*, Fed. Cas. 13,992; *Platt v. Archer*, Fed. Cas. 11,213. *Contrá: Chandler v. Siddle*, Fed. Cas. 2,594.

³⁴ See *Platt v. Archer*, Fed. Cas. 11,213; also cases cited ante under this heading.

³⁵ *In re Watts*, 190 U. S. 1, 10 Am. B. R. 113. See also *Matter of Milbury Co.*, 11 Am. B. R. 523; *Merry v. Jones (Ga. Sup.)*, 11 Am. B. R. 625; *In re White Mountain Paper Co.*, 11 Am. B. R. 491, 127 Fed. 189; *Matter of International Coal Mining Co.*, 16 Am. B. R. 309, 143 Fed. 665; *In re Salmon*, 16 Am. B. R. 122, 143 Fed. 395; *In re Standard Oak Veneer Co. (D. C., Tenn.)*, 22 Am. B. R. 833, 173 Fed. 103.

the ordinary meanings of the words. It will be found essential to refer constantly to the definitions here set forth, and the careful practitioner will familiarize himself at the outset, with the peculiar nomenclature of the law. It will be noted that some of the definitions in this section read "shall mean," while others read "shall include." It was not intended that definitions of words used in the act which read "shall include" should exclude other meanings or definitions of the word or limit the ordinary and well-understood meanings. It was intended to make sure that the words defined would be held to include what is expressed.³⁶ It will not be necessary to consider in this place all of the words and phrases here defined but reference will be made to them from time to time in connection with the discussion of the appropriate subject matter. It may be well, however, to briefly consider a few of the definitions, which, in their nature, are fundamental.³⁷

III. STATUTORY DEFINITIONS.

a. Adjudication.—It will be observed that "adjudication" is defined in subd. (2) of this section for the purpose of determining the time when the adjudication takes effect. It is not in this sense a definition. The definition indicates on its face that the adjudication is to be by decree, which should be executed as prescribed in Forms in Bankruptcy Nos. 11 or 12.³⁸ The effect of adjudication or dismissal is considered under § 18, *post*.³⁹ If there is no appeal from the decree adjudicating the defendant a bankrupt, it dates from the rendition of the decree, and if there is an appeal, and it is finally confirmed, the adjudication dates from the confirmation. If an appeal is taken and it is dismissed, the date of adjudication is not changed from the time it is made to the time of dismissal; such dismissal is not a final confirmation.⁴⁰

b. Courts; courts of bankruptcy.—It is provided by subd. (7) of this section that where the term "courts" is used it shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee. "Courts" and "Courts of bankruptcy" are frequently used with the same meaning. The latter term is evidently defined for the purpose of specifying what courts are courts of bankruptcy. Referees do not possess all the jurisdiction of courts of bankruptcy. Their jurisdiction is limited to the matters specially prescribed⁴¹ and to such matters as may be inferred to fall within the jurisdiction expressly granted by statute. Although "courts" may include the referees under the definition, it is not intended to confer upon them such jurisdiction as is possessed by courts of bankruptcy.⁴²

36. Opinion of Judge Ray in *In re Harper* (D. C., N. Y.), 23 Am. B. R. 918, 931, 175 Fed. 412.

37. The act of 1867 contained no definitions. Section 48 of that act explains that "person" included "corporation" and "oath" included "affirmation" and indicated that the singular included the plural and the like. The English bankruptcy act of 1883, § 168, defines expressly many of the terms used in that act, and our present bankruptcy act follows the English act in this respect.

38. A mere memorandum of the adjudication is not sufficient; an order must be entered and recorded. See *In re Boston*, etc.,

Co., Fed. Cas. 1,678; *In re Hill*, Fed. Cas. 6,484.

39. See Bankr. Act, § 18, *post*.

40. *Moore Bros. v. Cowan*, 173 Ala. 536, 26 Am. B. R. 902, 907, 55 So. 903. As to date of adjudication see *In re Lee* (D. C., Pa.), 22 Am. B. R. 820, 171 Fed. 266.

41. See Bankr. Act, § 38, *post*.

42. *In re Walsh Bros.* (D. C., Iowa), 21 Am. B. R. 14, 16, 163 Fed. 352, where the court said: "The word 'court' may include the referee (§ 1 (7)). But this obviously means the referee when acting upon a matter of which he is given jurisdiction by the act."

c. Creditor.—This term includes any person who owns a provable debt, demand, or claim against the bankrupt, and may include his duly authorized agent, attorney, or proxy. The determination of the question as to the provability of debts or claims depends upon the statute and must be made as therein provided. It has been contended that an indorser or surety is not a creditor within the meaning of the act; but this contention is untenable.⁴³ A surety, or indorser or other person secondarily liable for the bankrupt has a provable claim against the bankrupt estate, in a case where the principal claim is provable.⁴⁴ The mere fact that plaintiffs have brought suit on a claim, pending at the time of bankruptcy, does not justify a finding that they “owned a demand or claim provable in bankruptcy,” and are therefore creditors.⁴⁵ In the usual arrangement made between a broker and his customer for the purchase of stock, the broker never owns the stock purchased; the stock belongs to the customer, and he does not become a creditor of the broker, for the amount which he has paid to the broker for the purchase of the stock.⁴⁶ One who subscribes for stock in a corporation and pays the agreed amount under an agreement that the corporation shall issue fully paid stock for twice the amount of the subscription and in case of a failure on the part of the corporation to issue said stock the amount subscribed shall be a loan, if the corporation fails to issue the stock, the subscriber remains a creditor.⁴⁷

d. Debt.—Debt means a provable debt; any debt, demand, or claim provable in bankruptcy. A debt is provable if it is susceptible of proof.⁴⁸ A debt may be provable and within the definition although not proved within the time limit,⁴⁹ that is, if it is one of those debts which may be proved under § 63 of the act.⁵⁰ The intent of the law is to make every demand, which may be enforced against the bankrupt either at law or in equity, provable in bankruptcy,⁵¹ provided, of course, such demand is one which, by the terms of the act, does not fall without the classification of provable debts.⁵² While the unmatured liability of a bankrupt as an indorser, surety, or guarantor may not be a “debt” in a technical sense, it is a “demand” or “claim,” and falls within the definition.⁵³ A debt is provable whether due or not at the time of the bankruptcy.⁵⁴ The definition does not include contingent claims under

43. *Bank of Wayne v. Gold*, 146 N. Y. App. Div. 296, 26 Am. B. R. 722, 130 N. Y. Supp. 942; *Huttig Mfg. Co. v. Richards* (C. C. A., 8th Cir.), 20 Am. B. R. 349, 160 Fed. 619, 87 C. C. A. 521; *Kobusch v. Hand* (C. C. A., 8th Cir.), 19 Am. B. R. 379, 156 Fed. 660, 84 C. C. A. 372, 18 L. R. A. (N. S.) 660; *Swartz v. Siegel* (C. C. A., 8th Cir.), 8 Am. B. R. 689, 117 Fed. 13, 54 C. C. A. 399; *In re McCarthy Elevator Co.* (D. C., N. J.), 30 Am. B. R. 247, 205 Fed. 986; *Amundson v. Folsom* (C. C. A., 8th Cir.), 33 Am. B. R. 318, 219 Fed. 122.

44. *Robusch v. Hand* (C. C. A., 8th Cir.), 19 Am. B. R. 379, 156 Fed. 660; *Bank of Wayne v. Gold*, 146 N. Y. App. Div. 296, 26 Am. B. R. 722, 130 N. Y. Supp. 942. See discussion under Section Fifty-seven, and cases cited. Creditors only may be preferred, see *Bankr. Act*, § 60-a.

Guarantors are creditors within the meaning of § 60-a, relating to preferences. *Stern v. Paper* (D. C., No. Dak.), 25 Am. B. R. 451, 183 Fed. 228.

45. *In re Crafts-Riordan Shoe Co.* (D. C., Mass.), 26 Am. B. R. 449, 185 Fed. 931.

46. *Richardson v. Shaw* (U. S. Sup. Ct.), 19 Am. B. R. 717, 209 U. S. 365, affg. 16 Am. B. R. 842.

47. *Clark v. Hamilton* (C. C. A., 8th Cir.), 33 Am. B. R. 198, 217 Fed. 227.

48. *Crawford v. Burke* (Sup. Ct.), 12 Am. B. R. 659, 666, 195 U. S. 176.

49. *Norfolk & Western R. Co. v. Graham* (C. C. A., 4th Cir.), 16 Am. B. R. 610, 145 Fed. 809.

50. See *Bankr. Act*, § 63-a, *post*.

51. *In re Mahler* (D. C., Mich.), 5 Am. B. R. 453, 459, 105 Fed. 428.

52. The only obligations, which, strictly speaking, are provable are those specified in § 63-a *post*. As to debts or demands which are not provable, see under Section Sixty-three, sub-title “*What debts are not provable*,” *post*.

53. *In re Gerson* (C. C. A., 3d Cir.), 6 Am. B. R. 11, 107 Fed. 897.

54. *Germania Sav. Bank & Trust Co. v. Loeb* (C. C. A., 6th Cir.), 26 Am. B. R. 238, 243, 188 Fed. 287.

executory contracts which have not accrued at the time of the institution of the proceedings.⁵⁵ Taxes due are not, in a strict sense, debts, but being claims against the bankrupt or his estate, they fall within the definition.⁵⁶ They are payable by the trustee although not required to be proved like other debts.⁵⁷ Interest accruing after the institution of the proceedings should not be included as a part of the debt.⁵⁸

e. Insolvency.—(1) **IN GENERAL.**—Insolvency is defined in subdivision 15 of this section. In all foreign bankruptcy laws, cessation of payments is the essential of insolvency.⁵⁹ Until the passage of the present law, it was the test in the United States. Under the bankruptcy act of 1867 a debtor was deemed insolvent when he was unable to pay his debts in the ordinary course of business as they matured.⁶⁰ It was held under that act that “the amount of the trader’s property was of no consequence if he was unable to pay his debts in lawful money as they matured.”⁶¹ Under the law of 1898, the value of the property is the essential element.⁶² When applied to proceedings for the appointment of a receiver the definition of insolvency should be strictly construed.⁶³ The definition controls as against a finding of insolvency in a State court based upon facts contained in the record of a proceeding for the appointment of a receiver of a corporation.⁶⁴ The definition of insolvency contained in this section has been much criticised. It evidently has rendered

55. In re American Vacuum Cleaner Co. (D. C., N. J.), 26 Am. B. R. 621, 192 Fed. 939. In re Inman (D. C., Ga., 22 Am. B. R. 524, 171 Fed. 185; In re Roth & Appel (C. C. C. A., 2d Cir.), 24 Am. B. R. 588, 181 Fed. 667.

56. In re Fisher & Co. (D. C., N. J.), 17 Am. B. R. 404, 411, 148 Fed. 907.

57. See under Section Sixty-four, sub-title “*Payment of Taxes*,” post.

See § 17-a, which provides that “A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as (1) are due as a tax levied by, etc.” thus clearly implying that a tax is a provable debt.

58. In re Chandler (C. C. A., 7th Cir.), 25 Am. B. R. 865, 184 Fed. 887.

59. For the universality of this test, see “Bankruptcy, A Study of Comparative Legislation,” by S. Whitney Dunscomb, pp. 12-14.

60. Carson v. Chicago Title & Trust Co., 5 Am. B. R. 814, 824, 182 U. S. 438; Hussey v. Richardson-Roberts Dry Goods Co. (C. C. A., 8th Cir.), 17 Am. B. R. 511, 148 Fed. 598.

61. Ex parte Hull, Fed. Cas. 6,856; In re Dibblee, Fed. Cas. 3,884; In re Wells, Fed. Cas. 17,388; Morgan v. Mastick, Fed. Cas. 9,803. See, also, Wager v. Hall, 16 Wall, 599, 21 L. Ed. 504; Wilson v. City Bank, 17 Wall, 473, 21 L. Ed. 723; Toof v. Martin, 13 Wallace 40, 20 L. Ed. 481; Sawyer v. Turpin, 91 U. S. 114, 23 L. Ed. 235; Dutcher v. Wright, 94 U. S. 553, 24 L. Ed. 130.

62. **Insolvency defined.**—In speaking of this definition the court said, in the case of In re Andrews (C. C. A., 1st Cir.), 16 Am. B. R. 387, 390, 144 Fed. 192: “Atten-

tion is called to the fact that the act of 1898 has given an artificial meaning to the word ‘insolvent,’ thereby complicating very much the construction of the statute as applied to alleged preferences, and rendering to a large extent inapplicable the decisions of courts of authority on statutes where the word ‘insolvency’ is to be read in its ordinary business sense.” In the case of Marvin v. Anderson, 6 Am. B. R. 520, 111 Wis. 387, 87 N. W. 226, a distinction was made between the meaning of the term “insolvency,” as the subject of insolvency is dealt with by insolvent and bankrupt laws, and the general meaning thereof. The former was said to be the inability of a person to pay his debts as they mature in the ordinary course of business; the latter, a substantial excess of a person’s liabilities over the fair cash value of his property. 5 Cyc. 237, note 1. See, also, in this connection, Grunsfeld v. Brownell, 11 Am. B. R. 599, 601, 12 New Mex. 192, 76 Pac. 310.

What constitutes insolvency.—A debtor is insolvent where, within four months of the filing of his petition in bankruptcy, the aggregate of his property at a fair valuation is insufficient to pay his debts. Golden & Co. v. Loving (Ct. of App., D. C.), 42 App. D. C. 489, 33 Am. B. R. 469, 42 Wash. L. Rep. 818.

63. Maplecroft Mills v. Childs (C. C. A., 4th Cir.), 35 Am. B. R. 311, 226 Fed. 415.

64. In re Golden Malt Cream Co. (C. C. A., 7th Cir.), 21 Am. B. R. 36, 164 Fed. 326; Karst v. Black Diamond Range Co. (N. J. Ch.), 82 N. J. Eq. 231, 31 Am. B. R. 287, 88 Atl. 692; Butler & Co. v. Palmenberg (C. C. A., 1st Cir.), 30 Am. B. R. 502, 207 Fed. 705, 125 C. C. A. 223.

inapplicable the decisions of courts of authority on statutes where the word "insolvency" is to be read in its ordinary business sense.⁶⁵ It is undoubtedly humane, but is thought to put creditors at their debtor's mercy. On the other hand, it protects the debtor whose property is not quickly convertible. In this aspect, it results in conditions not unlike those of a debtor who has taken advantage of the suspended payment periods sanctioned by some of the continental bankruptcy systems. In actual practice it has done little harm.⁶⁶ In any event the definition of insolvency as prescribed by the statute must be strictly adhered to.⁶⁷

(2) PROPERTY TO BE INCLUDED.—The property to be valued may include all assets having a value belonging to the person alleged to be a bankrupt, but under the definition any property which is disposed of with intent to defraud, hinder or delay creditors, is to be excluded. The statute thus contemplates that a bankrupt shall not have the benefit of the valuation of property transferred by him in fraud of creditors, in determining whether he is insolvent.⁶⁸ The property to be excluded is that which is actually disposed of by the transfer in fraud of creditors, so that where a mortgage is given which is tainted with bad faith, the equity of redemption should be counted in.⁶⁹ Property transferred in fraud of creditors, and which can only be reached through litigation cannot be considered property of the bankrupt upon the question of solvency or insolvency.⁷⁰ Where property is transferred in payment of, or as security for a just debt, the mere fact that it may involve a preference in bankruptcy should bankruptcy proceedings be instituted, does not exclude it from consideration in determining the debtor's solvency.⁷¹ Under the definition property which is concealed with intent to defraud is not to be valued in determining the solvency of the debtor. Where a man receives money which should have been applied to the payment of his debts, refuses to state where it was kept, but insists that it has been invested by him without the jurisdiction of the court he may be said to have "concealed" it, within the meaning of this clause, and it is to be excluded.⁷² The definition does not exclude exempt property and such property should therefore be valued in determining the question of the alleged bankrupt's insolvency.⁷³ Only such assets should be

65. In re Andrews (C. C. A., 1st Cir.), 16 Am. B. R. 387, 144 Fed. 922, affg. 14 Am. B. R. 247. But see In re Electric Supply Co. (D. C., Ga.), 23 Am. B. R. 647, 175 Fed. 612.

66. See discussion upon what constitutes insolvency by Referee Hotchkiss in Matter of Rung Furniture Co. (Spec. M., N. Y.), 10 Am. B. R. 44. For further discussion as to what constitutes insolvency, see discussion under Section Three of this work.

67. Crancer & Co. v. Wade (Sup. Ct., Okl.), 25 Am. B. R. 880, 110 Pac. 778; Maplecroft Mills v. Childs (C. C. A., 4th Cir.), 35 Am. B. R. 311, 226 Fed. 415; Grandison v. National Bank of Commerce (C. C. A., 2d Cir.), 36 Am. B. R. 438, 231 Fed. 800.

68. In re Baumann (D. C., Tenn.), 3 Am. B. R. 196, 96 Fed. 946; In re Hines (D. C., Or.), 16 Am. B. R. 295, 144 Fed. 142; Acme Food Co. v. Meier (C. C. A., 6th Cir.), 18 Am. B. R. 550, 153 Fed. 74; Philipps v. Kleinman (Pa. Com. Pleas), 23 Am. B. R. 266;

Utah Association of Credit Men v. Boyle Furniture Co. (Utah Sup. Ct.), 31 Am. B. R. 488, 136 Pac. 572; In re Wenatchee Heights Orchard Co. (D. C., Wash.), 30 Am. B. R. 401, 204 Fed. 674; Debus v. Yates (D. C. Ky.), 30 Am. B. R. 823, 193 Fed. 427.

69. Lansing Boiler Works v. Ryerson (C. C. A., 6th Cir.), 11 Am. B. R. 558, 128 Fed. 701; Acme Food Co. v. Meier (C. C. A., 6th Cir.), 18 Am. B. R. 550, 153 Fed. 74.

70. Utah Assn. of Credit Men v. Boyle Furniture Co. (Utah, Sup. Ct.), 26 Am. B. R. 867, 117 Pac. 800; In re Crenshaw (D. C., Ala.), 19 Am. B. R. 502, 156 Fed. 638.

71. In re Doscher (D. C., N. Y.), 9 Am. B. R. 547, 554, 120 Fed. 408, holding, also, that this clause refers to the act of bankruptcy stated in § 3-a (1), and not to the acts of bankruptcy relating to preferences.

72. In re Shoesmith (C. C. A., 7th Cir.), 13 Am. B. R. 645, 135 Fed. 684.

73. In re Hines (D. C., Or.), 16 Am. B. R. 295, 144 Fed. 142; Patterson v. Baker Grocery Co. (Ore. Sup. Ct.), 33 Am. B. R. 740,

included as may be realized on by a creditor if he obtained judgment against the owner in the ordinary course of judicial procedure.⁷⁴

(3) **FAIR VALUATION OF PROPERTY.**—Insolvency turns on what is a "fair valuation" of the property.⁷⁵ Under this definition it is not necessary to show solvency that the bankrupt was able to realize from his property at the time of an alleged preference or unlawful transfer, a sufficient sum to pay his debts; but if at the time a fair valuation of his property is sufficient to pay his debts, he is solvent.⁷⁶ Fair valuation has been held to be the present market value, and not the amount which he might realize from a forced sale of his property.⁷⁷ The fair "market value" of assets is that value

144. Pac. 673; *In re Baumann* (D. C. Tenn.), 3 Am. B. R. 196, 96 Fed. 946, in which case the court said: "If Congress had intended to exclude from the terms of this definition property exempted by law either explicitly or by necessary implication. . . . it might have been best for Congress to have made that exception, but it is neither absurd nor in any sense unwise that it should, in furtherance of its determination to give us a fixed rule, have made no exception at all. Again, the statute does in fact contain in its language one particular exception and it contains no more. If another exception had been intended it would have been expressed along with that which was significantly declared."

Exempt as well as non-exempt property must be included. *In re Crenshaw* (D. C., Ala.), 19 Am. B. R. 502, 156 Fed. 638. See, also, *In re Rome Planing Mill Co.* (D. C.), 3 Am. B. R. 766, 99 Fed. 937.

The Ray amendatory bill of 1903 sought to insert words which would have excluded exempt property from the aggregate of a debtor's assets in determining whether he was insolvent, but the Senate, unfortunately, struck out the provision.

The definition of what constitutes "insolvency," contained in section 1, subd. 15, does not control in determining whether a debtor was insolvent so as to make a voluntary conveyance fraudulent under the laws of Minnesota. Hence the exempt property of the debtor is not to be considered in determining the value of the assets retained. Nor is a debt that is amply secured by mortgage on the property conveyed to be included in determining whether the debtor has retained assets amply sufficient to satisfy existing claims. *Underleak v. Scott* (Minn. Sup. Ct.), 28 Am. B. R. 926, 134 N. W. 731.

74. In considering assets in relation to liabilities, in order to determine the solvency of an alleged bankrupt, the assets ought to be such as a creditor could realize on if he obtained a judgment against him in the ordinary course of judicial procedure; and where an alleged bankrupt, who has confessed judgment and mortgaged his property, holds accounts for goods sold on the installment plan to people who have no assets except their salaries and are execution proof, though they are doubtless honest and

may eventually pay their debts in full, such accounts will not be considered in estimating his resources. *Louisiana Nat. Life Assur. Soc. v. Segen* (D. C., La.), 28 Am. B. R. 19, 196 Fed. 903.

75. *In re Gilbert* (D. C., Oreg.), 8 Am. B. R. 101, 112 Fed. 951. When the aggregate of a person's property at a fair valuation is insufficient to pay his debts he is insolvent within the definition contained in the bankruptcy act. *Carson v. Chicago Title & Trust Co.*, 5 Am. B. R. 814, 824, 182 U. S. 438.

76. *Crancer & Co. v. Wade* (Sup. Ct., Okl.), 25 Am. B. R. 880, 110 Pac. 778; *Duncan v. Landis* (C. C. A., 3d Cir.), 5 Am. B. R. 649, 106 Fed. 839, 45 C. C. A. 666.

77. *Duncan v. Landis* (C. C. A., 3d Cir.), 5 Am. B. R. 649, 106 Fed. 839.

Fair valuation.—In the case of *In re Hines* (D. C., Or.), 16 B. R. 295, 144 Fed. 142, the court said, in considering what constitutes a fair valuation: "As it respects property considered in a commercial sense, I can conceive of no better or surer standard by which to arrive at a fair valuation than the market valuation; that is, what the property will probably bring, or is worth, in the general market to-day, where everybody buys. It could not be what it is worth to one person or to another under special circumstances, or having special use for a particular article, but what it is worth as a marketable commodity at a given time with no special conditions prevailing other than affect the market generally in the locality where the commodity is for sale." As bearing upon the question of insolvency, the value of the property may be shown by evidence of what it sold for at private sale by the receiver of the alleged bankrupt appointed in the State court (*In re Bloch* [C. C. A., 2d Cir.], 6 Am. B. R. 300, 109 Fed. 790), but not what the property brought an auction sale by the trustee. *Rutland Co. Nat. Bank v. Graves* (D. C., Vt.), 19 Am. B. R. 146, 156 Fed. 168.

"Fair valuation," as used in the definition, means the fair cash value or the fair market value of the property as between one who wants to purchase and one who wants to sell the property. If the bankrupt had wanted to sell its property, the price it could have obtained for it upon the market from parties who wanted to buy and would give

which the debtor himself might have realized thereon if permitted to continue in business.⁷⁸ The value of the property as a part of the bankrupt's business as a "going concern" should be considered rather than the value after bankruptcy has intervened, and the property has ceased to be productive.⁷⁹ Mortgages held by an alleged insolvent bank should be taken at the value which can be realized thereon by the bank as a "going" bank and not at that which might be obtained by treating them as quick assets, such as commercial bonds and the like.⁸⁰ The actual value and not the face value of commercial paper, accounts and the like must govern.⁸¹ This value should be determined as of the time the proceedings were commenced.⁸² Where the act of bankruptcy itself depreciates the debtor's property until, under this definition, he is insolvent, the petition against the alleged bankrupt must be dismissed.⁸³ Manifestly, a person may not be able to meet current obligations, and yet his property at a fair valuation may be sufficient to pay his debts.⁸⁴

its fair value, is the "fair valuation" which the statute refers to. The price which the property would bring or does bring when forced off at auction, cannot be regarded as always fixing its fair market value. *Grandison v. National Bank of Commerce*, (C. C. A., 2d Cir.), 36 Am. B. R. 438, 231 Fed. 800.

78. *In re Marine Iron Works* (D. C., N. Y.), 20 Am. B. R. 390, 159 Fed. 753; *Arnold v. Knapp* (W. Va. Sup. Ct.), 34 Am. B. R. 432, 84 S. E. 895 (citing text).

Determination of valuation.—In the case of *Stein v. Paper* (D. C., No. Dak.), 25 Am. B. R. 451, 183 Fed. 228, the court said: "Fair valuation," within the meaning of subdivision 15 of section 1 of the Bankruptcy Act, means a value that can be made promptly effective by the owner of property 'to pay his debts.' That is the language of this liberal statute. It ought not to be enlarged. Such a value excludes, on the one hand, the sacrifice price that would result from an execution or foreclosure sale, and, on the other hand, the retail price that could be realized in the slow process of trade. This latter value should be excluded because it could only be gained by large expense and the many risks of a mercantile venture. 'Fair valuation' means such a price as a capable and diligent business man could presently obtain for the property after conferring with those accustomed to buy such property. Such a value will depend upon many circumstances, such as the age and condition of the stock, the season of the year, and the state of trade."

79. *Chicago Motor Vehicle Co. v. American Oak Leather Co.* (C. C. A., 7th Cir.), 15 Am. B. R. 804, 141 Fed. 518; *Butler Paper Co. v. Goemmel* (C. C. A., 7th Cir.), 16 Am. B. R. 26, 143 Fed. 295.

Market value, frequently used as a standard of "fair valuation" must be assumed to depend on whether a market exists or can be created by an attempt to sell the property, and expert opinion of market value must necessarily be intended to fix the value which the property ought to give as a fair return, if sold to some one who is willing to pur-

chase under the ordinary selling conditions. A valuation based only upon what may be obtained at a forced sale or an auction sale, or which may be realized under some accidental or unusual situation cannot be taken as the "fair valuation" of property to a going concern. *Matter of Kobre et al* (D. C., N. Y.), 35 Am. B. R. 389, 224 Fed. 106.

80. *Matter of Kobre*, (D. C., N. Y.), 35 Am. B. R. 389, 224 Fed. 106.

81. *Benjamin v. Ohandler* (D. C., Pa.), 15 Am. B. R. 439, 440, 142 Fed. 242; *Arnold v. Knapp* (W. Va. Sup. Ct.), 75 W. Va. 804, 34 Am. B. R. 432, 84 S. E. 895; *In re Codrington* (D. C., Pa.), 9 Am. B. R. 243, 118 Fed. 281, in which case it was held that where it appears that accounts due to an alleged bankrupt are not at present collectible their actual value must be taken in determining his solvency.

The actual fair valuation of leases, patents, licenses and other intangible property will be considered. See *Troy Wagon Works v. Vastbinder* (D. C., Pa.), 12 Am. B. R. 35, 130 Fed. 232; *Motor Vehicle Co. v. Oak Leather Co.* (C. C. A., 7th Cir.), 15 Am. B. R. 808, 141 Fed. 518; *In re Foley* (D. C., Pa.), 15 Am. B. R. 832, 140 Fed. 300.

82. *In re Hines* (D. C., Or.), 16 Am. B. R. 295, 144 Fed. 142.

83. *Chicago Title & Trust Co. v. Roebeling's Sons* (Cir. Ct., Ill.), 5 Am. B. R. 368, 107 Fed. 71. See also, *In re Rome Planing Mills* (D. C., N. Y.), 3 Am. B. R. 766, 99 Fed. 937; *In re Rogers Milling Co.* (D. C., Ark.), 4 Am. B. R. 540, 102 Fed. 687; *Vaccaro v. Bank* (C. C. A., 6th Cir.), 4 Am. B. R. 474, 103 Fed. 436; *Lansing Boiler Works v. Ryerson & Son* (C. C. A., 6th Cir.), 11 Am. B. R. 558, 128 Fed. 701.

The valuation for the test of solvency or insolvency upon an issue as to whether a chattel mortgage was preferential, must relate to the conditions, as a going concern, when the alleged preference was given, and not to the mere dead matter of the plant after bankruptcy intervened. *Butler Paper Co. v. Goemmel* (C. C. A., 7th Cir.), 16 Am. B. R. 26, 143 Fed. 295.

84. *Hackney v. Raymond Bros, etc., Co.*

(4) **EVIDENCE.**—Evidence must be adduced sufficient to show that the alleged bankrupt's debts were more than the value of his assets at the time the petition is filed.⁸⁵ The books of a bankrupt, his schedules, inventory and appraisal are competent evidence upon the question of insolvency.⁸⁶ The question of insolvency is one of fact and not of law, and is determinable as such.⁸⁷

f. Conceal.—The word "conceal" under the present law, means more than "hide;" it connotes more than "secrete." Thus, with peculiar reference to the second objection to a discharge,⁸⁸ it includes the falsifying or mutilating of books or business records. Under the former law, concealment of property included a concealment of title to property.⁸⁹ The new definition strengthens rather than impairs this doctrine. It may be doubted, however, whether the definition adds anything to the ordinary meaning of the word "concealed?" in § 29-b; the difficulty of reading in either "falsified" or "mutilated" will be apparent at a glance. Almost as difficult would be the interpolation of these new meanings into the first act of bankruptcy.⁹⁰ This definition has frequently been considered by the courts,⁹¹ in connection especially with the concealment of the bankrupt's property as an indictable offense,⁹² or as a ground for the withholding of a discharge.⁹³

g. Secured creditor.—This term is defined in subdivision 23 of this section. Under this definition a creditor, to be secured, must either (a) hold security against the property of the bankrupt, or (b) be secured by the individual obligation of another who holds such a security. This definition thus restricts the popular meaning.⁹⁴ If the security is the property of another, or if it is exempt property, that is, if it is not assignable under the bankruptcy act, the person holding the same is not a secured creditor within this definition.⁹⁵

(Sup. Ct., Neb.), 68 Neb. 624, 10 Am. B. R. 213, 94 N. W. 805, 99 N. W. 675. See also *In re Doscher* (D. C., N. Y.), 9 Am. B. R. 547, 556, 120 Fed. 408; *In re Coddington* (D. C., Pa.), 9 Am. B. R. 243, 126 Fed. 891.

Overdrafts at a bank do not show insolvency. The arranging to cover overdrafts by bank drafts and checks is not in itself sufficient to create even a suspicion of insolvency as the term is used in the act. *McDonald v. Clearwater Ry. Co.* (D. C., Ida.), 21 Am. B. R. 182, 190, 164 Fed. 1907.

85. *Knittel v. McGowan* (D. C., Pa.), 14 Am. B. R. 209, 134 Fed. 498.

Liability as surety or indorser, where principal solvent.—The liability of an alleged bankrupt as surety or indorser, if the principal is solvent and abundantly able to pay, should not be counted against him on the question of his solvency or insolvency, because, if called on to pay such debt, he would immediately have an asset which would be equal to the amount he would be required to pay. *Matter of Bowers* (D. C., Ga.), 33 Am. B. R. 51, 215 Fed. 617.

86. *In re Docker-Foster Co.* (D. C., Pa.), 10 Am. B. R. 584, 123 Fed. 190.

87. *Utah Assn. of Credit Men v. Boyle Furniture Co.* (Utah Sup. Ct.), 26 Am. B. R. 867, 117 Pac. 800.

88. See Bankr. Act, § 14-b (2), *post*.

89. *In re Williams*, Fed. Cas. 17,703.

90. See Bankr. Act, § 3-a (1), *post*.

91. See *In re Bellah* (D. C., Del.), 8 Am. B. R. 310, 116 Fed. 69; *Matter of Carbone* (Ref., Wash.), 13 Am. B. R. 55, and cases cited under § 14-b (1), *post*, and § 29-b.

Where an indictment under § 29-b uses the words "unlawfully, knowingly and fraudulently" to characterize the word "conceal" it is not necessary to specify whether the concealment consists of secreting, falsifying and mutilating, simply because the word "conceal" as defined in this section, includes "to secrete, falsify and mutilate." *United States v. Comstock* (Cir. Ct., Mass.), 20 Am. B. R. 520, 162 Fed. 416.

"Conceal" includes the withholding of assets, with fraudulent intent. *United States v. Rhodes* (D. C., Ala.), 32 Am. B. R. 523, 212 Fed. 513.

92. See discussion under Section Twenty-nine, sub-title "*Concealment of property*," *post*.

93. See discussion under Section Fourteen, sub-title "*Concealment of property*."

94. *In re Coe* (D. C., Ohio), 1 Am. B. R. 275, 49 Fed. 481; *Stauffer, etc., Co. v. Abington Co.* (Sup. Ct., La.), 131 La. 715, 32 Am. B. R. 120, 60 So. 202, citing *Collier on Bankruptcy* (6th ed.) 6.

95. *Gorman v. Wright* (C. C. A., 4th Cir.), 14 Am. B. R. 135, 136, 136 Fed. 164, *revd.* 13 Am. B. R. 91; *In re Mertens* (D. C.,

The English definition, "a person holding a mortgage, charge or lien on the property of the debtor, or any part thereof, for a debt due to him from the debtor,"⁹⁶ is even more restrictive than is ours. Thus, in both systems, creditors may often be secured and yet not be secured creditors.⁹⁷

h. Transfer.—This term is defined in subdivision 25 of this section. The word has most comprehensive meaning in the bankruptcy law. It includes every method of disposing of or parting with property or its possession; thus doubtless comprising within itself even the idea commonly expressed by "conceal." Its enlarged meaning has already been extensively discussed by the courts. A payment of money, even in due course of business, is a transfer.⁹⁸ Transfer includes a chattel mortgage,⁹⁹ as well as any other lien or

N. Y.), 14 Am. B. R. 226, 227, 134 Fed. 101, revd. on other grounds, 15 Am. B. R. 362, 144 Fed. 818; *Matter of Thompson* (D. C., N. Y.), 31 Am. B. R. 236, 208 Fed. 207, holding that the words "secured creditor" are limited to creditors secured out of or against the estate.

Exempt property is not of a nature to be assignable under the act, and a creditor holding a mortgage on exempt property is not a "secured creditor." In re *Bailey* (D. C., Utah), 24 Am. B. R. 201, 176 Fed. 990.

Assignability of homestead.—In the case of *Fenley v. Poor* (C. C. A., 6th Cir.), 10 Am. B. R. 377, 121 Fed. 739, it was held that the real estate in which the bankrupt may have a homestead passes to his trustee, and the holder of a mortgage thereon is a "secured creditor." The court said: "But the definition in the bankruptcy act refers to the nature of the property, and, if it is such as to be assignable under the act, the fact that it includes exemptions under the State laws in force at the time of the filing of the petition could not affect its nature and make it non-assignable. The act provides that the bankrupt shall make claim under oath to his exemptions, and file the same in triplicate, and also makes it the duty of the trustee to set apart the bankrupt's exemptions and report the estimated value to the court, and makes it the duty of the judge to determine all claims of bankrupts to their exemptions. These provisions clearly indicate that the whole estate of the bankrupt is assigned, under the law, to the trustee, and that then the claim of the bankrupt is to be made for his exemptions which are to be set apart by the trustee and determined by the court. The fact that the debtor has a homestead right in a tract of land does not change the nature of the property and make it non-assignable." Citing *In re Sisler* (D. C.), 2 Am. B. R. 760, 96 Fed. 402. See, also, *In re Meredith* (D. C., Ga.), 16 Am. B. R. 331, 144 Fed. 230.

⁹⁶ English Bankruptcy Act, 1883, § 168.

⁹⁷ *Gorman v. Wright* (C. C. A., 4th Cir.), 14 Am. B. R. 135, 136 Fed. revg. 13 Am. B. R. 19.

Indorsed notes.—Notes of a bankrupt, secured only by the personal indorsement of

another, are not secured within the meaning of the Bankruptcy Act. *Stauffer, etc., Co. v. Abington Co.* (Sup. Ct., La.), 131 La. 715, 32 Am. B. R. 120, 60 So. 602.

⁹⁸ *Carson v. Chicago Title & Trust Co.*, 182 U. S. 438, 5 Am. B. R. 814, sustaining many cases in the lower courts to the same effect, in which case the court said: "Transfer" is defined to be not only the sale of property, but every other and different mode of disposing of or parting with property. All technicality and narrowness of meaning is precluded; the word is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another and by which the result forbidden by the statute may be accomplished,—a preference enabling a creditor to obtain a greater percentage of his debt than any other creditor of the same class." *Matter of Muir* (D. C., Pa.), 31 Am. B. R. 528, 212 Fed. 495. It has been held to include the delivery and indorsement of firm notes by a member of a partnership. *Matter of Frazer* (D. C., N. Y.), 34 Am. B. R. 467, 221 Fed. 83.

Payment of money.—It was settled in the *Carson* case *supra*, that money is "property" within the meaning of the Bankruptcy Act, and that a payment of money is a "transfer." *West v. Bank of Lahoma*, 16 Am. B. R. 733, 16 Okla. 508, 86 Pac. 59. See, also, *Jaquith v. Alden*, 9 Am. B. R. 773, 189 U. S. 78, 47 L. Ed. 620, 23 Sup. Ct. 649; *In re Pfaffinger* (D. C., Ky.), 18 Am. B. R. 807, 154 Fed. 528; *Boyd v. Lemon Gale Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 81, 83, 114 Fed. 647; *Landry v. Andrews*, 6 Am. B. R. 281, 21 R. I. 597; *In re Sloan* (D. C., Iowa), 4 Am. B. R. 356, 102 Fed. 116; *In re Ft. Wayne Elec. Corp.* (C. C. A., 7th Cir.), 3 Am. B. R. 634, 99 Fed. 400; *Knost v. Wilhelmy* (Ref., Ohio), 2 Am. B. R. 471; *Johnson v. Wald* (C. C. A., 5th Cir.), 2 Am. B. R. 84, 91, 93 Fed. 640.

⁹⁹ *Matter of Riggs Restaurant Co.* (C. C. A., 2d Cir.), 11 Am. B. R. 508, 130 Fed. 691. This case was decided under the New York statute and the case of *Butler v. Miller*, 1 N. Y. 500, was cited, in which the court said: "A personal mortgage is more

mortgage voluntarily created by the debtor.¹⁰⁰ It includes orders drawn by the bankrupt, which operate as assignments of the funds upon which they are drawn.¹⁰¹ It is not, however, sufficiently broad to include a preferential payment to a creditor within the meaning of the term "transferred" so as to bar a discharge under § 14-b (4), in the absence of a fraudulent intent.¹⁰² The performance of labor by a debtor for a creditor does not constitute a "transfer of property."¹⁰³ Nor does a "transfer" include a bailment; it was only intended to apply to cases where from the nature of the contract, the title to the property has become vested in the bankrupt to such an extent as to render it his property, and as such liable for the payment of his debts.¹⁰⁴ The words "as a payment, pledge, mortgage, gift or security," as used in this definition are illustrative merely, and do not so qualify the meaning of the term as to permit a transfer by any other method.¹⁰⁵ In § 67-e, "transfer" seems to be used as something different from "conveyance," "assignment" and "encumbrance," though the better opinion is that this was an inadvertence in the drafting of the law, and that even here the general word includes those that are specific. This definition becomes important in §§ 3-a (1) (2) and b (1), 57-g, 60-a, 67-e, four of the leading sections of the law. Its significance to a proper understanding of the statute cannot be too much emphasized.

i. Wage-earner.—This term is defined in subdivision 27 of this section. Cases interpreting this definition are already numerous. A traveling salesman was held not to be a wage-earner;¹⁰⁶ yet, under the meaning of the word, as used in local statutes, may be.¹⁰⁷ But he is not within the definition if he receives a salary of \$100 per month, and his board and lodging which were worth \$40 per month to him.¹⁰⁸ The doubt as to this question led to the amendment of § 64-b (4) by the act of 1906, giving traveling salesmen the same priority as other wage-earners.¹⁰⁹ A bookkeeper working for a stated

than a mere security. It is a sale of the thing mortgaged and operates as a transfer of the whole legal title to the mortgage, subject only to be defeated by the full performance of the condition."

100. In re Tindal (D. C., S. Car.), 18 Am. B. R. 773, 155 Fed. 456; *Coder v. Arts* (C. C. A., 8th Cir.), 18 Am. B. R. 513, 152 Fed. 943; In re Wright Lumber Co. (D. C., Ark.), 8 Am. B. R. 345, 114 Fed. 1011, 1013.

A voluntary confession of a judgment in favor of certain of the creditors of any insolvent is a transfer. In re Nasbaum (D. C., N. Y.), 18 Am. B. R. 598, 152 Fed. 835; *Grant v. National Bank of Auburn* (D. C., N. Y.), 28 Am. B. R. 712, 197 Fed. 581. Allowing a judgment to be taken and docketed, thereby creating a lien and a security for the debt, may constitute a transfer, for it would be or might be a disposition of real property by way of security. In re Tupper (D. C., N. Y.), 20 Am. B. R. 824, 826, 163 Fed. 766.

Surrender to attaching creditor.—Where a bankrupt parts with the possession of property to the attaching officer, conditionally and as security, it may be admitted that there has been a transfer of the property. In re Crafts-Riordan Shoe Co. (D. C., Mass.), 26 Am. B. R. 449, 185 Fed. 931.

101. In re Hines, (D. C., Pa.), 16 Am. B. R. 495, 144 Fed. 543; *McDonald v. Clearwater Ry. Co.* (Cir. Ct., Idaho), 21 Am. B. R. 182, 164 Fed. 1007.

102. *Matter of Maher* (Ref., Mass.), 15 Am. B. R. 786, aff'd 16 Am. B. R. 340, 144 Fed. 505.

103. In re Steers Lumber Co. (C. C. A., 2d Cir.), 7 Am. B. R. 332, 112 Fed. 406, affg. 6 Am. B. R. 315, 110 Fed. 738.

104. *Walter A. Wood Co. v. Vanstory* (C. C. A., 4th Cir.), 22 Am. B. R. 740, 171 Fed. 375; See, also, In re Columbus Buggy Co. (C. C. A., 8th Cir.), 16 Am. B. R. 759, 143 Fed. 861.

105. In re Stege (C. C. A., 2d Cir.), 8 Am. B. R. 515, 116 Fed. 342, 54 C. C. A. 116.

106. In re Scanlan (D. C., Ky.), 3 Am. B. R. 202, 97 Fed. 26; In re Greenewald (D. C., Pa.), 3 Am. B. R. 696, 99 Fed. 705.

107. In re Lawlor (D. C., Wash.), 6 Am. B. R. 184, 110 Fed. 135.

108. In re Hurley (D. C., Minn.), 29 Am. B. R. 567, 204 Fed. 126.

109. See cases cited under section 64, subtitle "Traveling or city salesmen." As to priority where traveling salesman claims for \$175 earned within five weeks prior to adjudication of employer, see *Matter of Brecker & Co.* (D. C., N. Y.), 31 Am. B. R., 596.

Effect on priorities under § 64b(4).—The

salary when the act of bankruptcy was committed is a wage-earner.¹¹⁰ A teamster working with his team for day wages hauling logs and performing other similar services is a wage-earner.¹¹¹ But a music teacher giving music lessons at a certain sum an hour is not.¹¹² Nor is a married woman a wage-earner who lives at home and performs the ordinary domestic duties of a married woman, but at certain times during the year, when not otherwise engaged at home, performs services for others than the members of her own family.¹¹³ The definition resolves itself into what constitutes working for salary or hire, and, in the end, to the rulings of the State courts on analogous provisions in State laws.¹¹⁴ The importance of this definition is found in the fact that wage-earners cannot be petitioned against,¹¹⁵ and are entitled to priority of payment for a limited period of labor prior to the bankruptcy.¹¹⁶ All of these matters will be taken up and discussed at length in their proper connection.

IV. JUDICIAL DEFINITIONS.

a. Preferences.—Though this word is not defined in this section, the supreme court has held that § 60-a is a definition.¹¹⁷ A preference under this law has then but three elements: (a) insolvency, (b) the procuring or suffering of a judgment or the making of a transfer by the bankrupt, (c) a consequent inequality between creditors of the same class.¹¹⁸ A voidable preference is something very different.¹¹⁹ It follows, also, that only transfers and judgments can be preferences. The English law continues to distinguish between mere preferences and those that are either "fraudulent"¹²⁰ or "undue." The result of our new meaning to an oldtime word has been far-reaching.¹²¹

definition does not refer to or limit section 64b(4) giving priority to wages due to workmen, clerks, traveling or city salesmen, or servants, earned within three months; but was intended only to define the phrase "wage-earner" in any provision of the Bankruptcy Act or proceeding relating thereto in which the word may be found, and especially section 4b, which provides that any person, excepting a wage-earner or a person engaged chiefly in farming or the tillage of the soil, etc., may be adjudged an involuntary bankrupt. *Blessing v. Blanchard* (C. C. A., 9th Cir.), 35 Am. B. R. 135, 213 Fed. 35.

110. In *re Pilger* (D. C., Wis.), 9 Am. B. R. 244, 118 Fed. 206, where it was also held that the fact that the bookkeeper was a stockholder and officer of the insolvent corporation was immaterial.

111. In *re Yoder* (D. C., Pa.), 11 Am. B. R. 445, 127 Fed. 894. But see *Matter of Winton Lumber & Mfg. Co.* (Ref., Ky.), 14 Am. B. R. 117.

112. *First National Bank of Wilkes Barre v. Barnum* (D. C., Pa.), 20 Am. B. R. 439, 160 Fed. 245, considering a number of cases relative to what constitutes earning wages.

113. *Matter of Remaley* (Ref., Pa.), 23 Am. B. R. 29, in which case it was declared that the test in determining whether a person is a wage-earner is: Does the person claiming to be a wage-earner depend, first and foremost, upon the return from his personal service for his maintenance and support?

The definition of "wage-earner," contained in section 1 (27) of the Bankruptcy Act, is not applicable to the claim of the president and general manager, and the treasurer and assistant general manager, of a corporation so as to bring such claims within section 64b (4), giving priority to "wages due workmen," etc., merely because claimants received salaries. In *re Crown Point Brush Co.* (D. C., N. Y.), 29 Am. B. R. 638, 200 Fed. 882.

114. As to what persons are within the purview of statutes affecting the enforcement of claims for services, see article by Mr. C. B. Labatt in 44 Can. Law Journal, 369-427.

115. See Bankr. Act, § 4-b, *post*.

116. See Bankr. Act, § 64-b (4), *post*.

117. *Carson v. Chicago Title & Trust Co.*, 182 U. S. 438, 5 Am. B. R. 814, where it is said: "Subdivisions a and b (of § 60) are concerned with a preference given by a debtor to his creditor. Subdivision a defines what shall constitute it, and subdivision b states a consequence of it" (p. 116).

To same effect, In *re Rosenberg* (Ref., N. Y.), 7 Am. B. R. 316; *Swartz v. Bank* (C. C. A., 8th Cir.), 8 Am. B. R. 673, 117 Fed. 1. Compare, however, *Stern v. Louisville Trust Co.* (C. C. A., 6th Cir.), 7 Am. B. R. 305, 112 Fed. 501.

118. See Bankr. Act, § 60, *post*.

119. See Bankr. Act, § 60-b, *post*.

120. *Eng. Bankruptcy Act of 1883*, § 48.

121. Compare *Carson, Pirie, etc. v. Chicago Title & Trust Co.*, 182 U. S. 438, 5 Am. B. R.

b. Dividends.—Prior to the amendments of 1903, the meaning of “dividends” was important as a basis for compensation of trustees and referees under §§ 40-a and 48-a. The term has been defined as “a parcel of the fund arising from the assets of the estate, rightfully allotted to a creditor entitled to share in the fund, whether in the same proportion with other creditors or in a different proportion.”¹²² It may be doubted whether this is correct, since, under § 65-a, dividends can only be paid on claims which are neither secured nor entitled to priority.¹²³ It may also be doubted whether § 65-a amounts to a definition at all.¹²⁴ The meaning of this word is, however, now unimportant.¹²⁵

c. Property.—The English Bankruptcy Act of 1883 defines property as including “money, goods, things in action, land and every description of property, whether real or personal and whether situate in England or elsewhere, also obligations, easements, and every description of estate, interest or profit, present or future, vested or contingent, arising out of or incident to property as defined above.”¹²⁶ This definition is comprehensive. Section 70-a of our law indicates, in words which are at times oddly narrow and again surprisingly broad, what property passes to the trustee. Otherwise, the law contains no definition of “property.”

814, with *In re Hall* (Ref., N. Y.), 4 Am. B. R. 671, 679; and note changes due to amendments of 1903, under § 60, *post*.

122. *In re Barber* (D. C., Minn.), 3 Am. B. R. 306, 311, 97 Fed. 547.

123. *In re Utt* (C. C. A., 7th Cir.), 5 Am. B. R. 383, 105 Fed. 754.

124. Thus compare *In re Gerson* (D. C.,

Pa.), 2 Am. B. R. 352, 107 Fed. 897, with *In re Sabine* (Ref., N. Y.), 1 Am. B. R. 322, and *In re Barber* (D. C., Minn.), 3 Am. B. R. 306, 97 Fed. 547.

125. Commissions are now paid on “moneys disbursed.” §§ 40-a and 48-a.

126. English Bankruptcy Act, 1883, § 168.

SECTION TWO

CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION

§ 2. That the courts of bankruptcy as hereinbefore defined, viz., the District Courts of the United States in the several States, the supreme court of the District of Columbia, the districts courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to (1) adjudge persons bankrupt who have had their principal place of business, resided or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdiction; (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; (3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; (4) arraign, try, and punish bankrupts, officers and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States; (5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services *as provided in section forty-eight of this act*;* (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in

* The amendment of 1910 inserted the matter in italics, and omitted the words "but not at a greater rate than in this act allowed trustees for similar services."

controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; (8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered; (9) confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases; (10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; (11) determine all claims of bankrupts to their exemptions; (12) discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases; (13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment; (14) extradite bankrupts from their respective districts to other districts; (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act; (16) punish persons for contempts committed before referees; (17) pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them; (18) tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; (19) transfer cases to other courts of bankruptcy; and (20) exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy.* Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

Analogous provisions: In U. S.: Act of 1867, §§ 1, 11, 49, and R. S., §§ 563, 711, 4972, 4973, 4974, 4975, 4977, 4978, 4978-a, 4978-b, 4979, 5014; Act of 1841, §§ 6, 16; Act of 1800, § 2.

In Eng.: Act of 1883, §§ 92, 93, 94, 95, 99, 100, 102.

Cross-references: To the law: As to exercise of jurisdiction in respect: Adjudication, §§ 1(18), 18, 38-a(1). Allowance of claims, §§ 57, 63. Appointment of receivers and marshals, §§ 2(15), 3-e, 69-a. Offenses by bankrupts, officers, etc., § 29. Conduct of business by receivers, marshals or trustees, §§ 2(3, 15), 48, 72. Additional parties,

* The amendment of 1910 added subdivision 20 to this section.

§§ 23, 58-a (7), 59. Collection and distribution of bankrupt's estate and settlement of controversies, §§ 23-b, 47-a (2, 4, 9), 65. Closing and reopening estates, § 47. Compositions, §§ 12, 13. Confirmation, modification and overruling acts of referee, § 38-a. Exemptions, §§ 6, 7(8), 47-a (11). Discharge, §§ 14, 15. Obedience to lawful orders, §§ 2(15, 16), 41-a. Extradition, § 10. Lawful orders, process, etc., §§ 11, 21-a. Contempts, § 41. Appointment and removal of trustees, §§ 44, 46. Taxation of costs, §§ 3-e, 62, 64-b(3). Transfer of causes, § 32. Ancillary jurisdiction, § 23-b.

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a. What are courts of bankruptcy.—As in England, where in the London district the high court, and elsewhere the county courts, have jurisdiction in bankruptcy, our law avails itself of an existing organization and confers bankruptcy jurisdiction on the district courts in the States and Territories, and the corresponding courts in the District of Columbia and Alaska.¹ The English court of bankruptcy in the London district is in effect a separate court, devoted exclusively to bankruptcy matters, and appeals are uniformly heard by the same judge of the Court of Appeal.² This is not so in this country. It would seem, however, that, under our system, the district courts while sitting in bankruptcy are also separate courts, exercising a distinct jurisdiction, different from that, for instance, of the same courts while sitting in admiralty.³

b. Bankruptcy court as court of equity.—A bankruptcy court is a court of equity, seeking to administer the law according to its spirit, and not merely by its letter.⁴ Proceedings in bankruptcy generally are in the nature of pro-

1. See Bankr. Act, § 1 (8), *ante*.

2. Eng. Bankruptcy Act, 1883, §§ 93-95.

3. In re Norris. Fed. Cas. 10,304.

4. In re Kane (C. C. A., 7th Cir.), 11 Am. B. R. 533, 127 Fed. 552. See Am. B. R. Dig., § 15.

ceedings in equity,⁵ and frequently call for the exercise of full equity powers in the ascertainment and proper enforcement of the equities of the parties; where this is so the court may apply equitable rules and will be governed by equitable principles.⁶ But the bankruptcy act does not confer upon the bankruptcy court

The words "at law" as used in the first sentence conferring on courts of bankruptcy "such jurisdiction, *at law* and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings," may have been inserted to meet clause 4, authorizing the trial and punishment of offenses, the jurisdiction over which must necessarily be at law and not in equity. *Bardes v. Bank*, 4 Am. B. R. 163, 173, 178 U. S. 524.

Equitable jurisdiction.—The bankruptcy court is a court of equity and, controlled by the statute, may do equity guided by the well-defined and established principles of equity jurisprudence. *Matter of Syracuse Gardens Co.* (D. C., N. Y.), 37 Am. B. R. 354, 231 Fed. 284.

5. *Bardes v. Hawarden Bank*, 4 Am. B. R. 163, 173, 178 U. S. 150, 524, 44 L. Ed. 1175; *Mason v. Wolkowich* (C. C. A., 1st Cir.), 17 Am. B. R. 709, 150 Fed. 699; *In re Waugh* (C. C. A., 9th Cir.), 13 Am. B. R. 187, 192, 133 Fed. 281; *Lockman v. Lang* (C. C. A., 8th Cir.), 11 Am. B. R. 597, 132 Fed. 1; *In re Rochford* (C. C. A., 8th Cir.), 10 Am. B. R. 608, 124 Fed. 182; *Swartz v. Siegel*, 8 Am. B. R. 689, 117 Fed. 13; *Dodge v. Norlin* (C. C. A., 8th Cir.), 13 Am. B. R. 176, 133 Fed. 363; *Matter of Brenner* (D. C., Pa.), 26 Am. B. R. 646, 190 Fed. 209; *In re Thompson-Breeze Co.* (D. C., Ohio), 30 Am. B. R. 105; *Ogden & Jamison v. Gilt Edge Mines Co.* (C. C. A., 8th Cir.), 34 Am. B. R. 893, 225 Fed. 723.

Proceedings in equity.—In the case of *Westall v. Avery* (C. C. A., 4th Cir.), 22 Am. B. R. 673, 171 Fed. 626, the court said: "It is well settled that bankruptcy proceedings themselves are purely equitable in their character and within the limits prescribed by the Bankruptcy Acts and the special rules of practice prescribed by the Supreme Court are to be administered in accord with the general principles and practices of equity."

How it happened that jurisdiction in equity became of an equitable nature is explained historically in an interesting way in *Robson's Bankruptcy* (2d Ed.), p. 2.

The administration and distribution of the property of bankrupts is a proceeding in equity. The jurisdiction to inquire and determine who the lawful owners are, and to that end to call before it all claimants by a reasonable notice or order to present their claims to the court within a reasonable time or to be barred of any right or interest in the property in its custody or in its proceeds, is a power inherent in every court of equity incidental and indispensable to the authority to administer the property in its possession and to distribute its proceeds. *Nisbet v. Federal Title & Trust Co.* (C. C. A., 8th Cir.), 36 Am. B. R. 222, 229 Fed. 644.

Equitable relief.—A bankruptcy court as a court of equity may afford relief where one party with a full opportunity to avoid the result has placed it in the power of another to injure a third. *Matter of Virgin* (D. C., Ga.), 35 Am. B. R. 494, 224 Fed. 128.

6. **Application of equitable rules.**—In re *Siegel-Hillman Dry Goods Co.* (D. C., Mo.), 7 Am. B. R. 351, 358, 111 Fed. 983, holding that cases in bankruptcy are peculiarly within the rule that where a court of equity is charged with the distribution of an estate or a fund under its control, and has before it the several parties whose rights and interests are involved in the administration of the estate, it may, disregarding mere matters of form, but having regard to the substantial rights of all the parties, ascertain the ultimate relation and liability of the several parties, and base its decree thereon, thus avoiding the delay and expense which would be caused if the parties were remitted to the pursuit of their legal rights without aid from a court of equity; *In re Chase* (C. C. A., 1st Cir.), 10 Am. B. R. 677, 680, 124 Fed. 753; *Batchelder & Lincoln Co. v. Whitmore* (C. C. A., 1st Cir.), 10 Am. B. R. 641, 646, 122 Fed. 355, where it was held that the law applicable to proofs of debt in bankruptcy is governed by equitable considerations; *In re Broadway Sav. Trust Co.* (C. C. A., 8th Cir.), 18 Am. B. R. 254, 257, 150 Fed. 152, holding that a proceeding in bankruptcy is a proceeding in equity, and the rules and practice in equity prevail as far as they are consonant with the speedy administration of justice which is prescribed; *In re Herzikopf* (C. C. A., 9th Cir.), 9 Am. B. R. 745, 118 Fed. 101; *Matter of Larkey* (D. C., N. J.), 32 Am. B. R. 287, 214 Fed. 867.

Right to trial by jury does not exist in bankruptcy proceedings, except as provided in § 19, *post*, since such proceedings are equitable in their nature. *In re Rude* (D. C., Ky.), 4 Am. B. R. 319, 101 Fed. 805; *In re Christensen* (D. C., Iowa), 4 Am. B. R. 99, 101 Fed. 802.

Writ of ne exeat does not issue unless a suit in equity is commenced; a bankruptcy proceeding is a suit in equity for such purpose. *In re Lipke* (D. C., N. Y.), 3 Am. B. R. 569, 98 Fed. 970.

Adequate remedy at law.—In the case of *Sessler v. Nemcof* (D. C., Pa.), 25 Am. B. R. 618, 183 Fed. 656, the court said: "If the trustee has an adequate remedy at law, a bill in equity cannot be maintained, in this or in any other court. Whatever equitable jurisdiction may have been conferred upon the District Court by the Bankruptcy Act and the amendments thereto, it is confined to controversies relating to a bankrupt estate. Within this limited area, whether or not a

jurisdiction to entertain a plenary suit in equity,⁷ except where concurrent jurisdiction is conferred upon such court to set aside a preference, a fraudulent transfer made within four months preceding bankruptcy,⁸ and a transfer which any creditor of the bankrupt might have avoided.⁹ If a court of bankruptcy has jurisdiction of the person or subject matter, it may exercise the plenary powers of a court of equity for the ascertainment and enforcement of the rights and equities of the various parties interested in the estate of the bankrupt.¹⁰ If a proceeding to set aside an alleged fraudulent transfer is instituted in a court of bankruptcy it must be governed as to pleading and practice by the laws applicable to that court.¹¹ Being a court of equity it will exercise the equitable power of intervening in cases of mistake.¹²

c. Jurisdiction is limited by statute.—The origin of courts of bankruptcy is statutory, and they have no powers or jurisdiction other than is conferred on them by, or necessarily implied from, the statute.¹³ Their jurisdiction is limited—that is, limited in respect to the subjects over which they may exercise jurisdiction.¹⁴ They possess only such powers as are conferred upon

bill in equity may be maintained must be tested by the ordinary rules that govern bills before any other tribunal, and perhaps the most familiar test is to inquire whether the plaintiff has an adequate remedy at law.¹⁵

7. *Bardes v. Hawarden Bank*, 4 Am. B. R. 163, 173, 178 U. S. 524, 44 L. Ed. 1175; *In re Hutchinson & Wilmoth* (C. C. A., 6th Cir.), 19 Am. B. R. 313, 318, 158 Fed. 74; *Brumbey v. Jones* (C. C. A., 5th Cir.), 15 Am. B. R. 578, 141 Fed. 318; *Havens & Geddes Co. v. Pierck* (C. C. A., 7th Cir.), 9 Am. B. R. 569, 120 Fed. 244.

8. See § 23-b, *post*, § 60-b, *post*, § 67-e, *post*.

9. See § 70-e, *post*.

Whitney v. Wenman, 198 U. S. 539, 14 Am. B. R. 45, where it was held that a district court may under § 2 (3), (7) determine, in a plenary suit in equity, the title to property claimed by a trustee in bankruptcy to have been surrendered to third parties by the temporary receiver, after the filing of a voluntary petition in bankruptcy without right and without authority from the court.

Amendment of 1903.—The Supreme Court came to this conclusion without reference to the effect of the amendment of 1903 to § 70-e of this act. The effect of this amendment has been considered in *Hurley v. Devlin* (D. C., Kan.), 17 Am. B. R. 797, 149 Fed. 268, and it was there held that Congress intended to confer upon bankruptcy courts equity jurisdiction in suits arising under § 70-e to set aside transfers which creditors might have avoided. See also *Manning v. Evans* (D. C., N. J.), 19 Am. B. R. 217, 156 Fed. 106; *In re Hutchinson & Wilmoth* (C. C. A., 6th Cir.), 19 Am. B. R. 313, 318, 158 Fed. 74; *Skewis v. Barthell* (D. C., Iowa), 18 Am. B. R. 429, 153 Fed. 534. These cases are now confirmed by the amendment of § 23-b by the act of 1910, which expressly authorizes suits for the recovery of property under § 70-e in district courts. The cases of *Hull v. Burr* (C. C. A., 5th Cir.), 18 Am. B. R. 541, 547, 153 Fed.

945; *Warmath v. O'Daniel* (C. C. A., 6th Cir.), 20 Am. B. R. 101, 159 Fed. 87, are no longer of any force. The effect of this amendment upon the jurisdiction of the court to entertain plenary suits to set aside transfers in fraud of creditors will be further considered under § 70-e, *post*.

10. *In re Swafford Bros. Dry Goods Co.* (D. C., Mo.), 25 Am. B. R. 282, 180 Fed. 549; *Matter of National Boat & Engine Co.* (D. C., Maine), 33 Am. B. R. 154, 216 Fed. 208; *Matter of Larkey* (D. C., N. J.), 32 Am. B. R. 287, 214 Fed. 867.

11. *Westall v. Avery* (C. C. A., 4th Cir.), 22 Am. B. R. 673, 171 Fed. 626, holding that such a proceeding brought in a Federal court is governed by the Federal equity practice, unaffected by the procedure obtaining in the State courts.

12. *Matter of Brenner* (D. C., Pa.), 26 Am. P. R. 646, 190 Fed. 209.

13. *Bardes v. Hawarden Bank*, 178 U. S. 524, 4 Am. B. R. 163, 44 L. Ed. 1175; *In re Elmira Steel Co.* (D. C., N. Y.), 5 Am. B. R. 484, 109 Fed. 456; *In re Williams* (D. C., Ark.), 9 Am. B. R. 741, 120 Fed. 38; *Brumbey v. Jones* (C. C. A., 5th Cir.), 15 Am. B. R. 578, 141 Fed. 318; *Jobbins v. Montague*, Fed. Cas. 7,329; *In re Morris*, Fed. Cas. 9,825.

14. *Edelstein v. United States* (C. C. A., 8th Cir.), 17 Am. B. R. 649, 652, 149 Fed. 636; *In re Billing* (D. C., Ala.), 17 Am. B. R. 80, 86, 145 Fed. 395; *Taft v. Century Sav. Bank* (C. C. A., 8th Cir.), 15 Am. B. R. 594, 597, 141 Fed. 369.

The distribution of the judicial power of the United States among the courts of the United States is entirely within the control of Congress. *Johnson Co. v. Wharton*, 152 U. S. 252, 260. All courts, even the highest, are more or less limited in their jurisdiction. They are limited to particular classes of actions. *Windsor v. McVeigh*, 93 U. S. 274, 282.

them, either expressly or by necessary implication.¹⁵ But they are not courts of limited jurisdiction in respect to matters which are within their jurisdiction.¹⁶ In respect to the matters coming within their jurisdiction their judgments possess every attribute of finality and estoppel which pertains to those of courts of general jurisdiction.¹⁷ Such courts are not inferior courts in the sense that essential jurisdictional facts must affirmatively appear upon the record.¹⁸ It is not sufficient to allege facts showing jurisdiction; there must be evidence establishing such facts.¹⁹

d. Jurisdiction either exclusive or concurrent.—There are two distinct classes of jurisdiction conferred upon courts of bankruptcy by this section: First, jurisdiction over the proceedings in bankruptcy, initiated by the petition and ending in the distribution of assets among the creditors, and the discharge of, or refusal to discharge, the bankrupt. Second, jurisdiction as an ordinary court, of suits at law or in equity in respect to the estate of the bankrupt.²⁰ The first class of jurisdiction possessed by such courts is exclusive.²¹ It includes the power to adjudicate as to bankruptcy,²² and, after

The cardinal principle of the bankruptcy act is to conserve to creditors only such rights as would have been theirs had not bankruptcy intervened, and to save to the bankrupt such rights as would have been his against creditors seeking to enforce their claims by ordinary judicial process. In re Cohn (D. C., No. Dak.), 22 Am. B. R. 761, 171 Fed. 568.

15. Matter of Hollins (C. C. A., 2d Cir.), 36 Am. B. R. 168, 229 Fed. 349.

16. In re Marion Contract & Const. Co. (D. C., Ky.), 22 Am. B. R. 81, 166 Fed. 618.

A court of bankruptcy is of limited jurisdiction, in the sense that it can take cognizance of particular subjects only, namely, those included within the intendment of the statute; but its jurisdiction is unlimited in respect of its powers over proceedings in bankruptcy specifically made subject to its jurisdiction by § 2. Sabin v. Larkin-Green Logging Co. (D. C., Or.), 34 Am. B. R. 210, 218 Fed. 984.

17. In re First Nat. Bank of Belle Fourche (C. C. A., 8th Cir.), 18 Am. B. R. 265, 273, 152 Fed. 64; Edelstein v. United States (C. C. A., 8th Cir.), 17 Am. B. R. 649, 652, 149 Fed. 636.

18. In re First Nat. Bank of Belle Fourche (C. C. A., 8th Cir.), 18 Am. B. R. 265, 152 Fed. 64; In re Columbia Real Estate Co. (D. C., Ind.), 4 Am. B. R. 411, 101 Fed. 965; Hays v. Ford, 55 Ind. 52; Bryant v. Kinyon, 6 Am. B. R. 237, 127 Mich. 152, 86 N. W. 531, 53 L. R. A. 871; In re Elmira Steel Co. (D. C., N. Y.), 5 Am. B. R. 484, 109 Fed. 456.

Limited, but not inferior.—The district court of the United States is a court of limited but not inferior jurisdiction. Congress has conferred upon it original and exclusive jurisdiction to adjudicate bankruptcies, and its judgments therein are supported by the same presumptions which are indulged in favor of the judgments of all superior courts of general jurisdiction. In re Billing (D. C., Ala.), 17 Am. B. R. 80, 86, 145 Fed. 395.

19. Plant v. Gorham Mfg. Co. (D. C., N. Y.), 23 Am. B. R. 42, 174 Fed. 852.

20. Lathrop v. Drake, 91 U. S. 516; Bardes v. Hawarden Bank, 178 U. S. 524, 4 Am. B. R. 163.

21. Bardes v. Hawarden Bank, 178 U. S. 524, 4 Am. B. R. 163; In re Watts & Sachs, 190 U. S. 1, 10 Am. B. R. 113; Mueller v. Nugent, 184 U. S. 1, 7 Am. B. R. 224; Bryan v. Bernheimer, 181 U. S. 188, 5 Am. B. R. 623; In re Marion Contract & Const. Co. (D. C., Ky.), 22 Am. B. R. 81, 166 Fed. 618; In re Knight (D. C., Ky.), 11 Am. B. R. 1, 6, 125 Fed. 35; Matter of Lengert Wagon Co. (D. C., N. Y.), 6 Am. B. R. 535, 110 Fed. 927; In re Schloerb (D. C., Wis.), 3 Am. B. R. 224, 27 Fed. 326; Lea Bros. & Co. v. West Co. (D. C., Va.), 1 Am. B. R. 261, 91 Fed. 237; In re Huddleston (Ref., Ala.), 1 Am. B. R. 572; Matter of Maplecroft Mills (D. C., S. Car.), 33 Am. B. R. 815, 218 Fed. 659; Matthew's Sons v. Webre Co. (D. C., La.), 32 Am. B. R. 180, 213 Fed. 396; Matter of Yargan Naval Stores Co. (C. C. A., 6th Cir.), 32 Am. B. R. 269, 214 Fed. 563.

Exclusive jurisdiction.—The jurisdiction of the bankruptcy court is intended to be exclusive of all other courts, and such proceedings include all matters of administration and the determination of rights between contending parties with relation to the estate upon a fund in the custody of the court. Gibson v. Dexter Horton Trust & Savings Bank (D. C., Wash.), 35 Am. B. R. 632, 225 Fed. 424.

Estate in custodia legis.—The exclusive jurisdiction of the court is so far in rem that the estate is regarded as in custodia legis from the time of the filing of the petition. Matter of Schou (D. C., Conn.), 32 Am. B. R. 494, 213 Fed. 514.

22. In re Gutwillig (D. C., N. Y.), 1 Am. B. R. 78, 90 Fed. 475; In re Sievers (D. C., Mo.), 1 Am. B. R. 117, 91 Fed. 366.

adjudication, to administer the bankrupt estate.²³ Once acquiring the custody of the bankrupt's property, by adjudication of bankruptcy, the court is vested with exclusive jurisdiction to determine all liens and interests affecting it.²⁴ The possession or custody may be constructive, as well as actual; that is if the property is held by third parties for the benefit of the bankrupt, it will be deemed in the custody of the court.²⁵ Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby, withdrawn from the jurisdiction of all other courts. This rule applies generally to all courts, State or Federal.²⁶ The defense that bankruptcy proceedings are pending, interposed in a suit to foreclose a mortgage against the bankrupt's property will not be valid if the proceedings have not been prosecuted and the property in question was in the possession of a receiver appointed in

23. *Carpenter Bros. v. O'Connor* (D. C., Ohio), 1 Am. B. R. 381, 16 Ohio 526.

24. *Thomas v. Woods* (C. C. A., 8th Cir.), 23 Am. B. R. 132, 173 Fed. 585; *American Graphophone Co. v. Leeds & Catlin Co.* (Cir. Ct., N. Y.), 23 Am. B. R. 337, 174 Fed. 158; *Clemmshaw v. International Shirt & Collar Co.* (D. C., N. Y.), 21 Am. B. R. 616, 165 Fed. 797; *Matter of First* (D. C., Mass.), 37 Am. B. R. 512; *Matter of Goldberg & Sagman* (D. C., N. Y.), 36 Am. B. R. 736, 232 Fed. 194; *Meek v. Eggerman* (Okla. Sup. Ct.), 36 Am. B. R. 488, 155 Pac. 522; *Goldbraith v. Grocery Co.* (C. C. A., 8th Cir.), 32 Am. B. R. 752, 216 Fed. 842. For additional cases on this subject, see Am. B. R. Dig., § 14; see also discussion and cases cited under § 23-a, *Summary jurisdiction*, post.

Exclusive jurisdiction.—Where a District Court assumes jurisdiction of a bankruptcy proceeding, such jurisdiction is exclusive; and it has power by proper orders to prevent the doing of anything that will at any stage of the proceeding tend to embarrass it in the equitable distribution of the estate of the bankrupt. *Virginia Iron, Coal & Coke Co. v. Olcott* (C. C. A., 4th Cir.), 28 Am. B. R. 321, 197 Fed. 730.

Order of referee as bar to subsequent action in State court.—An order of a referee in bankruptcy, denying the right to recover a check payable to a trustee in bankruptcy, which has been deposited by a person not a creditor, as a part of the deposit required upon a composition, and payment thereon subsequently stopped after some controversy had arisen, is *res adjudicata* and a bar to a subsequent action in the State court by the maker of the check. *Coen v. James* (Sup. Ct., App. Div., N. Y.), 33 Am. B. R. 249, 164 N. Y. App. Div. 419.

Right to replevin property in possession of trustee.—Property in possession of a trustee in bankruptcy is under the control of the Bankruptcy Court and cannot be taken on replevin without the consent of said court. *Matter of Brockton Ideal Shoe Co.* (D. C., Mass.), 32 Am. B. R. 377, 212 Fed. 764.

25. *Orinoco Iron Co. v. Metzel* (C. C. A., 6th Cir.), 36 Am. B. R. 247, 230 Fed. 40, holding that where, at the time of the bank-

ruptcy of a corporation, a fund arising from a settlement of the corporation's affairs with a foreign country was being held by the United States for the benefit of the bankrupt's estate, in which fund the government recognized the right of the trustee in bankruptcy, a district court of a State sitting in bankruptcy has exclusive jurisdiction to try and determine claims asserted by a creditor of the bankrupt to the fund held by the government, and may enjoin a suit by such creditor in the District of Columbia; *Matter of Wellmade Gas Mantle Co.* (D. C., Mass.), 36 Am. B. R. 354, 230 Fed. 502.

26. *Murphy v. John Hoffman Co.*, 211 U. S. 562, 21 Am. B. R. 487; *Matter of Traunstein & White* (D. C., Mass.), 34 Am. B. R. 482, 225 Fed. 317.

Possession of property by officers of court.—Where the property in dispute is in the actual possession of the court of bankruptcy, there comes into play another principle, not peculiar to courts of bankruptcy, but applicable to all courts, Federal or State. Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court, having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession, or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. Jurisdiction in such cases arises out of the possession of the property and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be recognizable in them. Accordingly, where property was in the possession of the bankrupt at the time of the appointment of a receiver, the bankruptcy court has exclusive jurisdiction to determine the title as against an adverse claimant, and a State court has no jurisdictional right to take, or interfere with the possession of, said property in an action of replevin, or otherwise. *Darrough v. First National Bank of Claremore* (Okla. Sup. Ct.), 37 Am. B. R. 75, 156 Pac. 191.

a suit brought against the bankrupt prior to the bankruptcy.²⁷ This jurisdiction cannot be conferred by consent, if of the subject matter,²⁸ but can if of the person only.²⁹ The court having acquired jurisdiction its adjudication is conclusive upon the parties concerned, until set aside by review or appeal, and it cannot be questioned collaterally.³⁰

e. Jurisdiction of suits to recover property.—The animated controversy as to the proper forum for proceedings to recover property brought by the trustee was, in May, 1900, settled by the Supreme Court in *Bardes v. Hawarden Bank*.³¹ The amendment of § 23-b and the corresponding changes made in §§ 60-a, 67-e and 70-e by the act of 1903 are declaratory of the principle underlying this decision. The broad and elastic provisions of subdivisions 7 and 15 of this section, conferring, as they do, jurisdiction upon courts of bankruptcy to entertain suits by the trustee for the recovery of property alleged to have belonged to the bankrupt, are no longer limited by the provisions of § 23-b.³² It may be taken as settled that courts of bankruptcy as such have, within their respective territorial limits, ample, though, of course, as to suits, not exclusive, jurisdiction to do everything "which may be necessary for the enforcement of the provisions of the act." The jurisdiction of courts of bankruptcy to entertain suits brought by the trustee for the recovery of property will be further considered under § 23-b.

f. Courts always open.—Courts of bankruptcy are always open for the transaction of business.³³ It is expressly provided in this section that the jurisdiction conferred upon courts of bankruptcy may be exercised "in vacation, in chambers and during their respective terms." In most of the districts, bankruptcy matters are heard on certain days; this, for the convenience of the courts. Orders made in chambers in vacation are as effective as when made at a term or on a rule day.

g. Territorial extent of jurisdiction.—The act of 1867 limited the jurisdiction of courts of bankruptcy to "their respective districts." This has been held to mean that the exercise of those powers was limited to, those districts.³⁴

27. *Clark v. Norwalk Steel & Iron Co.* (D. C., Ohio), 34 Am. B. R. 550, 188 Fed. 999.

28. *Matter of Hollins* (C. C. A., 2d Cir.), 36 Am. B. R. 168, 229 Fed. 349; *Jobbins v. Montague*, Fed. Cas. 7,330.

Effect of action of trustee on jurisdiction.—No action of the trustee can impair or affect the jurisdiction of the bankruptcy court over the bankrupt's estate. *Matthews & Sons v. Webre Co.* (D. C., La.), 32 Am. B. R. 180, 213 Fed. 396.

29. *Hall v. Kincell*, 102 Fed. 301. Compare, also, *In re Mason* (D. C., N. Car.), 3 Am. B. R. 599, 99 Fed. 256; *In re Smith* (D. C., Ct.), 9 Am. B. R. 98, 117 Fed. 961.

30. *Sabin v. Larkin-Green Logging Co.* (D. C., Ore.), 34 Am. B. R. 210, 218 Fed. 984.

31. 4 Am. B. R. 163, 178 U. S. 524, 44 L. Ed. 1,175.

32. For the effect of the failure of the act of 1903 to amend § 70-e to correspond with the amendment of § 23-b, see discussion under § 70-e post.

33. *In re Ives* (C. C. A., 6th Cir.), 7 Am. B. R. 692, 113 Fed. 911, affg. s. c. 6 Am. B. R. 653, 111 Fed. 495; *In re Henschel* (D. C., N. Y.), 8 Am. B. R. 201, 114 Fed. 968.

As there are no terms of courts in bank-

ruptcy an adjudication may be vacated after the expiration of the term wherein it was entered. The district court, for all purposes of its bankruptcy jurisdiction, is always open. It has no separate terms. Its proceedings in any pending suit, are, therefore, at all times open for re-examination upon application therefor in an appropriate form. Any order made in the progress of the cause may be subsequently set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed by its vacation. *Matter of Rochester Baths Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 355, 222 Fed. 22, citing *Sandusky v. National Bank*, 23 Wall. 289.

Power to modify orders.—The general rule that the power of a court to modify its orders expires with the term at which they are granted does not apply to a bankruptcy court, as a proceeding in bankruptcy, from the time of its commencement until the final settlement of the estate, is but one suit. *Matter of Burr Mfg. Co.* (C. C. A., 2d Cir.), 32 Am. B. R. 708, 217 Fed. 16.

34. *Consult Lathrop v. Drake*, 91 U. S. 516, though the same is not exactly in point.

The present act vests jurisdiction in the courts of bankruptcy "within their respective territorial limits as now constituted." A court of bankruptcy may not, therefore, extend its process beyond the territorial limits of the district within which its ordinary jurisdiction may be exercised.³⁵ Thus, a subpoena in bankruptcy is not effective beyond the territorial limits of the court issuing it,³⁶ unless the residence of the person subpoenaed be less than one hundred miles away.³⁷ Likewise a bankruptcy court of one district cannot, by service of process outside of that district, obtain jurisdiction to summarily order a non-resident to deliver moneys collected upon which he claims a lien for

35. *In re Waukesha Water Co.* (D. C., Wis.), 8 Am. B. R. 715, 116 Fed. 1009; *In re Steele* (D. C., Ala.), 20 Am. B. R. 446, 161 Fed. 886; *In re Harris Co.* (D. C., N. Y.), 23 Am. B. R. 237, 173 Fed. 735; *Matter of Geller* (D. C., N. J.), 32 Am. B. R. 629, 216 Fed. 558; *Orinoco Iron Co. v. Metzler* (C. C. A., 6th Cir.), 36 Am. B. R. 247, 230 Fed. 40. See also under former act, *Jobbins v. Montague*, Fed. Cas. 7,329.

Enforcement of order beyond territorial limits.—In the case of *Staunton v. Wooden* (C. C. A., 9th Cir.), 24 Am. B. R. 736, 179 Fed. 61, the court said:

"In the present case the court made a summary order, directed against a resident of another State, ordering him to surrender property in that State to the trustee. It may be conceded that the court in which the petition in bankruptcy is filed has plenary jurisdiction in bankruptcy, co-extensive with the United States, to order and control the disposition of the bankrupt's estate, and is vested with jurisdiction to determine all liens thereon and all interests affecting it. *Thomas v. Woods* (C. C. A., 8th Cir.), 23 Am. B. R. 132, 173 Fed. 585, 97 C. C. A. 535; *In re Dempster* (C. C. A., 8th Cir.), 22 Am. B. R. 751, 172 Fed. 353, 97 C. C. A. 51; *In re Muncie Pulp Co.* (C. C. A., 2d Cir.), 18 Am. B. R. 56, 151 Fed. 732, 81 C. C. A. 116; *Guardian Trust Co. v. Kansas City Southern Ry. Co.*, 171 Fed. 43, 96 C. C. A. 285; *In re Granite City Bank* (C. C. A., 8th Cir.), 14 Am. B. R. 404, 137 Fed. 818, 70 C. C. A. 316. But this is not to say that the court of bankruptcy may issue its process to run into another district. It is one thing to issue citation to persons in another jurisdiction to appear before the court of bankruptcy in a proceeding which, in its exclusive jurisdiction, it is authorized to institute with a view to determining liens or rights of property wherever situate; but it is quite another thing to issue process to be enforced in another jurisdiction."

"By whom is the summary order in this case to be executed, and in what manner is obedience to it to be enforced? There is no express provision in the bankruptcy act, or in any statute, indicating the intention of Congress to confer such power. In *Toland v. Sprague*, 12 Pet. 328, 9 L. Ed. 1093, it was said:—

"Whatever may be the extent of their jurisdiction over the subject-matter of suits,

in respect to persons and property, it can only be exercised within the limits of the district. Congress might have authorized civil process from any Circuit Court to have run into any State of the Union. It has not done so."

"The Bankruptcy Act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517) limited the jurisdiction of courts of bankruptcy to 'their respective districts.' The present act invests them with jurisdiction 'within their respective territorial limits as now established, or as they may be hereafter changed;' and it has been held that a court of bankruptcy may not extend its process beyond the territorial limits of the district within which its ordinary jurisdiction may be exercised. *In re Waukesha Water Co.* (D. C., Wis.), 8 Am. B. R. 715, 116 Fed. 1009; *In re Alphin & Lake Cotton Co.* (D. C., Ark.), 12 Am. B. R. 653, 131 Fed. 824; *In re Steele* (D. C., Ala.), 20 Am. B. R. 446, 161 Fed. 886. In view of these considerations, and the authorities, we are of the opinion that the District Court was not possessed of jurisdiction to make and enforce the summary order."

Injunction against third person in another district.—A District Court, sitting as a court of bankruptcy, has no jurisdiction to enjoin a person, who resides in another district and is not a party to the bankruptcy proceedings, from proceeding to enforce an assignment of wages made by a bankrupt, but the proper remedy is by ancillary proceedings instituted in the bankruptcy court in the district wherein such party resides. *Progressive Bldg. & Loan Co. v. Hall* (C. C. A., 4th Cir.), 33 Am. B. R. 313, 220 Fed. 45.

36. *Paine v. Caldwell*, Fed. Cas. 10,674. Compare, also, *In re Hemstreet* (D. C., Iowa), 8 Am. B. R. 760, 117 Fed. 568.

37. See Bank Act, § 41, *post*.

U. S. Rev. Stats. § 876 provides that: "Subpenas for witnesses, who are required to attend a court of the United States, in any district, may run into any other district. *Provided*, That in civil causes the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same." See, also, *In re Hemstreet* (D. C., Iowa), 8 Am. B. R. 760, 117 Fed. 568; *In re Appel* (D. C., Neb.), 4 Am. B. R. 722, 103 Fed. 931, holding that, though served outside the district, it operates *in rem* within it.

services.³⁸ In States having several districts, this rule, in spite of the proviso clause of § 41-a, shortens the reach of the district courts and may make their process less effective than that of the State courts. A voluntary appearance of the party living without the district may constitute a waiver of the want of jurisdiction and confer jurisdiction over him,³⁹ although this would not be the case where the court has no jurisdiction of the subject matter.⁴⁰ The territorial limitation of jurisdiction as contained in the preliminary clause of this section is, of course, subject to the qualification made by subd. 20 of the section as added by the amendment of 1910, relative to the exercise of ancillary jurisdiction over persons or property in aid of a receiver or trustee appointed in any bankruptcy proceeding pending in any other court of bankruptcy.⁴¹

h. Ancillary proceedings.—(1) **AMENDMENT OF 1910.** The amendment of 1910 added subd. 20 to subsection *a* of this section, expressly authorizing a court of bankruptcy to exercise ancillary jurisdiction within its territorial limits "in aid of a receiver or trustee appointed in any bankruptcy proceeding pending in any other court of bankruptcy."

(2) **RULE PRIOR TO AMENDMENT.** Prior to the amendment of 1910 it was held that where process to seize the bankrupt's property was necessary, ancillary jurisdiction might be exercised,⁴² although this doctrine had been refuted in a number of well considered cases.⁴³ Under the act of 1867 there was no express provision conferring upon courts of bankruptcy ancillary jurisdiction, but it was held thereunder that such jurisdiction necessarily resulted from the general jurisdiction imposed in them and was in harmony with the scope and

38. *Matter of Geller* (D. C., N. J.), 32 Am. B. R. 629, 216 Fed. 558.

39. *In re Smith* (D. C., Cit.), 9 Am. B. R. 98, 117 Fed. 961; *Matter of Geller* (D. C., N. J.), 32 Am. B. R. 629, 216 Fed. 558.

Appearing as witness as conferring jurisdiction. The appearance of a non-resident as a witness at an examination under section 21a of the bankruptcy act and representation thereat by an attorney does not constitute such a general appearance as to give the court jurisdiction; *Matter of Geller* (D. C., N. J.), 32 Am. B. R. 629, 216 Fed. 558.

40. *Jobbins v. Montague*, Fed. Cas. 7,329.

41. See discussion under next paragraph.

42. *In re Benedict* (D. C., Wis.), 15 Am. B. R. 232, 140 Fed. 55; *In re John L. Nelson & Bro. Co.* (D. C., N. Y.), 18 Am. B. R. 66, 149 Fed. 590; *Matter of Sutter Bros.* (D. C., N. Y.), 11 Am. B. R. 632, 131 Fed. 654; *In re Peiser* (D. C., Pa.), 7 Am. B. R. 690, 115 Fed. 199; *In re Westfall Bros.* (D. C., Cal.), 8 Am. B. R. 431; *In re Schrom* (D. C., Iowa), 3 Am. B. R. 352, 97 Fed. 160; *Matter of Dunseath* (D. C., Pa.), 21 Am. B. R. 742, 168 Fed. 973; s. c., 22 Am. B. R. 75, 168 Fed. 973.

43. **Ancillary jurisdiction, prior to amendment of 1910**—*In re Williams* (D. C., Ark.), 9 Am. B. R. 741, 120 Fed. 38, the court was of the opinion that the bankruptcy act makes no provisions for ancillary or auxiliary proceedings in district courts other than that in which the proceedings are pending, and a petition for

an injunction to protect the assets of a bankrupt, where the proceedings were pending in another district, was denied. This opinion met the approval of the court in the case of *In re Williams* (D. C., Tenn.), 10 Am. B. R. 538, 120 Fed. 321, and in the case of *In re Von Hartz* (C. C. A., 2d Cir.), 15 Am. B. R. 747, 142 Fed. 726, where it was held that if a debtor is adjudicated a bankrupt in one district a bankruptcy court in another district cannot make a summary order directing one to whom the bankrupt had assigned his life insurance policy, to turn it over to his trustee. This question was fully discussed by Judge Hammon in *Ross-Meehan Foundry Co. v. Car & Foundry Co.* (D. C., Tenn.), 10 Am. B. R. 624, 124 Fed. 403, where the conclusion was reached that the "necessity for separate administrations and ancillary proceedings should not exist under any well-regulated system of bankruptcy. The design of the statute is to avoid all ancillary proceedings and secure one uniform possession of the estate by a single court of bankruptcy, having the jurisdiction to administer the assets everywhere under that statute." In the case of *Tybo Mining and Reduction Co.* (D. C., Nev.), 13 Am. B. R. 62, 132 Fed. 697, Judge Hawley refused to appoint an ancillary trustee to aid in the administration of a bankrupt estate, the proceedings in which were instituted in another district, on the ground that courts of bankruptcy are of limited jurisdiction—such

design of the act.⁴⁴ The better reasoning favored the exercise of such ancillary or auxiliary jurisdiction whenever necessary to preserve the bankrupt estate or recover property belonging to it, situated without the territorial limits of the district within which the estate was to be administered.⁴⁵ Congress has settled this disturbing controversy by expressly conferring upon bankruptcy courts ancillary jurisdiction over persons and property in aid of a receiver or trustee appointed in any bankruptcy proceeding pending in any other court of bankruptcy.⁴⁶

(3) **EFFECT OF AMENDMENT.** The amendment of 1910 substantiates clearly those cases upholding the exercise of ancillary powers by courts of bankruptcy. However doubtful may have been the authority under the law prior to this amendment, there can be no doubt now that a court of bankruptcy in one district may aid a trustee or receiver, appointed by another in recovering funds belonging to the estate.⁴⁷ The ancillary tribunal may, upon petition, appoint an ancillary receiver to take charge of the property of the alleged bankrupt,⁴⁸ and may make an order and issue subpoenas for the examination of persons concerning the acts, conduct and property of the bankrupt.⁴⁹ Where testimony

as the statute gives, and no other—and that the statute confers no such jurisdiction. In the case of *In re Dempster* (C. C. A., 8th Cir.), 22 Am. B. R. 751, 172 Fed. 353, the court held that any proceeding necessary for the protection of the estate had in any other district must take the form of a plenary action at law or suit in equity; the appointment of a receiver can only be made in some cause properly before the court.

44. *Lathrop v. Drake*, 91 U. S. 516; *Ex parte Martin*, Fed. Cas. 9,149; *Sherman v. Bingham*, Fed. Cas. 12,762; *Markson v. Heaney*, 1 Dill, 497, Fed. Cas. 9,098; *In re Tift*, Fed. Cas. 14,034; *Shainwald v. Lewis*, 5 Fed. 510.

45. See convincing opinion of Judge Young in *Matter of Dunseath* (D. C., Pa.), 21 Am. B. R. 742, 168 Fed. 973; *Babbitt v. Dutcher* (Sup. Ct.), 216 U. S. 102, 23 Am. B. R. 519, in which case it was held that where a Missouri corporation was adjudicated a bankrupt and a trustee appointed in proceedings instituted in the district court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, the district court of the United States in and for the Southern District of New York has jurisdiction of an application upon the trustee's petition for an order directing officers of the corporation within the jurisdiction of the latter court to deliver to the trustee books and documents of the corporation there in their custody. See *Lazarus v. Prentice* 234 U. S. 263, 32 Am. B. R. 559.

46. See Bankr. Act, § 2 (20) as amended by act of 1910.

47. *Lazarus v. Prentice*, 234 U. S. 263, 32 Am. B. R. 559, 562, holding that a bankruptcy court of a district in which property of a bankrupt is situated is specifically given ancillary jurisdiction over such property, and

may appoint a receiver and take summary proceedings for the restoration of such property so that it may be turned over to the bankruptcy court in which the proceedings are pending, for administration.

Obtaining possession of property.—A court of bankruptcy can exercise ancillary jurisdiction for the purpose of enabling a trustee in bankruptcy, who has been appointed and qualified in another jurisdiction, to reduce to his possession property of the bankrupt which is within the territorial jurisdiction of the court whose ancillary jurisdiction is invoked, and where the court of primary jurisdiction can act summarily, the court exercising ancillary jurisdiction may also proceed by summary order; *Matter of Sage* (D. C., Mo.), 35 Am. B. R. 436, 224 Fed. 525.

48. *Matter of Sutter Bros.* (D. C., N. Y.), 11 Am. B. R. 632, 131 Fed. 654.

Ancillary receiver.—A court exercising ancillary jurisdiction acts independently of the court of primary jurisdiction, or of its officers, and for itself. It appoints its own receiver, generally the same person being appointed receiver by the court of primary jurisdiction; but in the seizure, management, sale and distribution of the property seized within the territorial limits of its districts, of which it takes legal custody, this receiver is and must be governed by its orders exclusively. *Fidelity Trust Co. v. Gaskell* (C. C. A., 8th Cir.), 28 Am. B. R. 4, 198 Fed. 865.

49. As to examination of witnesses residing without the district before referees, see Bankr. Act, § 41-a, *post*.

Examination of non-resident witnesses.—In the case of *In re Robinson* (D. C., Minn.), 24 Am. B. R. 617, 179 Fed. 724, it was held that where, upon discharge proceedings, the objecting creditors desire to take the evidence of a witness residing in another Federal

only is wanted, it may be obtained by the customary method of deposition.⁵⁰ Where the ancillary tribunal takes possession of the property of the bankrupt within its territorial jurisdiction, such possession clothes such tribunal with the power to determine all questions of priorities and liens affecting such property,⁵¹ and may deal summarily or otherwise with such property, to the same extent and in the same manner as though the original bankruptcy proceedings were pending in such tribunal.⁵² The ancillary jurisdiction conferred by the amendment includes the power to hear and adjudge the adverse claims of parties to the specific property seized as the property of the bankrupt, and in the exercise of such jurisdiction district courts may, according to their adjudications, send the property or its proceeds to the court of primary jurisdiction, or apply them to the satisfaction of such claims.⁵³ There is no doubt that title passes to the trustee as of the date of the adjudication, no matter where the property may be situated;⁵⁴ it is equally certain that the district courts of other districts have jurisdiction to consider suits to recover possession of the bankrupt's property situated therein and by him fraudulently or preferentially transferred.⁵⁵

district, application for an order requiring such witness to appear before a referee in bankruptcy and give his testimony should be made to the Federal district court of the district where the witness resides. In the case of *Matter of Elkus* (Sup. Ct.), 23 Am. B. R. 614, 216 U. S. 115, 30 Sup. Ct. 377, the court said: "The questions submitted are: (1) Did the United States District Court for the Southern District of New York have jurisdiction to grant an order for the examination of witnesses, who were residents of that district, when the bankrupt proceedings in which the examination was desired were being administered in the Northern District of Illinois? (2) Have the respective district courts of the United States sitting in bankruptcy ancillary jurisdiction to make orders and issue process in said proceedings pending and being administered in the district court of another district? On the authority of *Babbitt, Trustee, etc. v. Dutcher et al.* (23 Am. B. R. 519, decided in Feb., 1910), just decided, we answer both questions in the affirmative."

50. See Bankr. Act. § 21-b-c. See also *In re Hemstreet* (D. C., Iowa), 8 Am. B. R. 760, 117 Fed. 568, and *in re Westfall Bros.* (D. C., Cal.), 8 Am. B. R. 431.

51. *Emerson v. Castor* (C. C. A., 6th Cir.), 37 Am. B. R. 719, 236 Fed. 29.

52. Exercise of ancillary jurisdiction.—The ancillary jurisdiction conferred by subdivision 20 of section 2 is such as the court of original jurisdiction would have had if it had had territorial jurisdiction, or such as the court appealed to would have had if the bankruptcy proceeding were pending therein. The ancillary jurisdiction so conferred of proceedings of a summary character is limited to cases in which the court in which the bankruptcy proceeding is pending could act summarily, if it had territorial jurisdiction and of plenary or independent suits to such as come within section 23-b of the

Bankruptcy Act. *De Friece v. Bryant* (D. C., Ky.), 37 Am. B. R. 275.

53. *Fidelity Trust Co. v. Gaskell* (C. C. A., 8th Cir.), 28 Am. B. R. 4, 195 Fed. 865.

The filing of a petition in the bankruptcy court constructively vests it with jurisdiction of all the property of the bankrupt wherever situated, the reduction of such property to actual possession being a mere detail in which a bankruptcy court of ancillary jurisdiction may aid, regardless of diversity of citizenship or amount, provided the property be found within the jurisdiction of such court. *In re Musica & Son* (D. C., La.), 30 Am. B. R. 555, 205 Fed. 413.

54. *Lazarus v. Prentice* (Sup. Ct., U. S.), 234 U. S. 263, 32 Am. B. R. 559. See discussion under § 70, post.

Liens subsequent to adjudication.—The filing of the petition and the adjudication brings the property of the bankrupt, wherever situated, into *custodia legis*, and it is thus held from the date of the filing of the petition, so that subsequent liens cannot be given or obtained thereon, nor proceedings had in other courts to reach the property the court of original jurisdiction acquires the full right to administer the estate under the bankruptcy law; *Lazarus v. Prentice* (Sup. Ct., U. S.), 234 U. S. 263, 32 Am. B. R. 559.

55. That is, since the amendatory act of 1903. See also *Goodall v. Tuttle*, Fed. Cas. 5,533, and *Lathrop v. Drake*, 91 U. S. 516; *Lawrence v. Lowrie* (D. C., Pa.), 13 Am. B. R. 298, 133 Fed. 995.

Ancillary jurisdiction; claims to assets in possession of court.—Ancillary jurisdiction is exercised for the purpose of aiding the court of primary jurisdiction to collect the estates of bankrupts and distribute them among those entitled thereto, and when property which has been transferred within the four months' period, in such circumstances as to suggest fraud, comes into the possession of the court exercising ancillary jurisdiction,

i. Court first acquiring jurisdiction.—It is a familiar rule of law, of universal application, essential to the orderly administration of justice, that in order to avoid a conflict between tribunals of co-equal authority, the court first acquiring jurisdiction must be allowed to pursue it to the end to the exclusion of others, and that it will not permit its jurisdiction to be impaired or subverted by a resort to some other tribunal.⁵⁶ This is especially true where there is conflict of jurisdiction between a bankruptcy court and a State court; in such cases if the bankruptcy court has assumed the custody and control of the bankrupt estate before proceedings are instituted in a State court, the jurisdiction of the former in respect to such estate is absolute and will not be disturbed.⁵⁷

that court, by its very possession, draws to itself the power to determine the interests therein of all parties making claim thereto, and it becomes its duty to so determine and grant complete relief that further litigation in respect thereto may be avoided. *In re Lipman*, (D. C., N. J.), 29 Am. B. R. 139, 201 Fed. 169; *Hartman v. Ackoury* (D. C., La.), 31 Am. B. R. 514, 210 Fed. 188.

Summary proceedings to recover assets.—Under clause 20 of this section a District Court of ancillary jurisdiction has authority to appoint a receiver and to take summary proceedings for the restoration of a bankrupt's estate, in the custody of people having no right to it, in order that same may be turned over to the bankruptcy having jurisdiction for administration. *Lazarus v. Prentice* (Sup. Ct., U. S.), 234 U. S. 263, 32 Am. B. R. 559.

Portion of expense.—Where in a bankruptcy proceeding instituted in New York, ancillary proceedings are had in New Jersey where property of the bankrupt is located, a claim by a landlord under the New Jersey statutes for rent as a prior claim, although he has not perfected his lien, is subject to that portion of the total expenses of the estate of the bankrupt, wherever situated, which the value of the chattels lying upon the demised premises when the petition in bankruptcy was filed bore to the value of the gross estate. *Matter of Braus* (D. C., N. Y.), 37 Am. B. R. 594, 233 Fed. 835.

56. *In re Southwestern Bridge & Iron Co.* (D. C., Kan.), 13 Am. B. R. 304, 133 Fed. 568.

Court first acquiring jurisdiction.—The United States Supreme Court in the case of *Pickens v. Dent*, 9 Am. B. R. 47, 187 U. S. 177, sustained the jurisdiction of a State court where it appeared that such court had had for years complete jurisdiction and control over the bankrupt and his property, and said: "The jurisdiction was not divested by the proceedings in bankruptcy, and it was the right and duty of that court to proceed to final decree notwithstanding adjudication, the rule being applicable that the court which first obtains rightful jurisdiction over the subject-matter should not be interfered with." The court cited the case of *Frazier v. Southern Loan & Trust Co.*, 3 Am. B. R. 710, 99 Fed. 707, in which Goff, J., said: "The Bankruptcy Act of 1898 does not in the least modify this rule, but with unusual careful-

ness guards it in all of its details, provided the suit pending in the State court was instituted more than four months before the District Court had adjudicated the bankruptcy of the party entitled to an interest in the subject-matter of such controversy."

Other cases declaring this same principle are *In re Price & Co.* (D. C., N. Y.), 1 Am. B. R. 606, 92 Fed. 987; *In re Gerdes* (D. C., Ohio), 4 Am. B. R. 346, 102 Fed. 318; *In re Tune* (D. C., Ala.), 8 Am. B. R. 285, 115 Fed. 906, in which case the court held that in cases of concurrent jurisdiction the court first obtaining possession of the property administers it, but where that court loses jurisdiction, and it is transferred by operation of valid laws to a court of the United States, which has exclusive jurisdiction of the subject-matter, the question becomes one of paramount authority of the constitution, and comity can have no influence in determining the right. *In re Wells* (D. C., Mo.), 8 Am. B. R. 75, 114 Fed. 222; *Metcalf v. Barker* (Sup. Ct.), 187 U. S. 175, 9 Am. B. R. 36; *In re English* (C. C. A., 2d Cir.), 11 Am. B. R. 674, 127 Fed. 940, rev. 10 Am. B. R. 133.

57. *In re Chambers* (D. C., R. I.), 3 Am. B. R. 537, 98 Fed. 865; *Keegan v. King* (D. C., Ind.), 3 Am. B. R. 79, 96 Fed. 758; *Leidigh Carriage Co. v. Stengel* (C. C. A., 6th Cir.), 2 Am. B. R. 385, 95 Fed. 637; *In re Glove Cycle Works* (Ref., N. Y.), 2 Am. B. R. 447; *In re Houston* (D. C., Ky.), 2 Am. B. R. 107, 94 Fed. 119; *Pietri v. Wells* (La. Sup. Ct.), 137 La. 1087, 36 Am. B. R. 105, 69 So. 847; *Union Banking Co. v. Truscott Boat Mfg. Co.* (Mich. Sup. Ct.), 36 Am. B. R. 175, 155 N. W. 717.

Possession of property as controlling jurisdiction.—Justice Moody, speaking for the Supreme Court of the United States, in *Murphy v. John Hoffman Co.*, 211 U. S. 562, 568, 21 Am. B. R. 487, 29 Sup. Ct. 154, 156 53 L. ed. 327-339, says: "Where the property in dispute is in the actual possession of the court of bankruptcy there comes into play another principle, not peculiar to courts of bankruptcy but applicable to all courts, Federal or State. Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court, having possession of the property, has an ancillary jurisdiction

There are essential exceptions to the rule as to the jurisdiction of State courts based upon prior acquisition, as where a lien would be acquired by proceedings therein within four months of the bankruptcy, or where such proceedings were instituted under State insolvency laws, a receiver or assignees being appointed therein during the four months' period.⁵⁸ As between two bankruptcy courts, the one in which the petition is first filed ought to be accorded exclusive jurisdiction over the case.⁵⁹ This question of priority of jurisdiction will be more fully considered under other sections of the act.⁶⁰

j. Expedition in exercise of jurisdiction.—The bankruptcy act contemplates that the bankrupt's estate shall be administered with all convenient dispatch, so that the property may be distributed and the bankrupt be discharged.⁶¹

to hear and determine all questions respecting the title, possession, or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. Jurisdiction in such cases arises out of the possession of the property and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them. *Wabash R. Co. v. Adelbert College*, 208 U. S. 38, 54, 28 Sup. Ct. 182, 52 L. Ed. 379, 386. Accordingly, where property was in the possession of the bankrupt at the time of the appointment of a receiver, it was held that the bankruptcy court had jurisdiction to determine the title to it as against an adverse claimant, and that the receiver had no right to deliver it to him without the order of the court. *Whitney v. Wenman*, 198 U. S. 539, 14 Am. B. R. 45, 25 Sup. Ct. 778, 49 L. Ed. 1157."

Conflict with State court.—When property is taken and held under process, *mesne* or final, of a court of the United States, it is in the custody of the law, and within the exclusive jurisdiction of the court from which the process has issued, for the purposes of the writ, and the possession of the officer cannot be disturbed by process from any State court. *Darrough v. First National Bank of Claremore* (Okla. Sup. Ct.), 37 Am. B. R. 75, 156 Pac. 191; *Meek v. Eggerman* (Okla. Sup. Ct.), 36 Am. B. R. 488, 155 Pac. 522.

Possession of property in controversy.—The jurisdiction of the bankruptcy court appears to turn upon the question whether or not it has the possession of the fund or property over which the controversy arises. If it has such possession, jurisdiction follows. If it does not have possession, it is without jurisdiction. In cases of this character where the bankruptcy court has no jurisdiction, the State court has jurisdiction. In cases where the bankruptcy court has jurisdiction, the State court has concurrent jurisdiction with it. *Union Banking Co. v. Truscott Boat Mfg. Co.* (Mich. Sup. Ct.), 36 Am. B. R. 176, 155 N. W. 717.

Maritime liens; admiralty jurisdiction.—Where an admiralty court, by libel proceedings, acquires complete jurisdiction of a vessel before bankruptcy proceedings are in-

augurated its jurisdiction is exclusive and will be retained to allow that court to determine all the lien claims which may be asserted against the vessel, whether presented before or after the filing of the bankruptcy petition or the adjudication in bankruptcy; and the proceeds of the sale will not be paid over to the trustee in bankruptcy but will be paid into the registry of the court. (See Am. B. R. Dig., §§ 14, 451, 469); *The Philomena* (D. C., Mass.), 37 Am. B. R. 220, 200 Fed. 859.

Where a bankruptcy court, through its receiver duly appointed, has taken possession of vessels belonging to the bankrupt, its jurisdiction is exclusive and will not be ousted to allow the enforcement of a libel in admiralty against the vessels, especially where the libellant's rights can be as well protected in the bankruptcy proceedings, even though the libels are founded on services rendered before the institution of bankruptcy proceedings. *The Casco* (D. C., Mass.), 37 Am. B. R. 215, 230 Fed. 929.

58. *Hooks v. Aldridge* (C. C. A., 5th Cir.), 16 Am. B. R. 658, 664, 145 Fed. 865, citing *In re Watts & Sachs*, 190 U. S. 1, 27, 10 Am. B. R. 113, 23 Sup. Ct. 718, 47 L. Ed. 933; *Matter of Maplecroft Mills* (D. C., S. Car.), 33 Am. B. R. 815, 218 Fed. 659.

59. *In re Tybo Mining & Reduction Co.* (D. C., Nev.), 13 Am. B. R. 62, 132 Fed. 697. Compare *In re Isaatson* (D. C., N. Y.), 20 Am. B. R. 430, 160 Fed. 777, 779.

60. See Bankr. Act, § 23-b, *post*, sub-title "Jurisdiction of State Courts."

61. *Blanchard v. Ammon* (C. C. A., 9th Cir.), 25 Am. B. R. 590, 183 Fed. 556; *In re Swofford Bros. Dry Goods Co.* (D. C., Mo.), 25 Am. B. R. 282, 180 Fed. 549; *In re Syracuse Paper & Pulp Co.* (D. C., N. Y.), 21 Am. B. R. 174, 164 Fed. 275; *Boyd v. Glucklich* (C. C. A., 8th Cir.), 8 Am. B. R. 393, 116 Fed. 131.

Such disposition should be made of bankruptcy cases that creditors may expeditiously realize what they may; but the substance of things and not the forms merely should be observed. *In re Faulkner* (C. C. A., 8th Cir.), 20 Am. B. R. 542, 161 Fed. 900; *Matter of Soloway & Katz* (C. C. A., 2nd Cir.), 37 Am. B. R. 257, 234 Fed. 67.

With this end in view the court will see to it that the proceedings are conducted without unnecessary delay.⁶² Proper regard must of course be had for the fundamental rights of the interested parties.⁶³

II. AS TO ADJUDICATION OF BANKRUPTCY.

a. In general.—Subdivision 1 of this section limits the power of the bankruptcy court to adjudicate the bankruptcy of persons to such as "have had their principal place of business, resided, or had their domicile" within the territorial jurisdiction of the court for the preceding six months or the greater portion thereof. Under the former law domicile and residence were often held equivalent terms. By that act when residence within the district was required, the word "domicile" was not used.⁶⁴ The confusion resulting from the conflicting decisions as to whether residence included domicile has been obviated by inserting in this subdivision the language "resided, or had their domicile" within the jurisdiction of the court.⁶⁵ To determine whether a court of bankruptcy may entertain a petition to adjudicate the bankruptcy of a debtor it must appear that he either, (1) had his principal place of business within the district; (2) or resided therein; (3) or had his domicile therein; and it must also appear that such place of business had been maintained, or such residence or domicile had been had, within such jurisdiction for the greater portion of the six months prior to the time when the petition for an adjudication of bankruptcy has been presented to the court. The existence of these requirements is jurisdictional and the effect of failure to show the same may not be waived by the voluntary appearance of the debtor.⁶⁶ The court may of its own volition

62. Unnecessary delay to be avoided.—The purpose of the act requires the court to cause the property and assets of the bankrupt to be collected, marshaled and distributed without unnecessary delay. In *re Lisk Mfg. Co.* (D. C., N. Y.), 21 Am. B. R. 674, 167 Fed. 411.

As stated by Mr. Justice Miller in *Bailey v. Glover*, 21 Wall. 346: "It is obviously one of the purposes of the bankruptcy law that there should be a speedy distribution of the bankrupt's assets. This is only secondary in importance to securing equality of distribution. The act is filled with provisions for the quick and summary disposal of questions arising in the progress of the case, without regard to the usual modes of trial attended with some delay." See also *Wisswall v. Campbell*, 93 U. S. 347. These cases arose under the former bankruptcy act, but are equally applicable to the present act.

63. Boyd v. Glucklich (C. C. A., 8th Cir.), 8 Am. B. R. 393, 116 Fed. 131, in which the court said: "Dispatch in judicial proceedings is commendable, but in proceedings involving the liberty of a citizen, he has a right not only to be informed of the precise claim against him, but, after receiving that information, he has a right to a reasonable time to prepare his answer and present his proofs, and, lastly, to be heard by counsel on the law and facts of the case."

64. Bankruptcy Act of 1867, § 11.

65. Matter of Lemen (D. C., Ohio), 30 Am. B. R. 638, 208 Fed. 80.

66. In re Plotke (C. C. A., 7th Cir.), 5 Am. B. R. 171, 175, 104 Fed. 964; In *re Clisdell* (Ref., N. Y.), 2 Am. B. R. 424; *Matter of Mitchell* (C. C. A., 2d Cir.), 33 Am. B. R. 463, 219 Fed. 690 (citing text).

Effect of section 740 of the Revised Statutes (Jud. Code, § 52).—In the case of *Hills v. McKinniss Co.* (D. C., Ohio), 26 Am. B. R. 329, 188 Fed. 1012, the court said:

"We are referred by defendant to section 740 of the Revised Statutes (Judiciary Code, § 52), providing that suits not of a local nature against a single defendant must be brought in the district in which such defendant resides, and it is urged that section 2 of the Bankruptcy Act does not in any way change or modify this general provision.

"We are not willing to agree with defendant that the Bankruptcy Act is in entire harmony with this general provision, for, as we have seen, the former omits the question of the present residence of the bankrupt altogether from the consideration of jurisdiction.

"A system of bankruptcy national in its character to be uniform in its operation must of necessity be unique in its method of administration, and when one of its provisions involving the very policy of the law is deemed inconsistent with the general law, the special provision must control."

Residence or domicile; waiver.—The question of jurisdiction, depending upon residence or place of business of the bankrupt, cannot be waived by the bankrupt at his election.

inquire into the facts as to these jurisdictional requirements so as to protect itself against fraud or imposition.⁶⁷ Subdivision 1 further provides that the power to adjudicate will exist in the court where the debtor has not had his principal place of business, does not reside, nor have his domicile within the United States but has property within the jurisdiction of the court, and also where a debtor, who has been adjudged a bankrupt by a court of competent jurisdiction without the United States, has property within the court's jurisdiction. In both of such cases, the location of the property of the debtor will determine the jurisdiction of the court. The jurisdiction of the court is further limited by the provisions of section 4 of the act which specifies the persons who may become bankrupts.

b. Domicile of debtor.— It will be noticed from the language of subdivision 1 that either domicile or residence within the territorial limits of the court will be sufficient to confer jurisdiction. It is not essential that both should exist.⁶⁸ Domicile means more than residence. To constitute domicile there must exist in combination the fact of residence and also the intent to remain,—the *animus manendi*.⁶⁹ The district in which an alleged bankrupt has resided during the greater portion of the six months next preceding the filing of a petition against him is the “district of his domicile” within the meaning of Gen-

Finn v. Carolina Portland Cement Co. (C. C. A., 5th Cir.), 37 Am. B. R. 449, 232 Fed. 815. See Am. B. R. Digest, § 18.

Jurisdiction dependent on residence or place of business.—Where in an involuntary proceeding an objection to the jurisdiction of the court upon the ground of lack of residence or place of business is raised by the alleged bankrupt within a month after adjudication and before any further proceedings are had, and the same objection is raised by two creditors before adjudication, the court must hear the objection, although the bankrupt first appeared by filing demurrers to the petition, going to the merits of the controversy, without objecting to the jurisdiction. Finn v. Carolina Portland Cement Co. (C. C. A., 5th Cir.), 37 Am. B. R. 449, 232 Fed. 815.

Jurisdiction of partnership; section 5c construed.—Under section 5c of the Bankruptcy Act a court which has jurisdiction over one partner can take to itself jurisdiction over the firm of which he is a member without reference to whether the firm is six months old or three months old, and without there being any specific allegation as to the firm's principal place of business. Matter of Mitchell (C. C. A., 2d Cir.), 33 Am. B. R. 463, 219 Fed. 690.

67. In re Garneau (C. C. A., 7th Cir.), 11 Am. B. R. 679, 127 Fed. 677; Matter of Mitchell (C. C. A., 2d Cir.), 33 Am. B. R. 463, 219 Fed. 690, quoting text with approval.

68. Matter of Harris (Ref., N. J.), 11 Am. B. R. 649, in which the referee says: “If a person has had any one of the three (place of business, residence or domicile) in the district for the greater part of six months immediately preceding the date of bankruptcy there is jurisdiction in the bankruptcy court of that district to proceed with the case.” See also In re Clisdell (Ref., N. Y.), 2 Am.

B. R. 424; In re Berner (Ref., Ohio), 2 Am. B. R. 197, 93 Fed. 943.

69. Distinction between residence and domicile.—In the case of In re Garneau (C. C. A., 7th Cir.), 11 Am. B. R. 679, 127 Fed. 677, the court says: “There is, of course, a legal distinction between ‘domicile’ and ‘residence’; although the terms are generally used as synonymous, the distinction depends upon the connection in which and the purpose for which the terms are used. ‘Domicile’ is the place where one has his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent he has the intention of returning, and where he exercises his political rights. There must exist in combination the fact of residence and the *animus manendi*.” See, also, In re Dinglehoeof Bros. (D. C., N. Car.), 6 Am. B. R. 242, 109 Fed. 866; In re Owings (D. C., N. Car.), 15 Am. B. R. 472, 140 Fed. 30; In re Scott (Ref., Mass.), 7 Am. B. R. 35; In re Williams (D. C., Wash.), 3 Am. B. R. 677, 99 Fed. 544; In re Berner (Ref., Ohio), 3 Am. B. R. 325; In re Grimes (D. C., N. Car.), 2 Am. B. R. 160, 96 Fed. 529; Matter of Davis (D. C., N. J.), 33 Am. B. R. 16, 217 Fed. 113, holding that domicile is of more extensive significance than residence and includes, beyond mere physical presence at a particular locality, an intention to constitute it a permanent abiding place.

The distinction between residence and domicile, that a man may reside in one State and be domiciled in another, noted in applying laws relating to the electoral franchise, may be applied in construing the Bankruptcy Act, and it is not impossible that the courts of two districts may have jurisdiction to entertain a petition against the same debtor, that one acting which is first invoked. Matter of Lemen (D. C., Ohio), 30 Am. B. R. 638, 208 Fed. 80.

eral Order VI.⁷⁰ Under this order if two or more petitions shall be filed against the same person in different districts the first hearing must be had in the district in which the debtor has his domicile. Domicile as here used means the place where the debtor permanently had his home for the greater portion of the six months preceding his bankruptcy, as distinguished from a residence temporarily acquired in some other place.⁷¹ Residence may involve the intent to leave when the purpose for which it has been acquired has ceased;⁷² domicile implies no such intent.⁷³ A debtor who absconds does not lose his domicile within the meaning of the act.⁷⁴ The fact that the alleged bankrupt is a roving character, and never residing at any place for the required period of time, does not affect the necessity of proving that such bankrupt had resided for a greater portion of the previous six months within the territorial limits of the court.⁷⁵ A domicile once acquired is presumed to continue until it is shown to have been changed.⁷⁶ Where it is alleged that there has been an abandonment of the old domicile and an establishment of a new one the burden of proof lies upon the person who asserts the change.⁷⁷ The domicile of any one of two or more partners would be sufficient to support the jurisdiction of the court.⁷⁸ It being established by both the petition and answer in an involuntary proceeding that the requisite jurisdictional fact as to domicile exists, the jurisdiction of the court may not be collaterally attacked after adjudication.⁷⁹

c. **Residence of debtor.**—The word “resided” as used in subdivision 1 is of

70. In re Isaacson (D. C., N. Y.), 20 Am. B. R. 430, 161 Fed. 777, 779.

71. In re Isaacson (D. C., N. Y.), 20 Am. B. R. 437, 161 Fed. 777; s. c. (D. C., N. Y.), 20 Am. B. R. 430, 161 Fed. 779.

Intention of debtor.—In determining the residence of a debtor his intention as expressed by him is always a fact to be considered, but should be measured in the light of the facts in the case and especially in the light of his own conduct. Matter of Lemen (D. C., Ohio), 30 Am. B. R. 638, 208 Fed. 80.

72. **Removal for particular purpose.**—A removal from one's place of residence does not *prime facie* prove a change in his domicile, when it appears that the removal was, for some particular purpose, expected to be only of a temporary nature, and which is not inconsistent with an intention to return to the original domicile. Matter of Davis (D. C., N. J.), 33 Am. B. R. 16, 217 Fed. 113.

73. In re Berner (Ref., Ohio), 3 Am. B. R. 325.

Intention of remaining.—Two things must concur to establish a domicile—the fact of residence and the intention of remaining. In re Owings (D. C., N. Car.), 15 Am. B. R. 472, 140 Fed. 739; In re Dinglehoe Bros. (D. C., N. Car.), 6 Am. B. R. 242, 109 Fed. 866.

74. In re Filer (D. C., N. Y.), 5 Am. B. R. 332, 108 Fed. 209; In re Oldstein, (D. C., Ore.), 25 Am. B. R. 138, 182 Fed. 409. The fact that the act so plainly makes residence, domicile or conduct of business for something less than the whole time immediately before the filing of the petition the sole criterion of jurisdiction suggests that the personal movements of the bankrupt are immaterial. Hills v. McKinness Co. (D. C., Ohio), 26 Am. B. R. 329, 188 Fed. 1012.

75. In re Williams (D. C., Ark.), 9 Am. B. R. 736, 120 Fed. 34, in which case it was held that a court of bankruptcy did not have jurisdiction to adjudge bankrupt a traveling gambler who had resided within the district and carried on his business there for only two months prior to the filing of the petition in bankruptcy against him.

76. In re Oldstein (D. C., Ore.), 25 Am. B. R. 138, 409 Fed. 182; In re Filer (D. C., N. Y.), 5 Am. B. R. 332, 108 Fed. 209; Matter of Davis (D. C., N. J.), 33 Am. B. R. 16, 217 Fed. 113.

77. In re Berner (Ref., Ohio), 3 Am. B. R. 325; In re Scott (D. C., Mass.), 7 Am. B. R. 39, 111 Fed. 144; In re Waxelbaum (D. C., N. Y.), 3 Am. B. R. 267, 97 Fed. 562; In re Clisdell (Ref., N. Y.), 2 Am. B. R. 424.

The burden of establishing a change of domicile is not discharged by showing that the bankrupt had decided to remain permanently away from his old domicile, without showing an intention to remain permanently in the new place. Matter of Davis (D. C., N. J.), 33 Am. B. R. 16, 217 Fed. 113.

Relinquishment of domicile.—Where the bankrupt had formerly relinquished both his residence and domicile in the State of New York in order to acquire a residence in New Jersey, which would justify him in bringing an action for divorce, he should not be permitted to seek the jurisdiction of a district court in New York to be relieved of his debts. Matter of Lipphart (D. C., N. Y.), 28 Am. B. R. 705, 201 Fed. 103.

78. In re Blair (D. C., N. Y.), 3 Am. B. R. 588, 99 Fed. 76.

79. Matter of Sage (D. C., Mo.), 35 Am. B. R. 436, 224 Fed. 525.

slight importance. Cases may arise where it may be useful, as when a debtor attempts to escape bankruptcy by denying domicile. Residence may mean no more than sojourning. It is a personal presence in a fixed and permanent abode as distinguished from a temporary occupation, but it does not include as much as domicile, which requires an intention combined with residence.⁸⁰ If the residence, not amounting to a domicile, continues for the required portion of the three months preceding the filing of the petition in bankruptcy, it will be sufficient to clothe the court with jurisdiction.⁸¹ If change of residence is asserted the burden of proof is upon him who asserts it.⁸²

d. Principal place of business.—(1) **IN GENERAL.**—A court of bankruptcy may, under subdivision 1 of this section, adjudge a person bankrupt who has had his principal place of business within the territorial jurisdiction of the court for the preceding six months or the greater portion thereof although he may not have resided or had his domicile therein during such period. The former Bankruptcy Act used the words “carried on business” instead of “had their principal place of business” as in the present section.⁸³ Principal place of business means the place where the principal affairs and business of the debtor are transacted,⁸⁴ as a principal and not as an agent or employee; generally speaking a person who is employed by another on a salary, having no business of his own, may not have a “place of business,” within the meaning of the Bankruptcy Act.⁸⁵ The residence of the debtor will not control as to his principal place of business; he may reside in one district and be adjudged a bankrupt in another district in which he has his principal place of business.⁸⁶

(2) **OF CORPORATIONS.**—The question as to what constitutes a principal place of business arises more frequently in respect to a corporation. The principal office of a corporation as specified in its articles of incorporation will not control. The principal place of business may not be conclusively determined by the designation thereof in a certificate of incorporation or of authority to transact business, unless it actually appears that business is done there.⁸⁷ The district

80. In re Dinglehoef Bros. (D. C., N. Car.), 6 Am. B. R. 242, 109 Fed. 866; In re Garneau (C. C. A., 7th Cir.), 11 Am. B. R. 679, 127 Fed. 677, citing Tracey v. Tracey, 62 N. J. Equity 807, 48 Atl. 533; Shaeffer v. Gilbert, 73 Md. 66, 20 Atl. 434; Matter of Lemen (D. C., Ohio), 30 Am. B. R. 638, 208 Fed. 80; Matter of Davis (D. C., N. J.), 33 Am. B. R. 16, 217 Fed. 113.

81. Matter of Lemen (D. C., Ohio), 30 Am. B. R. 638, 208 Fed. 80.

82. In re Waxelbaum (D. C., N. Y.), 3 Am. B. R. 267, 97 Fed. 562; In re Bassett (D. C., Wash.), 26 Am. B. R. 800, 189 Fed. 410.

83. Act of 1867, § 11. The language of the present section is more exact than that used in the former act.

84. Milwaukee Steamship Co. v. City of Milwaukee, 83 Wis. 590, 53 N. W. 839, 18 L. R. A. 353.

85. Matter of Lipphart (D. C., N. Y.), 28 Am. B. R. 705, 201 Fed. 103.

86. In re Brice (D. C., Iowa), 2 Am. B. R. 197, 93 Fed. 942; In re Magie, Fed. Cas. 8,951. See also Guinn v. Iowa Cent. Ry. Co., 14 Fed. 323, 324, which is to the effect that the principal place of business of a corporation is no test of residence. A natural per-

son might reside in one State and have his principal, or for that matter his sole place of business in another State. See Am. B. R. Dig. § 19.

A farmer who lived in one district and whose business consisted of raising, buying and selling farm products, buying and slaughtering live stocks and selling the meat from a stall in a market place in a city in another district where he exhibited and sold all but a comparatively small portion of the produce handled by him, was held to have a principal place of business in the city. In re Mackey (D. C., Del.), 6 Am. B. R. 577, 110 Fed. 355.

Partners residing in other districts.—Evidence examined and held sufficient to show that the principal place of business of a partnership was within the jurisdiction of the court at the time of the commencement of involuntary proceedings against it and during six months prior thereto, although the members of the firm resided in another district and there conducted a smaller business. Matter of Gurler & Co. (D. C., Iowa), 37 Am. B. R. 418, 232 Fed. 1016.

87. Matter of Thomas McNally Co. (D. C., N. Y.), 31 Am. B. R. 382, 208 Fed. 291; In re Wenatchee-Stratford Orchard Co. (D. C., Wash.), 30 Am. B. R. 540, 205 Fed. 964;

court of the district in which the assets, manufacturing plant and business office of a corporation are located will have jurisdiction as against the court of the district in which the articles of incorporation specify that the principal place of business is located.⁸⁸ Corporations are frequently organized under the statutes of one State for the purpose of transacting business in another State. The requirement that a corporation so organized shall have an office within the State where incorporated will not preclude the exercise of jurisdiction by a court of bankruptcy in a district other than that in which such office is located.⁸⁹ If the office be the place where the business affairs of the corporation are managed it may determine the jurisdiction of the court, although

In re United States Lumber Co. (D. C., Wash.), 30 Am. B. R. 682, 685, 206 Fed. 236, citing text; Matter of Federal Contracting Co. (C. C. A., 7th Cir.), 32 Am. B. R. 381, 212 Fed. 688.

Articles of incorporation as determining.—Where there is any doubt on the question as to the principal place of business of a bankrupt corporation the proper course would be to yield to the provisions of the articles of incorporation in determining where the corporation's principal place of business is, although the fact that such articles fixed a named city as the principal place of business is not always conclusive of the question. Matter of Pennington & Co. (D. C., Ky.), 35 Am. B. R. 832, 228 Fed. 388.

88. Place where business is transacted.—In the case of Dressel v. North State Lumber Co. (D. C., N. Car.), 5 Am. B. R. 744, 107 Fed. 255, it appeared that the certificate of incorporation specified the home office of the corporation to be in Detroit, Mich., while all its assets, its plant and business were located in Durham, N. C. The court said: "It would be an anomalous construction of the law, and defeat one of the purposes of the bankruptcy act, to hold that by the mere assertion in the articles of association a corporation can fix its principal office in one State or district when in fact all its property is located and its business transacted in a distant district, and thus escape the jurisdiction of the courts in both districts."

See also Tiffany v. La Plume Condensed Milk Co. (D. C., Pa.), 15 Am. B. R. 413, 141 Fed. 444; Milwaukee Steamship Co. v. City of Milwaukee, 83 Wis. 590, 53 N. W. 839, 18 L. R. A. 353; Matter of Perry Aldrich Co. (D. C., Mass.), 21 Am. B. R. 244, 165 Fed. 249; In re Elmira Steel Co. (D. C., N. Y.), 5 Am. B. R. 485, 109 Fed. 456; Matter of Beirmeister Bros. Co. (D. C., N. Y.), 31 Am. B. R. 474, 208 Fed. 945, holding that the bankruptcy court in the district where a corporation for the last six months has had its factory, and executive office, where its books have been kept and principal banking done and payments made, has jurisdiction of a voluntary proceeding notwithstanding the creditors have the day before filed a petition in another district in which the principal place of business named in the articles of incorporation is located.

Location of property.—The fact that the greater portion of the property of a bankrupt corporation is at a given place is some evidence, though not controlling, that its principal place of business was located there. Matter of Pennington & Co. (D. C., Ky.), 35 Am. B. R. 832, 228 Fed. 388.

89. In re Magid-Hope Silk Manufacturing Co. (D. C., Mass.), 6 Am. B. R. 610, 110 Fed. 352; Matter of Tennessee Construction Co. (C. C. A., 2d Cir.), 32 Am. B. R. 405, 213 Fed. 33.

Where a West Virginia coal company, though its charter stated that its principal place of business was in that State, as were its mines and real estate, had from the time of its incorporation and for six months prior to the commencement of bankruptcy proceedings maintained its executive office and principal place of business in Philadelphia, the bankruptcy court of the Eastern District of Pennsylvania having first acquired jurisdiction should retain the same as against the bankruptcy court in West Virginia, it not appearing that the greater convenience of parties would be promoted by a transfer. In re Pennsylvania Cons. Coal Co. (D. C., Pa.), 20 Am. B. R. 872, 163 Fed. 579.

Mining corporation not yet engaged in business.—The charter of a corporation organized for the purpose of mining provided that its principal place of business should be at Phoenix, Arizona. The corporation had never done any mining, but its activities were principally connected with the sale of its stock and the payment of its running expenses, and the only place in which business had been conducted was an office in New York City, the rent of which was being paid by its president at the time the board of directors met there and authorized him to file a voluntary petition. The books were all kept there, all meetings of the board were held there and all moneys of the company were disbursed from there, no meetings having ever been held at Phoenix, except the technical ones required by the law of Arizona. Held, that the principal place of business, if any, was in New York City, so that the District Court for the Southern District of New York had jurisdiction to adjudicate it a bankrupt in voluntary proceedings. In re Guanacevi Tunnel Co. (C. C. A., 2d Cir.), 29 Am. B. R. 230, 201 Fed. 316.

factories, mills or mines in another district are operated therefrom.⁹⁰ The question is one of fact to be determined in each particular case by the character of the corporation, its purposes, and the kind of business it is engaged in;⁹¹ and the burden of proof that the principal place of business was in a certain district, other than that specified in the articles of incorporation, is on the petitioning creditors.⁹² Business transacted in a district by a receiver of a corporation appointed to collect assets and turn them into money, is not "business" as meant by the phrase "principal place of business."⁹³ The failure of a foreign corporation to secure a certificate permitting it to do business in a State does not affect the jurisdiction of a court of bankruptcy, nor alter the fact that the principal place of business of the corporation is where its principal business is done.⁹⁴ And the fact that a foreign corporation has filed a certificate in a public office designating its "place of business" within the state does not establish such "place of business" within the meaning of this section, unless business is actually carried on at such place.⁹⁵ Where there is doubt as to which of two States is the location of the principal place of business of a corporation, it should be decided in favor of the State in which it was incorporated.⁹⁶ Where there are two alleged bankrupt corporations, whose business transactions are so intermingled as to be impossible of separation, requiring administration under one jurisdiction, the proceedings may be con-

A corporation organized in Rhode Island maintained a nominal office but never owned any substantial property there. It acquired a lease of a theatre in Massachusetts, made a substantial deposit with the lessor, installed certain chattels used in its business, and never had any office from which its business was conducted, except that connected with the theatre. The lessor brought an action in the State court of Massachusetts in which a receiver was appointed, and a judgment rendered relieving the corporation from forfeiture upon its making certain payments, which it failed to do, and thereafter a petition in bankruptcy was filed against it in Massachusetts. Held, that the corporation had its principal place of business in the district of Massachusetts. *Matter of E. & G. Theatre Co.* (D. C., Mass.), 35 Am. B. R. 255, 223 Fed. 657.

90. *In re Matthews Consolidated Slate Co.* (C. C. A., 1st Cir.), 16 Am. B. R. 407, 144 Fed. 737, affg. 16 Am. B. R. 350, 144 Fed. 724, in which case it was held that where a corporation owning a quarry in one State but whose business was transacted and controlled from an office in another State, the principal place of business was in the latter State. See also *In re Marine Machine and Conveyor Co.* (D. C., N. Y.), 1 Am. B. R. 421, 91 Fed. 630.

91. *In re Tygarts River Coal Co.* (D. C., W. Va.), 30 Am. B. R. 183, 203 Fed. 178; *Matter of Pennington & Co.* (D. C., Ky.), 35 Am. B. R. 832, 228 Fed. 388.

Question of fact.—The principal place of business of a corporation during the six months prior to the filing of a petition in bankruptcy is to be determined purely by the facts, and not by intentions of the cor-

porate authorities or recitals in the charter. *Matter of San Antonio Land & Irrigation Co.* (D. C., N. Y.), 36 Am. B. R. 512, 228 Fed. 984.

92. *Matter of Tennessee Construction Co.* (C. C. A., 2d Cir.), 32 Am. B. R. 405, 213 Fed. 33.

Burden of proof.—Where, in involuntary bankruptcy proceedings, there is a contest as to the principal place of business of the bankrupt corporation, the burden of proof is on the petitioning creditors to establish that fact where it is shown by the articles of incorporation that the domicile and place of residence of the bankrupt is in another district. *Matter of Pennington & Co.* (D. C., Ky.), 35 Am. B. R. 832, 228 Fed. 388.

93. *Matter of Perry Aldrich Co.* (D. C., Mass.), 21 Am. B. R. 244, 165 Fed. 249.

94. *In re Duplex Radiator Co.* (D. C., N. Y.), 15 Am. B. R. 324, 142 Fed. 906; *Matter of Perry Aldrich Co.* (D. C., Mass.), 21 Am. B. R. 244, 165 Fed. 249.

95. *Matter of McNally Co.* (D. C., N. Y.), 31 Am. B. R. 382, 208 Fed. 291.

96. *In re Tennessee Construction Co.* (D. C., N. Y.), 31 Am. B. R. 67, 207 Fed. 203, in which case it was held that where a corporation, incorporated in Missouri and required by statute to keep a general office in that State, has not been in active business during the past six months, and its principal business in this State during such period has been to try to work out a reorganization so that its assets in the hands of a receiver in Missouri may be made valuable, a bankruptcy court in New York will not assume jurisdiction; *affd.* 32 Am. B. R. 405, 213 Fed. 33.

ducted in the court first acquiring jurisdiction regardless of the location of the principal place of business of one of such corporations.⁹⁷

e. Preceding six months.—The alleged bankrupt must have resided, had his domicile, or transacted business within the district for six months or the greater portion thereof preceding the application. This does not mean the full period of six months prior to the filing of the petition;⁹⁸ a residence, domicile or transaction of business for more than three months, whether at the beginning or end of the period of six months, will be sufficient.⁹⁹ The apparent intent of the section is that no adjudication may be had where three months have not elapsed since the alleged bankrupt acquired a domicile, residence or place of business within the district.¹⁰⁰ It has been held that where a voluntary petition was filed prior to the expiration of such period, the adjudication should be set aside, but that upon proper application being made after the expiration of such period a new order of adjudication would be entered.¹⁰¹

f. Alien bankrupts.—An alien may be adjudged bankrupt, provided he has property within the United States, or, if he has been adjudged bankrupt in the bankruptcy courts of another country and does not reside but has property within the United States.¹⁰²

g. Property within district.—The jurisdiction extends also to persons and corporations who reside, have a domicile or place of business in another district provided they have property within the district in which the jurisdiction is exercised. The actual situs of the property of a person or corporation will control, and the general doctrine *mobilia sequuntur personam* will not apply.¹⁰³

⁹⁷ In re Southwestern Bridge & Iron Co., (D. C., Kan.), 13 Am. B. R. 304, 133 Fed. 568; In re Alaska-American Fish Co. (D. C., Wash.), 20 Am. B. R. 712, 162 Fed. 498, citing Collier on Bankruptcy (6th Ed.), p. 17.

⁹⁸ In re Ray (Ref., Wash.), 2 Am. B. R. 158. Contra, In re Stokes (Ref., Wash.), 1 Am. B. R. 35.

⁹⁹ In re Plotke (C. C. A., 7th Cir.), 5 Am. B. R. 171, 104 Fed. 964, 44 C. C. A. 282; In re R. H. Williams (D. C., Ark.), 9 Am. B. R. 736, 128 Fed. 38; Matter of Harris (Ref., N. J.), 11 Am. B. R. 649; In re Berner (Ref., Ohio), 3 Am. B. R. 325.

The act of 1867 contained the words "for the six months next preceding or for the longest period during such six months," which were construed as giving the court jurisdiction to adjudge one a bankrupt if he had resided only one day in the district, provided he had not resided a longer period in any other district. See In re Foster, 3 N. Bank. Rep. 236; In re Goodfellow, 3 N. Bank. Rep. 452.

Greater portion of six months.—If it be made to appear to the satisfaction of the court that an alleged bankrupt has not had his residence, domicile or place of business within the jurisdiction of the court for the period of six months or the greater portion thereof, the proceeding should be dismissed. Finn v. Carolina Portland Cement Co. (C. C. A., 5th Cir.), 37 Am. B. R. 449, 232 Fed. 815.

¹⁰⁰ In re Tully (D. C., N. Y.), 19 Am. B. R. 604, 156 Fed. 634.

¹⁰¹ **Objection as to residence by creditors.**—In re Tully (D. C., N. Y.), 19 Am. B. R. 604, 156 Fed. 634, in which the court said: "But it would be a hardship which certainly no court would allow, unless it is without jurisdiction to prevent, for a creditor, as in the case at bar, to conceal from the court the defect in the allegation as to residence, to stand by and allow proceedings to go on before the referee, and then when the estate has been administered, and the matter progressed to the point where the bankrupt applied for a discharge, successfully nullify the proceedings to which he has been a party, and cause the bankrupt the expense of an additional proceeding, where no end would apparently be accomplished except harassing the bankrupt."

¹⁰² See discussion under section 4 of this work. Matter of Berthond (D. C., N. Y.), 36 Am. B. R. 555, 231 Fed. 529, holding that where an alien residing abroad and having a deposit with a bank in New York City made a general assignment in England, and a petition in bankruptcy was filed against him in the district, including New York City, within four months after the assignment, the bankruptcy court has jurisdiction.

¹⁰³ **The meaning of the word "property"** under section 2 of the Bankruptcy Act, giving jurisdiction of a corporation having property within a district but its principal place of business, residence, or domicile without the United States, should be much the same as that under judicial decisions relating to matters of taxation and attachment, and the situs of property is not to be

h. Removal from one district to another.—The removal of a person from one district to another for the purpose of pretending to acquire a residence so that a petition in bankruptcy might be filed by him in a district in which he did not reside, with the intention of leaving the place as soon as his discharge was granted, does not make him a resident of the district, and such facts being disclosed upon his examination, his creditors may have the proceedings dismissed for want of jurisdiction, the adjudication in bankruptcy not being conclusive upon them.¹⁰⁴

i. Effect of adjudication, in rem.—An adjudication acts both *in personam* and *in rem*. The property of the bankrupt at once vests in the trustees subsequently to be appointed, remaining meanwhile *in custodia legis*. In this the law is defective, and the resultant difficulties and dangers are not fully met by § 2 (3) authorizing the appointment of receivers. In the absence of an official with powers and functions similar to those of the official receiver in England,¹⁰⁵ the custody of the court in the *interregnum* between the filing of the petition and the appointment and qualification of the trustee is often more theoretical than actual. The practice has grown up in some districts of appointing receivers in all cases; this rests on doubtful authority, because not always “absolutely necessary for the preservation of estates,” is expensive and sometimes proves an interference with the right given the creditors to choose their trustee. In other districts, the attorney in charge is held responsible for the property. In still others, the property is in effect put under the seal of the court by being locked up and the keys delivered to the referee. While the rules of the western district of Michigan establish the practice of making the referee to whom the case has been referred and who is, therefore, “the court” as well, *eo nomine* the receiver in every voluntary case.¹⁰⁶

III. CLAIMS.

Subdivision 2 of the section authorizes a court of bankruptcy to allow, disallow, and reconsider the allowance or disallowance of claims. This jurisdiction will be fully discussed hereafter.¹⁰⁷

IV. RECEIVERS, APPOINTMENT AND POWERS.

a. In general.—A court of bankruptcy may, under subdivision 3 of this section, appoint receivers of the property of the alleged bankrupt when absolutely necessary for the preservation of the bankrupt estate, “after the filing of the petition and until it is dismissed or the trustee is qualified.” The court may also, under subdivision 15, make such orders and interlocutory judgments and issue such process as may be necessary for the enforcement of the provisions of the act. This is in recognition of the equity powers of the court and authorizes intervention by the court, through a receivership or otherwise, to

determined by general doctrines, such as “*mobilia sequuntur personam*.” Corporate stock and bond certificates pledged with a trust company and money in an account with the trust company is property within the district so as to confer jurisdiction. But a deposit to meet unpaid coupons is a trust deposit belonging to the holders of the coupons, and is not property within the district belonging to the bankrupt. *Matter of San Antonio Land & Irrigation Co.* (D. C., N. Y.),

36 Am. B. R. 572, 228 Fed. 984.

^{104.} *In re Garneau* (C. C. A., 7th Cir.), 11 Am. B. R. 679, 127 Fed. 677. See also *In re Oldstein* (D. C., Or.), 25 Am. B. R. 138, 182 Fed. 409.

^{105.} Eng. Bankruptcy Act of 1883, §§ 66–71.

^{106.} As to appointment of receiver when necessary for preservation of estate, see next paragraph but one, *et seq.*

^{107.} Bankr. Act, § 57, *post.*

preserve the property of the alleged bankrupt. If appointed under the former provision he is the custodian of the estate, but may be clothed with such powers as to the court may seem necessary, subject, however, to the title to be acquired by the trustee upon his appointment and qualification.¹⁰⁸ The necessity of providing for the appointment of a receiver is obvious. A considerable time must necessarily elapse between the filing of a petition and the adjudication of bankruptcy and selection and qualification of a trustee. During this period opportunity may be afforded for the dissipation or depreciation of the assets either by the alleged bankrupt, or by third persons, with or without his connivance.¹⁰⁹

b. When receiver should be appointed.—(1) **WHEN ABSOLUTELY NECESSARY.**

—The power to appoint may be exercised in either voluntary or involuntary proceedings. The power to appoint is statutory and may only be exercised when “absolutely necessary for the preservation of estates.”¹¹⁰ The necessity

^{108.} Compare *In re Fixen* (D. C., Cal.), 2 Am. B. R. 822, 96 Fed. 748, and *In re Floerken* (D. C., Cal.), 5 Am. B. R. 802, 107 Fed. 241, with *Boonville Nat. Bank v. Blakey* (C. C. A., 7th Cir.), 6 Am. B. R. 13, 107 Fed. 891; *Whittlesey v. Becker & Co.* (N. Y. App. Div.), 25 Am. B. R. 672, 142 N. Y. App. Div. 313; *Matter of Larkey* (D. C., N. J.), 32 Am. B. R. 287, 214 Fed. 867.

^{109.} *In re Benedict* (D. C., Wis.), 15 Am. B. R. 232, 140 Fed. 55.

Object of receivership.—The duty required and the power conferred clearly are that the receiver or the marshal should take possession of property that would otherwise go to waste, and hold it and preserve it, so that it might come to the trustee, when selected, without needless injury. *Boonville Nat. Bank v. Blakey* (C. C. A., 7th Cir.), 6 Am. B. R. 13, 107 Fed. 891.

Preservation of assets and appointment of receiver.—Courts of bankruptcy are invested with such jurisdiction at law and equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation, in chambers, and during their respective terms, to appoint receivers or marshals, in case the courts shall find it absolutely necessary for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition, and until it is dismissed or the trustee is qualified. *Darrough v. First National Bank of Claremore* (Okla. Sup. Ct.), 37 Am. B. R. 75, 156 Pac. 191. See Am. B. R. Dig. § 297.

^{110.} *Bryan v. Bernheimer*, 181 U. S. 188, 5 Am. B. R. 623; *In re Floerken* (D. C., Cal.), 5 Am. B. R. 802, 107 Fed. 241; *In re Rosenthal* (D. C., N. J.), 16 Am. B. R. 448, 144 Fed. 548, holding that an order appointing a receiver in a voluntary bankruptcy will be set aside where the petition merely states that the bankrupt verily believes that such an appointment will be to the benefit of all persons in interest. See also *In re Knopf* (D. C., S. Car.), 16 Am. B. R. 432, 144 Fed. 245; *In re Moody* (D. C., Iowa), 12 Am. B. R. 718, 131 Fed. 525;

Faulk & Co. v. Steiner (C. C. A., 5th Cir.), 21 Am. B. R. 623, 165 Fed. 861; *Sprague v. Margolis Co.* (D. C., Mass.), 32 Am. B. R. 692, 211 Fed. 171; *Badders Clothing Co. v. Burnham-Munger-Root Dry Goods Co.* (C. C. A., 8th Cir.), 36 Am. B. R. 115, 228 Fed. 470.

Absolute necessity of appointment.—In the case of *Matter of Oakland Lumber Co.* (C. C. A., 2d Cir.), 23 Am. B. R. 181, 174 Fed. 634, the court said: “Congress recognized the necessity for caution by limiting the appointment of receivers to cases where it is ‘absolutely necessary’ for the preservation of the estate. In other words, the reason for such interference with such rights of property must be clear, positive and certain. Of course cases frequently arise where this remedy may be necessary,—cases where there is a reason to believe that the property may be stolen or secreted, or turned over to favored creditors. But fraud cannot be presumed, neither can danger to property be predicated of acts which are honest and lawful. It cannot be presumed that an assignee under a State law intends to plunder the fund he is appointed to administer. Unless something be shown to the contrary the presumption is persuasive that during the interval between the filing of the petition and the appointment of a trustee, the property will be entirely safe in the hands of the assignee.” And see *Ingram v. Ingram Dart Lighterage Co.* (D. C., Ga.), 34 Am. B. R. 622, 226 Fed. 58.

Preservation of estate.—In no case should a receiver in bankruptcy be appointed except where, upon clear and convincing proof, the court finds it absolutely necessary for the preservation of the estate. *Matter of Oakland Lumber Co.* (C. C. A., 2d Cir.), 23 Am. B. R. 181, 174 Fed. 634. An alleged bankrupt cannot, by his consent, waive the limitation as to the necessity of the appointment of a receiver for the preservation of the estate. *Faulk & Co. v. Steiner* (C. C. A., 5th Cir.), 21 Am. B. R. 623, 165 Fed. 861. See also *In re Desrochers* (D. C., N. Y.), 25 Am. B. R. 703, 183 Fed. 991.

of showing that the receivership is necessary for the preservation of the estate will not be obviated by the consent of the bankrupt.¹¹¹ And it must affirmatively appear that the assets of the alleged bankrupt are likely to be dissipated or wasted pending the adjudication.¹¹²

(2) CAUTION TO BE USED.— Unless the creditors as a whole are to be benefited by the receivership, a receiver should not be appointed. It must appear that the appointment will protect their interests by the preservation of the estate. A creditors' petition for a receivership will usually be granted where it appears that otherwise the bankrupt's estate will be left wholly unprotected, and be subject to dissipation, especially where there is no fraud or collusion and the other interested parties do not object.¹¹³ The court will carefully scrutinize arrangements made whereby attorneys for the parties are to profit by the receivership; if it appears that the appointment was secured by connivance of the interested parties and their attorneys and that some motive existed, as an agreed division of the fees or the like, for securing such appointment, the court should vacate the order.¹¹⁴

(3) EFFECT OF ASSIGNMENT FOR BENEFIT OF CREDITORS.— Where an assignment for the benefit of creditors has been made within the four months period, constituting an act of bankruptcy, and an assignee or receiver of the property of the debtor has been appointed by a State court, the power of a bankruptcy court to appoint a receiver is not restricted.¹¹⁵ This is apparent when it is considered that an assignment for creditors within the four months period is an act of bankruptcy and when made the basis of involuntary proceedings, the property assigned immediately becomes subject to administration in bankruptcy.¹¹⁶ The court may, in its discretion, recognize the assignee for the purpose of preserving the alleged bankrupt's estate, or appoint a receiver, if the circumstances warrant it, and may restrain the assignee from administering the estate.¹¹⁷

(4) EFFECT OF APPOINTMENT.— Coincident with the filing of a petition the court acquires control of the property of the alleged bankrupt, and to properly exercise this control, it is thereupon vested, under the subdivisions

111. *Faulk & Co. v. Steiner* (C. C. A., 5th Cir.), 21 Am. B. R. 623, 165 Fed. 861, in which the court said: "It was not intended, we think, that the bankrupt, by his consent, could remove the limitation of the statute, and authorize the appointment of a receiver, where it was not necessary for the preservation of the estate. Provisions of the act for the protection of the bankrupt cannot be waived by him if such provisions also serve to protect the bankrupt's creditors."

112. *In re Standard Cordage Co.* (D. C., N. Y.), 30 Am. B. R. 448, 184 Fed. 156.

113. *In re Huddleston* (D. C., Ga.), 21 Am. B. R. 669, 167 Fed. 428.

114. *Matter of Oshwitz* (D. C., N. Y.), 25 Am. B. R. 594, 183 Fed. 590; *In re Desrochers* (D. C., N. Y.), 25 Am. B. R. 703, 183 Fed. 991.

115. *Appointment of receiver after qualification of assignee for benefit of creditors.*— The power of the bankruptcy court to appoint a receiver is not affected by the fact that an assignment for the benefit of creditors has been executed and that the assignee

named therein has qualified. Whether to appoint a receiver in a given case is a matter for the exercise of a proper discretion, and depending upon the question whether the assignee is a proper custodian of the property during the period between the filing of the petition and the election of a trustee. *Matter of Federal Mail & Express Co.* (D. C., N. Y.), 37 Am. B. R. 240, 233 Fed. 691. And see *In re Oakland Lumber Co.* (C. C. A., 2d Cir.), 23 Am. B. R. 181, 174 Fed. 634.

116. *In re Guttmellig* (D. C., N. Y.), 1 Am. B. R. 78, 90 Fed. 475; s. c. on appeal, 1 Am. B. R. 388, 92 Fed. 337; *Matter of Federal Mail & Express Co.* (D. C., N. Y.), 37 Am. B. R. 240, 233 Fed. 691.

117. *Matter of Federal Mail & Express Co.* (D. C., N. Y.), 37 Am. B. R. 240, 233 Fed. 691, holding that in all cases where a petition in bankruptcy has been filed within four months of making a general assignment, the bankruptcy court has both the power and the absolute discretion to restrain the assignee from administering the estate. See *Am. B. R. Digest*, § 935.

above referred to, with full power to designate officers of the court, either a receiver or marshal, to preserve such property, to the end that the interests of the creditors may be protected.¹¹⁸ The power to appoint a receiver, where the court has acquired jurisdiction of the parties, is not affected by the fact that the respondent, a corporation, was not subject to adjudication as a bankrupt.¹¹⁹ It seems that if a receiver is appointed in an involuntary case, before adjudication, he must give a bond.¹²⁰ The official status or regularity of appointment of a receiver is not subject to collateral attack.¹²¹

c. Practice on appointment.—(1) **APPLICATION.**—Before reference of the bankruptcy proceeding, the application for a receiver should be made to the judge; after that time to the referee.¹²² The application should state facts showing that a receiver is absolutely necessary for the preservation of the estate,¹²³ and should be accompanied by a bond as required by § 3-e of the bankruptcy act.¹²⁴ The application may be on affidavits of parties in interest, showing the requisite facts. A petition which fails to allege or is not accompanied by affidavits showing that the appointment is absolutely necessary for the preservation of the estate is insufficient.¹²⁵ The proceedings for the

118. In re Kleinhans (D. C., N. Y.), 7 Am. B. R. 604, 113 Fed. 107.

The title to the property of the alleged bankrupt remains in him until adjudication, subject to the control of the court to be exercised either by a receiver or the marshal, if otherwise the interests of the creditors are not sufficiently protected. In re La Plume Milk Co. (D. C., Pa.), 16 Am. B. R. 729, 145 Fed. 1013.

Pending and prior to the adjudication in bankruptcy title to the bankrupts' property still remains in them. But the court may take into its custody and control this property pending an adjudication. Whittlesey v. Becker & Co., 25 Am. B. R. 672, 677, 142 N. Y. App. Div. 313.

Effect of appointment on right to acquire lien.—An order of the bankruptcy court appointing a general receiver of the bankrupt's entire estate, directing the delivery of such estate to him as far as possible by the bankrupt, and enjoining all other persons from transferring or otherwise interfering with the property, assets and effects of the bankrupt, effects a sequestration of the bankrupt's estate to such an extent as to prevent the acquisition of any new lien thereon. Agnew v. Board of Education (Ct. of Chan., N. J.), 83 N. J. Equity 49, 33 Am. B. R. 132, 89 Atl. 1046.

119. In re Hill Co. (C. C. A., 7th Cir.), 20 Am. B. R. 73, 159 Fed. 73.

120. Bankr. Act, § 3-e, *post*.

121. Ross v. Stroh (C. C. A., 3d Cir.), 21 Am. B. R. 644, 165 Fed. 628.

122. Gen. Ord. XII. As to the effect that after the order referring a case to a referee, the proceedings, except such as are required by the act or by the general orders to be had before the judge, shall be had before the referee, see In re Florecken (D. C., Cal.), 5 Am. B. R. 802, 107 Fed. 241.

Form of application for receiver before adjudication, see Form No. 64, *post*; Form

No. 52, Hagar & Alexander's Bankr. Forms, 2d Ed.

123. In re Oakland Lumber Co. (C. C. A., 2d Cir.), 23 Am. B. R. 181, 174 Fed. 634; In re Rosenthal, (D. C., N. J.), 16 Am. B. R. 448, 144 Fed. 548.

124. Matter of Haff (C. C. A., 2d Cir.), 13 Am. B. R. 354, 135 Fed. 472.

Bond required upon appointment.—It is the evident purpose of section 3-e of the Bankruptcy Act, requiring a bond by an applicant for the appointment of a receiver, to protect the alleged bankrupt from all costs, expenses, and damages incident to the seizure of his property, not only up to the time of appeal, if there be an appeal, but until final adjudication or an order of the court turning back the property. If no bond should be given under said section, or if a bond be given and it proves to be inadequate the applicant for the appointment of the receiver would still be liable, and, independent of the bond, he could be compelled to pay the costs and expenses of the receivership. Upon the appointment of a receiver on the application of a creditor the alleged bankrupt can be identified only by a bond executed pursuant to section 3-e of the Bankruptcy Act and he must resort to this to recover his damages and expenses upon the discharge of the receiver. But, if it appears to the alleged bankrupt that the bond is inadequate, he may apply to the court to require the creditor to give an additional and sufficient bond. Hill Co. v. U. S. Fidelity Co. (Sup. Ct., Ill.), 265 Ill. 534, 33 Am. B. R. 781, 107 N. E. 194.

125. Faulk & Co. v. Steiner (C. C. A., 5th Cir.), 21 Am. B. R. 623, 165 Fed. 861; Matter of Oakland Lumber Co. (C. C. A., 2d Cir.), 23 Am. B. R. 181, 174 Fed. 634; In re New Chattanooga Hardware Co. (D. C. Tenn.), 27 Am. B. R. 77, 190 Fed. 241.

appointment of a receiver are not a part of the proceedings for adjudication but are ancillary thereto; the application for a receiver should therefore be separate.¹²⁶ The law does not authorize an application by the attorney of the creditors. The analogy of the statute suggests that it be accompanied with a consent, signed by a goodly number of creditors, and a request that a named person be appointed; or, if not so accompanied, the appointment may be withheld until the wishes of creditors can be ascertained. The Bankruptcy Act does not limit the right to apply for the appointment of a receiver to any one or more of the petitioning creditors, but provides that any party in interest may make application for such appointment. This necessarily includes any creditor who has a provable debt against the bankrupt that would be affected by his discharge, whether he be one of the petitioning creditors or not.¹²⁷

(2) NOTICE OF APPLICATION.—Notice of the application for the appointment of a receiver is proper; the statute does not expressly require it, but it should be given except in rare cases, where it is apparent that irreparable loss or injury is threatened or that notice might defeat the very purpose of the receivership.¹²⁸ An appointment without notice is not in a constitutional sense a deprivation of property without due process of law.¹²⁹

(3) ORDER OF APPOINTMENT.—Whether a receiver should be appointed is a judicial question to be determined by the court; its determination may not be compelled by mandamus.¹³⁰ The order of appointment should fix the amount of the receiver's bond, and distinctly specify his powers and duties. Should he find the order insufficient, he may, of course, apply for modifications, fixing or increasing his powers. He should be ready at the first meeting of creditors with a report and account, which should then be audited and his allowance fixed; whereupon he should turn over the property to the trustee. This pro-

126. Receivership proceedings ancillary to bankruptcy proceedings.—It is apparent from a consideration of the provisions of the bankruptcy act that a petition for adjudication and an application for the appointment of a receiver are separate and distinct, and that the receivership proceedings are but ancillary to the proceedings in bankruptcy. *Hill Co. v. U. S. Fidelity Co.* (Sup. Ct., Ill.), 265 Ill. 534, 33 Am. B. R. 781, 107 N. E. 194.

127. *Hill Co. v. U. S. Fidelity Co.* (Sup. Ct., Ill.), 265 Ill. 534, 33 Am. B. R. 781, 107 N. E. 194.

128. *Latimer v. McNeal* (C. C. A., 3d Cir.), 16 Am. B. R. 43, 142 Fed. 451, affg. *In re Francis* (D. C., Pa.), 14 Am. B. R. 678, 136 Fed. 912; *In re Abrahamson & Bretstein* (Ref., N. Y.), 1 Am. B. R. 44; *Faulk & Co. v. Steiner* (C. C. A., 5th Cir.), 21 Am. B. R. 623, 165 Fed. 861.

129. Due process of law.—In the case of *Latimer v. McNeal* (C. C. A., 3d Cir.), 16 Am. B. R. 43, 45, 142 Fed. 451, the court said: "Now, as respects the matter of notice, it will be observed that the Bankrupt Act does not expressly require notice to be given the bankrupt before the appointment of a receiver, under the provision quoted. Such appointment, more-

over, does not deprive the bankrupt of his property without due process of law, for the appointment is essentially for the temporary custody of his property with a view to its preservation. Furthermore there occur well-recognized instances of such urgency as to dispense with notice; as where irreparable loss or injury is impending, or where notice might defeat the very purpose of the receivership. We are, indeed, of the opinion that except in rare cases a receiver ought never to be appointed without notice to the alleged bankrupt."

Ancillary appointment.—A bankruptcy court in the district other than that in which the bankruptcy proceedings are pending has no jurisdiction to appoint a receiver of the property of the alleged bankrupt, except upon motion in open court upon such notice to the persons in the actual possession of property so located and to those otherwise interested, as will in the circumstances constitute due process of law, as required by the constitution of the United States. *Ross-Meehan Foundry Co. v. Southern Car & Foundry Co.* (D. C., Tenn.), 10 Am. B. R. 624, 124 Fed. 403.

130. *Edinburg Coal Co. v. Humphreys* (C. C. A., 7th Cir.), 13 Am. B. R. 593, 134 Fed. 839.

cedure rests on custom and the analogy of the administrative features of the statute, rather than on the law or the rules of the courts.¹³¹

d. Powers of receiver.—(1) **IN GENERAL.**—The powers of the receiver will depend on the purpose for which he is appointed. They are limited by the powers specified in the order of appointment,¹³² or by the jurisdiction, directly or otherwise, of the court which appoints him.¹³³ If appointed for the preservation of the bankrupt estate under authority of § 2 (3), he becomes a mere custodian. He may take custody of whatever is plainly the property of the bankrupt, and against which no third party makes any claim with color of title.¹³⁴ He is a statutory receiver and possesses the powers conferred upon him by the statute, or such as may necessarily be implied from the powers so conferred.¹³⁵

(2) **SALE OF PROPERTY BY RECEIVER.**—When appointed for the preservation of the estate the court may, for cause, order a sale of the property in his possession,¹³⁶ if it appear that the property be of a perishable nature and sale

131. Where a marshal is required to seize and take possession of the property of the alleged bankrupt the special warrant to him should be in the form prescribed in official forms in bankruptcy number 8; the bond of the marshal is prescribed by form number 10. These forms do not apply to receivers. In supplementary forms numbers 101-104 are found petition and orders for the appointment of receivers before and after adjudication. These will be found useful in practice in receiverships. See also Hagar & Alexanders' Forms on Bankruptcy (2nd Ed.), Nos. 52, 53, 58, 59.

Vacating receivership.—While the questions presented by the creditors' petition and the alleged bankrupt corporation's answer remain undetermined, and there is nothing to indicate that its assignee for creditors was not an honest, capable and responsible man, in whose hands the property of the estate was entirely safe, an *ex parte* order appointing a receiver granted upon the filing of the petition in bankruptcy will be reversed with costs and the receivership vacated. *Matter of Oakland Lumber Co.* (C. C. A., 2d Cir.), 23 Am. B. R. 181, 174 Fed. 634. To the same effect is the case of *In re Desroschers* (D. C., N. Y.), 25 Am. B. R. 703, 183 Fed. 991.

132. Matter of Metropolitan Motor Car Co. (D. C., Wash.), 35 Am. B. R. 539, 225 Fed. 274.

133. In re Benedict (D. C., Wis.), 15 Am. B. R. 232, 140 Fed. 55. It seems well established that a receiver appointed in any proceeding, who relies upon his authority as an officer of the court, has no authority to do any official act outside of the jurisdiction of the court appointing him. *Great Western Mining & Mfg. Co. v. Harris*, 198 U. S. 561; *Hale v. Allinson*, 188 U. S. 56; *Booth v. Clark*, 17 How. (U. S.) 327. A receiver of a corporation appointed in a court other than a court of bankruptcy, may contest the adjudication of the corporation

as a bankrupt. *Matter of Hudson River Electric Power Co.* (D. C., N. Y.), 23 Am. B. R. 191, 173 Fed. 934, *affd.* 25 Am. B. R. 504, 183 Fed. 701.

134. In re Michaelis & Lindeman (D. C., N. Y.), 27 Am. B. R. 299, 196 Fed. 718.

135. "A statutory receiver is one appointed in pursuance of special statutory provisions. He derives his power from the statute, and to it must look for the duty imposed on him. He possesses such power only as the statute confers, or such as may be fairly inferred from the general scope of the law of his appointment. We are therefore referred to the Bankrupt Act to ascertain the powers of the bankruptcy court to appoint a receiver and the extent of the power which the act confers upon him.

"* * * It plainly was not contemplated that the receiver or the marshal so designated should supersede the trustee, or exercise the general powers conferred upon a trustee. There is no such power specially conferred or any provisions of the act from which such power can reasonably be implied. Such temporary receiver, whether he be a marshal or another, is not a trustee for the creditors, but is a caretaker and custodian of the visible property pending adjudication and until a selection of a trustee. If in any sense a trustee, he is trustee for the bankrupt, in whom is the title to the property until it passes by operation of law as of the date of adjudication to the trustee selected by the creditors. The duty required and the power conferred clearly are that the receiver or marshal shall take possession of property that would otherwise go to waste, and hold it and preserve it, so that it might come to the trustee, when selected, without needless injury." *Boonville Nat. Bank v. Blakey* (C. C. A., 7th Cir.), 6 Am. B. R. 13, 107 Fed. 891.

136. In re Becker (D. C., Pa.), 3 Am. B. R. 412, 98 Fed. 407.

thereof is necessary in order to preserve it.¹³⁷ But it must be remembered that pending and prior to an adjudication the property of the bankrupt still belongs to him, and title thereto only vests in the trustee after an adjudication has been obtained.¹³⁹ The importance of the question as to whether a sale by a receiver so appointed may be ordered is lessened, when it is considered that the court may direct a trustee when appointed to ratify a sale so made by the receiver.¹³⁹ General Order XVII provides for an order, upon the petition of a receiver directing him to sell part or the whole of the bankrupt's estate, if the same is perishable, and it appears that there will be loss if it is not sold immediately.¹⁴⁰

(3) **SUITS BY RECEIVER.**—The question has also arisen as to whether a receiver before adjudication may be permitted to bring suit for the recovery of the property of the bankrupt not in his possession. The weight of authority is against the right of a receiver to sue to recover such property.¹⁴¹ But it has been held in a well-considered case that where property has been fraudulently and illegally transferred by a bankrupt within the four months period, the court may, acting under authority of § 2 (3), appoint a receiver of such property, since by the terms of the act¹⁴² such transfer was declared null and void and the property involved to be the property of the bankrupt.¹⁴³ In this and similar cases it was assumed that the court in the exercise of its equity jurisdiction could protect the rights of creditors by the appointment of a receiver, by injunction or any other appropriate remedy.¹⁴⁴ It is suggested that if the receiver is appointed "for the preservation of the estate," under the statute, his powers must be restricted, necessarily, to suits respecting property in the possession or which should have been in the possession of the

137. Sale for preservation.—In the case of *In re Kelly Dry Goods Co.* (D. C., Wis.), 4 Am. B. R. 528, 102 Fed. 747, it was held that as a general rule no order of sale should be made until after adjudication, unless the property is of such a nature that a sale is necessary to preserve its value.

Perishable property.—In the case of *In re Garner & Co.* (D. C., Ala.), 18 Am. B. R. 733, 135 Fed. 914, and *In re Harris* (D. C., Ala.), 19 Am. B. R. 635, 155 Fed. 216, the court limited the right to order a sale of perishable property to cases in which it was clear to the court that the property was, in fact, perishable in part or in its entirety, or would greatly deteriorate if held without a sale, and only that portion which was of such nature could be ordered sold.

Sales by receivers in bankruptcy are justified only when property is perishable or is rapidly depreciating in value on a falling market or for other reasons. *In re Desrochers* (D. C., N. Y.), 25 Am. B. R. 703, 183 Fed. 991; *In re Duke & Son* (D. C., Ga.), 28 Am. B. R. 195, 199 Fed. 199.

138. Bankr. Act, § 70-a, *post*; *In re La Plume Condensed Milk Co.* (D. C., Pa.), 16 Am. B. R. 729, 731, 145 Fed. 1013.

139. As to sales by trustee, see discussion under § 70-b, sub-title "Sales by trustee."

140. See Gen. Ord. XVII, and cases cited thereunder, *post*.

141. *Boonville Nat. Bank v. Blakey* (C.

C. A., 7th Cir.), 6 Am. B. R. 13, 107 Fed. 891, in which the court said: "The receiver or marshal takes possession of the visible property of the bankrupt for delivery to the trustee, not to pursue the debtors of the estate, nor to enforce rights of action vested in the trustee alone, nor to involve the estate in possibly unnecessary litigation." *Guaranty Title & Trust Co. v. Pearlman* (D. C., Pa.), 16 Am. B. R. 461, 144 Fed. 550; *In re Dunseath* (D. C., Pa.), 22 Am. B. R. 75, 168 Fed. 973; *In re Lebrecht* (D. C., Tex.), 14 Am. B. R. 445, 135 Fed. 878; *Frost v. Latham & Co.* (D. C., Ala.), 25 Am. B. R. 313, 181 Fed. 866. *Contra*: *In re Fixen* (D. C., Cal.), 2 Am. B. R. 822, 96 Fed. 748.

142. Bankr. Act, § 67-e.

143. *Horner-Gaylord v. Miller & Benedict* (D. C., W. Va.), 17 Am. B. R. 257, 147 Fed. 295. But see *Contra*: *Frost v. Latham* (D. C., Ala.), 25 Am. B. R. 313, 181 Fed. 866, in which it was held that receivers in bankruptcy may not maintain suits to recover fraudulent or preferential transfers made prior to bankruptcy.

Upon a fictitious sale of property shortly prior to the adjudication, no title passes to the fraudulent vendee, and the receiver is entitled to the possession of the property. *In re Siegel* (D. C., N. Y.), 21 Am. B. R. 154, 164 Fed. 559.

144. *In re Schrom* (D. C., Iowa), 3 Am. B. R. 352, 97 Fed. 760.

bankrupt, and constitute the corpus of the estate. The recovery of property fraudulently or preferentially transferred is a function of the trustee, and ordinarily will be left to him. In any event a receiver may not be authorized to sue in a district other than the one in which he is appointed,¹⁴⁵ but an ancillary receiver may be appointed to aid in protecting the assets in any district pending the selection of a trustee.¹⁴⁶ Where the circumstances are such that it would be impossible for a receiver to apply to the court of his appointment to enforce the delivery of property belonging to the estate which might be dissipated and the estate suffer an irreparable loss, he may maintain a suit for its protection in any district where the property may be.¹⁴⁷

e. Possession by receiver.—(1) CUSTODIAN OF PROPERTY.—A receiver appointed under this section for the "preservation of the estate," is merely a custodian of the property of the alleged bankrupt, until the question of bankruptcy is adjudicated.¹⁴⁸ He takes no title to the property.¹⁴⁹

(2) PROPERTY CLAIMED ADVERSELY.—In the interim between Supreme Court decisions in *Bardes v. Bank*¹⁵⁰ and *Bryan v. Bernheimer*,¹⁵¹ it was generally conceded that receivers had not power to take possession of property claimed adversely, even if to act only as custodians. Since the latter case, however, the lower courts have been confirmed in their earlier opinions that the district court had power to direct receivers or the marshals to seize and hold the property of the bankrupt wherever found; this is something very different from a summary settlement of a controversy as to the title of property so seized, which must usually be by plenary suit.¹⁵² But, though such jurisdiction exists, it will rarely be exercised.¹⁵³ An injunction, either in the proceeding,¹⁵⁴ or in an ancillary action in equity to prevent the adverse claimant from disposing of the property,¹⁵⁵ will usually be enough. Nor should courts of bankruptcy, through their receivers, seize property claimed adversely and already in the custody of a State court; comity requires that the first court obtaining jurisdiction shall retain it until ousted by its consent.¹⁵⁶ Thus, though there is ample jurisdiction to take possession of such property, the trustee should always apply to the State court in the first instance.¹⁵⁷ If a

145. *In re Nat. Mercantile Agency* (D. C., Pa.), 12 Am. B. R. 189, 128 Fed. 639; *Matter of Dunseath* (D. C., Pa.), 22 Am. B. R. 75, 168 Fed. 973.

146. *In re Benedict* (D. C., Wis.), 15 Am. B. R. 232, 140 Fed. 55; *Matter of Dunseath* (D. C., Pa.), 21 Am. B. R. 742, 168 Fed. 973.

147. *In re Dempster* (C. C. A., 8th Cir.), 22 Am. B. R. 751, 172 Fed. 353.

148. *Matter of Larkey* (D. C., N. J.), 32 Am. B. R. 287, 214 Fed. 867; *In re Leonard* (D. C., Nev.), 24 Am. B. R. 97, 177 Fed. 503; *In re Michaelis v. Lindeman* (D. C., N. Y.), 27 Am. B. R. 299, 196 Fed. 718.

149. *Matter of Larkey* (D. C., N. J.), 32 Am. B. R. 287, 214 Fed. 867; *Whittlesley v. Becker & Co.* (N. Y. Sup. Ct.), 25 Am. B. R. 672, 142 N. Y. Supp. 1046.

150. 4 Am. B. R. 163, 178 U. S. 525.

151. 5 Am. B. R. 623, 181 U. S. 188.

152. *In re Etheridge Furniture Co.* (D. C., Ky.), 1 Am. B. R. 112, 92 Fed. 329; *In re Young* (C. C. A., 8th Cir.), 7 Am. B. R. 14, 111 Fed. 158; *In re Tune* (D. C., Ala.), 8 Am. B. R. 285, 115 Fed. 906.

153. Compare "*Effect on Auxiliary Remedies*," in Section Twenty-three of this work.

154. See "*Injunctions other than against Suits*," in this section, *post*.

155. As in *Beach v. Macon Grocery Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 751, 116 Fed. 143.

156. For instance, see *In re Russell* (C. C. A., 2d Cir.), 3 Am. B. R. 658, 101 Fed. 248. But it may be questioned whether this doctrine of comity has not been carried too far in such cases, as *In re Shoemaker* (D. C., Va.), 7 Am. B. R. 437, 112 Fed. 648, and *In re Wells* (D. C., Mo.), 8 Am. B. R. 75, 114 Fed. 222. See comment on these cases in the case of *In re Donnelly* (D. C., Ohio), 26 Am. B. R. 304, 306, 188 Fed. 1001. See also discussion under Section Eleven of this work, and "*Injunctions other than against Suits*," *post*, in this section.

157. *In re Lengert Wagon Co.* (D. C., N. Y.), 6 Am. B. R. 535, 110 Fed. 927; *Mauran v. Crown Carpet Lining Co.* (Sup. Ct., R. I.), 6 Am. B. R. 734; *Carling v. Seymour Lumber Co.* (C. C. A., 5th

receiver of a bankrupt estate is in possession of goods the title to which is in dispute, and which are not included in the bankrupt's schedules, an action of replevin will not lie to recover the goods upon the theory that the receiver was holding the goods, not as an officer of the court, but as an individual.¹⁵⁸ Where a receiver, acting under an erroneous order, takes property from one claiming to be the owner, without his consent, the property should be returned to him, without charge of any kind.¹⁵⁹

f. Suits against receivers.—The Judicial Code provides in substance that a receiver appointed in a Federal court may be sued without leave of the court "in respect to any act or transaction of his in carrying on the business connected with" the property in his charge.¹⁶⁰ It has been held that this provision applies to receivers appointed in bankruptcy proceedings as well as other Federal receivers.¹⁶¹ If the action is not based "on an act or transaction in carrying on the business" of the receiver it may properly be stayed if not brought with leave of the court.¹⁶² A receiver may not defend, compromise or adjust claims against the estate of the bankrupt.¹⁶³ An action in a State court against a receiver upon an agreement which pertains to the preservation of the estate, or business connected therewith, may not be stayed by an order of the bankruptcy court.¹⁶⁴

g. Compensation of receiver.—(1) In GENERAL.—The compensation of receivers was not limited by the original statute, but rested in the sound discretion of the court.¹⁶⁵ His compensation may only be allowed for services per-

Cir.), 8 Am. B. R. 29, 113 Fed. 483; *In re Watts*, 10 Am. B. R. 113, 124, 190 U. S. 1, 23 Sup. Ct. 718. It has been held that the State court which yields possession may retain the costs and expenses of its officer. *Wilson v. Parr*, 8 Am. B. R. 230. This rule was convincingly challenged in *In re Rogers* (D. C., Ga.), 8 Am. B. R. 723, 116 Fed. 435.

^{158.} *Murphy v. John Hofman Co.* (U. S. Sup. Ct.), 211 U. S. 562, 21 Am. B. R. 487, affg. 187 N. Y. 548.

^{159.} *Beach v. Macon Grocery Co.* (C. C. A., 5th Cir.), 11 Am. B. R. 104, 125 Fed. 513, 60 C. C. A. 557. But a receiver should not be compelled to turn over property to a claimant where there is a question as to the interests of the parties in such property. *Matter of Mundle* (D. C., N. Y.), 13 Am. B. R. 490, 139 Fed. 691.

^{160.} Judicial Code, § 66.

^{161.} *In re Kanter & Kohen* (C. C. A., 2d Cir.), 9 Am. B. R. 372, 121 Fed. 984; *In re Smith* (D. C., N. Y.), 9 Am. B. R. 603, 121 Fed. 1014; *In re Kelly Dry Goods Co.* (D. C., Wis.), 4 Am. B. R. 528, 102 Fed. 747.

^{162.} *Matter of Kalb & Berger Mfg. Co.* (C. C. A., 2d Cir.), 21 Am. B. R. 393, 165 Fed. 895.

^{163.} **Rights and duties of receivers in respect to claims against estate.**—In the case of *In re Heim Milk Product Co.* (D. C., N. Y.), 25 Am. B. R. 746, 183 Fed. 787, the court said: "Receivers, prior to adjudication, are in no condition to adjust claims, liquidated or unliquidated, and have no power. They may not compromise claims or admit or reject them. They cannot

properly defend, or, if they do, cannot act intelligently, as their office is of short duration, and their province is to care for and protect or preserve the property, not defend suits. In short, the act contemplates that all claims against the bankrupt, which are provable—and this a provable claim—shall be proved and presented to the referee or court with such proof and then be allowed or disallowed and liquidated, if unliquidated, as directed by the referee or the court. Section 63. All pending suits against a bankrupt are to be stayed. Section 11. This section clearly indicates that suits against a bankrupt and the receivers are not to be authorized by the court in any event and not against any one prior to the appointment of a trustee who is to represent the creditors. Even then claims in controversy are not to be settled or liquidated by suit in the State courts unless the judge or referee so directs. This claim arises on a contract made by the alleged bankrupt, and is a claim against the bankrupt, and is not a claim against the receivers for some act or omission of theirs."

^{164.} *Idem*; *In re Roberts* (C. C. A., 2d Cir.), 22 Am. B. R. 908, 169 Fed. 1022.

^{165.} *In re Adams Sartorial* (D. C., Col.), 4 Am. B. R. 107, 101 Fed. 215; *In re Kelly Dry Goods Co.* (D. C., Wis.), 4 Am. B. R. 528, 102 Fed. 747; *In re Scott* (D. C., N. Car.), 3 Am. B. R. 625, 96 Fed. 607; *In re Cambridge Lumber Co.* (D. C., Mass.), 14 Am. B. R. 168, 136 Fed. 983; *Dunlap Hardware Co. v. Huddleston* (C. C. A., 5th Cir.), 21 Am. B. R. 731, 167 Fed. 433.

Reasonable compensation.—Upon the ad-

formed within the scope of his authority; he may not receive compensation for activities not authorized.¹⁶⁶ Where a receiver has been negligent in the performance of his duties, the court may, in a proper case, deny him any commissions.¹⁶⁷

(2) EFFECT OF AMENDMENT OF 1910.— Clause 5 of section 2, and section 48 of the bankruptcy act have been amended by the amendatory act of 1910 so that the discretion of the court in allowing additional compensation is limited by fixing the maximum commissions to be allowed receivers (1) for services rendered by them when appointed under § 2 (3) to take charge of and preserve the property of the alleged bankrupt, and (2) for services rendered by them in conducting the business of the bankrupt.¹⁶⁸ Some of the cases variously construing the act of 1903 amending § 2 (5) are cited in the foot-note.¹⁶⁹ These cases are not controlling under the law as amended by the amendatory act of 1910. The words added to subd. 5 by the act of 1903, "but not at a greater rate than in this act allowed trustees for similar services," were omitted by the amendment of 1910; they were held to be a limitation on the discretion of the court so far as they related to compensation allowed for continuing a going business. In such cases receivers are not entitled to greater allowances than the percentages fixed by § 48-a on moneys disbursed by trustees,¹⁷⁰ but where receivers have carried on the business of the bankrupt with skill and success they may be allowed the maximum compensation allowed to trustees under that section.¹⁷¹ The amount specified is not intended as a

ministration of assets subject to specific liens, reasonable compensation, not, however, in excess of the allowances made by the Bankruptcy Act, should be allowed to receivers, if appointed. *Matter of Rauch* (D. C., Va.), 36 Am. B. R. 75, 226 Fed. 982.

166. *Matter of Metropolitan Motor Car Co.* (D. C., Wash.), 35 Am. B. R. 539, 225 Fed. 274.

167. *In re Schoenfeld* (C. C. A., 3d Cir.), 25 Am. B. R. 748, 183 Fed. 219.

168. See §§ 1 and 9 of Amendatory Act of 1910, amending §§ 2 (5) and 48 of the Bankr. Act of 1898.

Compensation where receivers are changed by adjudication in another district.— Where, by order of the court in the Southern District of New York, the business of an alleged bankrupt was continued by the receiver and, pending the adjudication, the debtor was adjudicated a bankrupt in the Eastern District of New York and receivers appointed, and the adjudication previously made in the Southern District was vacated, by an order directing that all property held by the Southern District receivers be turned over to the Eastern District receivers, the court in the Southern District has jurisdiction to determine what is a proper compensation for its receivers, who actually continued the business for five days. *Matter of Isaacson* (C. C. A., 2d Cir.), 23 Am. B. R. 98, 174 Fed. 406.

169. **Effect of amendment of 1903.**— *In re Kirkpatrick* (C. C. A., 6th Cir.), 17 Am. B. R. 594, 148 Fed. 811, in which case the court held that the amendment to § 2 (5) had reference to services rendered by a re-

ceiver, marshal or trustee, in conducting the business of the bankrupt and not to services required of receivers and marshals by § 2 (3); *In re Martin Borgeson Co.* (D. C., N. Y.), 18 Am. B. R. 178, 151 Fed. 780. In the case of *In re Cambridge Lumber Co.*, 14 Am. B. R. 581, 127 Fed. 772, it seems to have been inferred that the amendment limited the exercise of the court's discretion in fixing the compensation to that allowed to trustees. In the case of *In re Sully* (D. C., N. Y.), 13 Am. B. R. 22, 133 Fed. 997, which arose subsequent to the amendment of 1903, a compensation much larger than that allowed to trustees was awarded to receivers who had rendered valuable services by collecting a large sum for the estate, which the judge thought was due to the experience and skill of the receivers. See *In re Falkenberg* (D. C., New Mex.), 30 Am. B. R. 718, 206 Fed. 835.

A receiver who is in possession of the bankrupt's property for not more than six days, during which he did not open the store more than three times for only a short period, when the property was sold through no effort of his, is not entitled to additional compensation. *Matter of Greisheimer* (D. C., Cal.), 31 Am. B. R. 567, 209 Fed. 134.

170. For the compensation of court receivers who have surrendered to receivers in bankruptcy, see *Mauran v. Crown Carpet Lining Co.* (Sup. Ct., R. I.), 23 R. I. 324, 6 Am. B. R. 734, 50 Atl. 331; *In re Allison Lumber Co.* (D. C., Ga.), 14 Am. B. R. 78, 137 Fed. 643.

171. *In re Richards* (D. C., Mass.), 11

fixed and invariable amount, to be awarded in all cases; the rate fixed should be determined in accordance with the value of the services rendered.¹⁷²

(3) **HOW PAYABLE.**—Petitioning creditors in case of a receiver in involuntary proceedings may be charged with the compensation of the receiver, and the costs and expenses of the receivership.¹⁷³ A receiver may be allowed compensation and the expenses of the receivership out of the assets, though the court, on dismissal of the proceedings, may ultimately charge such expenses in whole or in part against the petitioning creditors.¹⁷⁴ As a general rule where the estate is benefited by the receivership, and an adjudication is had, the compensation and expenses of the receiver should be paid from the fund.¹⁷⁵

V. CONTINUANCE OF A GOING BUSINESS.

a. In general.—Section 2 (5) permits the court to authorize the business of a bankrupt to be conducted for a limited period by a receiver or marshal, or by the trustee when appointed. This is a power inherently belonging to the court independent of the statute. The chief function of a bankruptcy law is to distribute an insolvent's assets *pro rata*; this implies the power to marshal those assets. In ordinary cases, a court of bankruptcy will go no further. Yet occasion will often arise where a going business may be preserved and advantageously sold by keeping it alive under the management of the trustee. By this supervision, courts of bankruptcy are vested with

Am. B. R. 581, 127 Fed. 772; In re Sully (D. C., N. Y.), 13 Am. B. R. 22, 133 Fed. 997.

When receiver not "mere custodian."—A receiver who takes charge of a stock of goods and later sells them for more than their appraised value is more than a "mere custodian," and is entitled to compensation within the limits fixed by the general provisions of section 48-d, that is, not exceeding six per cent. of the first five hundred dollars, etc. Matter of Ginsburg (D. C., Tenn.), 31 Am. B. R. 240, 208 Fed. 160; service rendered by receivers examined and allowance by referee reduced. Matter of Mills Tea & Butter Co. (D. C., Mass.), 37 Am. B. R. 148, 235 Fed. 813. (See Am. B. R. Digest, § 305.

172. Matter of Mills Tea & Butter Co. (D. C., Mass.), 37 Am. B. R. 148, 235 Fed. 813.

173. In re Lavoc (C. C. A., 2d Cir.), 15 Am. B. R. 290, 142 Fed. 960; Beach v. Macon Grocery Co. (C. C. A., 5th Cir.), 8 Am. B. R. 751, 116 Fed. 143.

174. In re Hill Co. (D. C., N. Y.), 20 Am. B. R. 73, 157 Fed. 73.

Payment by petitioning creditors.—In the case of Matter of Aschenbach Co. (C. C. A., 2d Cir.), 25 Am. B. R. 502, 183 Fed. 305, the proceedings were dismissed and the court held that where a receiver in bankruptcy has been appointed to conduct an alleged bankrupt's business pending its adjudication as an involuntary bankrupt, and the petition for adjudication is subsequently dismissed and the receivership vacated, the bankruptcy court has the discretion to assess the receiver's fees and other expenses

in the first instance against the petitioning creditors instead of directing their payment first out of the property in his hands. But in the case of In re Metals Extraction & Refining Co. (C. C. A., 7th Cir.), 27 Am. B. R. 11, 193 Fed. 172, it was held that the petitioning creditors should not be charged with the costs of the receivership unless the proceedings had been instituted without reasonable cause or in bad faith.

175. Payment of compensation out of estate.—In the case of Matter of Wentworth Lunch Co. (Ref., N. Y.), 25 Am. B. R. 612, 189 Fed. 831, Referee Dexter states the rules as follows: "It is a general rule of equity that the compensation and expenses of the receiver are payable out of the fund. The receiver does not act as the agent for either of the parties, but as the hand of the court. Union Trust Co. v. Ry. Co., 117 U. S. 434; Central Trust Co. v. Wabash, 23 Fed. 863.

"He is not appointed for the benefit of either of the parties, but of all concerned. Davis v. Gray, 16 Wall. 203, 218. The expenses which the court creates are burdens necessarily on the property taken possession of, irrespective of the question who may be the ultimate owner or who may invoke the receivership. Kneeland v. Am. Loan Co., 126 U. S. 89, 98; Atlantic Trust Co. v. Chapman, 208 U. S. 360.

"The only qualification of these familiar rules is that the court must have had jurisdiction of the subject matter and that the appointment of the receiver involved no irregularity. Atlantic Trust Co. case, *supra*."

ample power to that end. A referee should not exercise the power on the initiative of the trustee to carry into effect the unexecuted contracts of the bankrupt; nor should it be exercised for the benefit of general creditors at the expense of secured creditors who do not consent thereto.¹⁷⁶ A secured creditor's security may not be diminished by any expense of administration or operation of the business, unless such creditor has sought or acquiesced in the order continuing such operation.¹⁷⁷ When an order is made authorizing the continuance of the business it may not be attacked collaterally.¹⁷⁸

b. Limited period.—The business may be continued for a "limited period." These words are intended to indicate that the time should not be protracted, and that the receiver or trustee should use due diligence in bringing the active business affairs of the bankrupt to a speedy termination.¹⁷⁹

c. Contracting indebtedness.—A receiver who is authorized to conduct a business, for the successful conduct of which it is necessary and customary to receive credit and borrow money, has the implied power to purchase on credit and even to borrow money; where the power is expressly conferred by the court the limitations imposed must be observed.¹⁸⁰ Where receivers authorized to continue the business of the bankrupt go beyond the extent of their authority to contract indebtedness, the indebtedness so contracted is not a prior lien upon the assets of the bankrupt. It is the duty of those dealing with receivers in such cases to inquire as to the extent of their authority, and the orders of the court in respect to their powers will be regarded as notice to all persons.¹⁸¹

d. Conduct of business.—The conducting of daily auction sales by the trustee of the bankrupt's goods in his stores may be considered in effect as the continuance of business by the trustee for the purpose of allowing additional

176. *In re Bourlier Cornice & Roofing Co.* (D. C., Ky.), 13 Am. B. R. 585, 590, 133 Fed. 958, in which the court said: "I am much inclined to think that a referee should never permit a procedure for the carrying into effect of the unexecuted contracts of a bankrupt, to be commenced upon the initiative of the trustee. Much abuse of the power might be avoided and temptation for the trustee removed by putting that burden on the creditors. Such authorization should generally be made upon the application of some or all of the general creditors."

177. *In re Clark Coal & Coke Co.* (D. C., Pa.), 22 Am. B. R. 843, 173 Fed. 652.

178. *Matter of Isaacson* (C. C. A., 2d Cir.), 23 Am. B. R. 98, 174 Fed. 406.

179. *In re Lisk* (D. C., N. Y.), 21 Am. B. R. 674, 167 Fed. 411.

180. *In re Burkhalter & Co.* (D. C., Ala.), 25 Am. B. R. 378, 182 Fed. 353; *In re Restein* (D. C., Pa.), 20 Am. B. R. 832, 162 Fed. 986.

Modification of order to borrow money and continue business.—An application by an alleged bondholder of a bankrupt corporation for the modification of an order authorizing the receiver to borrow money and continue the business should not be passed upon by the court where the petitioner's ownership of the bonds is denied; such issue should be first

settled by referring it to a special master. *Matter of Consumer's, etc., Brewing Co.* (D. C., N. Y.), 33 Am. B. R. 309, 216 Fed. 988.

181. *In re Erie Lumber Co.* (D. C., Ga.), 17 Am. B. R. 689, 707, 150 Fed. 817.

Unauthorized loans.—In the case of *In re Burkhalter & Co.* (D. C., Ala.), 25 Am. B. R. 378, 182 Fed. 353, the court held that where a bank, without authority of court, undertook to charge against funds of the bankrupt estate, deposited with it by the receiver, notes on which it had advanced money to the receiver in excess of the amount which he was authorized to borrow, it did so wrongfully, because it had no right to appropriate the trust funds to unauthorized loans, until it had been determined by the court that the proceeds of the loans had been used by the receiver for the benefit of the trust estate and because it thereby perferred a claim which was entitled to no preference.

Liability of trustee.—A trustee of a bankrupt contracting, who has not been authorized by order of the court to continue the business, is not liable, in his representative capacity, for injuries to an adjoining landowner inflicted in the course of construction work. *It seems*, that the trustee is liable personally. *McAuley v. Jackson*, 34 Am. B. R. 371, 165 N. Y. App. Div. 846.

compensation.¹⁸² A receiver should not be surcharged for losses or sales during the continuance of the business,¹⁸³ except, possibly, where by improper methods of conducting the business, losses have accrued.¹⁸⁴ Where a receiver is in possession of leased premises for the purpose of continuing the business, he should pay the *pro rata* rent at a reasonable value.¹⁸⁵ A garnishment against the wages of an employee of the bankrupt, is not effective against the trustee who continues the business unless the order has been served on him.¹⁸⁶

e. Compensation of receiver or trustee.—Section 48 of the act was amended by the act of 1910 so as to limit the amount which may be paid to trustees, marshals or receivers for services performed by them in the conduct of the business of the bankrupt. The ordinary fees of trustees and receivers and marshals are fixed by subdivisions *a* and *d* of such section 48. The fees allowed for the continuance of the business of the bankrupt are in addition to such compensation. The maximum amount of such additional compensation is six per centum on the first \$500 or less, four per centum on moneys in excess of \$500 and less than \$1,500, two per centum on moneys in excess of \$1,500 and less than \$10,000, and one per centum on moneys in excess of \$10,000.¹⁸⁷ The compensation of a trustee for continuing a going business was, prior to the amendment of 1903, based upon moneys received and paid out rather than work done.¹⁸⁸ It was held that, under § 48-*a* as amended by the act of 1903 an additional allowance might be made to a trustee where he had performed services of value in respect to the bankrupt's business and had thus materially

¹⁸². In re Dimm & Co. (D. C., Pa.), 17 Am. B. R. 119, 146 Fed. 402.

What constitutes continuance of business.—Where at the time a receiver took possession of bankrupt's store, a widely advertised sale was being conducted, and the receiver permitted the employees of the bankrupt to go on with the business during the remainder of that day, but then closed the store and did not open it again except to deliver the stock in bulk to a purchaser at a judicial sale thereof, he cannot be said to have carried on the business, so as to be entitled to additional compensation. In re Knosher & Co. (C. C. A. 9th Cir.), 28 Am. B. R. 747, 197 Fed. 136.

¹⁸³. Matter of Isaacson (C. C. A., 2d Cir.), 23 Am. B. R. 98, 174 Fed. 406.

¹⁸⁴. In re Consumers Coffee Co. (D. C., Pa.), 20 Am. B. R. 835, 162 Fed. 786.

¹⁸⁵. In re Yodleman-Walsh Foundry Co. (D. C., N. Y.), 21 Am. B. R. 509, 166 Fed. 381.

¹⁸⁶. Matter of Murphy (D. C., N. Y.), 34 Am. B. R. 522, 221 Fed. 49, decided under N. Y. Code Civil Procedure, § 1391.

¹⁸⁷. See § 48-*a*, *d* and *c*, and discussion thereunder, *post*.

Purpose of amendment of 1910.—The report of the Senate judiciary committee of the 61st Congress (Rep. No. 691) contains the following statement as to the purpose and effect of the amendment to § 48 of the act relative to compensation of trustees, receivers or marshals in conducting the business of the bankrupt: "The present amendment fixes the maximum compensation that can be allowed receivers for the performance

of the ordinary duties at precisely this same rate (the rate allowed trustees under § 48-*a*) instead of leaving it to the unlimited discretion of the court. It also fixes the extra compensation, whether it be to the receiver or trustee, for the conducting of the business, to once again this same rate; so that at best, the ordinary and extraordinary compensation taken together, in the event that both a receiver and trustee have successively had charge of the estate, and even have both conducted the business, cannot exceed four times the amount allowable to a trustee by § 48-*a* of the act for the performance of his ordinary duties. The practical difficulty in the way of allowing commissions to receivers, where the receivers turn over to the trustee in specie the property which they have been taking care of, is obviated by the provision that the commissions are to be figured upon the amounts thereafter actually realized upon sale of such property so turned over in specie. Thus the bill seeks to reduce to the one rational basis of commissions, on moneys actually realized, the compensation, both ordinary and extraordinary, of both trustee and receiver; and by this is done away with also the unlimited discretion of the courts in the allowance of compensation to such officers. Of course the rates of commission prescribed are maximum limitations. Less but not more may be allowed, and it is hoped the courts will exercise their discretion still in allowing less amounts where proper."

¹⁸⁸. In re Epstein (D. C., Ark.), 6 Am. B. R. 191, 109 Fed. 879; In re Plummer (D. C., N. Y.), 3 Am. B. R. 320.

increased the bankrupt's estate.¹⁸⁹ The amendatory act of 1910 amending § 2 (5) and § 48 has finally disposed of the entire question as to the allowances to be made to trustees and receivers for continuing the business of the bankrupt by prescribing the maximum amount which may be allowed such officers for such services. Where the receiver was more than a "mere custodian," performing valuable services to the estate, although not "conducting the business" within the meaning of § 48, he should be compensated by a reasonable amount for the services rendered.¹⁹⁰

VI. PUNISHMENT FOR CRIME; ENFORCEMENT OF OBEDIENCE TO LAWFUL ORDERS.

a. In general.—By subdivisions 4, 13 and 16 of § 2 a court of bankruptcy is clothed with ample power to punish violations of the bankruptcy act, to enforce obedience to the lawful orders issued thereunder and to punish persons for contempts committed in a bankruptcy proceeding. They are among the most important powers possessed by courts of bankruptcy and are essential for the proper carrying into effect of the provisions of the act. Other sections of the act relate to these powers and provide more in detail for the exercise thereof.

b. Punishment for violations of the act.—Subdivision 4 authorizes a court of bankruptcy to punish bankrupts, officers and other persons, including the agents, officers and directors of corporations, for violations of any provisions of the bankruptcy act. Section 29, *post*, specifies certain offenses and prescribes the punishment therefor. These specific offenses and the procedure required for the punishment thereof will be considered under that section. If an offense consists of a violation of the act not included in those specified in § 29, subd. 4 of § 2 confers the power of punishment. As to the right to a jury trial reference should also be made to § 19-a, *post*.

c. Enforcement of obedience to lawful orders.—The power to enforce obedience to its lawful orders is inherent in every court. Being clothed with power to make such orders as may be necessary to carry into effect the provisions of the act, it must possess the powers essential to enforce such orders.¹⁹¹ The act recognizes the power of the court to punish as for contempt any person who disregards its lawful orders. The exercise of the power is discretionary but cannot be invoked in any case unless the order is a lawful one.¹⁹²

VII. PUNISHMENT FOR CONTEMPT.

a. In general.—The power to punish for contempt committed before referees is expressly conferred by subd. 16 of this section. Section 41 of the

189. *Matter of Pequod Brewing Co.* (Ref., N. Y.), 18 Am. B. R. 352; *In re Dimm & Co.* (D. C., Pa.), 17 Am. B. R. 119, 146 Fed. 402; *Matter of Shiebler & Co.* (C. C. A., 2d Cir.), 23 Am. B. R. 162, 174 Fed. 336. But the compensation of trustees for continuing the business of the bankrupt should not be fixed in advance of the services rendered. *In re Russell Card Co.* (D. C., N. J.), 23 Am. B. R. 300, 174 Fed. 202.

190. **Valuable service rendered by receiver.**—A receiver appointed to take charge of and preserve the bankrupt's assets pending the election and qualification of the trustee or until the dismissal of the petition, who, instead of merely holding possession of the accounts and bills receivable and the personal

property, collected many of the accounts, pending the election of the trustee, and thereby saved to the estate a considerable sum of money, was more than a "mere custodian," but was not "conducting of the business," within the meaning of section 48 of the Bankruptcy Act, and should be compensated by a reasonable amount for the services rendered. *Matter of Metropolitan Motor Car Co.* (D. C., Wash.), 35 Am. B. R. 539, 225 Fed. 274.

191. See § 2, subd. 15, and discussion under title "Enforcement of act by necessary orders, process or judgment."

192. Compare a similar phrasing in Bankr. Act. § 7-a(2), *post*, and in § 14-b(6), *post*.

act specifies in detail the acts which constitute contempts before the referee, and prescribes the practice essential to secure punishment. The detailed discussion of contempts and their punishment is more appropriately placed under that section. Reference should be made to such section for a further consideration of this subject. We will confine ourselves at this point with the enunciation of general principles pertaining directly to the exercise by a court of bankruptcy of the power to punish a contempt. As already indicated the court has power under § 2 (13) to punish by fine or imprisonment any violation of a lawful order issued by it. This confers upon the court ample power in contempt proceedings. The power to punish for contempt in bankruptcy proceedings has always been recognized.¹⁹³ In many cases, as where the bankrupt or another contumaciously keeps property belonging to the estate in his possession, it is essential to the proper administration of the act. The proceeding is quasi-criminal, yet not one entitling the person proceeded against to a trial by jury.¹⁹⁴ The power to punish for contempt is a judicial one and cannot be referred or delegated.¹⁹⁵

b. Imprisonment for debt; constitutionality.—The power to imprison for contempt is not an infringement of the constitutional prohibition on imprisonment for debt; but a bankrupt cannot be imprisoned indefinitely for a contempt.¹⁹⁶ The constitutional provision here referred to is that contained in the constitutions of many of the States to the effect that no person shall be imprisoned for debt in any civil action unless in case of fraud. Where the

193. See *Ex parte Robinson*, 86 U. S. 505; *In re Alphin & Lake Cotton Co.* (D. C., Ark.), 14 Am. B. R. 494, 134 Fed. 477, in which the court said: "These provisions of the bankruptcy act, authorizing courts of bankruptcy to enforce obedience to their orders by punishment as for contempt are neither novel nor unusual. They were included in every bankruptcy act and similar provisions have been enacted by almost every state in the Union, including the state of Arkansas. In proceedings supplemental to or in aid of executions, courts are authorized by these statutes to enforce the surrender of assets subject to execution, and for this purpose may commit to jail any person refusing to comply with such order."

194. *In re Debs*, 158 U. S. 564; *Ripon Knitting Works v. Schreiber* (D. C., Wash.), 4 Am. B. R. 299, 101 Fed. 810.

Proceeding to punish a bankrupt for contempt in failing to obey an order to turn over assets are for civil contempt and cannot be reviewed by writ of error. *Freed v. Central Trust Co.* (C. C. A., 7th Cir.), 33 Am. B. R. 64, 215 Fed. 873; *Matter of Stanny* (D. C., N. Y.), 36 Am. B. R. 79, 226 Fed. 517.

195. *Bank of Ravenswood v. Johnson* (C. C. A., 4th Cir.), 16 Am. B. R. 206, 143 Fed. 463; *Boyd v. Glucklich* (C. C. A., 8th Cir.), 8 Am. B. R. 393, 116 Fed. 131; *Smith v. Belford* (C. C. A., 6th Cir.), 5 Am. B. R. 291, 106 Fed. 658.

196. *Matter of Lavoe* (C. C. A., 2d Cir.), 15 Am. B. R. 290, 142 Fed. 960, in which case it was held that the enforcement of

an order directing the payment of the expenses of a receiver by imprisonment was not unlawful because an imprisonment for debt, since under the laws of New York (Civ. Pro. § 1241) disobedience of an order is punishable as for a contempt of court, where it required the payment of money to the court or to an officer of the court; *In re Leinweber* (D. C., Ct.), 12 Am. B. R. 175, 128 Fed. 641; *In re Taylor* (D. C., Col.), 7 Am. B. R. 410, 114 Fed. 607; *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224; *Ripon Knitting Works v. Schreiber* (D. C., Wash.), 4 Am. B. R. 299, 101 Fed. 810; *In re Anderson* (D. C., S. Cal.), 4 Am. B. R. 640, 103 Fed. 854; *In re Schlesinger* (C. C. A., 2d Cir.), 4 Am. B. R. 361, 102 Fed. 117; *In re Rosser* (C. C. A., 8th Cir.), 4 Am. B. R. 153, 101 Fed. 562.

Enforcement of contempt order; imprisonment for debt.—Where the record in contempt proceedings shows that a bankrupt, who has been ordered to turn over property to his trustee, has neither possession of the property nor ability to comply with the order, he cannot be legally punished for contempt; and if, in such case, notwithstanding his inability, the court orders the bankrupt committed for failure to obey, such order has no justification as a contempt proceeding, but, having no purpose except to force by imprisonment the payment of money on debts, it amounts to an imprisonment for debt. *In re Purvine*, 2 Am. B. R. 787, 96 Fed. 192, and *Samel v. Dodd*, 16 Am. B. R. 163, 142 Fed. 68, discussed and the latter case approved. *Stuart v. Reynolds* (C. C. A., 5th Cir.), 29 Am. B. R. 412, 204 Fed. 709.

order of the court directs the surrender to the proper officer of property in respect to which the court has jurisdiction, the obligation and duty of the person to whom it is directed to surrender cannot be converted into a debt by his mere refusal to comply with the order.¹⁹⁷ The commitment for disobedience of an order directing that property belonging to the bankrupt's estate be delivered to the trustee, is not a punishment for non-payment of a debt. There is no debt due the trustee. The punishment is inflicted for failure to perform a legal duty.¹⁹⁸

c. When proceedings will lie.—(1) **IN GENERAL.**—The power of commitment should be cautiously exercised and only when its propriety is beyond a reasonable doubt; it should appear from the facts in the case that there has been a wilful disobedience of the order.¹⁹⁹ It should not be exercised to compel the payment of a debt, or to punish for a fraudulent transfer.²⁰⁰ There should be clear and convincing proof amounting at least to a fair preponderance of evidence, that the person charged with the contempt is guilty thereof.²⁰¹

197. *Schweer v. Brown* (C. C. A., 8th Cir.), 12 Am. B. R. 178, 130 Fed. 328, *affd.*, 12 Am. B. R. 673, 195 U. S. 171; *In re Schlesinger* (C. C. A., 2d Cir.), 4 Am. B. R. 361, 102 Fed. 117.

198. **Order to pay over not an order to pay debt.**—In the case of *Samel v. Dodd* (C. C. A., 5th Cir.), 16 Am. B. R. 163, 142 Fed. 68, the court said: "The order to pay over money, or to surrender other property as the case may be, in the possession of the bankrupt and forming part of his estate, is not an order for the payment of a debt, but an order for the surrender of assets of the bankrupt placed in *custodia legis* by the adjudication; and his commitment upon refusing to comply with the order is not imprisonment for debt." See also *In re Schlesinger* (C. C. A., 2d Cir.), 4 Am. B. R. 361, 102 Fed. 117; *Schweer v. Brown* (C. C. A., 8th Cir.), 12 Am. B. R. 178, 130 Fed. 328, *affd.* 12 Am. B. R. 673, 195 U. S. 171; *In re Holland* (D. C., N. Y.), 23 Am. B. R. 835, 176 Fed. 624.

199. *Moody v. Cole* (D. C., Me.), 17 Am. B. R. 818, 148 Fed. 295, holding that in bankruptcy a contempt proceeding is criminal in its character, and the conclusion that a party is in contempt should be reached only upon evidence which induces belief beyond a reasonable doubt; *In re Switzer* (D. C., S. Car.), 15 Am. B. R. 468, 140 Fed. 976; *In re Adler* (D. C., Tenn.), 12 Am. B. R. 19, 129 Fed. 502; *In re Goldfarb Bros.* (D. C., Ga.), 12 Am. B. R. 386, 131 Fed. 643; *American Trust Co. v. Wallis* (C. C. A., 3d Cir.), 11 Am. B. R. 360, 126 Fed. 466; *Boyd v. Glucklich* (C. C. A., 8th Cir.), 8 Am. B. R. 393, 116 Fed. 140; *In re De Gottardi* (D. C., Cal.), 7 Am. B. R. 723, 114 Fed. 328; *In re Schlesinger* (C. C. A., 2d Cir.), 4 Am. B. R. 361, 102 Fed. 111; *In re Anderson* (D. C., S. Car.), 4 Am. B. R. 640, 103 Fed. 854; *In re Deuell* (D. C., Mo.), 4 Am. B. R. 60, 100 Fed. 634; *In re Mayor* (D. C., Wis.), 3 Am. B. R. 533, 98 Fed. 839; *In re Mc-*

Cormick (D. C., N. Y.), 3 Am. B. R. 340, 99 Fed. 56.

Power exercised with caution.—In the case of *Samel v. Dodd* (C. C. A., 5th Cir.), 16 Am. B. R. 163, 142 Fed. 68, the court said: "While bankruptcy courts are vested with power to require bankrupts to surrender their property, and to enforce obedience to the order by attachment for contempt, yet the power is 'far reaching and drastic and should be exercised with cautious discretion.' Indeed, it may be said that it should never be exercised except in a plain case, and always with a due regard to the constitutional rights of the citizen. . . . It is objected, however, that the failure of the courts to exercise with a firm hand the power to punish, by contempt proceedings, designing and unscrupulous bankrupts, would practically deprive the law of its efficacy and convert it into a mere shield for the protection of dishonest debtors. In doubtful cases the power should not be exercised; and in view of the stringent provisions of law punishing fraudulent conduct, and other forms of dishonesty, on the part of the bankrupt, the objection is untenable. The original act not only contains ample provisions for the punishment of the bankrupt in the regular mode of trial by jury, for false swearing and for the fraudulent disposition of assets (§ 29), but section 14, as amended by the act of 1903 renders it extremely difficult, if not impossible, for the contumacious or dishonest bankrupt to secure a discharge from his indebtedness."

200. *In re Dickens* (D. C., Ala.) 23 Am. B. R. 659, 175 Fed. 808; *In re Holland* (D. C., N. Y.), 23 Am. B. R. 835, 176 Fed. 624.

201. *Samel v. Dodd* (C. C. A., 5th Cir.), 16 Am. B. R. 163, 142 Fed. 68; *In re Mize* (D. C., Ala.), 22 Am. B. R. 577, 172 Fed. 945; *In re Dickens* (D. C., Ala.), 23 Am. B. R. 659, 175 Fed. 808; *In re Cramer* (D. C., Mass.), 23 Am. B. R. 635, 175 Fed. 879; *In re Alphin & Lake Cotton Co.* (D. C., Ark.), 12 Am. B. R. 653, 131 Fed. 824; *In re Purvine*

(2) **POSSIBILITY OF PERFORMANCE.**—It should not be sought by proceedings for contempt to compel a person to do that which he has no power to do. If it is sought to compel the bankrupt to surrender to the trustee property belonging to the estate it must appear that such property is in the actual control or possession of the bankrupt and that it is possible for him to surrender it.²⁰² This fact should be established by clear and convincing proof,—by a fair preponderance of evidence, and in some cases it has been held that the evidence must be sufficient to satisfy the mind beyond a reasonable doubt.²⁰³ If the bankrupt denies under oath that he has the money or property in his possession, he should not be punished by commitment unless it is shown beyond a reasonable doubt that he is able to produce the same.²⁰⁴

(C. C. A., 5th Cir.), 2 Am. B. R. 787, 96 Fed. 192.

202. *Boyd v. Glucklich* (C. C. A., 8th Cir.), 8 Am. B. R. 393, 116 Fed. 140; *In re Mize* (D. C., Ala.), 22 Am. B. R. 577, 172 Fed. 945; *Freed v. Central Trust Co.* (C. C. A., 7th Cir.), 33 Am. B. R. 64, 215 Fed. 873.

Impossible to perform.—In the case of *Goldfarb Bros.* (D. C., Ga.), 12 Am. B. R. 386, 131 Fed. 643, the court held that a bankrupt cannot be required, under a proceeding for contempt, to do that which is out of his power to do; the evidence in such a proceeding should satisfy the court beyond a reasonable doubt that the bankrupt has the money or goods in his possession or control and is able to turn them over when so ordered. *Schweer v. Brown* (C. C. A., 8th Cir.), 12 Am. B. R. 178, 130 Fed. 328; *In re Adler* (D. C., Tenn.), 12 Am. B. R. 19, 129 Fed. 902; *In re Gertsel* (D. C., Ill.), 10 Am. B. R. 411, 123 Fed. 166; *Sinsheimer v. Simonson* (C. C. A., 6th Cir.), 5 Am. B. R. 537, 107 Fed. 898; *Matter of Adler* (D. C., Okla.), 21 Am. B. R. 371; *In re Mize* (D. C., Ala.), 22 Am. B. R. 577, 172 Fed. 945; *In re Reynolds* (D. C., Ala.), 27 Am. B. R. 200, 190 Fed. 967, affd. 29 Am. B. R. 412, 204 Fed. 709. An order will not be granted directing the bankrupt to turn over property alleged to have been in his possession six years prior thereto, the time of beginning the proceedings in bankruptcy, in the absence of proof of the bankrupt's ability to comply with the order. *In re Ruos* (D. C., Pa.), 21 Am. B. R. 257, 164 Fed. 749.

Where a bankrupt has no property in his possession or under his control he should not be imprisoned for contempt for failing to comply with an order of the referee to turn over money, although he has committed one of the offences mentioned in section 29 of the Bankruptcy Act. *Matter of McNaught* (D. C., Mass.), 35 Am. B. R. 609, 225 Fed. 511.

203. See cases cited in preceding note.

Proof required.—Clear and convincing, *Samel v. Dodd* (C. C. A., 5th Cir.), 16 Am. B. R. 163, 142 Fed. 68; *In re Levy & Co.* (C. C. A., 2d Cir.), 15 Am. B. R. 166, 142 Fed. 442; *In re Dickens* (D. C., Ala.), 23 Am. B. R. 659, 175 Fed. 808.

Beyond reasonable doubt, *In re De Gottardi* (D. C., Cal.), 7 Am. B. R. 723, 114 Fed. 328,

citing *Ripon Knitting Works v. Schreiber* (D. C., Wash.), 4 Am. B. R. 299, 101 Fed. 810; *In re McCormick* (D. C., N. Y.), 3 Am. B. R. 340, 99 Fed. 56; *In re Purvine* (C. C. A., 5th Cir.), 2 Am. B. R. 787, 37 C. C. A. 446, 96 Fed. 192; *Boyd v. Glucklich* (C. C. A., 8th Cir.), 8 Am. B. R. 393, 116 Fed. 131; *In re Goldfarb Bros.* (D. C., Ga.), 12 Am. B. R. 389, 131 Fed. 643; *In re Cashman* (D. C., N. Y.), 21 Am. B. R. 284; *In re Mize* (D. C., Ala.), 22 Am. B. R. 577, 172 Fed. 945. Proceedings not criminal and same degree of proof not required, see *In re Cole* (C. C. A., 1st Cir.), 16 Am. B. R. 302, 144 Fed. 392; *In re Alphin & Lake Cotton Co.* (D. C., Ark.), 14 Am. B. R. 194, 134 Fed. 477. Before a bankrupt may be committed for contempt in failing to obey an order to turn over property to his trustee, the court should be satisfied by proof beyond a reasonable doubt that he has present ability to comply. *Kirsner v. Taliaferro* (C. C. A., 4th Cir.), 29 Am. B. R. 832, 202 Fed. 51. If a district court cannot find affirmatively that the bankrupt had the property under his control or in his possession, he should not be punished. *Stuart v. Reynolds* (C. C. A., 5th Cir.), 29 Am. B. R. 412, 204 Fed. 709, affg. 27 Am. B. R. 200, 190 Fed. 967; *Matter of Dixon* (D. C., Mass.), 35 Am. B. R. 482, 224 Fed. 624.

204. Denial by person charged; proof required.—In the case of *Ripon Knitting Works v. Schreiber* (D. C., Wash.), 4 Am. B. R. 299, 304, 101 Fed. 810, the court said: "One of the principal grounds of defense upon which the respondent relies is contained in his answer denying that he has any money. His answer is not conclusive, but the rule in such cases requires that the denial be overcome by evidence proving beyond a reasonable doubt that the bankrupt actually has the present possession or control of money, or that any alleged transfer or other disposition of it is a mere subterfuge which does not prevent him from producing it." See *In re Mayer* (D. C.), 3 Am. B. R. 533, 98 Fed. 839; *In re Purvine* (C. C. A., 5th Cir.), 2 Am. B. R. 787, 37 C. C. A. 446, 96 Fed. 192; *Stuart v. Reynolds* (C. C. A., 5th Cir.), 29 Am. B. R. 512, 204 Fed. 709, affg. 27 Am. B. R. 200. So also in the case of *In re Adler* (D. C., Tenn.), 12 Am. B. R.

Bare denial of itself is not, for obvious reasons, conclusive.²⁰⁵ It must at least appear that the property directed to be surrendered is part of the bankrupt's estate, and that the person to whom the order is directed has control of it at the time.²⁰⁶ The order to restore may be directed to both the bankrupt and his wife, if either or both have had possession of the property.²⁰⁷

(3) **GOOD FAITH; FAILURE TO EXPLAIN.**—It should appear that the person complained of was acting in bad faith and for the purpose of evading the

19, 129 Fed. 502, the court said: "The court has no doubt of the power of the court, where it reasonably appears that the bankrupt has the money in his possession or under his control, to compel him to pay it over; but that fact must appear by something more substantial than mere presumptions or inferences taken from such circumstances as those which have been proven in this case. To invoke that power requires something like incontestible proof as against the bankrupt's denial that he has the money."

Denial of possession insufficient.—Where the evidence shows that at or shortly before his adjudication, certain goods or their value were in bankrupt's possession, they will be presumed to have remained in his possession, or under his control, until their disposition or disappearance is satisfactorily accounted for; and his sworn denial that he is in the possession of the goods or money, is insufficient. *Kirsner v. Taliaferro* (C. C. A., 4th Cir.), 29 Am. B. R. 832, 202 Fed. 51.

205. *In re Friedman* (D. C., N. Y.), 18 Am. B. R. 712, 153 Fed. 939, affd. 20 Am. B. R. 37, 161 Fed. 260; *In re Marks* (D. C., Pa.), 23 Am. B. R. 911, 176 Fed. 1018; *In re Goldfarb Bros.* (D. C., Ga.), 12 Am. B. R. 386, 131 Fed. 643; *In re Lasky* (D. C., Ala.), 20 Am. B. R. 729, 163 Fed. 99; *In re Gerstel* (D. C., Ill.), 10 Am. B. R. 411, 123 Fed. 166; *Schweer v. Brown* (C. C. A., 8th Cir.), 12 Am. B. R. 178, 130 Fed. 328; *Matter of Kramer & Muchnick* (D. C., Pa.), 31 Am. B. R. 525, 210 Fed. 977, holding that where bankrupts deny their ability to comply with an order to turn over moneys, but the evidence shows that such denial is false or fraudulent and that the case is one of simple concealment, they should be adjudged in contempt and committed.

206. *In re Rosser* (C. C. A., 8th Cir.), 4 Am. B. R. 153, 101 Fed. 462; *In re Wilson* (D. C., Ark.), 8 Am. B. R. 612, 116 Fed. 419; *In re Adler* (D. C., Tenn.), 12 Am. B. R. 19, 129 Fed. 902.

Control of property.—Where it appears that money in the bank was taken by the bankrupt after a petition in involuntary bankruptcy was filed, but before adjudication, and it does not seem probable that the money was expended for the support of his family, it will be held to be under his control and he may be adjudged in contempt for failure to turn it over to his trustee. *In re Kane* (D. C., Pa.), 10 Am. B. R. 478, 125 Fed. 984; *In re Gerstel* (D. C., Ill.), 10 Am. B. R. 411, 123 Fed. 166. Where the

property is beyond the present control of the bankrupt and in the hands of third parties claiming title derived prior to the proceedings in bankruptcy, the court may not punish either of them for contempt, although the transaction is manifestly fraudulent. *In re Mayer* (D. C., Wis.), 3 Am. B. R. 533, 98 Fed. 839. It would be different if the property claimed was in the bankrupt's possession. *In re DeGottardi* (D. C., Cal.), 7 Am. B. R. 723, 144 Fed. 328. Loss of money in gambling is not a sufficient defense. *Ripon Knitting Works v. Schreiber* (D. C., Wash.), 4 Am. B. R. 299, 101 Fed. 810. Where it appeared that an alleged robbery of stock belonging to a bankrupt merchant never occurred and that such stock is still under his control, the disobedience of an order directing the bankrupt to deliver over the stock to his trustee is a contempt of court. *In re Levin* (D. C., N. Y.), 6 Am. B. R. 743, 113 Fed. 498.

Present possession.—In the case of *In re Barton Bros.* (D. C., Ark.), 18 Am. B. R. 98, 149 Fed. 620, the court said: "It is seen by an examination of the decisions last quoted, unless they were in possession of the money at the time the order is made to pay over, the court has no power to make the order." In the case of *In re Rosser* (C. C. A., 8th Cir.), 4 Am. B. R. 153, 101 Fed. 562, it was held that two essential facts condition the lawful exercise of the power to require a bankrupt or other person to pay or deliver to the trustee money or property in his possession: (1) the money or property directed to be delivered to the trustee is a part of the bankrupt estate and (2) that the bankrupt or person ordered to deliver it has it in his possession or under his control at the time the order of delivery is made. See also *In re Dickens* (D. C., Ala.), 23 Am. B. R. 659, 175 Fed. 808; *In re Rogowski* (D. C., Ga.), 21 Am. B. R. 551, 166 Fed. 165.

Liability of alleged partner.—Where one of the members of a bankrupt partnership was a mere clerk, received what was equivalent to wages, and had nothing to do with the real conduct of the business, and actually turned over all the proceeds of property received a short time before bankruptcy to his partner, and never knew what became of them, he should not be held liable for failure to account for the same. *Matter of Vyse* (D. C., N. Y.), 34 Am. B. R. 378, 220 Fed. 727.

207. *Power v. Fuhrman* (C. C. A., 9th Cir.), 34 Am. B. R. 418, 220 Fed. 787.

provisions of the law; thus, an attorney who in good faith, but wrongly, advises a State court as to the right of such court to compel a receiver in bankruptcy to surrender property in controversy cannot be adjudged guilty of contempt.²⁰⁸ The fact that the person complained of acted under advice of counsel may not in every case be a defense.²⁰⁹ A bankrupt who refuses to account for property which should have been in his possession without any effort to explain the loss of the property may be adjudged guilty of contempt.²¹⁰ The failure or refusal to explain what became of property not scheduled by the bankrupt, and in his possession immediately prior to his bankruptcy, as where he merely answers all material questions as to the disposition of such property by saying: "I don't know," or "I can't remember," connected with convincing proof that he had designed to convert his assets into money and defraud his creditors, will justify his commitment for contempt.²¹¹ The rule is that property of a bankrupt estate, traced to the

208. *In re Watts*, 10 Am. B. R. 113, 190 U. S. 1, 23 Sup. Ct. 718; *In re Zier & Co.* (C. C. A., 7th Cir.), 15 Am. B. R. 646, 142 Fed. 102.

The attorneys for parties who were responsible for the seizure of property from the sheriff and its removal from the district when the bankruptcy proceedings were instituted are equally guilty with their clients of contempt, which may only be purged by a return of the property or payment of its full value. *In re Walsh Bros.* (D. C., Iowa), 20 Am. B. R. 472, 159 Fed. 560.

209. *In re Home Discount Co.* (D. C., Ala.), 17 Am. B. R. 168, 147 Fed. 538.

Advice of counsel.—In the case of *Orr v. Tribble* (D. C., Ga.), 19 Am. B. R. 849, 158 Fed. 897, it was held that a sheriff who is in possession of property by virtue of a levy will not be adjudged in contempt, where, in good faith and acting under advice of counsel, he refuses to surrender the property upon the demand of the receiver in bankruptcy. See *In re Strobel* (D. C., N. Y.), 20 Am. B. R. 754, 163 Fed. 380.

210. *In re Deuell* (D. C., Mo.), 4 Am. B. R. 60, 100 Fed. 633. Compare *In re Schlesinger* (D. C., N. Y.), 3 Am. B. R. 342, 97 Fed. 930, in which case the court committed a bankrupt who failed to account for a certain sum of money in his possession which had been directed to be paid to the trustee.

Concealment of property.—The mere fact that the possession and control by the bankrupt is not open and notorious would not prevent his punishment for contempt. A concealment of the property in controversy by the bankrupt and his refusal to disclose may be a contempt, and where the facts are such as to indicate concealment the court may enforce its order to surrender the property by commitment. *In re Shachter* (D. C., Ga.), 9 Am. B. R. 499, 119 Fed. 1010; *Boyd v. Glucklich* (C. C. A., 8th Cir.), 8 Am. B. R. 393, 116 Fed. 131, in which Judge Sanborn said: "The rule by which this issue is to be determined is that the property of the

bankrupt estate traced to the recent possession or control of the bankrupt is presumed to remain there until he satisfactorily accounts to the court for its disposition or disappearance. He cannot escape an order for its surrender by simply adding perjury to fraudulent concealment or misappropriation." See also *In re Purvine* (C. C. A., 5th Cir.), 2 Am. B. R. 787, 96 Fed. 192; *In re Willson* (D. C., Ark.), 8 Am. B. R. 612, 116 Fed. 419; *In re Lesains* (D. C., Pa.), 21 Am. B. R. 23, 163 Fed. 614; *In re Rogowski* (D. C., Ga.), 21 Am. B. R. 553, 166 Fed. 165.

Explanation as to money in recent possession, but not scheduled.—Where the bankrupt, a woman, fails to account for a relatively large amount of goods which she had purchased prior to bankruptcy, to keep any books of accounts, and to make any explanation of the great discrepancies in the amount turned over to the trustee and the amount which she should have had on hand, and where the husband and son, who carried on business for her, have testified that they did not appropriate or have the goods or the money, she must either account for this money or pay the penalty by being committed for contempt until she accounts for and turns over to the trustee the sum which, after making all possible allowances in her favor, represents the amount unaccounted for. *In re Deuell* (D. C., Mo.), 4 Am. B. R. 60, 100 Fed. 633; *In re Richards* (D. C., Ark.), 25 Am. B. R. 176, 183 Fed. 501.

A bankrupt's willingness to admit that he gambled with everything upon which he could lay his hands does not excuse him from liability to account to his trustee for several thousand dollars in his possession a short time before bankruptcy. *Matter of Vyse* (D. C., N. Y.), 34 Am. B. R. 378, 220 Fed. 727.

211. *In re Richards* (D. C., Ark.), 25 Am. B. R. 176, 183 Fed. 501; *In re Meier* (C. C. A., 8th Cir.), 25 Am. B. R. 272, 182 Fed. 799; *In re Rosser* (D. C., Mo.), 2 Am. B. R. 746, 96 Fed. 308; *United States v. Appel* (D. C., N. Y.), 31 Am. B. R. 154, 211 Fed. 495. And see cases cited under § 41a, *post*.

recent control or possession of the bankrupt, is presumed to remain there until he satisfactorily accounts to the court for its disposition or disappearance.²¹² But where the property is not described and the person proceeding against the bankrupt is unable positively to assert that particular property, or a particular sum, has been removed or concealed, contempt proceedings are not justified.²¹³

(4) **INSTANCES OF CONTEMPT.**—A surrender of property by a bankrupt, after a petition in bankruptcy had been filed, to a secured creditor may be punished as a contempt both on the part of the bankrupt and the creditor.²¹⁴ Likewise a bankrupt is guilty of contempt when, after the filing of an involuntary petition and the service of process, he pays an indebtedness.²¹⁵

212. *In re Laskey* (D. C., Ala.), 20 Am. B. R. 729, 163 Fed. 99; *Boyd v. Glucklich* (C. C. A., 8th Cir.), 8 Am. B. R. 393, 116 Fed. 138, 53 C. C. A. 451 (opinion of Judge Sanborn); *In re Fidler & Son* (D. C., Pa.), 21 Am. B. R. 101, 163 Fed. 973; *In re Cramer* (D. C., Mass.), 23 Am. B. R. 635, 175 Fed. 879; *In re Epstein* (Ref., Pa.), 15 Am. B. R. 711; *In re Adler* (D. C., Tenn.), 12 Am. B. R. 19, 129 Fed. 502; *In re Kane* (D. C., Pa.), 10 Am. B. R. 478, 125 Fed. 984.

The recent possession of goods by a bankrupt, unexplained, is not of itself sufficient to show that he still has them and, therefore, sufficient to prove that he is in contempt in failing to obey an order to produce them, so as to dispense with the necessity of evidence. *Stuart v. Reynolds* (C. C. A., 5th Cir.), 29 Am. B. R. 412, 204 Fed. 709.

The presumption of law, in the absence of satisfactory explanation, is that property traced to the hands of the bankrupt a short time prior to the suspension of business remains in his hands, and the bankrupt must answer therefor. *In re Royce Dry Goods Co.* (D. C., Mo.), 13 Am. B. R. 257, 266, 133 Fed. 100, citing *In re Deuell*, 4 Am. B. R. 60, 100 Fed. 633; *In re Greenberg* (D. C., N. Y.), 5 Am. B. R. 840, 106 Fed. 496; *In re McCormick* (D. C., N. Y.), 3 Am. B. R. 340, 97 Fed. 566; *In re Mayer* (D. C., Wis.), 3 Am. B. R. 533, 98 Fed. 839; *Good v. Kane* (C. C. A., 8th Cir.), 32 Am. B. R. 19, 211 Fed. 956.

Fraudulent disposition of assets.—In the case of *In re Shaffer & Stern* (D. C., N. Y.), 26 Am. B. R. 54, 185 Fed. 549, it appeared that the firm became bankrupt, and after unsuccessful effort to compromise with the creditors, one of the members of the firm transferred the assets of the firm to a corporation; the corporation did not assume the debts of the firm and subsequently the partner withdrew from the corporation a large sum of money, and it was shown that money belonging to the corporation was in his hands and he failed to account therefor; the stock of the corporation became worthless; it was held that the partner should be compelled to pay to the trustee in bankruptcy of said firm, the amount of money traced into his hands.

Burden of proving disposition.—Where unscheduled property is traced to the recent

possession or control of the bankrupt a presumption of fact arises that such property remains there until he satisfactorily accounts for its disposition; a presumption which varies in weight with the circumstances of each case; and the burden is upon the bankrupt to satisfactorily account for its non-production, in assuming which, however, he is entitled to the benefit of a reasonable doubt because the drastic means of imprisonment for contempt may be invoked to enforce the order to turn over. *In re Nisenon* (D. C., N. J.), 24 Am. B. R. 915, 182 Fed. 912.

As stated by the court in the case of *In re Meier* (C. C. A., 8th Cir.), 25 Am. B. R. 272, 182 Fed. 799: "But the settled rule is that, when property of a bankrupt estate is traced to the possession of one who receives it upon the eve of the bankruptcy of its owner, it is presumed that it remains in his possession or under his control until he satisfactorily accounts to the court of bankruptcy for its disposition or disappearance; that the burden is upon him to satisfactorily so account for it; and that he cannot escape an order for its surrender by simply denying under oath that he has it, or that it is the property of the bankrupt estate. *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224, 22 Sup. Ct. 269, 46 L. Ed. 405; *Boyd v. Glucklich* (C. C. A., 8th Cir.), 8 Am. B. R. 393, 116 Fed. 135-143, 53 C. C. A. 451; *Schweer v. Brown* (C. C. A., 8th Cir.), 12 Am. B. R. 178, 130 Fed. 328, 64 C. C. A. 574; *In re Salkey*, 21 Fed. Cas. Nos. 12,253 and 12,254."

213. *Samel v. Dodd* (C. C. A., 5th Cir.), 16 Am. B. R. 163, 142 Fed. 68; *In re Rogowski* (D. C., Ga.), 21 Am. B. R. 553, 166 Fed. 165.

214. *In re Arnett* (D. C., Tenn.), 7 Am. B. R. 522, 112 Fed. 770. See *Matter of Lutfy* (D. C., N. Y.), 19 Am. B. R. 614, 156 Fed. 873, to the effect that after notice of bankruptcy proceedings an attaching creditor and his attorney are guilty of contempt, if they take possession of the property.

215. *Matter of Paris Mfg. Co.* (D. C., Mo.), 33 Am. B. R. 365, wherein the court said: "It is well established upon authority that the filing of a petition in bankruptcy and the service of process upon the bankrupt, if afterwards followed by an adjudication of

It is probable that any unlawful interference on the part of the bankrupt after adjudication, may be a contempt, although a mere threat to interfere would not be sufficient.²¹⁶ A person who takes and conceals, intentionally, property of the bankrupt in his possession at the time of the adjudication, having no title, lien or colorable claim thereto, will, since the bankruptcy proceeding is injunctive in character, be guilty of unlawful interference with assets in the legal custody of the court, which constitutes a contempt.²¹⁷ Any wilful disregard of an order requiring the bankrupt to pay to the trustee money which belongs to the estate may be punished.²¹⁸ A bankrupt may be committed for contempt because of his refusal to surrender his books of account to the receiver in bankruptcy.²¹⁹ So also may a stakeholder be adjudged guilty of contempt where he refuses to surrender to the marshal money placed in his hands by the bankrupt.²²⁰ False swearing, although punishable as perjury, is also punishable summarily as a contempt of court.²²¹ So, too, any intentional evasion and refusal to make proper explanation of material facts or a deliberate determination to conceal such facts may be punished.²²² A city marshal who proceeds in executing a writ of replevin, although notified that an injunction has been issued in bankruptcy proceedings, is guilty of a contempt.²²³

d. Practice.—(1) **IN GENERAL.**—The practice outlined in the case of *Mueller v. Nugent*,²²⁴ will be found useful in conducting proceedings in contempt. The mode of proceeding in a court of bankruptcy to determine whether the party complained of is guilty of contempt should conform as nearly as may be to the established practice in like cases in all other United States courts; whatever is legally sufficient to purge a contempt in any of

bankruptcy, constitutes a commanding injunction of the court against the interference of the bankrupt or third persons with, and their concealment or removal from the trustee or the court of any of the property of the bankrupt, and that a wilful violation of such injunction will be punished as a contempt of court."

216. *In re McBryde* (D. C., N. Car.), 3 Am. B. R. 729, 99 Fed. 686.

217. *Clay v. Waters* (C. C. A., 8th Cir.), 24 Am. B. R. 293, 178 Fed. 385; *In re Walsh Bros.* (D. C., Iowa), 20 Am. B. R. 472, 159 Fed. 560; *Matter of Paris Mfg. Co.* (D. C., Mo.), 33 Am. B. R. 565, holding that a member of a bankrupt firm who after its bankruptcy pays out firm money in satisfaction of a personal debt is guilty of a criminal contempt; *Matter of Dialogue* (D. C., N. J.), 32 Am. B. R. 183, 215 Fed. 462, holding that a person who, with full knowledge of the facts, forcibly removes property from the possession of a receiver is guilty of a criminal contempt of court.

218. *In re Cole* (C. C. A., 1st Cir.), 20 Am. B. R. 761, 163 Fed. 180.

219. *In re Wilson* (D. C., Ark.), 8 Am. B. R. 612, 116 Fed. 419. See as to failure to obey order directing bankrupt to turn over to the trustee certain missing papers, *In re Herr* (D. C., Pa.), 25 Am. B. R. 141, 182 Fed. 715.

220. *Matter of Macon Sash, Door & Lumber*

Co. (D. C., Ga.), 7 Am. B. R. 66, 112 Fed. 322.

221. *Matter of Fellerman* (D. C., N. Y.), 17 Am. B. R. 785, 149 Fed. 244; *Matter of Bronstein* (Ref., N. Y.), 24 Am. B. R. 524, 182 Fed. 349; *Matter of Shear* (D. C., N. Y.), 32 Am. B. R. 833, 188 Fed. 677. But if he changes his mind, and swears truthfully, he ought not to be punished for contempt. *In re Gordon* (D. C., N. Y.), 21 Am. B. R. 290, 167 Fed. 239.

222. *Matter of Schulman* (D. C., N. Y.), 21 Am. B. R. 288, 167 Fed. 237; *Matter of Shear* (D. C., N. Y.), 32 Am. B. R. 833, 188 Fed. 677.

Concealment of assets; failure to explain.

—Where a bankrupt, who has knowingly disposed of or concealed property after notice of involuntary bankruptcy proceedings and who had immediately preceding bankruptcy squandered or recklessly disposed of partnership assets under circumstances indicating an intent to defraud creditors, is ordered to account for the property disposed of, a failure on his part to appear before a special master and frankly explain the various transactions is punishable as for a contempt. *In re Smith* (D. C., N. Y.), 26 Am. B. R. 399, 185 Fed. 983.

223. *In re Wilk* (D. C., N. Y.), 19 Am. B. R. 178, 155 Fed. 943.

224. 184 U. S. 1, 7 Am. B. R. 224.

such courts is sufficient for like purpose in a court of bankruptcy.²²⁵ In the case of *Mueller v. Nugent*, on the verified petition of the trustee, the referee issued a show cause to the party alleged to be in possession of the property coupled with an injunction. On the return day, a response on behalf of the claimant was filed. The matter was then heard summarily by the referee who found the response insufficient. Thereupon, the referee granted an order directing a surrender to the trustee within a limited period. On default being made, the referee certified the facts to the judge, recommending that the respondent be punished and committed for contempt. In this case, a review of this order was asked. The same result would have been accomplished had the respondent appeared voluntarily before the judge and brought up the whole matter on the merits, the judge not being in such case bound by the findings of fact of the referee.²²⁶ The judge, with all the facts thus before him, affirmed the order of the referee, found the respondent guilty of contempt, and called him to the bar for commitment. This practice is not fixed by rules. It may be varied to fit the circumstances of each case. Valuable precedents will be found in the Supreme Court decisions controlling the procedure to punish for contempts in other than courts of bankruptcy.

(2) NOTICE OF HEARING.—The person alleged to be in contempt must be given notice of the charge against him, and be given an opportunity to show cause why he should not comply with the order.²²⁷ An order committing a person for failure to comply with the direction of the court, granted without notice and an opportunity to be heard, violates one of the fundamental principles of our laws and cannot be sustained.²²⁸

225. *Boyd v. Glucklich* (C. C. A., 8th Cir.), 8 Am. B. R. 393, 116 Fed. 131.

See cases cited, Am. B. R. Dig., § 1169.

For rules to be observed in the exercise of jurisdiction to punish for contempt, see *Matter of DeGottardi* (D. C., Cal.), 7 Am. B. R. 723, 114 Fed. 328.

226. *In re Mayer* (D. C., Wis.), 3 Am. B. R. 533, 98 Fed. 839.

227. *In re Rosser* (C. C. A., 8th Cir.), 4 Am. B. R. 153, 101 Fed. 462; *Stuart v. Reynolds* (C. C. A., 5th Cir.), 29 Am. B. R. 412, 204 Fed. 709, affg. 27 Am. B. R. 200, 190 Fed. 967.

A rule requiring the bankrupt to appear and show cause why he should not be punished for contempt in declining to answer sundry questions is sufficient where it refers to the transcript of proceedings filed by the referee. *U. S. v. Goldstein* (D. C., Va.), 12 Am. B. R. 755, 132 Fed. 789.

228. Opportunity to be heard.—In the case of *In re Rosser* (C. C. A., 8th Cir.), 4 Am. B. R. 153, 101 Fed. 562, the court said: "The basic principle of English jurisprudence is that no man shall be deprived of life, liberty or property, without due process of law, without a course of legal proceedings according to those rules and forms which have been established for the protection of private rights. Such a course must be appropriate to the case and just to the party affected. It must give him notice of the charge or claim against him and an opportunity to be heard respecting the justice of

the order or judgment sought. And the opportunity to be heard must be such that he may, if he chooses, cross-examine the witnesses produced to sustain the claim and produce witnesses to refute it if a question of fact is in issue, and if a question of law is presented, the opportunity to be heard must be such that his counsel may, if they desire, argue the justice and propriety of the judgment or order proposed. Judicial orders or judgments affecting the lives or property of citizens in the absence of such a notice and opportunity to the party affected are violative of the fundamental principles of our laws and cannot be sustained."

Notice to bankrupt.—Where an order requiring the bankrupt to turn over property to his trustee is based upon a hearing had without notice to the bankrupt such order may not be enforced by punishment for contempt. *In re Frank* (C. C. A., 8th Cir.), 25 Am. B. R. 486, 182 Fed. 794.

Right to be heard.—In the case of *Matter of Banzai Mfg. Co.* (C. C. A., 2d Cir.), 25 Am. B. R. 497, 183 Fed. 298, the court held that where a person has been duly ordered to pay over to the trustee money found to be due the estate and he fails to do so, he is nevertheless entitled to be heard on the question whether he should be committed to jail for such failure, and an *ex parte* order judging him in contempt, of the application for which he had no notice, stating when or where such application would be made, will be reversed.

(3) **PLEADING; INTERVENTION.** A proceeding to punish a bankrupt for contempt should be brought by petition, alleging essential facts. A petition would be insufficient which merely contained such allegations as would be required for ordinary supplementary proceedings, without alleging that the bankrupt's failure to pay money or restore property was wilful and that he had the ability to do so if he would.²²⁹ Although if it had already been made to appear after a full hearing that the bankrupt had concealed available assets, it would not be necessary to allege inability to restore.²³⁰ Where the proceeding for the examination of a bankrupt is brought, prior to the appointment of a receiver or trustee, by petitioning creditors, an order to permit outside creditors to intervene for the purpose of punishing the bankrupt for contempt should not be granted.²³¹

(4) **CONDUCT OF PROCEEDINGS; ORDER OF COMMITMENT.**—The court will not be deceived by evasions, or deterred by consequences.²³² It has been held that the respondent's answer may not be traversed but that it should be taken as true, and if in fact false, prosecution should be had against him for perjury.²³³ An order which directs a marshal to confine the bankrupt in jail until he complies with the order is erroneous; the order should permit the bankrupt to show that he has complied therewith.²³⁴ Upon a motion to punish a bankrupt for contempt because of his refusal to obey the order of the referee directing him to turn over certain property to his trustee, the only question at issue is the disposition of the property by the bankrupt since the date of the order; the bankrupt is estopped from denying that he was in possession of the property directed to be turned over.²³⁵ A referee in bankruptcy has no jurisdiction, upon a petition by the bankrupt and some of his creditors, to order the trustee to refrain from taking further proceedings for the commitment of the bankrupt for failure to comply with an order of the court for delivery to his trustee of certain property; this question should be determined by the court upon the return of the bankrupt to an order to show cause.²³⁶ Section 41-b prescribes the procedure to be followed in the punishment of a contempt before a referee. The required steps must be closely followed. A further discussion of the required practice will be found under that section.²³⁷

e. Contempts before referee.—Subdivision (16) seems merely to confer on the judge power to punish for contempts other than those committed in his presence or consisting of violations of his own orders. He has the usual power, irrespective of statute, to punish for contempt committed in his presence. If the contempt is committed in the presence of the referee, § 41

²²⁹ *In re Cole* (C. C. A., 1st Cir.), 20 Am. B. R. 761, 163 Fed. 180.

²³⁰ *Matter of Stavrah* (C. C. A., 2d Cir.), 23 Am. B. R. 168, 174 Fed. 330. As to allegations in petition, see Am. B. R. Dig. § 1170.

²³¹ **Right of outside creditor to move to punish for contempt.**—Where no receiver or trustee of a bankrupt has been appointed, but only a custodian, and an order for examination has been obtained by the petitioning creditors, a motion by an outside creditor, without previous application to the court for leave to intervene to punish the bankrupt for contempt, should be denied, in the absence of any allegation of neglect or misconduct

on the part of the petitioning creditors. *Matter of Cantor* (C. C. A., 2d Cir.), 32 Am. B. R. 768, 215 Fed. 61.

²³² *In re Kane* (D. C., Pa.), 10 Am. B. R. 478, 125 Fed. 984.

²³³ *In re Purvine*, (C. C. A., 5th Cir.), 2 Am. B. R. 787, 96 Fed. 192.

²³⁴ *In re Baum* (C. C. A., 8th Cir.), 22 Am. B. R. 295, 169 Fed. 410.

²³⁵ *In re Frankel* (D. C., N. Y.), 25 Am. B. R. 920, 184 Fed. 539.

²³⁶ *Matter of Eystein* (D. C., Pa.), 33 Am. B. R. 606, 219 Fed. 635.

²³⁷ See § 41, "*Contempts before referees*," *post.* See also Am. B. R. Dig., §§ 1170-1174.

applies. The district court may summarily try and determine the question as to whether an assault upon a trustee, as an officer of the court, had been committed, and if so whether it was a contempt of court.²³⁸

VIII. BRINGING IN ADDITIONAL PARTIES.

Subdivision 6 of this section authorizes the court in bankruptcy to bring in and substitute additional persons or parties when necessary for the complete determination of a matter in controversy. The case of *Bryan v. Bernheimer* is an instance where this power was recognized.²³⁹ This power is an important one in bringing about a complete determination of the rights of all parties interested in the property subject to the proceeding. The power has been exercised to bring in a non-joining partner,²⁴⁰ and persons who have filed mechanics' liens for labor and materials furnished to the bankrupt in the construction of a building.²⁴¹ It may be exercised where the name of a creditor has been inadvertently omitted from the schedule. The rule under the former law, that strangers to the proceedings cannot be compelled to come in, is probably still the law; for subsection (6) refers only to "proceedings in bankruptcy."²⁴² Under the case of *Bardes v. Bank*,²⁴³ consent of the proposed defendant was necessary, where the stranger to the proceeding claimed title adversely. Since the amendment of 1903, however, this distinction is not important. The court can order the trustee to sue in a district court, and thus in effect bring in strangers to proceedings in bankruptcy.²⁴⁴ The statute makes ample provision for the intervention of creditors who have failed for some sufficient reason to join with the original petitioners.²⁴⁵ The power to bring in additional parties as conferred by this subdivision, is sufficiently broad to permit the bringing in of any person who has any claim or interest which may be properly determined in the proceedings.

IX. COLLECTION AND DISTRIBUTION OF ESTATES AND DETERMINATION OF CONTROVERSIES.

a. In general.—By subdivision 7 of this section courts of bankruptcy have power to cause the assets of bankrupts to be collected, reduced to money and distributed, and to determine controversies in relation thereto except as herein otherwise provided. It will not be attempted to discuss in this place the power hereinafter conferred upon trustees to sue to recover property preferentially and fraudulently transferred or of a court of bankruptcy generally to entertain a suit for the collection of the bankrupt's assets. These

²³⁸. *Ex parte O'Neal* (D. C., Fla.), 11 Am. B. R. 196, 125 Fed. 967.

²³⁹. 181 U. S. 188, 5 Am. B. R. 623.

²⁴⁰. *In re O'Brien*, 2 N. B. N. Rept. 312. See *In re J. & M. Schwarz* (D. C., N. Y.), 30 Am. B. R. 344, 204 Fed. 326.

²⁴¹. *In re Hobbs & Co.* (D. C., W. Va.), 16 Am. B. R. 544, 145 Fed. 211, holding that where it becomes necessary to complete the bankrupt's building contract in order to receive payment from the owners, the Bankruptcy Court has jurisdiction under section 2 (6) to bring persons who have filed mechanic's liens for labor and materials furnished to the bankrupt in the construction of

the building and to determine the validity of the liens, in order to make proper distribution of the funds arising under the contract of each lienor, and to determine what is due the bankrupt estate.

²⁴². *Sinsheimer v. Simonson* (C. C. A., 6th Cir.), 5 Am. B. R. 537, 107 Fed. 898. See also *In re Hobbs & Co.* (D. C., W. Va.), 16 Am. B. R. 544, 145 Fed. 211.

²⁴³. 178 U. S. 524, 4 Am. B. R. 163.

²⁴⁴. See *Loeser v. Savings Dep. Bank & Trust Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 845, 163 Fed. 212.

²⁴⁵. See section 59-f, and discussion under title "*Intervention by other creditors*," *post*.

powers are more appropriately considered under other sections of the act.²⁴⁶ It will only here be attempted to show how the power may be exercised generally and without special regard for other provisions of the act.

b. Collection and distribution.—(1) **IN GENERAL.**—The act of 1867 contained similar language conferring upon courts of bankruptcy the power to collect and distribute the estates of bankrupts. Precedents under that law will be found valuable. The power to turn a bankrupt's estate into money and distribute it *pro rata* would probably flow from subd. 15, were it not specifically conferred by subd. 7. The power conferred by this subdivision is broad and should be liberally construed in connection with other provisions of the act to accomplish the purposes thereof. The power to collect and reduce to money has a bearing upon the jurisdiction of the court to entertain and determine suits brought by receivers or trustees for the purpose of collecting and reducing to money all the assets of the bankrupt. This subdivision confers express power upon the bankruptcy court to aid duly authorized officers of the court in collecting and distributing the bankrupt's assets. Unless otherwise provided in the act, the power conferred by this subdivision appears to be plenary.²⁴⁷

(2) **RECOVERY OF PROPERTY.**—The extent of this jurisdiction and the conditions under which it will be exercised fall within the consideration of section 23 of the act, which confers jurisdiction upon bankruptcy courts in respect to suits by the trustee, for the recovery of property.²⁴⁸ The power to recover property by suit is subject to the limitation "except as otherwise provided in this act," which evidently has reference to the limitation on the jurisdiction of the district courts imposed by such section.²⁴⁹ It is this power to collect the estate of the bankrupt that authorizes the court to issue all necessary orders directing the bankrupt and others having property belonging to the estate to surrender the same to the trustee.²⁵⁰ It has been deemed sufficient to justify an order directing the bankrupt to sign and deliver to a stock exchange a request for the sale of his seat, and for the payment of the proceeds to the trustee in bankruptcy.²⁵¹ So, too, where property of bankrupt has been taken under a void attachment an order may be issued directing the surrender of the proceeds of the attachment sale to the trustee.²⁵² The court may compel the surrender of money or other assets of the bankrupt, or that of some one for him, on petition and rule to show cause.²⁵³ Where a fraudulent

^{246.} As to jurisdiction of district courts to entertain suits by trustees or receivers in bankruptcy, see Bankr. Act, § 25-b, *post*. As to power of trustee to institute suits for the recovery of property, preferentially or fraudulently transferred, see Bankr. Act, §§ 60-b, 67-e and 70-e, *post*. As to the distribution of the bankrupt's estate among creditors, see Bankr. Act, § 65, *post*.

^{247.} *In re Sievers* (D. C., Mo.), 1 Am. B. R. 117, 124, 91 Fed. 366.

^{248.} See Bankruptcy Act, § 23, and discussion thereunder.

^{249.} See discussion in *Cohen v. American Surety Co.*, 20 Am. B. R. 65, 71, 192 N. Y., 227; *Lynch v. Bronson* (D. C., Conn.), 20 Am. B. R. 139, 160 Fed. 139.

^{250.} *In re Rosser* (C. C. A., 8th Cir.), 4 Am. B. R. 153, 101 Fed. 462; *Ripon Knitting*

Works v. Schreiber (D. C. Wash.) 4 Am. B. R. 299, 101 Fed. 810.

Summary order compelling bankrupt to turn over property.—An order directing a bankrupt to pay over money to his trustee relates to funds under his control at the date of bankruptcy and not at the date of the order, and should so state. *Matter of Pennell* (C. C. A., 3d Cir.), 32 Am. B. R. 241, 214 Fed. 337.

^{251.} *Matter of Hurlbutt, Hatch & Co.* (C. C. A., 2d Cir.), 13 Am. B. R. 50, 135 Fed. 504.

^{252.} *In re Grassler* (C. C. A., 9th Cir.), 18 Am. B. R. 694, 154 Fed. 478.

^{253.} *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224; *In re Kane* (D. C., N. Y.), 20 Am. B. R. 616, 161 Fed. 633; *In re Fidler* (D. C., Pa.), 21 Am. B. R. 101, 163 Fed. 973.

transfer has been made, and the court is satisfied that there is danger of the property transferred being dissipated, the court may order a seizure of the property.²⁵⁴ The court may order property of the bankrupt in the hands of an agent to be delivered to the receiver pending the appointment of a trustee.²⁵⁵ If the court is convinced²⁵⁶ that a third person has money belonging to the bankrupt's estate, it is its duty to require the payment thereof to the trustee; if the money is traced into the hands of such third person the burden is on him to explain how it came there, what became of it, or that he did not have it when the order was made.²⁵⁷ But it is only in clear cases, in which the proof is decisive, that the court is justified in making a peremptory order against a third party directing the disclosure of concealed assets.²⁵⁸ If property mortgaged is not in the possession of a trustee, and the general creditors have no interest therein the court has no jurisdiction to set aside and cancel the mortgage.²⁵⁹ In the exercise of the jurisdiction here conferred the court will be governed by the provisions of section 60-b, which authorizes the trustee to recover property which has been transferred preferentially; of section 67-e, which requires a trustee to institute such suits and proceedings as may be required to reclaim or recover property which has been transferred or incumbered unlawfully; and generally of section 70-e which authorizes a trustee to avoid any transfer of the bankrupt's property which might have been avoided by any creditor of the bankrupt.

(3) SALE OF PROPERTY; ADMINISTRATION.—The power to cause the bankrupt's estate to be reduced to money implies the power to direct the sale of the estate, either subject to or clear from mortgages or other liens.²⁶⁰ It includes the power to preserve the estate, as well as the power to sell. Hence, it comprises the power to enjoin those who would interfere with the

^{254.} *In re Knopf* (D. C., S. Car.), 16 Am. B. R. 432, 144 Fed. 245. In the case of *Matter of Belluscio* (Ref., N. Y.), 25 Am. B. R. 660, it appears that the bankrupt within the four months' period, bought a large amount of goods on credit, the disposition of which or the proceeds of the sale thereof, he did not satisfactorily account for; it was held that an order should be made directing him to turn over to the trustees, the goods for which he did not account or the value thereof.

^{255.} *Matter of Muncie Pulp Co.* (C. C. A., 2d Cir.), 14 Am. B. R. 70, 139 Fed. 546; but not where the payment was of salary actually due the agent when the proceedings were instituted. *In re Lebrecht* (D. C., Tex.), 14 Am. B. R. 445, 135 Fed. 878.

^{256.} *In re Feldser* (D. C., Pa.), 14 Am. B. R. 216, 134 Fed. 307.

^{257.} *In re Alphin & Lake Cotton Co.* (D. C., Ark.), 14 Am. B. R. 194, 134 Fed. 477. See cases cited under "*Punishment for contempt*," ante.

^{258.} *Matter of Gilroy* (D. C., N. Y.), 14 Am. B. R. 627, 140 Fed. 733; *In re Weinreb* (C. C. A., 2d Cir.), 16 Am. B. R. 702, 146 Fed. 243.

A summary order may not be issued compelling a bank to turn over to the trustee in bankruptcy the amount of checks which had been drawn against the bank by depositors,

subsequent to the filing of the bankruptcy petition against them, where it appears that the bank had neither actual nor personal notice of the filing of such petition. *Matter of Zotti* (C. C. A., 2d Cir.), 26 Am. B. R. 234, 186 Fed. 84.

^{259.} *Brumley v. Jones* (C. C. A., 5th Cir.), 15 Am. B. R. 578, 141 Fed. 318.

^{260.} *In re Pittlekow* (D. C., Wis.), 1 Am. B. R. 472, 92 Fed. 901; *In re Worland* (D. C., Iowa), 1 Am. B. R. 450, 92 Fed. 893; *In re Kerski* (D. C., Wis.), 2 Am. B. R. 79; *In re Fite* (D. C., Pa.), 31 Am. B. R. 308, 61 Pitts. Leg. J. 169; *In re Benjamin* (C. C. A., 2d Cir.), 14 Am. B. R. 481, 136 Fed. 175, in which case it was held that a bankruptcy court had power to designate some auctioneer to act for the trustee in selling the bankrupt's estate.

In the case of *In re Arden* (D. C., N. Y.); 26 Am. B. R. 684, 188 Fed. 475, the court said: "This court may, under section 2 of the Bankrupt statute, sell an interest, such as a remainder in real property, and pay off a judgment or mortgage lien on said interest, if the proceeds be sufficient for that purpose, in order to preserve the equity in the property for the benefit of general creditors, but the lien and all rights accruing therefrom, must be respected by the bankruptcy court."

due administration of assets.²⁶¹ This power extends even to a refusal to administer burdensome property.²⁶² Under the present law, it has been asserted to the extent of ordering an assessment for unpaid subscriptions upon the stockholders of a bankrupt corporation.²⁶³ So also in respect to the liquidation of a claim for damages of the bankrupt against a creditor who has come into court with a claim against the estate.²⁶⁴ But the power does not include the power to direct the persons interested in the estate to accept a plan whereby it is proposed to reorganize the business of the bankrupt as a corporation and to deliver to the creditors bonds or other evidences of indebtedness binding upon the proposed corporation.²⁶⁵

(4) CUSTODY OF PROPERTY BY RECEIVER OR MARSHAL.—This subdivision is frequently considered in connection with that provision of the same section which authorizes an order directing the receiver or marshal to take charge of the property of the bankrupt.²⁶⁶ The provisions apply to the powers of receivers or the marshal to take charge of property of bankrupts in the hands of third persons after the filing of the petition, and until it is dismissed or the trustee has qualified.²⁶⁷

c. Settlement of controversies.—Subdivision 7 empowers courts of bankruptcy to determine controversies in relation to the estates of bankrupts, "except as herein otherwise provided." The exception has reference particularly to the limitation imposed upon the jurisdiction of such courts by § 23-b.²⁶⁸ The jurisdiction in respect to the determination of controversies, prior to the amendatory act of 1903, depended on who were the parties to the

²⁶¹. See under Section Eleven. See also "*Effect of Bryan v. Bernheimer*," 5 Am. B. R. 623, 181 U. S. 188, and "*Injunctions other than against Suits*," post; both under this section.

²⁶². Discussed under Section Seventy.

²⁶³. In re Miller Electrical Maintenance Co. (D. C., Pa.), 6 Am. B. R. 701, 111 Fed. 515.

²⁶⁴. In re Harper (D. C., N. Y.), 23 Am. B. R. 918, 934, 175 Fed. 412.

²⁶⁵. Reorganization of corporations.—In the case of Matter of Cornell Co. (D. C., N. Y.), 26 Am. B. R. 252, 186 Fed. 856, the court said: "Nor can a bankruptcy court compel a creditor to consent to have all the bankrupt estate transferred to a corporation and accept in settlement of his claim obligations of the new corporation, payable at a future date. There is no explanation in this bid of what the amount of the capital of the new corporation will be, or how it will be furnished, or how the money necessary to carry on the business will be obtained, but the bid states that any new indebtedness which may be necessarily created by the corporation for money borrowed for any purpose shall have priority over all the certificates of indebtedness proposed to be given in settlement of the debts of the bankrupt. The proposition therefore is that a court of bankruptcy is to authorize a transfer of all the assets of the bankrupt to a corporation, and compel

the creditors of the bankrupt to take the unsecured obligations of the new corporation, payable a long time in the future, and to leave it in the power of the new corporation to create obligations which shall be a prior lien on its assets over its liability upon its obligations to the creditors of the bankrupt. I am clear that a court of bankruptcy has no power to authorize such a sale, and, if it had, I should deem it inexpedient to do so."

In the case of In re Northampton Portland Cement Co., (D. C., Pa.), 25 Am. B. R. 565, 185 Fed. 542, the court held that it had no power to compel creditors of a bankrupt corporation to give up their existing claims, and in the place of such claims to accept stock in the new corporation to be formed to take over all the assets of the bankrupt, and to assent to other conditions contained in the plan of reorganization, even though the plan is a desirable one, and regular administration in bankruptcy would result in heavy loss to the creditors.

²⁶⁶. McNulty v. Feingold (D. C., Pa.), 12 Am. B. R. 338, 129 Fed. 1001; Mason v. Wolkowich (C. C. A., 1st Cir.), 17 Am. B. R. 709, 150 Fed. 699.

²⁶⁷. McNulty v. Feingold (D. C., Pa.), 12 Am. B. R. 338, 129 Fed. 1001.

²⁶⁸. In re Walsh Bros. (D. C., Ia.), 21 Am. B. R. 14, 17, 163 Fed. 352; In re Kornit Mfg. Co. (D. C., N. J.), 27 Am. B. R. 244, 192 Fed. 392.

suit.²⁶⁹ Since then, as to suits to recover property, it depends, as did the same jurisdiction under the law of 1867, on the subject-matter.²⁷⁰ When the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine the controversies in relation to the disposition of the same and the extent and character of liens thereon or rights therein.²⁷¹ If the property or fund is in the possession of the court, represented by one of its officers, as receiver or trustee, controversies in respect thereto are clearly within its jurisdiction.²⁷² If the property is in the possession of an adverse claimant the court cannot summarily direct him to turn the property over to an officer of the court.²⁷³ If an adverse claimant bases his right upon that of the bankrupt the controversy is within the summary jurisdiction of the bankruptcy court.²⁷⁴ The rule may be summarized as follows: Where there is a claim of adverse title to property of the bankrupt based on a transfer antedating the bankruptcy, a plenary suit must be brought, either at law or in equity, by the trustee, in which the adverse claim of title may be adjudicated. But if there is no such adverse claim of title, and the property is in the physical possession of a third party, or of an agent of the bankrupt, or of an officer of a bankrupt corporation, who refuses to deliver it to the trustee, it is not necessary to bring a plenary suit, but the court may act summarily.²⁷⁵ All of these rules are elaborated upon and discussed fully under section 23 which has special reference to suits by trustees in respect to property in the bankrupt estate.

269. *Bardes v. Bank*, 178 U. S. 524, 4 Am. B. R. 163.

Subsection (7) applies only where the trustee is the adverse claimant, and leave to sue him in the State court will be denied. In re McCallum (D. C., Pa.), 7 Am. B. R. 596, 113 Fed. 393. See also In re Siegel-Hillman Co. (D. C., Mo.), 7 Am. B. R. 351, 111 Fed. 983, and In re Kellogg (D. C., N. Y.), 7 Am. B. R. 623, 113 Fed. 120, *affd.*, 10 Am. B. R. 7, 121 Fed. 333, 57 C. C. A. 547, holding on appeal that the controversies in relation to the bankrupt estate which do not come within the jurisdiction of the bankruptcy court are those where the trustee must bring suit to assert title to property not in his possession or under his control. Where, even before the amendment, the claimant is also a bankrupt, jurisdiction to decide between the two estates exists; In re Rosenberg (D. C., Pa.), 8 Am. B. R. 624, 116 Fed. 402.

270. *Kelly v. Smith*, Fed. Cas. 7,675. Under law of 1841, Buckingham v. McLean, 13 How. 151. See also Section Twenty-three.

271. *Whitney v. Wenman*, 198 U. S. 539, 14 Am. B. R. 45, in which case it was held that a district court could determine by plenary suit in equity the title to property claimed by trustee to have been surrendered to third parties by the temporary receiver after the filing of a voluntary petition in bankruptcy, without right and authority from the court; *Matter of Traunstein &*

White (D. C., Mass.), 34 Am. B. R. 482, 225 Fed. 317; In re National Boat & Engine Co. (D. C., Mo.), 33 Am. B. R. 154, 216 Fed. 211; *Matter of Larkey* (D. C., N. J.), 32 Am. B. R. 287, 214 Fed. 867.

272. In re Antigo Screen Co. (C. C. A., 7th Cir.), 10 Am. B. R. 359, 123 Fed. 249, 58 C. C. A. 248; In re Leeds Woolen Mills (D. C., Tenn.), 12 Am. B. R. 136, 129 Fed. 922, holding further that the jurisdiction once acquired cannot be defeated by the surrender of the property to the alleged rightful owner; *Cleminshaw v. International Shirt & Collar Co.* (D. C., N. Y.), 21 Am. B. R. 616, 164 Fed. 797; In re McDougall (D. C., N. Y.), 23 Am. B. R. 762, 175 Fed. 400; In re Drayton (D. C., Wis.), 13 Am. B. R. 602, 135 Fed. 883; *Matter of McBride* (D. C., N. Y.), 12 Am. B. R. 81, 132 Fed. 285.

273. *Matter of Andre* (C. C. A., 2d Cir.), 13 Am. B. R. 132, 135 Fed. 736, 68 C. C. A. 374. The validity of an assignment of wages made prior to the filing of the bankruptcy petition must be determined by plenary suit. In re Driggs (D. C., N. Y.), 22 Am. B. R. 621, 171 Fed. 897.

274. *Goodnough Mercantile & Stock Co. v. Galloway* (D. C., Or.), 19 Am. B. R. 244, 156 Fed. 504; In re Kane (D. C., N. Y.), 20 Am. B. R. 616, 624, 161 Fed. 633; In re Franklin Suit & Skirt Co. (D. C., Pa.), 28 Am. B. R. 278, 197 Fed. 591.

275. *Babbitt v. Dutcher* (Sup. Ct.), 216 U. S. 102, 23 Am. B. R. 519.

X. CLOSING AND REOPENING ESTATES.

a. In general.—Subdivision 8 of section 2 invests courts of bankruptcy with the power to “close estates whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered.” The final accounts of trustees are to be filed with the court fifteen days before the date fixed for the final meeting of the creditors.²⁷⁶

b. Closing estates.—Under this subdivision an estate can only be closed when it appears that it has been fully administered.²⁷⁷ Where the final account of the trustee has been approved, the trustee discharged and all the funds of the estate distributed, the estate will be deemed “closed” within the meaning of this subdivision.²⁷⁸ Where there are no assets and no creditors appear at the first meeting, the appointment of a trustee may be dispensed with.²⁷⁹ It would seem to follow that where there are no assets, an estate may not be technically closed under this subdivision.²⁸⁰ The estate is usually closed by the entry of an order approving the accounts of the trustee and discharging him from his trust. By the terms of the subdivision the act of closing the estate consists of the approval of the final accounts and the discharge of the trustee.²⁸¹ As we have seen the general policy of the law requires trustees and other court officials to deal expeditiously with the administration of bankrupt estates.²⁸² The closing of the estate does not operate to transfer the title of unadministered assets back to the bankrupt,

^{276.} See Bankr. Act, § 47-a, subd. 8, and cases cited thereunder. As to closing and reopening estate in bankruptcy, see cases digested in Am. B. R. Dig. §§ 623-629. Matter of Sayer (D. C., N. Y.), 32 Am. B. R. 90, 210 Fed. 397. (Quoting text.)

^{277.} Matter of Sayer (D. C., N. Y.), 32 Am. B. R. 90, 210 Fed. 397. (Quoting text.)

^{278.} Kinder v. Scharff, 129 La. 218, 26 Am. B. R. 765, 55 So. 769.

It is provided in section 11-d, that “suits shall not be brought by or against the trustee of a bankrupt estate subsequent to two years after the estate has been closed.” There is no difficulty as to the time when an estate is deemed closed, where the trustee has assets in his possession and makes distribution thereof among the creditors. In such cases the time of closing is the date of the discharge of the trustee upon submission of his final account. More difficulty will arise in determining the time of closing when the estate of the bankrupt contains no assets. (See discussion of this subject under Section Eleven of this work, subtitle “*Limitation on Suits by Trustees.*”)

^{279.} General Order XV. See also Clark v. Pidcock (C. C. A., 3d Cir.), 12 Am. B. R. 309, 129 Fed. 745; In re Levy (D. C., Wis.), 4 Am. B. R. 108, 101 Fed. 247.

^{280.} Clark v. Pidcock (C. C. A., 3d Cir.), 12 Am. B. R. 309, 129 Fed. 745, in which case the court said: “The estate, however, was not technically closed because there

was no final meeting of creditors or discharge of the trustee upon the settlement of his accounts.”

^{281.} **Settlement of estate.**—The final settlement of the bankrupt's estate will not be ordered until a full and complete record of the proceedings is made, showing that they have been conducted in accordance with the requirements of the act and the general orders of the Supreme Court and the district rules and a balance sheet is presented which can be understood, and from which the bankrupt and his creditors can see what has been done with their money. In re Carr (D. C., N. C.), 8 Am. B. R. 635, 116 Fed. 556.

^{282.} See discussion under heading “*Expeditious exercise of jurisdiction.*” *ante.*

In re Carr (D. C., N. C.), 8 Am. B. R. 635, 116 Fed. 556. See generally under Bankr. Act, § 47, *post*; and as to when an estate is “closed,” see §§ 11 and 55, *post*.

Speedy administration.—In the case of Boyd v. Glucklich (C. C. A., 8th Cir.), 8 Am. B. R. 393, 116 Fed. 131, the court said: “The bankruptcy act contemplates that proceedings in bankruptcy shall go forward with all reasonable dispatch compatible with the due and orderly administration of justice and a proper regard for the fundamental rights of the citizens.” See also In re Paine (D. C., Ky.), 11 Am. B. R. 354, 127 Fed. 346.

so as to permit recovery by the legal representatives of the bankrupt after his death.²⁸³

c. Reopening estates.—(1) **IN GENERAL.**—This subdivision recognizes the power of the court to reopen estates “whenever it appears they were closed before being administered.” Upon the proper showing of jurisdictional facts, it is the duty of the court to reopen the estate.²⁸⁴ The exercise of the power to reopen rests in the sound discretion of the court, upon the consideration of all the circumstances.²⁸⁵ The reopening does not reinstate the discharged trustee, but creates a vacancy in the office, to be filled as provided in § 44, post.²⁸⁶

(2) **LACK OF ADMINISTRATION SOLE GROUND.**—The subdivision provides for the reopening of an estate only when closed “before being administered.” This is the only ground for the reopening of an estate. It becomes essential therefore to ascertain whether there has been a lack of administration before granting the application to reopen.²⁸⁷ The common cause is, therefore, the discovery of unadministered assets, and it has been held that the allegations of the petition to reopen must be such as to satisfy the court that such assets exist.²⁸⁸ An application by the bankrupt to reopen the proceedings may be granted on the ground of newly discovered assets, although the time for filing claims has expired.²⁸⁹ And where the bankrupt failed to schedule an interest in a trust fund the estate should be reopened where it appears that the bankrupt has an interest in remainder or expectancy in such trust.²⁹⁰

(3) **PARTIES WHO MAY APPLY.**—The application for reopening must be made by some party interested in the estate, and who would be benefited by the reopening.²⁹¹ Creditors who have not proved their claims cannot apply for the relief.²⁹² A former trustee has no standing in court to seek the reopening of an estate.²⁹³

(4) **NOTICE AND PETITION.**—The practice is simple—an *ex parte* application to the judge for an order reopening, and, if granted, a reference to the referee and a meeting of creditors on notice, with the other subsequent

^{283.} *Matter of Lighthall*, (D. C., N. Y.), 34 Am. B. R. 594, 221 Fed. 791; and see *Fowler v. Jenks* (Minn. Sup. Ct.), 11 Am. B. R. 255, 90 Minn. 74, 95 N. W. 887, 96 N. W. 914.

^{284.} *In re Newton* (C. C. A., 8th Cir.), 6 Am. B. R. 52, 107 Fed. 429; *Matter of Sayer* (D. C., N. Y.), 32 Am. B. R. 90, 210 Fed. 397 (quoting text).

^{285.} *Matter of Paine* (D. C., Ky.), 11 Am. B. R. 351, 127 Fed. 246.

Discretion of court.—An application to reopen the estate of a bankrupt to enable the trustee to maintain an action to recover concealed assets is addressed to the discretion of the court, and its action will not be reversed except for an abuse of discretion. *In re Goldman* (C. C. A., 2d Cir.), 11 Am. B. R. 707, 129 Fed. 212; *Matter of Sayer* (D. C., N. Y.), 32 Am. B. R. 90, 210 Fed. 397 (quoting text).

^{286.} *Matter of Rochester Baths Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 355, 222 Fed. 22.

^{287.} *Matter of Paine* (D. C., Ky.), 11 Am. B. R. 351, 127 Fed. 246, in which the court said: “The power to reopen the case

is given in one contingency only, namely, when it appears that the case was closed before being fully administered.” *Matter of Sayer* (D. C., N. Y.), 32 Am. B. R. 90, 210 Fed. 397 (quoting text).

^{288.} *In re Newton* (C. C. A., 8th Cir.), 6 Am. B. R. 52, 107 Fed. 439; *Matter of Paine* (D. C., Ky.), 11 Am. B. R. 351, 127 Fed. 246; *Matter of Sayer* (D. C., N. Y.), 32 Am. B. R. 90, 210 Fed. 397 (quoting text).

^{289.} *In re Pierson* (D. C., N. Y.), 23 Am. B. R. 58, 174 Fed. 160.

^{290.} *Pollack v. Meyer Bros. Drug Co.* (C. C. A., 8th Cir.), 36 Am. B. R. 835, 233 Fed. 861.

^{291.} *In re Chandler* (C. C. A., 7th Cir.), 14 Am. B. R. 512, 138 Fed. 637, 71 C. C. A. 87; *In re Meyer* (D. C., Or.), 25 Am. B. R. 44, 181 Fed. 904.

^{292.} *Matter of Paine* (D. C., Ky.), 11 Am. B. R. 351, 127 Fed. 246; *In re Shaffer* (D. C., N. Car.), 4 Am. B. R. 728, 104 Fed. 982.

^{293.} *Matter of Paine* (D. C., Ky.), 11 Am. B. R. 351, 127 Fed. 246.

proceedings as in the original case. The petition to reopen an estate need not be of any formal or technical character, but should reasonably satisfy the court of the requisite jurisdictional fact of non-administration.²⁹⁴ The petition is not required to show what property was surrendered by the bankrupt, or what representations were made in his schedules, nor that any creditor was deceived by his representations.²⁹⁵

(5) **HEARING ON APPLICATION.**—The jurisdictional facts must appear, that is, it must be established in some legal way that some assets belonging to bankrupt at the time of his bankruptcy were not administered in the proceeding.²⁹⁶ And to establish the essential facts the court may take into consideration anything that appears in the record of the original bankruptcy proceeding.²⁹⁷

(6) **WHEN APPLICATION GRANTED.**—The application may be granted where a probable fraudulent transfer of property is apparent; in such case the order reopening the estate should not be construed as authorizing the trustee to commence an action in a State court to set aside the transfer.²⁹⁸ The bankrupt's application to reopen made several months after his discharge, so as to permit him to amend his schedules by inserting the name of a creditor omitted therefrom, so that the bankrupt may be discharged also from such creditor's claim should be denied.²⁹⁹ But a reopening after a discharge has been permitted for the purpose of amending schedules by inserting a claim upon which an action was pending at the time of adjudication and to which a counterclaim had been pleaded.³⁰⁰ Where assets are discovered or become available which were not known or were unadministered when the estate was closed, an order may be made reopening the estate; such assets must have been in existence when the petition was filed, and must be such as would pass to the trustee.³⁰¹ And where an estate has been opened because of newly discovered assets the bankrupt will be permitted to amend his schedules to include exemptions, where he had received but a part of the

^{294.} *In re Newton* (C. C. A., 8th Cir.), 6 Am. B. R. 52, 107 Fed. 430, holding that while a petition to reopen an estate once closed need not be of formal or technical character, it should, either in itself or in connection with supporting affidavits, be of such a nature as to reasonably satisfy the court of the requisite jurisdictional fact that there are some assets belonging to the bankrupt which have not been administered; and a petition which does not state substantial or definite facts, but simply asks for the appointment of a trustee, is not sufficient to warrant action by the court in this respect.

Unverified petition.—An order to open a closed estate will not be granted when the papers in the case are unverified, if affidavits of reputable, disinterested persons are filed which deny the statements in the moving papers. *In re Soper & Slada* (Ref., N. Y.), 1 Am. B. R. 193.

^{295.} *Traub v. Marshall Field Co.* (C. C. A., 5th Cir.), 25 Am. B. R. 410, 182 Fed. 622.

^{296.} *In re Newton* (C. C. A., 8th Cir.), 6 Am. B. R. 52, 107 Fed. 430.

^{297.} *Pollack v. Meyer Bros. Drug Co.* (C. C. A., 8th Cir.), 36 Am. B. R. 835, 233 Fed. 861.

^{298.} *In re Ryburn* (D. C., Ct.), 16 Am. B. R. 514, 145 Fed. 662.

^{299.} *In re Spicer* (D. C., N. Y.), 16 Am. B. R. 802, 145 Fed. 431.

^{300.} *In re McKee* (D. C., N. Y.), 21 Am. B. R. 306, 165 Fed. 269.

^{301.} *Matter of Lighthall* (D. C., N. Y.), 34 Am. B. R. 594, 221 Fed. 791, in which it was held that where a bankrupt duly scheduled as an asset a claim against a debtor and the latter's assignee, and it appeared that the debtor owned an interest in an insurance policy on the life of a third party, which was of little cash value, and on which the premiums were paid by others than the bankrupt, and the trustee did not abandon the claim, upon the death of the insured after the closing of the bankrupt's estate, the dividend on such claim resulting from the proceeds of the insurance policy belongs to the estate and is not after-acquired property.

exemptions to which he was entitled, because of insufficiency of assets.³⁰² Where a discharge was refused because the bankrupt had not accounted for a large sum of money, the estate may be reopened.³⁰³ It has been held that, where the time to file claims has expired, a reopened case will redound to the benefit only of creditors whose claims were allowed in the original proceeding.³⁰⁴ Laches of the applicant may deprive him of his right to a reopening.³⁰⁵ It frequently becomes necessary to reopen estates that there may be a trustee on whom process may be served; thus, where burdensome property has vested in the trustee, and, by inadvertence, he has not been formally excused from taking the same, and a mortgagee wishes to foreclose.

XI. CONFIRMATION OR REJECTION OF COMPOSITIONS.

Subdivision 9 of this section authorizes a court of bankruptcy to "confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases." Section 12 of the act recognizes and specifies the compositions which are subject to confirmation by the court. This whole subject is discussed under that section. The power conferred upon the court to confirm or reject such composition is limited to those recognized in § 12.³⁰⁶

XII. ENFORCEMENT OF ACT BY NECESSARY ORDERS, PROCESS OR JUDGMENT.

a In general.—Subdivision 15 invests courts of bankruptcy with the powers "to make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act." This is the omnibus clause of the section. Generally speaking, it may be availed of to compel anything which ought to be done for, or to prevent anything which ought not to be done against, the enforcement of the law; provided the court of bankruptcy otherwise has jurisdiction of the person or the subject-matter.³⁰⁷ Under the power here conferred the bankrupt may be compelled to perform other duties than those enumerated in § 7; he may be restrained from leaving the juris-

³⁰² *In re Irwin* (D. C., Pa.), 22 Am. B. R. 165, 177 Fed. 284.

³⁰³ *In re Barton* (D. C., Ark.), 16 Am. B. R. 569, 144 Fed. 540.

³⁰⁴ *In re Shaffer* (D. C., N. Car.), 4 Am. B. R. 728, 104 Fed. 982.

³⁰⁵ **Laches in making application.**—In the case of *In re Paine* (D. C., Ky.), 11 Am. B. R. 351, 127 Fed. 248, the court held the proper rule to be that a fairly reasonable time, under all the circumstances of the case, should be allowed and that if the parties who had full knowledge delayed an unreasonable time to seek to reopen a case, their laches should authorize the court to refuse to do so. In the case of *In re Reese* (D. C., Ala.), 8 Am. B. R. 411, 115 Fed. 993, it was held laches on the part of a creditor, who had received notice of the filing of a petition, to fail to contest the bankrupt's claim to exemption. In the case of *Vary v. Jackson* (C. C. A., 5th Cir.), 21 Am. B. R. 334, 164 Fed. 840, a delay of seven years was held laches, especially since the peti-

tioner failed to show when the alleged fraud was discovered. See also *Traub v. Marshall Field Co.* (C. C. A., 5th Cir.), 25 Am. B. R. 410, 182 Fed. 622.

³⁰⁶ *In re Frear* (D. C., N. Y.), 10 Am. B. R. 199, 120 Fed. 978.

³⁰⁷ *In re Hicks* (D. C., N. Y.), 13 Am. B. R. 654, 133 Fed. 739. The language of the text was quoted with approval in the case of *In re Donnelly* (D. C., Ohio), 26 Am. B. R. 304, 307, 188 Fed. 1001.

Scope of subdivision.—In the case of *In re Swofford Bros. Dry Goods Co.* (D. C., Mo.), 25 Am. B. R. 282, 286, 180 Fed. 549, the court said: "It is said this section may be availed of to compel anything which ought to be done for, or to prevent anything which ought not to be done against the enforcement of the law; provided the court of bankruptcy otherwise has jurisdiction of the person or the subject-matter. For such purposes the court has the plenary powers of a court of equity and can exercise the powers of such a court for the ascertainment and en-

diction of the court in the proper case, by writ of *ne exeat*.³⁰⁸ This subdivision is not sufficiently broad to authorize an order requiring a bankrupt, who has been released from arrest, to give bail.³⁰⁹ It is ample to authorize a referee to order a creditor to file a bill of particulars as to a certain item in his claim.³¹⁰

b. Injunctions other than against suits.—(1) **IN GENERAL.**—Early in the administration of the present law, the injunction was frequently used to prevent the dissipation of assets to which the bankrupt had title.³¹¹ Through this power a court may extend the powers of receivers appointed under § 2 (3); in the exercise of it the court may compel the surrender by a bankrupt of his property. It is frequently called upon to justify the making of orders and the issuing of process required for the due administration of the bankrupt's estate. Many instances of such orders and process might be here cited, but it seems more appropriate to refer to them in connection with other parts of the act. The power to enjoin is inherent in the court of bankruptcy as a court of equity. It includes the power to grant stays, conferred by § 11, of pending suits in other courts. That the broad phrasing of subdivision 15 amounts to an express ratification of this inherent power has not been doubted. The exercise of it, like the quasi-criminal remedy of contempt, is essential to the due enforcement of the act, as was the additional process of seizure when the act complained of amounted to an act of bankruptcy or other fraud on the act.³¹² The power when exercised, is subject to the same rules and limitations as in the case of a writ of injunction issued under other circumstances; for instance its use is available to prevent the infliction of threatened or imminent, and not mere possible injury.³¹³ Where,

forcement of the rights and equities of the various parties interested in the estate of the bankrupt company." Citing *In re Seigel-Hillman Dry Goods Co.* (D. C., Mo.), 7 Am. B. R. 351, 111 Fed. 980-983; *Dodge v. Norlin* (C. C. A., 8th Cir.), 13 Am. B. R. 176, 133 Fed. 363-368, 66 C. C. A. 425; *Bardes v. Hawarden Bank*, 178 U. S. 524-535, 4 Am. B. R. 163, 20 Sup. Ct. 1000, 44 L. Ed. 1175. The power should be exercised so as to facilitate the prompt settlement of bankrupt estates, and technical pleas should be disregarded when no injustice will result. *In re Musica & Son* (D. C., La.), 30 Am. B. R. 555, 205 Fed. 413.

^{308.} *In re Cohen* (D. C., Ill.), 14 Am. B. R. 355, 126 Fed. 599; *In re Lipke* (D. C., N. Y.), 3 Am. B. R. 569, 98 Fed. 970; *In re Fleischer* (D. C., N. Y.), 18 Am. B. R. 194, 151 Fed. 82; *Matter of Berkowitz* (D. C., N. J.), 22 Am. B. R. 231, 173 Fed. 1012. Compare *In re Ketchum* (C. C. A., 6th Cir.), 5 Am. B. R. 532, 108 Fed. 35.

^{309.} *U. S. ex rel. Kelly v. Peters* (D. C., Ill.), 22 Am. B. R. 177, 166 Fed. 613.

^{310.} **Bill of particulars.**—Under section 63b and section 2(15) of the bankruptcy act, a referee may in his discretion require creditors to file a bill of particulars as to a certain item of their claim, whether liquidated or unliquidated. *Matter of Siegel Co.*

(D. C., Mass.), 35 Am. B. R. 128, 228 Fed. 368.

^{311.} For instance, see *In re Gutwillig* (C. C. A., 2d Cir.), 1 Am. B. R. 388, 92 Fed. 337, which is typical of the earlier cases, and *In re Kleinhans* (D. C., N. Y.), 7 Am. B. R. 604, 113 Fed. 107; *In re Smith* (D. C., Ga.), 8 Am. B. R. 55, 113 Fed. 993; *In re Tune* (D. C., Ala.), 8 Am. B. R. 285, 115 Fed. 906, and *In re Gutman* (D. C., N. Y.), 8 Am. B. R. 252, 114 Fed. 1009, among the later cases. Nor is it thought that the cases of *In re Shoemaker* (D. C., Va.), 7 Am. B. R. 437, 112 Fed. 648, and *In re Wells* (D. C., Mo.), 8 Am. B. R. 75, 114 Fed. 222, have, save in their respective districts, abridged this very necessary power. Verbal notice of the injunction has been held enough. *In re Krinsky Bros.* (D. C., N. Y.), 7 Am. B. R. 535, 112 Fed. 972. For analogous cases, see, also, under section eleven of this work.

^{312.} *In re Etheridge Furniture Co.* (D. C., Ky.), 1 Am. B. R. 112, 92 Fed. 329; *In re Sievers* (D. C., Mo.), 1 Am. B. R. 117, 91 Fed. 366; *In re De Gottardi* (D. C., Cal.), 7 Am. B. R. 723, 114 Fed. 328.

^{313.} **Matter of Penn Development Co.** (D. C., Cal.), 33 Am. B. R. 739, 220 Fed. 222. As to injunctions to restrain disposition of property transferred fraudulently, see *Moore on Fraudulent Conveyances*, Vol. 2, p. 1041-1046.

however, the property at which the process was aimed was claimed adversely by another and in that other's possession, the Supreme Court's decision in the *Bardes* case at once made it doubtful whether this jurisdiction could longer be exercised.³¹⁴ This doubt has now been removed by the amendments of 1903.³¹⁵ It may be suggested, however, that *Bryan v. Bernheimer*, *supra*, having affirmed the doctrines of the earlier decisions and to that extent limited the *Bardes* case, the power to take a bankrupt's property from the possession of one who holds it under a transfer which is in itself an act of bankruptcy, and the lesser power of enjoining his disposition of it, have always been available.³¹⁶ Indeed, the reasoning of *Bryan v. Bernheimer* indicates that where the possession, though adverse, is through an act which amounts to a fraud on the law, though possibly not an act of bankruptcy, the power to enjoin existed even before the amendment of § 23-b by the act of 1903.³¹⁷ In any event, as the law now stands, ample authority exists to prevent by injunction the disposition of property in the possession of adverse claimants, pending the determination of the controversy as to the title of such property,³¹⁸ provided there is no unreasonable delay on the part of the attacking creditors.³¹⁹

(2) ACTS PRIOR TO ADJUDICATION.—When a petition is filed the bankruptcy court may restrain by injunction the commission of any act that will interfere with or prevent the due administration of the act,³²⁰ for the purpose

³¹⁴ See *In re Ward* (D. C., Mass.), 5 Am. B. R. 215, 104 Fed. 985.

³¹⁵ See Section Twenty-three of this work.

Injunction to restrain disposition of property.—In the case of *In re Norris* (D. C., N. Y.), 24 Am. B. R. 444, 177 Fed. 598, the court said: "Under the circumstances, it would seem that the only safe way to protect the rights of the creditors is to continue the injunction until the rights of the parties have been determined by a proper tribunal. Formerly it was doubtful whether a court of bankruptcy could take jurisdiction to restrain the disposition of property in possession of a third person claiming title thereto; but the case of *Bryan v. Bernheimer*, 181 U. S. 188, 5 Am. B. R. 623, 21 Sup. Ct. 557, 45 L. Ed. 814, and the amendment of 1903 (Act Feb. 5, 1903, c. 487, § 8, 32 Stat. 798 [U. S. Comp. St. Supp. 1909, p. 1312]) to section 23-b of the bankruptcy act, removes any doubt that may theretofore have existed as to such power. If the proposed sale of the property, which is in the possession of the wife of the bankrupt therein, is not enjoined during the pendency of the plenary action, it is not difficult to perceive that the interests of the general creditors are liable to suffer." Citing *Collier on Bankruptcy* (7th ed.) p. 50.

³¹⁶ See *In re Bender* (D. C., Ark.), 5 Am. B. R. 632, 106 Fed. 873; s. c., on appeal *sub nom.* *In re Young* (C. C. A., 8th Cir.), 7 Am. B. R. 14, 111 Fed. 158.

³¹⁷ Note also *In re Currier* (Ref., N. Y.), 5 Am. B. R. 639.

³¹⁸ *Lawrence v. Lowrie* (D. C., Pa.), 13 Am. B. R. 297, 133 Fed. 995; *Blake v. Nesbet* (D. C., Mo.), 16 Am. B. R. 269, 144 Fed. 279; *Matter of Berkowitz* (D. C., N. J.),

22 Am. B. R. 233, 173 Fed. 1013; *In re Norris* (D. C., N. Y.), 24 Am. B. R. 444, 177 Fed. 598. See cases cited Am. B. R. Dig. § 669.

319. Injunction against officers of corporation; delay.—Where there is no testimony tending to show that property in the possession of an officer of a bankrupt corporation really belongs to the corporation or that it has any interest therein, and where there is nothing to challenge the officer's claim of personal ownership except suspicion due to the general situation, any impounding of the property while petitioning creditors look for evidence at least approaches the margin line of the rightful exercise of power; but in any event, only the briefest practicable delay can be allowed, and the exercise of diligence must be imposed upon the attacking creditors. *Matter of McGurley* (C. C. A., 6th Cir.), 33 Am. B. R. 612, 219 Fed. 159.

³²⁰ *In re Hornstein* (D. C., N. Y.), 10 Am. B. R. 308, 122 Fed. 266, in which it was held that the court has power between the time an involuntary petition is filed and the selection of a trustee, to enjoin all persons within its jurisdiction from doing any act that will interfere with or prevent the due administration of the bankruptcy act, and comity does not require said court to compel persons whose rights are seriously jeopardized by proceedings in a State court to resort thereto for protection. *In re Smith* (D. C., Ga.), 8 Am. B. R. 55, 113 Fed. 993; *In re Goldberg* (D. C., N. Y.), 9 Am. B. R. 156, 117 Fed. 692; *In re Hines* (D. C., Ore.), 16 Am. B. R. 538, 144 Fed. 147; *Matter of Schow* (D. C., Conn.), 32 Am. B. R. 494, 213 Fed. 514.

of preserving the *statu quo* of the property until it may be ascertained whether or not an adjudication should be decreed.³²¹

(3) **INJUNCTION TO RESTRAIN SALES.**—Under this clause a court of bankruptcy may restrain a sale of the property of a bankrupt corporation, at the instance of its treasurer, to pay debts secured by a trust deed covering all the property, where it appears that the interests of all the parties would be protected by selling the property under the direction of the bankruptcy court.³²² The court may enjoin the sale of real property under foreclosure in a state court, where necessary to protect the interests of creditors of a bankrupt who has a substantial interest in such property;³²³ but the court should not intervene where the interests of the bankrupt's creditors in the property would be protected amply in the state court.³²⁴ Where the judgment of foreclosure antedated the four months' period before adjudication; the injunction will be denied.³²⁵ A bankruptcy court may not restrain a sale by the pledgee of property held by him under a valid agreement of pledge by the bankrupt and pursuant to its terms.³²⁶ Such a pledge and the rights of the parties thereto are governed by the law of the State where made,³²⁷ and, being valid and not forbidden by any provision of the bankruptcy act, cannot be interfered with by the court. A sale by a receiver of a corporation, who has been in possession for a considerable time prior to bankruptcy, should not be restrained unless it clearly appears that the interests of creditors will be thereby jeopardized.³²⁸

(4) **OTHER INSTANCES WHERE INJUNCTION WILL ISSUE.**—The power will be exercised to protect the bankrupt from the enforcement of a penalty imposed by a State law or city ordinance, for a failure to pay a dischargeable debt,³²⁹ and to protect the bankrupt from arrest while attending court or engaged in the performance of a statutory duty.³³⁰ Injunction will lie to prevent removal of property to a foreign country which is alleged to have

321. *Matter of Schow* (D. C., Conn.), 32 Am. B. R. 494, 213 Fed. 514; *In re Hines* (D. C., Ore.), 16 Am. B. R. 538, 144 Fed. 147.

322. *In re Jersey Island Packing Co.* (C. C. A., 9th Cir.), 14 Am. B. R. 689, 138 Fed. 625.

323. **Jurisdiction to enjoin sale under mortgage foreclosure.**—A bankruptcy court has jurisdiction to stop the sale of a bankrupt's property under a mortgage foreclosure in a State court where absolutely necessary under the facts of the particular case in order to protect the rights of the creditors or the trustee, which would otherwise be lost or impaired. Whether or not a sale should be enjoined, however, is a question of discretion and policy in each case under its peculiar facts. *Broach v. Mullis* (D. C., Ga.), 35 Am. B. R. 841, 228 Fed. 551.

Where a bankrupt has any substantial equity in real estate sought to be sold in foreclosure and partition actions, such sale should be stayed until a trustee is appointed and qualified so that he may protect the interests of the general creditors in such property. *Matter of Morse* (D. C., N. Y.), 32 Am. B. R. 207, 210 Fed. 900.

324. Where the trustee may assert all the

rights he has in the State court and where the sheriff of the State court has seized the property, the rule of comity prevailing between the courts would constrain a bankruptcy court to deny an injunction. *Broach v. Mullis* (D. C., Ga.), 35 Am. B. R. 841, 228 Fed. 551.

325. *Broach v. Mullis* (D. C., Ga.), 35 Am. B. R. 841, 228 Fed. 551.

Sale of real estate.—A bankruptcy court has not jurisdiction to stay the sale of real estate duly seized under a judgment rendered in an action to foreclose a mortgage, rendered long prior to the four months preceding the petition and adjudication of the mortgagor. *Sample v. Beasley* (C. C. A., 5th Cir.), 20 Am. B. R. 164, 158 Fed. 606.

326. *Matter of Mayer* (C. C. A., 2d Cir.), 19 Am. B. R. 356, 156 Fed. 432.

327. *Hiscock v. Varick Bank*, 208 U. S. 26, 18 Am. B. R. 1.

328. *In re Steelingworth Ry. Supply Co.* (D. C., Pa.), 21 Am. B. R. 342, 164 Fed. 591.

329. *In re Hicks* (D. C., N. Y.), 13 Am. B. R. 654, 133 Fed. 739; *In re Home Discount Co.* (D. C., Ala.), 17 Am. B. R. 168, 187, 147 Fed. 538.

330. *Matter of Adler* (C. C. A., 2d Cir.), 16 Am. B. R. 414, 144 Fed. 659.

been preferentially transferred.³³¹ Where a contract is in existence in which the bankrupt has a valuable interest, the court may, at the instance of the trustee, restrain the violation of such contract.³³² An injunction to prevent the breach of a contract is a negative specific enforcement of it, and the test of the jurisdiction of equity to grant such an injunction is the inadequacy of the legal remedy.³³³

c. **Practice.**— This protective process is frequently resorted to in involuntary cases, sometimes being included in and sometimes following the order appointing a receiver. Where possible, the order granted should be in the nature of a temporary stay, coupled with a show cause returnable on a day certain. The use of the writ itself is, however, not unusual, and, there being no limitation on its operation, as there is on the writ issued under § 11, it remains in force until modified or dissolved. Any one aggrieved can, on proper notice, move to dissolve. The application both for and to dissolve the injunction may be made on petition or affidavits, entitled in the case, and, if after the adjudication, should be made to the referee.³³⁴ It has been thought that the referee can grant no more than a temporary stay, the Supreme Court having, by General Order XII, limited the granting of injunctions on suits to the judge. But this general order affects the injunction here discussed only by analogy. Since *Mueller v. Nugent*, *supra*, it would seem that the referee, being vested with all the functions of a court of bankruptcy save a few, not inclusive of the power to enjoin, may grant permanent injunction orders having all the force of like orders issuing from the judge, except to stay proceedings of a court or an officer of the United State or of a State.³³⁵

d. **Precedents under the law of 1867.**— For precedents as to principles as well as practice, see discussion of injunctions against suits under Section Eleven.³³⁶

XIII. TAXATION OF COSTS.

By subdivision 18 of this section a court of bankruptcy may "tax costs, whenever they are allowed by law, and render judgments therefor against

³³¹ *Pyle v. Texas Transport & Terminal Co.* (D. C., La.), 25 Am. B. R. 829, 185 Fed. 309.

³³² **Authority to restrain violation of contract with trustee.**— A court of bankruptcy has jurisdiction, on the application of the trustee in bankruptcy of a brewing company, by injunction to compel the owner and lessor of certain premises and the lessee thereof to purchase malt liquors exclusively from the trustee during the period of a certain lease, the payment of which the bankrupt had guaranteed, in consideration of the tenant purchasing malt liquors from it exclusively, especially where the trustee had withdrawn opposition to dispossess proceedings under an oral agreement by the owner and a proposed new tenant that the latter would enter into an agreement similar to the contract with the first tenant, to purchase malt liquors exclusively from the trustee.

Matter of Consumers' Albany Brewing Co. (D. C., N. Y.), 35 Am. B. R. 358, 224 Fed. 235.

³³³ 1 *Joyce on Injunctions*, p. 646, § 429, and cases cited.

³³⁴ For form of petition for injunction other than against suits, see Form No. 73, *post*.

³³⁵ Gen. Ord. XII, 3; *In re Berkowitz* (D. C., Pa.), 16 Am. B. R. 251, 143 Fed. 598; *In re Steuer* (D. C., Mass.), 5 Am. B. R. 209, 214, 104 Fed. 976.

For forms of referee's stays and show cause orders, and orders that writs of injunction shall issue, see Forms Nos. 74-75, *post* and Hagan & Alexander's Bankruptcy Forms.

³³⁶ See also *Irving v. Hughes*, Fed. Cas. 7,076; *In re Muller*, Fed. Cas. 9,912; *Kellogg v. Russell*, Fed. Cas. 7,666; *U. S. ex rel. Hyde v. Bancroft*, Fed. Cas. 14,513; *In re South Side R. R. Co.*, Fed. Cas. 13,190.

the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy." The costs for which payment is herein authorized are such as are allowed by this act arising from the bankruptcy proceedings in the administration of the estate.³³⁷ The costs taxable under this subdivision are something different from the costs allowed as fees and mileage of witnesses, and the allowances to the attorneys, which are considered under other sections of the act.³³⁸ So too, allowances for fees of stenographers are expressly provided for under § 38-a (5) and will be considered under that section. Costs must be allowed in all involuntary cases where the adjudication is contested.³³⁹ Only costs allowed by law may be taxed. Where there is no specific provision,³⁴⁰ this subdivision seems to assimilate costs in bankruptcy to those under the equity practice in the United States courts.³⁴¹ Under the former law, it was held that costs might be allowed the prevailing party in a proceeding to set aside a discharge;³⁴² under the present law, the same has been held as to a proceeding for a discharge.³⁴³ Where the bankrupt consents costs may be paid from the proceeds of the sale of exempt property, even if a creditor having an equitable lien thereon objects to such payment.³⁴⁴ Precedents as to costs on appeal will be found in the foot-note.³⁴⁵ It seems, too, that under the previous law, costs were allowed against creditors who unsuccessfully contested the validity

337. Costs in administration of estate.—

In the case of *Matter of Kyte* (D. C., Pa.), 26 Am. B. R. 507, 189 Fed. 531, the court said: "Administration of an estate has been defined to mean, a term applied to denote the management of an estate by a person appointed by authority of law to take charge thereof in place of the legal owner. In a bankruptcy court the legal owner of the estate is the bankrupt, who is required to turn over his entire estate to some one to be designated by the creditors and approved by the court, for the purpose of administering the same for the benefit of all the bankrupt's creditors. All acts necessary to be done to accomplish the purpose of converting the assets of the estate and distributing the same to and amongst the creditors legally entitled thereto, as well as any act tending to increase the value of the estate, or in some material manner benefit the estate of the bankrupt, whereby the general interests of all the creditors may be advanced, constitute the administration of the estate. The intent of the law is to administer the estate for the general interests of all the creditors with the least possible expense, and to this end when any proposition of interest, as well as detrimental to the creditors is made, the law provides that all the creditors shall have notice of a time and place to meet and either assent to or disapprove of such proposition. This undoubtedly is a provision of the law which has been created to throw a safeguard around the interests of the creditors so that the opportunity for abuse or mismanagement of their interests may be reduced to a minimum."

338. See Bankr. Act, §§ 62 and 64, *post*.

339. See Bankr. Act, § 3-e and General Order XXXIV. See also *In re Ghigliione* (D. C., N. Y.), 1 Am. B. R. 580, 93 Fed. 186; *In re Morris* (D. C., Pa.), 7 Am. B. R. 709, 115 Fed. 591; *Clark-Herrin-Campbell Co. v. Claffin Co.* (C. C. A., 5th Cir.), 33 Am. B. R. 414, 218 Fed. 429.

340. As, for instance, in Bankr. Act, § 3-e.

341. See the Equity Rules and local rules in the different districts.

Attorney's docket fee on hearing before referee.—A referee in bankruptcy is not a "referee" within the meaning of section 824 of the U. S. Revised Statutes, allowing a docket fee of twenty dollars "on a trial before referees, or on a final hearing in equity" . . . Nor is a hearing upon a claim against the bankrupt estate "a final hearing" within the meaning of the statute. Hence, a docket fee should not be allowed under the statute on the hearing of a claim before the referee. *Peck v. Richter* (C. C. A., 8th Cir.), 33 Am. B. R. 11, 217 Fed. 880.

342. *In re Holgate*, Fed. Cas. 6,601.

343. *Bragassa v. St. Louis Cycle* (C. C. A., 5th Cir.), 5 Am. B. R. 700, 107 Fed. 77. Compare also *In re Wolpert* (Ref., N. Y.), 1 Am. B. R. 436, and *In re Gaylord* (D. C., N. Y.), 5 Am. B. R. 805, 106 Fed. 833.

344. *In re Castleberry* (D. C., Ga.), 16 Am. B. R. 430, 143 Fed. 1018.

345. *In re Orman* (C. C. A., 5th Cir.), 5 Am. B. R. 698, 107 Fed. 101; *In re Dickson* (D. C., N. Y.), 7 Am. B. R. 679, 111 Fed. 726; *Matter of Josephson* (D. C., Ga.), 9 Am. B. R. 608, 121 Fed. 142.

of claims,³⁴⁶ and that, if the trustee refused to object to claims, creditors successfully contesting the same were allowed costs out of the estate.³⁴⁷ Where an involuntary petition is dismissed for want of jurisdiction costs cannot be allowed to the successful party.³⁴⁸ But costs, to be taxable under this subdivision, must be incurred "in proceedings in bankruptcy." Costs may be taxed by the referee.³⁴⁹

346. In re Troy Woolen Co., Fed. Cas. 14,203.

347. In re Little River Lumber Co. (D. C., Ark.), 3 Am. B. R. 682, 101 Fed. 558.

348. In re Williams (D. C., Ark.), 9 Am. B. R. 736, 120 Fed. 34.

349. In re Scott (Ref., Mass.), 7 Am. B. R. 710.

SECTION THREE.

ACTS OF BANKRUPTCY.

§ 3. **Acts of Bankruptcy.**— Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors, *or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States;** or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

b A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.

c It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of the filing the petition against him, and if

* Amendment of 1913 in italics.

solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt.

d Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him.

e Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt.

If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond.

Analogous provisions. In U. S.: Act of 1867, § 39 (as amended by Act of July 27, 1868), R. S., § 5021 (as amended by Acts of June 22, 1874, and July 26, 1876), Act of 1841, § 1; Act of 1800, §§ 1, 2.

In Eng.: Act of 1883, § 4; Act of 1890, § 1.

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I. ACTS OF BANKRUPTCY IN GENERAL.

a. **History and analogies.**—In most of the continental bankruptcy systems, acts of bankruptcy, in our sense of the term, are unknown. Mere cessation of payment is enough to entitle the creditors to resort to the court. In France, the debtor is legally bound to notify the court that he has stopped payment. Indeed, in several of the Latin systems, the court may declare a debtor a bankrupt on its own motion. Anglo-Saxon jurisprudence, while allowing the debtor to initiate bankruptcy by his own declaration or petition, not only does not otherwise permit the court to adjudicate save at the instance of creditors, but even affords further protection against arbitrary or unjust interference with the property of the individual, by providing that he shall not be amenable to bankruptcy unless he has done or suffered certain acts which either amount to actual or constructive frauds on creditors or are tantamount to declarations of hopeless insolvency. These acts are called under our present statute “acts of bankruptcy.”

b. **Comparative legislation.**—The present English act,¹ as supplemented by § 1 of the amendatory act of 1890, specifies eight acts of bankruptcy, four of which² are practical equivalents of the first, second, fourth, and fifth acts found in § 3-a of our law. Of the others, absconding or concealing himself³ is ancient, while of the remaining three an unpaid levy outstanding for twenty-one days⁴ is but little more drastic than is our third act of bankruptcy, and the giving of a notice by the debtor that he has suspended payments,⁵ or the failure on his part to respond within seven days to a demand to pay a final judgment,⁶ are but statutory recognition of the continental doctrine that cessation of payments and the status of bankruptcy are one and the same thing. The two systems, therefore, aside from the difference which grows out of our definition of insolvency, are, as acts of bankruptcy, near akin. There has been a like paralleling at other periods.⁷

1. English Bankruptcy Act of 1883, § 4.

2. *Id.*, § 4(1)-a-b-c-f.

3. *Id.*, § 4(1)-d.

4. Eng. Bankruptcy Act of 1890, § 1.

5. Eng. Bankruptcy Act of 1883, § 4(1)-h.

6. *Id.*, § 4(1)-g.

7. Compare the English Act of 1869 with our law of 1867.

c. **Former United States statutes.**—The acts of bankruptcy in our statute of 1800⁸ were largely copied from those then in force in England. Of the six acts of bankruptcy in the law of 1841,⁹ only three, the procuring or suffering of a levy or attachment, the concealing of property with intent to prevent a levy, and the fraudulently conveying or transferring of property, are similar to those now available; only the last is in effect an equivalent. There were nine acts of bankruptcy under the law of 1867. The third and fourth are comprised within the present § 3-a (1), and the eighth is similar to our § 3-a (2). Here the similitude ends, save that the making of a general assignment became by judicial construction in effect a tenth act of bankruptcy. Our third act is new, as is our fifth. We certainly have now nothing like such once well-known acts of bankruptcy as the alleged bankrupt's abscondence, or being in custody on a civil judgment, or, if a banker, merchant, trader, or manufacturer, stoppage of payment for a specified period. The decisions under the former law, while, of course, valuable, are not always controlling.¹⁰ Where the language of the former act has been incorporated in the present act, it may be assumed that the intent was to use such language with the meaning given to it by the courts under such act.¹¹ The practitioner, when citing, should observe the changes in § 39 of the former statute made by the acts of June 22, 1874, and July 26, 1876. It is often important, too, to note the difference in phrasing between the two statutes, even where there is a seeming equivalence.¹²

d. **Construction of the section.**—(1) **IN GENERAL.**—Section 3 clearly indicates what wrongdoing or acts on the part of the bankrupt must be alleged in the creditors' petition and established by them as a part of their proof on the trial. Such a petition, prepared after carefully observing the provisions of this section, and of § 4-b, indicating against whom such a petition may be filed, and § 59-b, declaring by whom it may be filed, and § 2 (1), specifying where it may be filed, and § 18-a, indicating how it is served, and § 63-a-b, specifying what are petitioning creditor's debts, will, provided the act of bankruptcy relied on is alleged with sufficient detail, render the petitioners reasonably secure against a plea in the nature of a demurrer.¹³

(2) **RULE OF CONSTRUCTION.**—The purpose of the act as a whole is remedial; but this portion of it, while not penal, is in derogation of common-law rights. The higher courts have, therefore, quite uniformly refused to read into this and the corresponding sections of previous laws, meanings which do not appear from the very words.¹⁴ Strong reasons may, however, be urged for a liberal construction. The law was intended to compel prorating,

8. Act of 1800, § 1.

9. Act of 1841, § 1.

10. Compare *Wilson v. City Bank*, 17 Wall. 473, 21 L. Ed. 723, with *Wilson v. Nelson*, 183 U. S. 191, 7 Am. B. R. 142, 46 L. Ed. 147.

11. *Huntington v. Baskerville* (C. C. A., 8th Cir.), 27 Am. B. R. 219, 192 Fed. 813; *In re Levin* (C. C. A., 1st Cir.), 23 Am. B. R. 845, 176 Fed. 177, holding that the court will construe the provisions of the bankruptcy act and of the General Orders as similar provisions of the Act of 1867 and the General Orders thereunder were construed.

12. As bearing on the purpose of Congress in limiting the acts of bankruptcy to those

discussed in detail, *post*, reference to the Torrey bill in its latest form, the so called Lindsay bill (see § 40, S. 1032, 55th Congress, 1st Session; and compare also § 2 of the Henderson substitute, Cong. Rec. 55th Congress, 2d Session, Vol. 31, p. 2038) will prove suggestive.

13. Compare Form No. 3, and "Creditors' Petitions in Involuntary Bankruptcy," by Mr. Collier, 1 N. B. N. 62.

14. *Jones v. Sleeper*, Fed. Cas. 7,496; *Wilson v. City Bank*, 17 Wall. 473, 21 L. Ed. 723; *In re Empire Metallic Bedstead Co.* (C. C. A., 2d Cir.), 3 Am. B. R. 575, 98 Fed. 581. And see *Maplecroft Mills v. Childs* (C. C. A., 4th Cir.), 35 Am. B. R. 311, 226 Fed. 415.

by halting frauds and checking preferences. As has been seen, defined acts of bankruptcy are merely limitations expressive of the caution inherent in Anglo-Saxon jurisprudence when dealing with the rights to property. Being limitations on the operation of a statute that is highly remedial, a broad construction, while not perhaps so safe, would in the long run accomplish more equity.¹⁵ As a rule, the statute as an entirety, as well as its sections other than § 3, are liberally construed.¹⁶

(3) NOT APPLICABLE TO VOLUNTARY BANKRUPTCY.—The section does not apply to voluntary bankruptcy. A petition by a voluntary bankrupt is not required to set up any of the specific acts of bankruptcy contained in this section. A voluntary petition is itself treated as an act of bankruptcy.¹⁷

e. *Insolvency when essential.*—(1) IN GENERAL.—What constitutes insolvency has already been considered.¹⁸ Insolvency has in all bankruptcy laws been a most important element of allegation and proof. Yet, where the act of bankruptcy consists of a general assignment for the benefit of creditors,¹⁹ insolvency is immaterial.²⁰ Although where the act of bankruptcy consists of the appointment or the application for the appointment of a receiver, insolvency is a material element.²¹ The bankruptcy act does not prevent an insolvent person from disposing of his property, providing his dealings are conducted without any purpose of hindering or defrauding his creditors, or of giving a preference.²² The act is not intended to cover all cases of insolvency to the exclusion of judicial proceedings in State courts, affecting the property of the insolvent.²³

(2) PLEADING INSOLVENCY; SOLVENCY AS A DEFENSE.—Under the present definition, it is conceivable that a debtor who “admits in writing his inability

15. Compare, as tending to support this view, *In re Gutwillig* (D. C., N. Y.), 1 Am. B. R. 78, 90 Fed. 475; *In re Adams* (Ref., N. Y.), 1 Am. B. R. 94; *Southern Loan & Trust Co. v. Benbow* (D. C., N. Car.), 3 Am. B. R. 9, 96 Fed. 514; *Silverman's Case*, Fed. Cas. 12,855; *In re Mueller*, Fed. Cas. 9,912. The bankruptcy act is remedial and should be interpreted reasonably and in accordance with the fair import of its terms with a view to effect its objects and to promote justice. *Southern Loan & Trust Co. v. Benbow* (D. C., N. Car.), 3 Am. B. R. 10, 96 Fed. 514.

See discussion as to construction of act, under § 1, *ante*.

16. For instance, see *Blake v. Francis Valentine Co.* (D. C., Cal.), 1 Am. B. R. 372, 89 Fed. 691.

17. *In re Fowler* (D. C., Mass.), 1 Lowell, 161, Fed. Cas. No. 4,998; *In re Forbes* (D. C., Mass.), 11 Am. B. R. 787, 128 Fed. 137. In the case of *Hanover National Bank v. Moyses* (Sup. Ct.), 186 U. S. 181, 8 Am. B. R. 1, 10, 46 L. Ed. 1113, it was held that where a voluntary bankrupt has set up all the essential facts to warrant a decree, the filing of the petition constitutes an act of bankruptcy.

18. See discussion under Section One of this work, *ante*; subtitle “*Insolvency*.”

19. Bankr. Act, § 3-a(4).

20. *West Co. v. Lea*, 174 U. S. 590, 2 Am. B. R. 463, 43 L. Ed. 1098.

21. It is provided in subsection a(4) of

this section, that an act of bankruptcy is committed by a person *who being insolvent*, applies for a receiver, or where *because of insolvency* a receiver has been put in charge of his property.

22. *Richardson v. Shaw*, 203 U. S. 587, 19 Am. B. R. 717, 28 Sup. Ct. 512.

Transactions by insolvent.—There is nothing in the bankrupt act, either in its language or object, which prevents an insolvent from dealing with his property, selling or exchanging it for other property at any time before proceedings in bankruptcy are taken by or against him, provided such dealing be conducted without any purpose to defraud or delay his creditors or give preference to any one, and does not impair the value of his estate. An insolvent is not bound, in the misfortune of his insolvency, to abandon all dealing with his property; his creditors can only complain if he waste his estate or give preference in its disposition to one over another. His dealing will stand if it leave his estate in as good plight and condition as previously. *Cook v. Tullis*, 18 Wall. 332, 340, 21 L. Ed. 933.

23. *In re Wilmington Hosiery Co.* (D. C., Del.), 9 Am. B. R. 581, 120 Fed. 179.

In the case of *Wilson v. City Bank*, 17 Wall. 473, 21 L. Ed. 723, the court said: “We do not construe the act as intending to cover all cases of insolvency to the exclusion of other judicial proceedings. It is very liberal in the classes of insolvents which

to pay his debts"²⁴ may still be solvent; yet insolvency need not be alleged or shown. But it is either a necessary element of, or its opposite, a conclusive defense to, the other acts of bankruptcy.²⁵ A general averment in an answer, that no act of bankruptcy, such as is charged, has been committed, may be deemed sufficient as a denial of insolvency, although if insolvency be alleged as a material element, it would be better to specifically deny the insolvency at the time the act was committed.²⁶

(3) TIME OF INSOLVENCY.—It is important to determine the time of insolvency. The language of the statute in respect to the second and third acts of bankruptcy, indicates that the insolvency must be shown to exist at the time either of these acts was committed.²⁷ It is not sufficient as an answer to a petition alleging either the second, third, fourth, or fifth acts of bankruptcy, to allege solvency at the time the petition was filed.²⁸ But the act itself provides that it is a complete defense to a petition alleging the first act of bankruptcy to show that the alleged bankrupt was not insolvent at the time of the filing of the petition.²⁹

(4) PROOF OF INSOLVENCY.—The facts and circumstances indicating a state of insolvency have already been considered under section 1 (15), subtitle "INSOLVENCY." It will also be necessary to discuss the question under other headings under this section where the various acts of bankruptcy are treated, and also under sections 60 and 67 relative to preferential and fraudulent transfer hindering or defrauding creditors. There is a general presumption in favor of the continuance of the solvency of a debtor where shown to exist immediately prior to the alleged wrongful act, which requires presentation of proof to rebut.³⁰ It should be noted, however, that under subsection c of this section, the burden of proving solvency, where the alleged act of bankruptcy consists of a transfer with intent to hinder, delay or defraud creditors, is on the bankrupt.³¹ That the act of bankruptcy itself brought about the insolvency is not enough.³² A general letter to creditors admitting insolvency will outweigh mere estimates.³³ Where upon the trial of the issue of insolvency the evidence is of such a conclusive character as to justify the court in setting aside a verdict in favor of solvency if one was awarded, the court

it does include, and needs no extension in this direction by implication. But it still leaves in the great majority of cases, persons who are really insolvent, to the chances that their energy, care and prudence in business may enable them finally to recover without disastrous failure or positive bankruptcy. All experience shows both the wisdom and justice of this policy."

24. See discussion under this section, *post*; subtitle "Fifth Act of Bankruptcy; a Confession of Bankruptcy."

25. As to what constitutes insolvency, see § 1(15), *ante*, and the cases cited.

26. *Troy Wagon Works v. Vastbinder* (D. C., Pa.), 12 Am. B. R. 352, 130 Fed. 232, in which case the court held that where an involuntary petition charges as an act of bankruptcy a preferential transfer within the four months' period, a denial of the commission of the act of bankruptcy is sufficient as a denial of insolvency, where the petitioners so regarding it proceed to the taking of proof.

27. *In re Rome Planing Mills* (D. C., N. Y.), 3 Am. B. R. 123, 96 Fed. 812; *Elliott v. Toepfner* (Sup. Ct.), 187 U. S. 327, 9 Am. B. R. 50, in which case it was stated that under subsection a(2) (3) of this section, insolvency must exist at the time of the commission of the acts specified. *Johansen Bros. Shoe Co. v. Alles* (C. C. A., 8th Cir.), 28 Am. B. R. 299, 197 Fed. 274.

28. *In re Rome Planing Mills* (D. C., N. Y.), 3 Am. B. R. 123, 96 Fed. 812.

29. *West Co. v. Lea*, 174 U. S. 590, 2 Am. B. R. 463, 43 L. Ed. 1098.

30. *Chamberlain*, *Modern Law of Evidence*, Vol. 2, § 1046.

31. *Badders Clothing Co. v. Burnham-Munger-Root Dry Goods Co.* (C. C. A., 8th Cir.), 36 Am. B. R. 115, 228 Fed. 470.

32. *Chicago Title & Trust Co. v. Roebbling's Sons* (D. C., Ill.), 5 Am. B. R. 368, 107 Fed. 71.

33. *In re Lange* (D. C., N. Y.), 3 Am. B. R. 231, 97 Fed. 190.

may direct a verdict of insolvency, although there is conflicting evidence as to details not essential to a conclusion.³⁴

(5) **INSOLVENCY OF PARTNERSHIP.**—If the insolvency of a partnership is at issue, it must not only be shown that the partnership assets are insufficient, but also that the assets of individual members, after paying their debts, are not enough to make up the deficiency.³⁵ It seems generally accepted, by the weight of authority, that the individual properties of the partners are to be considered in determining the question of the solvency of the firm.³⁶ It is impossible to declare a partnership insolvent so long as the partners are able to pay its debts and others, whether out of joint or separate estate, and hence the rule that a partnership is not insolvent unless all its partners are insolvent.³⁷ This entire question of solvency of a partnership is also considered under § 5 of the act.³⁸

II. ACTS OF BANKRUPTCY UNDER PRESENT LAW.

a. **First act of bankruptcy; a fraudulent transfer.**—(1) **IN GENERAL.**—The first act of bankruptcy prescribed by this section consists of a person having “conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors or any of them.” The important elements of this act of bankruptcy are: (1) The disposition of the bankrupt’s property either by himself or by his permission, and (2) the intent to defraud creditors. The distinction is not clearly drawn between the first and second acts of bankruptcy. It will frequently be difficult to determine which of these two acts of bankruptcy has been committed by a transfer. This is due possibly to the fact

34. *In re Iron Clad Mfg. Co.* (C. C. A., 2d Cir.), 28 Am. B. R. 628, 197 Fed. 280.

35. *Vaccaro v. Security Bank* (C. C. A., 6th Cir.), 4 Am. B. R. 474, 103 Fed. 436; *In re Blair* (D. C., N. Y.), 3 Am. B. R. 588, 96 Fed. 76.

Insolvency of partnership.—In the case of *In re Bertenshaw* (C. C. A., 8th Cir.), 19 Am. B. R. 577, 588, 157 Fed. 363, it was said that “If a partnership is a distinct entity separate from the individuals who compose it,—if its property and its debts are separate and distinct from the property of its individual members, and from their individual debts, then it is insolvent under this act when the aggregate of its property is not sufficient to pay its debts.” See also *Matter of Everybody’s Market* (D. C., Okl.), 21 Am. B. R. 925, 173 Fed. 492; *In re Perlhefter* (D. C., N. Y.), 25 Am. B. R. 576, 177 Fed. 299; *Tumlin v. Bryan* (C. C. A., 5th Cir.), 21 Am. B. R. 319, 165 Fed. 166, 91 C. C. A. 200, 21 L. R. A. (N. S.) 960.

36. **Individual properties of partners.**—In the case of *In re Perley & Hays* (D. C., Mo.), 15 Am. B. R. 54, 138 Fed. 927, the court said: “The real question in this case still remains. It is whether or not, the bankrupts were insolvent, within the meaning of the present Bankruptcy Act, or, to state it in another way, whether or not, the individual properties of the partners are to be considered in determining the question of insolvency. It has been held in a number of cases, that the individual properties must be con-

sidered, and I find no case to the contrary. *Vaccaro v. Security Bank of Memphis*, 4 Am. B. R. 474, 103 Fed. 436, 43 C. C. A. 279. This case, while not binding on this court, was decided by the Court of Appeals of the 6th Circuit. The same doctrine is distinctly held in the case of *Davis v. Stevens*, by Judge Corland, in 4 Am. B. R. 763, 104 Fed. 235. In both these cases the question was carefully considered, and these cases have the approval of this court.” And see *Matter of Hansley & Adams* (D. C., Cal.), 36 Am. B. R. 1, 228 Fed. 564.

37. *In re Forbes* (D. C., Mass.), 11 Am. B. R. 787, 128 Fed. 137. In the case of *In re Morgan & Williams* (D. C., Ga.), 25 Am. B. R. 861, 184 Fed. 938, the court said: “Assuming the entity doctrine to prevail under the more recent decisions of the courts as contended by counsel for the petitioning creditor, and that the firm’s assets and liabilities, would be a test of solvency or insolvency as against the firm, and that notwithstanding the fact that the individuals composing the firm are proceeded against also, still it must appear to justify the adjudication in bankruptcy, that the real indebtedness on the part of an alleged bankrupt firm to a petitioning creditor or creditors, exceeds the aggregate at a fair valuation of the alleged bankrupt firm’s property.”

38. See discussion under Section Five, subtitle, “*When Partnership may be Adjudged Bankrupt.*”

that a transfer made with intent to prefer a creditor may have associated with it the intent to hinder, delay or defraud other creditors.³⁹ An intent to prefer is not to be confounded with an intent to defraud, nor a preferential transfer with a fraudulent one.⁴⁰ A preferential payment to creditors will, in most cases, amount to a transfer with intent to hinder, delay or defraud; but where such an act has been committed it falls under the second subdivision of sub-section *a*. To constitute the first act of bankruptcy the disposition of the property and the intent must co-exist.⁴¹ It has been held that a transfer falling within the first clause of this section includes those which, according to the established course of authority, were fraudulent transfers at the time of the passage of the bankruptcy act; a mere preferential transfer as distinguished from a fraudulent transfer, is not an act of bankruptcy within the first clause of the section.⁴²

(2) BY WHOM MADE.—Any *person* who transfers any part of his property with intent “to hinder, delay or defraud his creditors” is guilty of this act of bankruptcy. The word “person” includes a corporation and a partnership.⁴³ An *ultra vires* act of a corporation, transferring, concealing or removing its property, with intent to hinder, delay and defraud its creditors is an act for which it may be adjudged a bankrupt.⁴⁴

(3) DISPOSITION OF PROPERTY.—(I) *Statute of frauds*.—The particular acts referred to in subd. 1 of this section are those conveyances or transfers made with intent to hinder, delay or defraud, which were interdicted by the statute of frauds, now a part of the law of nearly every State.⁴⁵ The expression “transfer with intent to hinder, delay or defraud creditors” is familiar to the law of fraudulent conveyances and was used in the common law as declared in the old statute of Elizabeth.⁴⁶ There can be no doubt that the intent was to use the words with the same meaning, construction and effect as have for a long period of time been attributed to them.⁴⁷ The words as so

39. In re Mingo Valley Creamery Ass'n (D. C., Pa.), 4 Am. B. R. 67, 100 Fed. 282.

40. *Intent to prefer or defraud; distinction*.—In the case of Githens, Ressamer & Co. v. Schiffer & Bros. (D. C., Pa.), 7 Am. B. R. 453, 112 Fed. 505, it was held that a cash sale of property by an insolvent debtor for a full consideration, not made for the purpose of putting the property out of the reach of creditors, is not a fraudulent transfer or act of bankruptcy, although the debtor intended to and did use the proceeds to prefer certain creditors, and to meet his own personal needs. See also In re Belknap (D. C., Pa.), 12 Am. B. R. 326, 129 Fed. 646, in which case the court approved the case above cited and stated that “The intent to defraud is essential under clause (1), and differs from the intent to prefer which is essential to the act of bankruptcy described in clause (2);” In re Duffy (D. C., Pa.), 9 Am. B. R. 358, 118 Fed. 986.

41. In re Flint Hill Stone & Construction Co. (D. C., N. Y.), 18 Am. B. R. 81, 149 Fed. 1,007; In re Tupper (D. C., N. Y.), 20 Am. B. R. 824, 827, 163 Fed. 766; Coder v. Arts (Sup. Ct.), 213 U. S. 223, 22 Am. B. R. 1, 15, 53 L. Ed. 772.

42. In re Bloch (C. C. A.), 15 Am. B. R. 748, 142 Fed. 676, 74 C. C. A. 250.

43. See definition of “persons” in Bankr. Act, § 1 (19) *ante*.

44. Badders Clothing Co. v. Burnham-Munger-Root Dry Goods Co. (C. C. A., 8th Cir.), 36 Am. B. R. 115, 228 Fed. 470.

45. 13 Eliz. c. 5. See Githens etc., Co., v. Shiffer & Bros. (D. C., Pa.), 7 Am. B. R. 453, 112 Fed. 505.

46. *Statute of frauds in United States*.—The statute of 13 Elizabeth, cl. 5, against fraudulent conveyances has been universally adopted in American law as the basis of our jurisprudence on that subject, and either re-enacted in terms or nearly so, or with some change of language, by the legislatures of practically all the states, or recognized as an exposition of the principles of the common law and, although not re-enacted, adopted as and held to be a part of the common law in force here. Moore on Fraudulent Conveyances, § 9, and cases cited.

47. Lansing Boiler & Eng. Works v. Ryerson (C. C. A., 6th Cir.), 11 Am. B. R. 558, 128 Fed. 701, 63 C. C. A. 253, in which the court said: “The language of subsection 1 of § 3 is the familiar language of statutes against conveyances fraudulent as against creditors, and we think there can be no doubt that Congress intended the words employed should have the same construction and effect as have for a long period of time been

used have always been held to require in order to invalidate a conveyance that there shall be actual fraud; and it makes no difference that the conveyance was made upon a valuable consideration if it appears to have been for the purpose of hindering, delaying or defrauding creditors.⁴⁸

(II) *Particular transactions; chattel mortgages.*—Just what transactions will furnish a legal presumption that this act of bankruptcy has been committed will depend largely on the State decisions. The execution of a chattel mortgage by a debtor to secure a present loan to pay certain creditors may be an act of bankruptcy under this subdivision.⁴⁹ A chattel mortgage which authorizes the mortgagor to remain in possession of the mortgaged property and to sell the same in the usual course of business, without any obligation to apply the proceeds to the payment of the debt is, under the laws of some States, constructively fraudulent as against creditors. Such fraud may be an element in an act of bankruptcy under this clause, unless it be purged by the mortgagee taking possession of the mortgaged property, before the creditors seize it, or take any action in respect to it.⁵⁰

(III) *Conveyances as security.*—If conveyances are made in good faith with the intent only of securing the grantees as sureties for the grantor, their execution is not an act of bankruptcy.⁵¹ A conveyance as security for a debt which was subsequently paid, but which the creditor was permitted to retain as a continuing security for subsequent indebtedness with the understanding that he was to record it at any time, will be deemed an act to hinder, delay or defraud creditors, and an act of bankruptcy if recorded within four months prior to filing the petition in bankruptcy.⁵² A mortgage on all the debtor's property is not within the act if the equity remaining is sufficient to pay his debts.⁵³

attributed to those words." Compare *In re Salmon* (D. C., Mo.), 16 Am. B. R. 122, 127, 143 Fed. 395; *Rumsey & Sikemier v. Novelty Mfg. Co.* (D. C., Mo.), 3 Am. B. R. 704, 99 Fed. 699.

48. *Coder v. Arts* (Sup. Ct.), 213 U. S. 223, 22 Am. B. R. 1, 15, 53 L. Ed. 772.

49. *In re Pease* (D. C., Mich.), 12 Am. B. R. 66, 129 Fed. 446. See also *Martin v. Hulen & Co.* (C. C. A., 8th Cir.), 17 Am. B. R. 510, 149 Fed. 982, where it was held that the giving of a mortgage to secure the purchase price of goods purchased, covering after-acquired stock, was not an act of bankruptcy.

50. **Chattel mortgage constructively fraudulent; law of Missouri.**—Although under the law of Missouri a conveyance to the use of the mortgagor, good between the parties, is constructively fraudulent as to creditors, in the absence of actual fraud, the constructive fraud implied from such a conveyance is purged away even as to creditors, by the mortgagee taking possession of the mortgaged property before creditors seize it or take any action to enforce their rights to it; and constructive fraud cannot be imputed to an alleged bankrupt so as to charge him with having committed an act of bankruptcy in transferring his property with intent to hinder, delay and defraud creditors, where in good faith and while solvent, he gave a chattel mortgage on his stock and fixtures, which although duly re-

corded three days afterwards, was constructively fraudulent as to creditors because it permitted the mortgagor to retain possession of the stock and sell the same in the usual course of business, but it appears that mortgagee took possession of the property by legal proceedings before the petition in bankruptcy was filed. *Johansen Bros. Shoe Co. v. Alles* (C. C. A., 8th Cir.), 28 Am. B. R. 299, 197 Fed. 274.

51. *Acme Food Co. v. Meier* (C. C. A., 6th Cir.), 18 Am. B. R. 550, 577, 153 Fed. 74.

Mortgage to secure advances made by the mortgagor's son, in the payment of debts, the mortgagor believing that she was solvent at the time, and it appearing that her indebtedness was reduced between the date of the mortgage and the filing of the petition in bankruptcy, and no unsecured debts were incurred after the mortgage was executed, is not an act of bankruptcy. *In re McLoon* (D. C., Me.), 20 Am. B. R. 719, 162 Fed. 575.

52. *In re Donnelly* (D. C., Ohio), 27 Am. B. R. 506, 193 Fed. 755.

53. *Lansing Boiler & Eng. Works v. Ryerson* (C. C. A., 6th Cir.), 11 Am. B. R. 558, 128 Fed. 701.

The equity of redemption should be considered in determining whether the mortgagor can pay his debts. *Acme Food Co. v. Meier* (C. C. A., 6th Cir.), 18 Am. B. R. 550, 153 Fed. 74.

(IV) *Cash sales and payments.*—Cash sales of property by the debtor, to meet an indebtedness, but the proceeds of which were not so applied, are not inhibited;⁵⁴ nor are such sales when made in the ordinary course of trade for full consideration, and not for the purpose of putting the property out of reach of creditors.⁵⁵ The payment of current expenses necessarily liquidated to continue the business would not be an act of bankruptcy.⁵⁶ The use of the alleged bankrupt's funds in the support of his family would not constitute an unlawful transfer; but a payment to an adult son who lives apart from the alleged bankrupt, or the transfer of property to his wife beyond her reasonable requirements may constitute an act of bankruptcy.⁵⁷

(V) *Voluntary transfers.*—Conveyances of real estate by a husband to his wife, without a present consideration, about a month prior to the filing of a petition against him is an act of bankruptcy.⁵⁸ And where such a conveyance is made, it will be deemed to have been made with the intent to hinder or delay creditors, although no fraudulent intention was shown or suspected.⁵⁹ But a mere voluntary transfer, impeachable only upon the ground that it is a preference, is not sufficient.⁶⁰

(VI) *Change of title.*—There can be no transfer in fraud of creditors unless the title to the property is changed. So an instrument executed by the officers of an alleged bankrupt, containing no words of conveyance or transfer, but merely designating persons as agents or attorneys for the stockholders, to wind up the affairs of the corporation, is not a fraudulent transfer and its execution does not constitute an act of bankruptcy.⁶¹ And a deed of trust executed by an alleged bankrupt and delivered in escrow, is not a transfer in fraud of creditors, where it appears that the creditors would within the period prior to final delivery of the deed be paid in full.⁶²

(4) MEANING OF WORDS OF DEVOLUTION.—The word "convey" has its common meaning and is the equivalent of "grant." The word "transfer" has a broad generic meaning; it is defined for the purposes of this act in § 1 (15). The payment of a partner's individual debts out of the assets of the

54. In re Belknap (D. C., Pa.), 12 Am. B. R. 326, 129 Fed. 646.

55. Githens, etc., Co. v. Shiffler & Bros. (D. C., Pa.), 7 Am. B. R. 453, 112 Fed. 505; Richardson v. Shaw, 203 U. S. 587, 19 Am. B. R. 717, 51 L. Ed. 329.

A transfer to a bona fide purchaser for a present fair consideration is not ordinarily such a transfer as to make the sale an act of bankruptcy. Tiffany v. Lucas, 15 Wall, 421, 21 L. Ed. 128; Stewart v. Platt, 101 U. S. 731, 25 L. Ed. 816; In re Franklin, Fed. Cas. 5,053, 8 Ben. 233; In re Pusey, Fed. Cas. 11,478.

56. Richmond Standard Steel Spike & Iron Co. v. Allen (C. C. A., 4th Cir.), 17 Am. B. R. 583, 148 Fed. 657.

57. In re Condon (D. C., N. Y.), 29 Am. B. R. 907, 198 Fed. 947.

58. Henkel v. Seider (D. C., N. Y.), 20 Am. B. R. 773, 163 Fed. 553.

59. In re Hughes (D. C., N. Y.), 25 Am. B. R. 556, 183 Fed. 872.

Intent to defraud: Where a conveyance is voluntary and therefore fraudulent and void as to then existing creditors of the debtor, though without intent to defraud, the intention of the parties is immaterial, and actual

fraudulent intent on the part of the grantor need not be shown. Moore on Fraudulent Conveyances, p. 570, and cases cited.

60. Githens, etc., Co. v. Shiffler Bros. (D. C., Pa.), 7 Am. B. R. 453, 112 Fed. 505. It must also appear that the mortgage was given with intent to hinder, delay and defraud creditors. In re Flint Hill Stone & Construction Co. (D. C., N. Y.), 18 Am. B. R. 81, 149 Fed. 1,007.

Deed of trust with condition.—It has been held an act of bankruptcy where an insolvent debtor conveyed all his property to a trustee with directions as to the payment of creditors without preference, and the deed contained a condition of defeasance and an equity reserved in the property to the grantor after the satisfaction of the claims of the beneficiaries, in that such transfer was made to hinder, delay and defraud his creditors. Rumsey & Sikemier v. Novelty & Machine Mfg. Co. (D. C., Mo.), 3 Am. B. R. 704, 99 Fed. 699.

61. Matter of Matthews & Co. (D. C., N. J.), 36 Am. B. R. 501, 229 Fed. 309.

62. Carpenter & Co. v. Lybrand (C. C. A., 4th Cir.), 36 Am. B. R. 12, 230 Fed. 84.

partnership is, as to the creditors of the partnership, a transfer.⁶³ A discussion of what constitutes a concealment of property is had under § 29-b, *post*; to determine the meaning of this term reference should be made to § 1 (22). A debtor who absconds and takes part of his property with him, both "conceals" and "removes" the property.⁶⁴ When the quantum of the property is not kept under cover, but remains visible, even though the transaction is fraudulent, it is not such a concealment as to amount to an act of bankruptcy.⁶⁵ The word "removed" as used in this clause signifies an actual or physical change in the position or locality of the property constituting the subject of the removal.⁶⁶ Where property is removed by a creditor in the debtor's absence, and against his protest, the failure to take legal proceedings to recover such property is not an act of bankruptcy.⁶⁷ A person does not "permit" a removal or concealment of property who has neither the power nor right to prevent it.⁶⁸

(5) INTENT TO HINDER, DELAY OR DEFRAUD.—(I) *In general*.—The intent on the part of the debtor to hinder, delay or defraud his creditors must be shown in order to constitute the transfer an act of bankruptcy under this subdivision.⁶⁹ It is still an open question whether a voluntary receivership by an insolvent corporation under a State law may not be "with intent to hinder or delay creditors" and thus an act of bankruptcy, irrespective of the amendment of 1903.⁷⁰ In a proceeding instituted prior to the amendment

63. *Mattocks v. Rogers*, Fed. Cas. 9,300; In re *Gillette* (D. C., N. Y.), 5 Am. B. R. 119, 104 Fed. 769.

64. In re *Filer* (D. C., N. Y.), 5 Am. B. R. 332, 108 Fed. 209.

65. *Citizens' Bank v. DePauw Co.* (C. C. A., 7th Cir.), 5 Am. B. R. 345, 105 Fed. 926.

Concealment implies something more than a mere failure to disclose; it may include an act of the debtor which places his property beyond the reach of his creditors. In re *Shoesmith* (C. C. A., 7th Cir.), 13 Am. B. R. 645, 135 Fed. 684. See also In re *Hussman*, Fed. Cas. 6,951; In re *Williams*, Fed. Cas. 17,703; *Anonymous*, Fed. Cas. 466; *O'Neill v. Glover*, 5 Gray (Mass.), 159.

The word "conceal," as used in section 3a (1), means to hide or withdraw from observation; to cover or keep from sight; to prevent the discovery of, or to withhold knowledge of; it has to do with what concerns others, and implies an act done or procured to be done which is intended to prevent or hinder. In re *Glazier* (D. C., Pa.), 28 Am. B. R. 391, 195 Fed. 1020.

66. In re *Wilmington Hosiery Co.* (D. C., Del.), 9 Am. B. R. 581, 120 Fed. 180, holding that the word "removed" has no application to the taking of property by a receiver of a corporation acting under competent authority. As to what constitutes concealing or removing property with intent to hinder, delay or defraud creditors, see *Anonymous*, Fed. Cas. 466, 1 Pac. L. Rep. 173; *Livermore v. Bagley*, 3 Mass. 489; *Fox v. Eckstein*, Fed. Cas. 5,009, 4 N. B. R. 373; In re *Shapiro*, 106 Fed. 495, 3 N. B. R. 385.

67. In re *Belknap* (D. C., Pa.), 12 Am. B. R. 326, 129 Fed. 646.

68. In re *Wilmington Hosiery Co.* (D. C., Del.), 9 Am. B. R. 581, 120 Fed. 179.

69. In re *Cowles*, Fed. Cas. 3,297; In re *McKibbin*, Fed. Cas. 8,859; *Fox v. Eckstein*, Fed. Cas. 5,009; In re *Belknap* (D. C., Pa.), 12 Am. B. R. 326, 129 Fed. 646; In re *Wilmington Hosiery Co.* (D. C., Del.), 9 Am. B. R. 581, 120 Fed. 180; *Lansing Boiler Works v. Ryerson & Son* (C. C. A., 6th Cir.), 11 Am. B. R. 558, 128 Fed. 701; In re *Tupper* (D. C., N. Y.), 20 Am. B. R. 824, 827, 163 Fed. 766; *Coder v. Arts* (Sup. Ct.), 213 U. S. 223, 22 Am. B. R. 1, 15, 53 L. Ed. 772.

70. See In re *Empire Metallic Bedstead Co.* (D. C., N. Y.), 1 Am. B. R. 136, 141 (this point not having been passed on when this case was subsequently reversed); In re *Gutwillig* (C. C. A., 2d Cir.), 1 Am. B. R. 388, at p. 390, 92 Fed. 337; In re *Harper & Bros.* (D. C., N. Y.), 3 Am. B. R. 804, 100 Fed. 266, and *Scheuer v. Smith* (C. C. A., 5th Cir.), 7 Am. B. R. 384, 112 Fed. 407.

Receivership of corporation.—In the case of In re *Wilmington Hosiery Co.* (D. C., Del.), 9 Am. B. R. 581, 120 Fed. 171, it was held that where an insolvent corporation, against which a bill was filed alleging its insolvency and praying the appointment of a receiver, and a receiver was thereupon appointed who took possession of its property, the corporation did not thereby permit its property to be removed, with intent to hinder or delay its creditors, within the meaning of § 3-a (1). To a similar effect see In re *Baker-Ricketson Co.* (D. C., Mass.), 4 Am. B. R. 605, 97 Fed. 489; *Vaccaro v. Security Bank* (C. C. A., 6th Cir.), 4 Am. B. R. 474, 103 Fed. 436; In re *Zeitner Brewing Co.* (D. C., N. Y.), 9 Am. B. R. 63, 117 Fed. 799.

of 1903 it was held that the appointment of a receiver of an insolvent partnership was not an act of bankruptcy under this clause.⁷¹ Thus, also, a transfer intended to delay was under the former statute held an act of bankruptcy.⁷² If the alleged bankrupt was insane at the time the transfer was made, he cannot be said to have made it with intent "to hinder, delay and defraud his creditors."⁷³

(II) *Allegations in petition.*—The petition should allege that the transfer or conveyance was made with intent to hinder, delay or defraud creditors.⁷⁴ The facts relied upon to establish the alleged fraudulent transfer must be set forth with such fulness as to apprise the alleged bankrupt of what he will be required to meet;⁷⁵ there must be a full disclosure concerning the alleged fraudulent transfers, and it is not sufficient to set forth merely rumor, suspicion or hearsay.⁷⁶ Allegations that the defendant transferred his property with intent to hinder, delay or defraud his creditors should be specific if possible, but the purpose of the law does not require greater detail than it is probable that creditors can furnish.⁷⁷ An allegation, in the language of the statute, of a disposition of property to hinder, delay and defraud creditors, is not sufficient; facts and circumstances should be stated from which the inference may be drawn that the disposition of the property was done with an evil intent.⁷⁸ A petition is insufficient which fails to describe the prop-

71. *Matter of Burrell & Corr Co.* (C. C. A., 2d Cir.), 9 Am. B. R. 625, 123 Fed. 414, 59 C. C. A. 508.

A deed of trust conveying all the debtor's property to be distributed ratably among his creditors was held presumptively fraudulent and an act of bankruptcy. *Rumsey v. Novelty & Machine Co.* (D. C., Mo.), 3 Am. B. R. 104, 99 Fed. 699.

72. *In re Goldschmidt*, Fed. Cas. 5,520.

73. *Intent of insane person.*—In the case of *In re Ward* (D. C., N. J.), 20 Am. B. R. 482, 486, 161 Fed. 755, the court said: "If the alleged bankrupt was, at the time of committing the alleged act of bankruptcy charged in the petition filed against him, so insane that he did not understand the nature of the act, its commission should be denied on the ground that, being insane, he could not commit it. On the trial of such an issue, the adjudication of lunacy may, perhaps, be offered as *prima facie* evidence of insanity, provided it shows lunacy at the time of the commission of the alleged act of bankruptcy."

74. *In re Tupper* (D. C., N. Y.), 20 Am. B. R. 824, 163 Fed. 824. See Am. B. R. Dig. § 216.

75. *In re Hallin* (D. C., Mich.), 28 Am. B. R. 708, 199 Fed. 806, holding that a charge that the alleged bankrupt on a specified date, while insolvent and within four months of the date of the petition conveyed "certain of his property" to creditors whose names are unknown, with intent to hinder, delay and defraud other creditors, does not set forth an act of bankruptcy with the required particularity as to essential data and details.

76. *In re Blumberg* (D. C., Pa.), 13 Am. B. R. 343, 133 Fed. 845.

General averments in an involuntary peti-

tion that the alleged bankrupts within the four months' period, while insolvent, committed an act of bankruptcy by transferring a certain portion of their property to one or more of their creditors with intent to prefer, and that they have transferred and concealed large sums of money and valuable securities with intent to hinder, delay and defraud creditors, which concealment was and is continuous, are insufficient to sustain the petition upon demurrer. *In re Rosenblatt & Co.*, (C. C. A., 2d Cir.), 28 Am. B. R. 401, 193 Fed. 638.

77. *In re Mero* (D. C., Ct.), 12 Am. B. R. 171, 128 Fed. 630.

A **petition charging** that the act of bankruptcy was the giving of a chattel mortgage within the four months' period must allege facts sufficient to show that it was given either with intent to hinder, delay and defraud creditors, or with intent to prefer mortgagees over other creditors. *In re Flint Hill Stone & Construction Co.* (D. C., N. Y.), 18 Am. B. R. 81, 149 Fed. 1,007.

An **allegation, unsupported by other facts**, that certain claims due the alleged bankrupt were assigned by it without consideration to one who has commenced suit on such claims, and that such assignment was made for the purpose of concealment, and to hinder, delay and defraud creditors, is insufficient to justify a conclusion that the assignment was not made for the purposes of collection. *In re Radke Co.* (D. C., Cal.), 27 Am. B. R. 950, 193 Fed. 735.

78. *In re White* (D. C., Pa.), 14 Am. B. R. 241, 135 Fed. 199; *In re Hark Bros.* (D. C., Pa.), 14 Am. B. R. 400, 135 Fed. 603; *In re Pressed Steel Goods Co.* (D. C., Mich.), 27 Am. B. R. 44, 193 Fed. 811; *In re Condon*, 31 Am. B. R. 754, 209 Fed. 800.

erty alleged to have been transferred, the time of the alleged transfer, and to whom it was made.⁷⁹ A failure to allege that the transfer was made within the period of four months prior to the filing of the petition, renders the petition defective.⁸⁰ Where the act of bankruptcy consists of a concealment of the alleged bankrupt's property, the precise details of the act of concealment may not, from the nature of the act, be alleged; the manner and details of the concealment are matters of evidence and not of averment.⁸¹

(III) *Proof of intent*.—The intent of the transfer can rarely be established by direct proof.⁸² It may be inferred from the acts done and the surrounding circumstances, though the debtor denies such intent.⁸³ But the intent must be actual;⁸⁴ the mere fact that the transaction complained of has hindered or delayed creditors will not be enough.⁸⁵ The circumstances relied upon to show intent must be sufficient to lead to the conclusion that the debtor actually intended to hinder, delay or defraud his creditors. The words "hinder, delay or defraud" are used in the disjunctive; if a transfer is shown to have been made with intent to hinder and delay, it is not necessary to establish intent to defraud.⁸⁶ The intent may be established by the debtor's admission and declarations,⁸⁷ or it may be inferred from the act itself as a necessary consequence of it; for instance if a creditor in failing circumstances places all his property beyond the reach of his creditors, that fact may

79. *Conway v. German* (C. C. A., 4th Cir.), 21 Am. B. R. 577, 166 Fed. 67.

80. *Armour & Co. v. Miller* (C. C. A., 5th Cir.), 31 Am. B. R. 356, 209 Fed. 784.

81. *In re Bellah* (D. C., Del.), 8 Am. B. R. 310, 116 Fed. 69.

82. *Van Wyck v. Seward*, 18 Wend, 375, 395.

Great latitude allowed.—In the investigation of questions of fraud, as a rule, great latitude is allowed in the admission of evidence, in order that the jury may be able to determine from all the circumstances whether the transaction was fraudulent or not. Questions of fraud can scarcely ever be proven by direct evidence, hence the necessity for the admission of all the circumstances fairly connected with the transaction. *In re Luber* (D. C., Pa.), 18 Am. B. R. 476, 152 Fed. 492.

83. *In re Larkin* (D. C., N. Y.), 21 Am. B. R. 711, 168 Fed. 100. Where the transfer is voluntary, the question of fraudulent intent is one of fact, but in the absence of explanation the presumption of fraud will prevail. *Butcher v. Cantor* (D. C., N. Y.), 26 Am. B. R. 424, 185 Fed. 945.

84. *In re McLoon* (D. C., Me.), 20 Am. B. R. 719, 162 Fed. 575; *Houck v. Christy* (C. C. A., 8th Cir.), 18 Am. B. R. 330, 152 Fed. 612, in which the court said that "the fact that a sale, assignment, transfer or conveyance is made out of the usual and ordinary course of business, does not, without more, render it *prima facie* fraudulent; but it may be a badge of fraud, of little or considerable influence, depending upon the surrounding facts."

85. *Lansing Boiler Works v. Ryerson* (C. C. A., 6th Cir.), 11 Am. B. R. 558, 128 Fed. 701, 63 C. C. A. 253; *In re McLoon* (D. C., Me.), 20 Am. B. R. 719, 162 Fed. 575.

86. Hinder and delay, intent to defraud.

—In the case of *In re Hughes* (D. C., N. Y.), 25 Am. B. R. 556, 183 Fed. 872, the court said: "The question, therefore, is whether this was a conveyance 'with intent to hinder, delay, or defraud' creditors, or any of them. The statute is in the disjunctive, and while it may be admitted, and is I think true, that the words 'hinder' and 'delay' are synonymous (*Read v. Worthington*, 9 Bosw. [N. Y.] 628), it is not necessary, under the language of the statute itself, that any intent to defraud should be present. It is enough if any creditor is intentionally to be hindered or delayed. If the intent to hinder and delay exists, a conveyance made by an embarrassed debtor with a view, known to the purchaser, of securing the conveyed property from attachment, is voidable as against creditors, even though it be honestly made and the debtor intends, as *Hughes* says he did, that all creditors should be paid in full. *Kimball v. Thompson*, 4 Cush. (Mass.), 446, 50 Am. Dec. 799. This must necessarily be the correct view upon any consideration of language which traces its origin to the statute of Elizabeth; for a debtor's property is in legal theory subject to immediate process at the instance of any creditor, and a debtor will not be permitted to hinder or delay any creditor by any device which leaves his property, or the avails of it, subject to his control and disposition; and it makes no difference that the debtor intends to apply the avails of the same to the payment of his debts. It still remains true that he has hindered his debtors from applying the property in the way that they have a legal right to rely upon."

87. Compare *In re Foster* (D. C., Pa.), 11 Am. B. R. 131, 133, 126 Fed. 1014.

be considered in determining whether he did so in good faith, without intent to defraud.⁸⁸ The insolvency of the debtor at the time the transfer was made will not always of itself be sufficient to show intent to defraud or delay.⁸⁹ If a concealment be charged, the intent of the alleged bankrupt may be determined by the result of the act; but if the bankrupt fail to disclose the existence of the property, while retaining his control over it and claiming title thereto, the fact that he did not have a right to the property at the time may not be of much importance.⁹⁰ The burden of proving fraudulent intent is, of course, on him who asserts it. Thus, in the absence of proof as to when or how assets were lost, the presumption is against fraud.⁹¹ There can be no intent to hinder, delay or defraud unless at the time the transfer was made the debtor knew or had reason to know of the existence of more than one creditor.⁹² The alleged bankrupt should be permitted to show that a deed which is relied upon as an act of bankruptcy, though absolute upon its face, was intended as a mere security and that there was no intent to defraud.⁹³

(6) **INSOLVENCY.**—We have already considered what constitutes insolvency,⁹⁴ and have also discussed the subject in respect generally to acts of bankruptcy under this section.⁹⁵ We will also hereafter under this section again refer to solvency as a defense to proceedings in bankruptcy and the proof necessary to establish the fact.⁹⁶ It is only necessary here to call attention to the fact that the insolvency of the debtor is not required to be shown. A person is not permitted to convey, transfer, conceal or remove any part of his property with intent to hinder, delay or defraud his creditors, and on becoming insolvent within four months thereafter, escape the bankruptcy law by showing that he was solvent when he so conveyed, transferred, concealed or removed his property.⁹⁷ The question is was he insolvent when the petition was filed. The act of bankruptcy is declared to consist of a transfer by the debtor with intent to hinder, delay or defraud his creditors. If the debtor shows that at the time of filing a petition in bankruptcy he was actually

88. *Bean Chamberlain Mfg. Co. v. Standard Spoke & Nipple Co.* (C. C. A., 6th Cir.), 12 Am. B. R. 610, 131 Fed. 215; *In re Salmon* (D. C., Mo.), 16 Am. B. R. 122, 143 Fed. 395.

Intent implied.—Where it appears that the purpose of an alleged bankrupt in making certain transfers was to put his property beyond the reach of his creditors and he professes to be unable to tell of the disposition of the money received, the intent to defraud may be implied. *In re Minard* (D. C., Or.), 19 Am. B. R. 475, 156 Fed. 377. See also *Macon Grocery Co. v. Beach* (D. C., Ga.), 19 Am. B. R. 558, 156 Fed. 1,009. In the case of *In re Larkin* (D. C., N. Y.), 21 Am. B. R. 711, 168 Fed. 100, it was held that where one in debt transfers or conveys his property to one or more of his creditors, all the surrounding circumstances and conditions are to be considered in determining whether or not it was done with intent to hinder, delay or defraud his other creditors; the intent may be inferred from the acts done and surrounding circumstances, though the debtor denied such intent.

89. *Richardson v. Shaw*, 203 U. S. 587, 19 Am. B. R. 717, 51 L. Ed. 329, in which the court held that there is nothing in the bank-

ruptcy act which prevents an insolvent from disposing of his property, provided his dealings are conducted without any purpose of defrauding his creditors or giving a preference to any of them.

90. *In re Glazier* (D. C., Pa.), 28 Am. B. R. 391, 195 Fed. 1020.

91. *Davis v. Stevens* (D. C., S. Dak.), 4 Am. B. R. 763, 104 Fed. 242. Compare *In re Shapiro & Novick* (D. C., N. Y.), 5 Am. B. R. 839, 106 Fed. 495; *Houck v. Christy* (C. C. A., 8th Cir.), 18 Am. B. R. 330, 152 Fed. 612.

The burden is shifted to the debtor to explain the transaction where it appears that all his property has been removed to a vessel about to leave for a foreign country. *Hoffschlaeger Co. v. Young Nap.* (D. C., Hawaii), 12 Am. B. R. 517, 2 U. S., D. C., Hawaii 97.

92. *Merchants' Nat. Bank v. Cole* (C. C. A., 6th Cir.), 18 Am. B. R. 44, 149 Fed. 708.

93. *Acme Food Co. v. Meier* (C. C. A., 6th Cir.), 18 Am. B. R. 550, 153 Fed. 174.

94. See Bankr. Act, § (15) and discussion thereunder, *ante*.

95. See *ante*.

96. See *post*, p.

97. *In re Larkin* (D. C., N. Y.), 21 Am. B. R. 711, 168 Fed. 100.

solvent it is a complete defense in a proceeding based upon the first act of bankruptcy.⁹⁸ The right of petitioning creditors to an adjudication against the debtor is only made out *prima facie*, when it is shown that within four months he has conveyed his property with intent to hinder, delay or defraud creditors; for the debtor may then come in and prove that he was solvent when the petition was filed.⁹⁹

(7) CREDITORS OR ANY OF THEM.—The act under this subdivision must have been committed with intent to hinder, delay or defraud “his creditors or any of them.” This means a creditor who owns a judgment or claim provable in bankruptcy.¹⁰⁰ An unliquidated claim for tort, unreduced to judgment at the time of an alleged transfer, does not constitute the claimant a creditor so as to authorize him to insist that such transfer is an act of bankruptcy.¹⁰¹

(8) COMPARISON WITH OTHER SECTIONS.—If the fraudulent transfer is within four months of the filing of the petition, it is not only an act of bankruptcy but void under § 67-e; it is also an objection to discharge under § 14-b (4); and, if also voidable under the State laws, it may be set aside under § 70-e, and the property or its value recovered by proper proceedings begun within the limitations as to time fixed by the State statutes.¹⁰²

b. Second act of bankruptcy ; a preferential transfer.—(1) IN GENERAL.—The second act of bankruptcy consists of a debtor transferring while insolvent any portion of his property to one or more of his creditors with intent to prefer such creditor or creditors over his other creditors. As in the case of the other acts of bankruptcy it must have been committed within the four months preceding the filing of the bankruptcy petition. The interdicted transaction here must be between a debtor and his creditors. Where at the time of the transfer there were no creditors, a subsequent creditor cannot complain.¹⁰³ An accommodation or other indorsers of a note of the alleged bankrupt are creditors, and preferential transfers to secure them fall within the act.¹⁰⁴ The act itself may, not even be illegal or fraudulent. The debtor merely prefers to pay one creditor more than he does another.¹⁰⁵ The judicial definition of preference¹⁰⁶ is not controlling in this connection, for a preference which will

98. In re Schenkein (D. C., N. Y.), 7 Am. B. R. 162, 113 Fed. 421; In re West (C. C. A., 2d Cir.), 5 Am. B. R. 734, 108 Fed. 940; Matter of Aschenback Co. (C. C. A., 2d Cir.), 23 Am. B. R. 95, 174 Fed. 396.

Insolvency; condition of bankruptcy, when determined.—The condition of a bankrupt at the time of the commission of the alleged acts of bankruptcy must be taken as the standard from which to view an alleged fraudulent transfer or other alleged act of bankruptcy “while insolvent” under section 3a of the bankruptcy act. But the condition of the bankrupt at the time of filing the petition is to be taken as the standard from which to test the defense of “solvency” in order to give jurisdiction in bankruptcy under section 3c of the bankruptcy act. Matter of Koble et al. (D. C., N. Y.), 35 Am. B. R. 389, 224 Fed. 106.

99. In re Hughes (D. C., N. Y.), 25 Am. B. R. 556, 183 Fed. 872.

100. Bankr. Act, § 1 (9) and 63-a-b, *post*. See in re Watson (D. C., Ky.), 30 Am. B. R. 871, 201 Fed. 962.

101. Beers v. Hamlin (D. C., Or.), 3 Am. B. R. 745, 99 Fed. 695. A creditor cannot complain of an act committed before he was a creditor. In re Brinckmann (D. C., Ind.), 4 Am. B. R. 551, 103 Fed. 65.

102. These doctrines are further considered under the appropriate sections, *post*.

103. Brake v. Collison (C. C. A., 5th Cir.), 11 Am. B. R. 797, 129 Fed. 201. The petition must allege that there were other creditors than the one preferred. In re Flint Hill Stone & Const. Co. (D. C., N. Y.), 18 Am. B. R. 81, 149 Fed. 1007. Preferential transfers as acts of bankruptcy, see Am. B. R. Dig. §§ 166–171.

104. In re O'Donnell (D. C., Mass.), 12 Am. B. R. 621, 131 Fed. 150.

105. Rex Buggy Co. v. Hearick (C. C. A., 8th Cir.), 12 Am. B. R. 726, 132 Fed. 310.

106. See In re Wright Lumber Co. (D. C., Ark.), 8 Am. B. R. 345, 114 Fed. 1011. See also under Sections One and Sixty of this work

be an act of bankruptcy is something other and more than one voidable under § 60-b. Thus, the intent to prefer on the part of the debtor may not be accompanied by reasonable cause to believe on the part of the creditor.¹⁰⁷ A preferential transfer under this subdivision, must consist of: (1) a transfer of property, (2) insolvency and (3) intent to prefer.¹⁰⁸ In addition to this it must be shown that the transfer results in the depletion of the debtor's estate,¹⁰⁹ and that the creditor to whom the transfer is made thereby secures an undue advantage over other creditors of the same class.¹¹⁰

(2) TRANSFER OF PROPERTY.—(I) *In general*.—"Transfer" as here used has the enlarged meaning given it by § 1 (25).¹¹¹ It is immaterial how the transfer is made. It may be either directly to the creditor or indirectly through a third person for his benefit.¹¹² Whatever may be the nature of the transaction, if the result of it is to procure to a creditor a preference over any other creditor it may be an act of bankruptcy.¹¹³ The result of the transaction controls its character. If one or more creditors are paid and others are left unpaid as a result of the transfer, the transfer constitutes an act of bankruptcy. As for instance, where an insolvent person conveys his property and the grantee applies the proceeds of the sale to pay certain creditors of the grantor in preference over others, such conveyance is a preferential transfer.¹¹⁴ A transfer by an insolvent partner of his entire separate estate in satisfaction of a debt of his firm which had no assets, constitutes a preference over other firm creditors of the same class and is an act of bankruptcy on the part of the partner.¹¹⁵

(II) *Mortgage or security*.—A chattel mortgage is more than a mere security; it is a sale of the thing mortgaged and operates as a transfer of it to the mortgagee, and if given within the four months' period with intent to prefer it is an act of bankruptcy.¹¹⁶ The execution of a trust mortgage during

107. See *Crooks v. The People's Nat. Bank*, 3 Am. B. R. 238, 46 N. Y. App. Div. 335, 61 N. Y. Supp. 604; *In re Wright Lumber Co.* (D. C., Ark.), 8 Am. B. R. 345, 114 Fed. 1011.

108. As to what evidence will establish this act of bankruptcy, see *Goldman v. Smith* (D. C., Ky.), 1 Am. B. R. 266, 93 Fed. 182. For analysis of the subsection see *In re Rome Planing Mills* (D. C., N. Y.), 3 Am. B. R. 123, 96 Fed. 812.

109. *Martin v. Hulen* (C. C. A., 8th Cir.), 17 Am. B. R. 510, 149 Fed. 982.

110. *In re Douglass Coal & Coke Co.* (D. C., Tenn.), 12 Am. B. R. 539, 139 Fed. 769.

111. See *ante*, under § 1.

112. *In re McGee* (D. C., N. Y.), 5 Am. B. R. 262, 105 Fed. 895; *Troy Wagon Works v. Vastbinder* (D. C., Pa.), 12 Am. B. R. 352, 130 Fed. 232; as where a mortgage is executed by the cashier of a bank to a state bank commissioner, in payment of a liability incurred by him under the banking act of the state to a creditor of the bank, such mortgage constitutes a preference; *Fulkerson v. Shaffer* (C. C. A., 8th Cir.), 33 Am. B. R. 526, 217 Fed. 355.

113. *Carson, Pirie & Co. v. Chicago Title & Trust Co.*, 182 U. S. 438, 5 Am. B. R. 814, 45 L. Ed. 1,171; *Boyd v. Lemon, Gale Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 81, 114 Fed. 647; *Goldman v. Smith* (D. C., Ky.), 1 Am. B. R. 266, 93 Fed. 82.

Where an insolvent transfers his property to another who executes a mortgage thereon in favor of a creditor it is an act of bankruptcy. *Gibson v. Dobie*, Fed. Cas. 5,394.

Payment to wife.—Where an alleged bankrupt within four months of the filing of a petition in involuntary proceedings, and while he was insolvent, paid to his wife in settlement of an alleged indebtedness the proceeds of certain fire insurance policies as indemnity for a loss on his stock of goods, an act of bankruptcy was committed. *In re Pinson & Co.* (D. C., Ala.), 24 Am. B. R. 804, 180 Fed. 787.

114. *Boyd v. Lemon, Gale Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 81, 114 Fed. 647; *Mills v. Fisher & Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 237, 159 Fed. 897.

115. *Mills v. Fisher & Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 237, 159 Fed. 897.

116. *Matter of Riggs Restaurant Co.* (C. C. A., 7th Cir.), 11 Am. B. R. 508, 130 Fed. 691. Compare *In re Bogen* (D. C., Ohio), 13 Am. B. R. 529, 134 Fed. 1,019. Same rule applies in respect to a mortgage given on real property. *In re Edelman* (C. C. A., 2d Cir.), 12 Am. B. R. 238, 130 Fed. 700; *In re Wright Lumber Co.* (D. C., Ark.), 8 Am. B. R. 345, 114 Fed. 1,011; *In re Waite*, Fed. Cas. 17,044; *In re Rogers*, Fed. Cas. 12,002; *Baldwin v. Rosseau*, Fed. Cas. 803.

the four months' period to secure creditors who may become such between certain dates falls within the statute.¹¹⁷

(III) *Payment of money.*—There can be no question but that a payment of money by an insolvent is a transfer of property within the meaning of this subsection.¹¹⁸ Payments made by a corporation, however large, to creditors resulting in their preference over others will constitute an act of bankruptcy.¹¹⁹ Insubstantial payments of small amounts may be made under circumstances which would not constitute them preferential so as to make them acts of bankruptcy.¹²⁰ A preferential transfer of property to a creditor greater in value than the amount of the debt, the difference being paid in cash to the debtor, is an act of bankruptcy.¹²¹ And so also is the payment of one or more creditors in full to the exclusion of other creditors, out of the proceeds of the cash sale of the property of the debtor.¹²²

(IV) *Confession of judgment.*—A creditor who obtains a judgment which becomes a lien upon the debtor's property, thereby obtains security.¹²³ Under the definition of a transfer, [§ 1 (25)] any disposition of property by way of security constitutes a transfer. It would seem to follow that a debtor who aids a creditor in obtaining a judgment by means of which his debt is secured transfers his property. If this is done with intent to prefer, as where the debtor confesses judgment, and as a result the creditor obtains payment of his debt in preference over other creditors, the debtor has preferentially transferred his property within the second clause of subsection *a*.¹²⁴ The close connection between the confession of a judgment by an insolvent debtor, and the permitting a sufferance of a judgment in a legal proceeding must be noted. But

117. *Rouss v. Ottenness & Huxall* (C. C. A., 6th Cir.), 31 Am. B. R. 115, 208 Fed. 881.

118. *Landry v. Andrews*, 6 Am. B. R. 281, 22 R. I. 597; *Carson, Pirie & Co. v. Chicago Title & Trust Co.*, 182 U. S. 438, 5 Am. B. R. 814, 45 L. Ed. 1171; *Matter of Everybody's Market* (D. C., Okl.), 21 Am. B. R. 925, 173 Fed. 492. An assignment of money due to an alleged bankrupt on a building contract to an accommodation indorser of his note is a preferential transfer. In re *O'Donnell* (D. C., Mass.), 12 Am. B. R. 621, 130 Fed. 150. So also is a transfer of accounts in lieu of materials pledged. *Anniston Iron & Supply Co. v. Anniston Rolling Mills* (D. C., Ala.), 11 Am. B. R. 200, 125 Fed. 974.

119. *Naylon & Co. v. Christiansen & Co.* (C. C. A., 6th Cir.), 19 Am. B. R. 789, 158 Fed. 290.

120. *Payments of small amounts.*—In the case of In re *Hovall Grocery Co.* (D. C., Ga.), 20 Am. B. R. 537, 161 Fed. 882, it was held that a payment of a debt of \$3 to a creditor, a week before the filing of an involuntary petition, did not constitute an act of bankruptcy. See also *Macon Grocery Co. v. Beach* (D. C., Ga.), 19 Am. B. R. 558, 156 Fed. 1009; In re *Douglass Coal & Coke Co.* (D. C.), 12 Am. B. R. 859, 131 Fed. 769, holding that the small size of the payment may be looked to as a circumstance, in connection with others, to justify the conclusion that no preference was intended; In re *Gilbert* (D. C., Or.), 8 Am. B. R. 102, 112 Fed. 951.

The size of the payment makes no difference if the requisite intent existed, but it does make a difference in determining whether or not the intent did exist. In re *Perlhefter* (D. C., N. Y.), 25 Am. B. R. 576, 177 Fed. 299.

Payments in the ordinary course of business of maturing debts, comparatively insignificant in amount, by a concern actively prosecuting its business in the usual manner, are not preferences within the meaning of section 3-a (2). In re *Columbia Real Estate Co.* (D. C., N. J.), 30 Am. B. R. 471, 205 Fed. 980, citing text.

121. *Johnson v. Wald* (C. C. A., 5th Cir.), 2 Am. B. R. 84, 93 Fed. 640.

122. *Matter of Farrell Co.* (D. C., N. Y.), 9 Am. B. R. 341, 36 Fed. 500; *Boyd v. Lemon, Gale Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 81, 114 Fed. 647; *Rex Buggy Co. v. Hearick* (C. C. A., 8th Cir.), 12 Am. B. R. 726, 132 Fed. 310; *Wise Coal Co. v. Small* (C. C. A., 8th Cir.), 35 Am. B. R. 682, 225 Fed. 524, holding that payments by a debtor through a sale of his property pursuant to a plan to pay local creditors, to the exclusion of non-resident creditors, constitutes an act of bankruptcy.

123. *Clark v. Iselin*, 21 Wall. 372, 373, 22 L. Ed. 577.

124. In re *Truitt* (D. C., Md.), 29 Am. B. R. 570, 203 Fed. 550; In re *Nusbaum* (D. C., N. Y.), 18 Am. B. R. 598, 152 Fed. 835.

the fact that confession of judgment by the debtor is usually with intent to prefer the judgment creditor, brings the act within the second class of acts of bankruptcy, although it might also be included within the third class.¹²⁵

(V) *Depletion of estate*.—The preferential transfer must result in the depletion of the debtor's estate, so as to leave the other creditors without property out of which their claims may be paid. If there is no depletion of the estate the creditors cannot complain.¹²⁶ If the payments are essential to the continuance of the debtor in business, as for instance the payment of arrears of rent of the building occupied by the bankrupt, or payments made for advertisements upon which such business depends, they do not deplete the debtor's estate, and are not acts of bankruptcy.¹²⁷ The payment of unearned premiums on policies of insurance would amount to a depletion.¹²⁸ An agreement to insure goods and assign the policies to secure a creditor is not necessarily prejudicial to the other creditors, and an assignment of such policies made in pursuance thereof after the debtor became insolvent, is not an act of bankruptcy.¹²⁹ Where the transaction consists of merely making an exchange of securities it does not constitute an act of bankruptcy, for in such a case there is no satisfaction of a debt nor depletion of the debtor's estate.¹³⁰ A debtor must necessarily be allowed some liberty in the settlement of maturing obligations. Arrangements honestly made for the purpose of obtaining funds to pay such obligations so that the debtor's business may be continued in its regular course are not interdicted.¹³¹ So where a chattel mortgage or other security is given for a present loan, the money being applied by the alleged bankrupt in the regular transaction of his business,¹³² or for the security of notes given for the purchase price of merchandise added to the alleged bankrupt's stock of goods, it is not against the interests of other creditors as tending to

125. See *Matter of Irish* (D. C., Pa.), 36 Am. B. R. 185, 228 Fed. 573, holding that an insolvent who confesses judgment to his wife in an amount equal to the value of his only assets, and withholds execution, does not commit an act of bankruptcy within the meaning of section 3a (3) of the Bankruptcy Act; but an involuntary petition stating such facts may be amended so as to allege the acts of bankruptcy defined in clauses (1) and (2) of the same section; *Matter of Fisher* (D. C., Pa.), 33 Am. B. R. 628, 219 Fed. 638.

126. *Martin v. Hulen* (C. C. A., 8th Cir.), 17 Am. B. R. 510, 148 Fed. 982; *In re Pearson* (D. C., N. Y.), 2 Am. B. R. 482, 95 Fed. 425, in which case the payment of debts which were a charge upon a leaseholder in order to protect the debtor's interest therein was held not to be an act of bankruptcy, since the payment did not injuriously affect his creditors. Compare *In re Lange* (D. C., N. Y.), 3 Am. B. R. 231, 97 Fed. 197.

127. *In re Perlhefter & Shatz* (D. C., N. Y.), 25 Am. B. R. 576, 177 Fed. 299; *In re Pearson* (D. C., N. Y.), 2 Am. B. R. 482, 95 Fed. 425.

128. *Knickerbocker v. Comstock*, Fed. Cas. 7,879.

129. *Wilder v. Watts* (D. C., S. Car.), 15 Am. B. R. 57, 138 Fed. 426.

130. *Clark v. Iselin*, 21 Wall. 360, 22 L. Ed. 568; *In re Weaver*, Fed. Cas. 17,307;

In re Union Pacific R. R. Co., Fed. Cas. 14,376.

131. *In re Columbia Real Estate Co.* (D. C., N. J.), 30 Am. B. R. 471, 205 Fed. 980.

Chattel mortgage to cancel pre-existing mortgage.—A payment to a bank to take up a note, made from money loaned upon a chattel mortgage, the larger part of which was used to cancel a pre-existing mortgage on the same property, does not constitute a preference where, although the debtor was insolvent, it does not appear that he knew himself to be so, but notwithstanding that his creditors were pressing him for payment and his credit was very limited, he had quite a number of outstanding accounts, was endeavoring to pay his debts in full and the payment to the bank, which was small in comparison with his aggregate indebtedness, was made in the ordinary course of business, with the expectation on the part of the debtor of continuing his business and ultimately paying all of its obligations. *In re Hallin* (D. C., Mich.), 28 Am. B. R. 708, 199 Fed. 806.

132. *In re Hallin* (D. C., Mich.), 28 Am. B. R. 708, 199 Fed. 806, holding that the acceptance of less than the face value of the mortgage, the balance being a bonus or discount, or extra interest did not render the mortgage preferential.

deplete the estate and may not be deemed preferential.¹³³ The transfer must consist of the bankrupt's own property to constitute a preference; payment of a note of a bankrupt by an indorser would not be sufficient.¹³⁴ A renewal within the four months' period of a chattel mortgage, given as security for a pre-existing debt, is not an illegal preference.¹³⁵ A payment by an attorney, out of his own funds, of a claim against his client, which does not deplete his client's estate is not a preference constituting an act of bankruptcy.¹³⁶ The payment of a relatively small amount as a bonus for a loan secured by a chattel mortgage, although unlawful as between the alleged bankrupt and his mortgagee is not a preference constituting an act of bankruptcy.¹³⁷

(3) **INTENT TO PREFER.**—To authorize an adjudication of bankruptcy it must appear that the transfer alleged to constitute an act of bankruptcy was made with the intent to prefer the creditor to whom it was given; if no such intent exists it may be a preference but it is not an act of bankruptcy.¹³⁸ As indicated in the preceding paragraph, ordinary business transactions by a going concern, necessary for the continuance of the business are not prohibited, even if it happen that through some circumstance the debtor become insolvent. Payments to creditors in an ordinary business way made by a debtor who did not regard himself as insolvent, are not necessarily made with intent to prefer.¹³⁹ If a mortgage is given to a person not a creditor to secure advances made in the payment of debts, and the mortgagor believed at the time that she had ample property to meet all demands against her, it is not a preference.¹⁴⁰ The intent will be presumed when the transaction consists of a transfer of personal property by way of payment.¹⁴¹ If the bankrupt did not know of an alleged claim against him when he made payments to his only other creditors in due course of business, such payments were not made with intent to prefer and do not constitute acts of bankruptcy.¹⁴² If a debtor did not know of a claim against him, he cannot have intended to give a preference against such claim; but there is a strong presumption that he does know whether a claim is paid.¹⁴³ The intent of the creditor to whom the preferential transfer is made is not material; it need not be shown that the creditor knew or had reasonable grounds to believe that the transfer was preferential.¹⁴⁴ The question of intent is one for the jury.¹⁴⁵

^{133.} *Martin v. Hulen & Co.* (C. C. A., 8th Cir.), 17 Am. B. R. 510, 149 Fed. 982.

^{134.} *Mason v. Nat. Herkimer Co. Bank* (C. C. A., 2d Cir.), 22 Am. B. R. 733, 172 Fed. 529, *affd.* 225 U. S. 178, 28 Am. B. R. 218, 56 L. Ed. 1042.

^{135.} *In re Cutting* (D. C., N. Y.), 16 Am. B. R. 751, 145 Fed. 388.

^{136.} *In re Kerlin* (C. C. A.; 6th Cir.), 31 Am. B. R. 12, 209 Fed. 42, 135 C. C. A. 1, *revd.* 30 Am. B. R. 816.

^{137.} *In re Hallin* (D. C., Mich.), 28 Am. B. R. 708, 199 Fed. 806.

^{138.} *In re Gilbert* (D. C., Or.), 8 Am. B. R. 101, 112 Fed. 951; *In re Truitt* (D. C., Md.), 29 Am. B. R. 570, 203 Fed. 550; *Matter of Cotting Coal Co.* (D. C., Mass.), 32 Am. B. R. 489, 212 Fed. 548. See cases cited, Am. B. R. Dig., §§ 168, 169.

^{139.} *Goodlander-Robertson Lumber Co. v. Atwood* (C. C. A., 4th Cir.), 18 Am. B. R. 510, 152 Fed. 978.

^{140.} *In re McLoon* (D. C., Mo.), 20 Am. B. R. 719, 723, 162 Fed. 575.

Preferential transfer must be made to or for benefit of creditor. *Richardson v. Shaw*, 203 U. S. 587, 19 Am. B. R. 717.

^{141.} *Johnson v. Wald* (C. C. A., 5th Cir.), 2 Am. B. R. 84, 93 Fed. 640; *In re Rome Planing Mills* (D. C., N. Y.), 3 Am. B. R. 123, 96 Fed. 812; *In re Gilbert* (D. C., Or.), 8 Am. B. R. 101, 112 Fed. 951; *In re Flint Hill Stone & Construction Co.* (D. C., N. Y.), 18 Am. B. R. 81, 149 Fed. 1,007.

^{142.} *In re Morgan & Williams* (D. C., Ga.), 25 Am. B. R. 861, 184 Fed. 938.

^{143.} *In re Pangborn* (D. C., Mich.), 26 Am. B. R. 40, 185 Fed. 673.

^{144.} *In re Rome Planing Mills* (D. C., N. Y.), 3 Am. B. R. 123, 96 Fed. 812; *In re Wright Lumber Co.* (D. C., Ark.), 8 Am. B. R. 345, 114 Fed. 1,011.

^{145.} *In re Bloch* (C. C. A., 2d Cir.), 6 Am. B. R. 300, 109 Fed. 790.

(4) **PROOF OF INTENT.**—As in the case of a transfer to hinder, delay and defraud creditors, the intent to prefer may be implied from the actual result of the transaction.¹⁴⁶ One is presumed to intend the probable consequences of his acts,—that is, those consequences which would naturally follow, and which a person of ordinary intelligence would expect as the natural result thereof; this presumption is of weight in determining the debtor's intent to prefer, and has been frequently applied.¹⁴⁷ If the debtor knows that he is insolvent he must be presumed to know that a transfer made to one creditor to the exclusion of others will result in a preference, without regard to his actual intent in making such transfer.¹⁴⁸ Payment of a claim by one knowing himself to be insolvent raises a conclusive presumption of intent to prefer;¹⁴⁹ if it be shown that it was made in the honest belief that he is solvent, the burden shifts to the creditors.¹⁵⁰ Where a preference is given with the approval of

146. In re Douglass Coal & Coke Co. (D. C., Tenn.), 12 Am. B. R. 539, 131 Fed. 769; In re Wright Lumber Co. (D. C., Ark.), 8 Am. B. R. 345, 114 Fed. 1,011; In re McGee (D. C., N. Y.), 5 Am. B. R. 262, 105 Fed. 895; In re Bloch (C. C. A., 2d Cir.), 6 Am. B. R. 300, 109 Fed. 790; In re Rome Planing Mills (D. C., N. Y.), 3 Am. B. R. 123, 96 Fed. 812; Johnson v. Wald (C. C. A., 5th Cir.), 2 Am. B. R. 84, 93 Fed. 640.

As to proof of intent, see Am. B. R. Dig., § 265.

147. Macon Grocery Co. v. Beach (D. C., Ga.), 19 Am. B. R. 558, 156 Fed. 1,009.

Under the former law.—Toof v. Martin, 13 Wall. 40, 20 L. Ed. 481; Wager v. Hall, 10 Wall. 584, 21 L. Ed. 504; Traders' Bank v. Campbell, 14 Wall. 87, 20 L. Ed. 832; Samson v. Borton, 5 Ben. 325; In re Dibbles, 3 Ben. 283; Terry v. Cleaver, 2 Biss. 356; Rison v. Knapp, Fed. Cas. 11,681, 1 Dill. 186; Driggs v. Moore, Fed. Cas. 4,085, 1 Abb. C. C. 440; In re Silverman, 1 Sawy. 410; In re Oregon Bulletin Print. & Pub. Co., Fed. Cas. 10,559; Miller v. Keyes, Fed. Cas. 9,578.

148. In re Condon (C. C. A., 2d Cir.), 31 Am. B. R. 754, 209 Fed. 800; In re Wright Lumber Co. (D. C., Ark.), 8 Am. B. R. 345, 114 Fed. 1,011, in which case the court said: "If it be said that the testimony shows that the bankrupt did not intend to prefer a claimant, the answer is that he was insolvent, and he knew it, and he must be held to have intended that which was the necessary consequence of his act. He cannot be heard to say that he did not intend to do a thing when the necessary and logical consequence of his act was to do that very thing."

Presumption where transfer is made by insolvent.—Where a debtor known to be insolvent transfers a large portion of his property to one creditor to the exclusion of others, such transaction must be taken as conclusive of an intent to give a preference. In re McGee (D. C., N. Y.), 5 Am. B. R. 262, 105 Fed. 895. The debtor's intent to give a preference may be presumed from a transfer, while insolvent, of a large portion of his property to a single creditor. When this is proved, the burden is upon him to show that he was ignorant of his insolvency and had reason to believe that he could pay his debts

in full. In re Rome Planing Mills (D. C., N. Y.), 3 Am. B. R. 123, 96 Fed. 812. If a merchant is hopelessly insolvent during the four months preceding the filing of a petition in involuntary bankruptcy against him, and with knowledge of such condition of insolvency pays to certain of his creditors substantial sums of money in full satisfaction of their claims, and denies payment to others whose claims are due and equally entitled to payment he has committed an act of bankruptcy under this clause (§ 3-a, (2)). His payments under such circumstances inevitably result in giving the creditors so favored a preference over the others. The debtor is presumed to intend the necessary results of his own intelligent acts. Rex Buggy Co. v. Hearick (C. C. A., 8th Cir.), 12 Am. B. R. 726, 132 Fed. 310. See Johnson v. Wald (C. C. A., 5th Cir.), 2 Am. B. R. 84, 93 Fed. 640, and note as to proof of intent under former act, in 2 Am. B. R. 84-86.

Proof of knowledge of insolvency.—In order to charge a debtor with having committed an act of bankruptcy in the giving of a preference by the payment to a creditor of a past-due account, it is necessary to show that he intended thereby to give such creditor more than the other creditors would get; and this element is not met by showing that he ought to have thought so; but where it appears that though the debtor hoped to overcome a temporary embarrassment, yet knew that the result was very doubtful, and did not make such payment to carry his affairs through successfully, he must be deemed to have intended a preference. In re Condon (D. C., N. Y.), 29 Am. B. R. 907, 198 Fed. 947, affd. 31 Am. B. R. 754, 209 Fed. 800.

149. In re Billings (D. C., Ala.), 17 Am. B. R. 80, 45 Fed. 395; In re Wright Lumber Co. (D. C., Ark.), 8 Am. B. R. 345, 114 Fed. 1,011; Driggs v. Moore, Fed. Cas. 4,085; Rison v. Knapp, Fed. Cas. 11,861; In re Silverman, Fed. Cas. 12,855, 1 Sawy. 410; In re Dibblee, Fed. Cas. 3,884.

150. Toof v. Martin, 13 Wall. 40, 20 L. Ed. 481; In re Munn, Fed. Cas. 9,925, 3 Biss. 442; Morgan v. Mastick, Fed. Cas. 9,803; In re Rome Planing Mills (D. C., N. Y.), 3 Am. B. R. 123, 96 Fed. 812; In re Bloch

certain creditors such creditors are estopped from objecting to the transfer as an act of bankruptcy.¹⁵¹ It is possible that, under the new definition of insolvency, one may not always know the fair valuation of his property, and, therefore, may not be able to show that he knew whether he was solvent or not. But the presumption is that a person has knowledge of his financial condition.¹⁵² If a debtor honestly believes himself to be solvent when the transfer is made, or if he establishes his want of knowledge of his insolvency, the presumption of an intent to prefer is rebutted.¹⁵³ Where an insolvent debtor, before the entry of judgment on a verdict against him, gives a mortgage to secure another creditor, the intent to prefer will be presumed.¹⁵⁴ If a debtor, while insolvent, transfers all or nearly all his property to some of his creditors, leaving others unprovided for, the intent to prefer will be presumed.¹⁵⁵ The effect of this presumption will vary according to the proportionate amount of the transfer,¹⁵⁶ and is not conclusive.¹⁵⁷ If the amount of the transfer is comparatively small and it does not materially deplete the estate, the intent to prefer will not be presumed.¹⁵⁸ The circumstance that a mortgage executed within the four months' period was not recorded for a considerable time thereafter may be considered in determining whether such mortgage con-

(C. C. A., 2d Cir.), 6 Am. B. R. 300, 109 Fed. 790; In re McLoon (D. C., Me.), 20 Am. B. R. 719, 162 Fed. 575.

Production of books.—If the bankrupt does not submit to an examination or submit his books so that his financial condition may be ascertained the presumption of a general assignment for creditors will be taken against him. *Bray v. Cobb* (D. C., N. Car.), 1 Am. B. R. 153, 91 Fed. 102. See under "*Solvency and the second and third acts of bankruptcy*," *post*. The burden is shifted to creditors if alleged bankrupt appears with his books. *Matter of Election Chemical Co.* (D. C., N. Y.), 31 Am. B. R. 471, 208 Fed. 954.

151. *Matter of Freeman Cotting Coat Co.* (D. C., Mass.), 32 Am. B. R. 489, 212 Fed. 548.

152. In re Gilbert (D. C., Or.), 8 Am. B. R. 101, 104, 112 Fed. 951; In re Jacobs (Ref., La.), 1 Am. B. R. 518; In re Silverman, Fed. Cas. 12,855, 1 Sawy. 410.

153. In re Gilbert (D. C., Or.), 8 Am. B. R. 101, 104, 112 Fed. 951; In re Rome Planing Mills (D. C., N. Y.), 3 Am. B. R. 123, 96 Fed. 812.

A payment to a bank to take up a note, made from money loaned upon a chattel mortgage, the larger part of which was used to cancel a pre-existing mortgage on the same property, does not constitute a preference where, although the debtor was insolvent, it does not appear that he knew himself to be so, but notwithstanding that his creditors were pressing him for payment and his credit was very limited, he had quite a number of outstanding accounts, was endeavoring to pay his debts in full and the payment to the bank, which was small in comparison with his aggregate indebtedness, was made in the ordinary course of business, with the expectation on the part of the debtor of continuing his business and ultimately paying all of its obligations. In re Hallin (D. C., Mich.), 28 Am. B. R. 708, 199 Fed. 806.

154. In re Smith (D. C., N. Y.), 23 Am. B. R. 864, 176 Fed. 426.

155. *Nylon & Co. v. Christiansen Co.* (C. C. A., 6th Cir.), 19 Am. B. R. 789, 158 Fed. 290; *Boyd v. Lemon, Gale & Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 81, 114 Fed. 647; *Johnson v. Wald* (C. C. A., 5th Cir.), 2 Am. B. R. 84, 93 Fed. 640; *Goldman v. Smith* (D. C., Ky.), 1 Am. B. R. 266, 93 Fed. 182; In re Grant (D. C., N. Y.), 5 Am. B. R. 837, 106 Fed. 497; In re Waite, Lowell, 407; In re Drummond, Fed. Cas. 4,094; In re Foster, Fed. Cas. 4,964.

Intent to prefer by transfer of large part of property.—In the case of *Toof v. Martin*, 13 Wall. 40, 20 L. Ed. 481, the court said: "The transfer in any case by the debtor of a large part of all his property while he is insolvent, to one creditor without making provision for an equal distribution of its proceeds to all his creditors necessarily operates as a preference to him and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts."

156. In re Gilbert (D. C., Or.), 8 Am. B. R. 101, 106, 112 Fed. 951.

157. *Matter of Freeman Cotting Coat Co.* (D. C., Mass.), 32 Am. B. R. 489, 212 Fed. 548.

158. In re Kerlin (C. C. A., 6th Cir.), 31 Am. B. R. 12, 209 Fed. 42, revg. 30 Am. B. R. 816.

The paying of small sums to certain creditors in order to keep the business going does not give rise to this presumption. In re Douglass Coal & Coke Co. (D. C., Tenn.), 12 Am. B. R. 549, 131 Fed. 769; In re Stovall Grocery Co. (D. C., Ga.), 20 Am. B. R. 537, 161 Fed. 882; In re Perihelfter (D. C., N. Y.), 25 Am. B. R. 576, 177 Fed. 299.

stitutes an act of bankruptcy.¹⁵⁹ Where the proof is that the property was transferred to a mortgagee who was a creditor in an amount larger than the value of the property transferred, the presumption of intent to prefer will be negated.¹⁶⁰ If insolvency at the time of the transfer is not shown, the question of intent is immaterial.¹⁶¹

(5) **INTENT AS DISTINGUISHED FROM MOTIVE.**—There must be design to give an advantage. Where the transfer is in pursuance of an effort to extricate the transferor from his embarrassments, it will not be held a preference.¹⁶² Likewise, where the physical transfer is in pursuance of a valid contract antedating the bankruptcy.¹⁶³ But a transfer is not less a preference because given in answer to a request or in fulfillment of a prior promise made at the time of contracting the debt.¹⁶⁴ Evidence of a failure to record a mortgage until several months after its execution may justify a finding that it was given with an intent to prefer.¹⁶⁵ So whatever may have been the motive in making the transfer, it is immaterial as bearing upon the question of intent. However honest or proper may have been the motive, yet if the intent to prefer exists and is coupled with the other essential elements, an act of bankruptcy is the result.¹⁶⁶

(6) **ALLEGATIONS AS TO PREFERENCE.**—The specific facts as to the preference relied on to constitute an act of bankruptcy must be alleged.¹⁶⁷ The

159. In re Edelman (C. C. A., 2d Cir.), 12 Am. B. R. 238, 130 Fed. 700.

160. Livingston v. Bruce, Fed. Cas. 8,410; Catlin v. Hoffman, Fed. Cas. 2,521.

161. In re Kassel (C. C. A., 2d Cir.), 28 Am. B. R. 233, 195 Fed. 492.

Proof of intent under former law.—Any fact which tends to establish the existence or non-existence of intent is admissible evidence. Linkman v. Wilcox, Fed. Cas. 8,374; Giddings v. Dodds, Fed. Cas. 5,405. The testimony of the party himself is entitled to little weight. Oxford Iron Co. v. Slaughter, Fed. Cas. 10,637. Transfers of one's property afford a violent, almost conclusive, presumption of intent to prefer, if there are creditors unprovided for. In re Waite, Fed. Cas. 17,044. Proof of an antecedent indebtedness is, in general, necessary to establish that a payment or security is a preferential transfer. Clark v. Iselin, 21 Wall. 360, 22 L. Ed. 568; Burnhisel v. Firman, 22 Wall. 170, 2 L. Ed. 766; Sawyer v. Turpin, 91 U. S. 114, 23 L. Ed. 235.

162. In re Wolf (D. C., Iowa), 3 Am. B. R. 555, 98 Fed. 84.

163. Sabin v. Camp (D. C., Or.), 3 Am. B. R. 578, 98 Fed. 974. For analogous cases under the law of 1867, see Winter v. Railway Co., Fed. Cas. 17,890; In re Hapgood, Fed. Cas. 6,044.

164. Arnold v. Maynard, Fed. Cas. 561.

165. In re Edelman (C. C. A., 2d Cir.), 12 Am. B. R. 238, 130 Fed. 700.

166. Hardy v. Binniger, 7 Blatch. 262, 4 N. B. R. 262, Fed. Cas. 1,420; Strain v. Gourdin, 2 Woods 380, 11 N. B. R. 156, Fed. Cas. 13,621.

167. In re Nelson (D. C., Wis.), 1 Am. B. R. 63, 98 Fed. 76. An omission of the specific date does not render the petition demurrable. In re Vastbinder (D. C., Pa.), 11 Am. B. R. 118, 126 Fed. 417.

Sufficiency of petition; general averments.

—A petition in involuntary bankruptcy which merely charges that the alleged bankrupt on a specified date, while insolvent and within four months of the date of the petition, transferred and conveyed "certain of his property" to creditors whose names are unknown, with intent to hinder, delay and defraud other creditors or with intent to prefer said creditors over others of the same class, does not set forth an act of bankruptcy with the required particularity as to essential data and details, does not apprise the alleged bankrupt of what he is called upon to meet and, therefore, does not warrant the granting of any relief. In re Hallin (D. C., Mich.), 28 Am. B. R. 708, 199 Fed. 806. See also In re Rosenblatt & Co. (C. C. A., 2d Cir.), 28 Am. B. R. 401, 193 Fed. 638.

Preferential transfer.—A petition by creditors, representing about one-third of one per cent. of the total indebtedness (\$200,000) of the bankrupt, averring that the alleged bankrupt is insolvent and that, within four months next preceding the date of the petition, he paid certain unknown amounts to creditors whose names are unknown, with intent to prefer such creditors, is insufficient. Matter of Mason-Seaman Transportation Co. (D. C., N. Y.), 37 Am. B. R. 677, 235 Fed. 974. See Am. B. R. Dig., § 217.

petition should allege the amounts paid and to whom.¹⁶⁸ It should also allege that the alleged act was committed with an intent to prefer.¹⁶⁹

c. Third act of bankruptcy; preference through legal proceedings.—

(1) **IN GENERAL.**—The third act of bankruptcy consists of a person having “suffered or permitted while insolvent any creditor to obtain a preference through legal proceedings, and not having five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference.” If any of these elements, i. e. (1) insolvency, (2) suffering or permitting a creditor to obtain a preference through a legal proceeding, (3) not avoiding the preference five days before the sale, where (4) the property to be sold is affected by such preference, is missing, the act is not an act of bankruptcy under this clause.¹⁷⁰ This has been well termed the passive act of bankruptcy. It differs from the corresponding act in the law of 1867, in that intent is not material. It is in harmony with § 67-f, under which liens through legal proceedings are void, irrespective of intent on the part of the debtor, or pressure due to knowledge, on part of the creditor. The nearest approximation to it is found in the Canadian insolvency act of 1869 (now repealed).¹⁷¹ The corresponding clause in the English bankruptcy act is also of interest.¹⁷² The Torrey bill in its last form,¹⁷³ and the Henderson substitute, contained words which seemed to include these two foreign provisions. The exact phrasing of the present law did not appear until the bill had been agreed to in conference committee. Changes narrowing its scope were then made. In spite of them, it is the most virile and available of the acts of bankruptcy.

(2) **COMPARISON WITH THE ACT OF 1867.**—Section 39 of that act provided that an insolvent who should “procure or suffer his property to be taken on legal proceedings, with intent to give a preference to one or more

168. In re Blumberg (D. C., Pa.), 13 Am. B. R. 343, 133 Fed. 845. Where this is done the failure to state names of creditors is not fatal. In re Lackrow (D. C., Pa.), 14 Am. B. R. 514, 140 Fed. 573.

169. In re Tupper (D. C., N. Y.), 20 Am. B. R. 824, 827, 163 Fed. 766; In re New Chattanooga Hardware Co. (D. C., Tenn.), 27 Am. B. R. 77, 79, 190 Fed. 241, citing text.

170. Matter of Fisher (D. C., Pa.), 33 Am. B. R. 628, 219 Fed. 638; Matter of Fineman (D. C., Pa.), 34 Am. B. R. 245, 223 Fed. 652.

Elements constituting act of bankruptcy under subdivision a(3).—The act of bankruptcy defined by section 3a (3) of the Bankruptcy Act consists of three elements. The first is the insolvency of the debtor; the second is suffering or permitting a creditor to obtain a preference through legal proceedings; that is, to acquire a lien upon property of the debtor by means of a judgment, attachment, execution or kindred proceeding, the enforcement of which will enable the creditor to collect a greater percentage of his claim than other creditors of the same class; and the third is the failure of the debtor to vacate or discharge the lien and resulting preference five days before a sale or final disposition of any property affected. Only

through the combination of the three elements is the act of bankruptcy committed. Insolvency alone does not suffice, nor is it enough that it be coupled with suffering or permitting a creditor to obtain a preference by legal proceeding. The third element must also be present else there is no act of bankruptcy within the meaning of this provision. *Citizens Banking Co. v. Ravenna Natl. Bank*, 234 U. S. 360, 32 Am. B. R. 477, 58 L. Ed. 1352.

171. The Canadian act provided that: “A debtor shall be deemed insolvent, and his estate shall become subject to compulsory liquidation if he permits any execution issued against him under which any of his chattels, land, or property are seized, levied upon, or taken in execution, to remain unsatisfied till within four days of the time fixed by the sheriff or officer for the sale thereof, or for fifteen days after such seizure.”

172. Eng. Bankruptcy Act of 1890, § 1, provides that: “A debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any court, or in any civil proceeding in the high court, and the goods have been either sold or held by the sheriff for twenty-one days.”

173. S. 1035, introduced by Senator Lindsay, March 23, 1897.

of his creditors" thereby committed an act of bankruptcy; and, by § 35, it was provided that any attachment or seizure under execution of a person's property "procured by him" with a view to give a preference, should be void. The doubt which long divided the lower courts as to the meaning of these clauses was finally settled in *Wilson v. City Bank*,¹⁷⁴ wherein the Supreme Court held that no intent could be inferred from the mere neglect of the alleged bankrupt, properly sued on a just claim, to interpose an answer when there was no valid defense; and, therefore, that that intent which was an essential element of this act of bankruptcy could not be predicated on mere passive non-residence. This case has been the storm-center of the decisions on the subsection now under consideration.

(3) INTENT NOT ESSENTIAL.—On the question as to whether intent is an element in this act of bankruptcy, the earlier and most of the later cases have held that intent had been dropped out, and that result,—the inequity flowing from the transaction, rather than the animus of it—had been substituted instead.¹⁷⁵ Two decisions, however, held to the older doctrine, that mere passivity was not enough.¹⁷⁶ The earlier case seems to have been decided without the difference between the statutes being noted; the later is of great ability and for a time substituted doubt for what had grown to be certainty. The question reached the Supreme Court late in 1901, and was then settled by a five-to-four decision in *Wilson Bros. v. Nelson*,¹⁷⁷ which, reversing the court below, upholds the majority of the previous cases, and finally determines that intent is not an element of pleading or proof where the third act of bankruptcy is relied on.¹⁷⁸ As therein stated the act "makes the result obtained by the creditor and not the intent of the

174. 17 Wall. 473, 21 L. Ed. 723.

175. In re Meyers (Ref., N. Y.), 1 Am. B. R. 1; In re Reichman, 1 Am. B. R. 17, 91 Fed. 624; In re Moyer (D. C., Pa.), 1 Am. B. R. 577, 97 Fed. 324; In re Ferguson (D. C., N. Y.), 2 Am. B. R. 586, 95 Fed. 429; In re Rome Planing Mills (D. C., N. Y.), 3 Am. B. R. 123, 96 Fed. 812; Parmenter Mfg. Co. v. Stoeve (C. C. A., 1st Cir.), 3 Am. B. R. 220, 97 Fed. 330; In re Thomas (D. C., Pa.), 4 Am. B. R. 571, 103 Fed. 272; In re Miller (D. C., N. Y.), 5 Am. B. R. 140, 104 Fed. 764; In re Harper (D. C., Ill.), 5 Am. B. R. 567, 105 Fed. 900; Bradley Timber Co. v. White (C. C. A., 5th Cir.), 10 Am. B. R. 329, 121 Fed. 779, 58 C. C. A. 55; Matter of Rung Furniture Co. (C. C. A., 2d Cir.), 14 Am. B. R. 12, 139 Fed. 526; In re Truitt (D. C., Md.), 29 Am. B. R. 570, 203 Fed. 550.

176. In re Nelson (D. C., Wis.), 1 Am. B. R. 63, 98 Fed. 76; Duncan v. Landis (C. C. A., 3d Cir.), 5 Am. B. R. 649, 106 Fed. 839. Compare In re Kersten (D. C., Wis.), 6 Am. B. R. 516, 110 Fed. 929.

177. 183 U. S. 191, 7 Am. B. R. 142, 46 L. Ed. 147.

Result and not intent essential fact.—The court in this case drew a distinction between the present act and the act of 1867, and noted the effect of omitting certain phrases, which, under the earlier act, clearly indicated that a preference must have been intended by the

act of procuring or suffering property to be taken on legal proceedings. The court said: "The act of 1898 differs from that of 1867 in wholly omitting the clauses 'with intent to give a preference to one or more of his creditors' or 'to defeat or delay the operation of this act;' and in substituting for the words 'procures or suffers his property to be taken on legal process,' the words 'suffered or permitted while insolvent, any creditor to obtain a preference through legal proceedings,' and not having, five days before a sale of the property affected, 'vacated or discharged such preference.' . . . Taking together all the provisions of the act of 1898 on this subject and contrasting them with the provisions of the act of 1867, there can be no doubt of their meaning. The third clause of § 3, omitting the word 'procure,' and the phrase 'intent to give a preference,' of the former statute, makes it an act of bankruptcy if the debtor has 'suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings,' and has not 'vacated or discharged such preference' five days before a sale of the property. . . . This act of 1898 makes the result obtained by the creditor, and not the intent of the debtor, the essential fact."

178. Bradley Timber Co. v. White (C. C. A., 5th Cir.), 10 Am. B. R. 329, 121 Fed. 779, 58 C. C. A. 55, affg. 9 Am. B. R. 441.

debtor the essential fact.”¹⁷⁹ In other words, it is now the settled law that an insolvent may be thrown into bankruptcy by the requisite number of his creditors, if a judgment has been entered against him, execution issued and levy made, and sale five or less days away, irrespective of whether he procured or merely could not prevent the judgment against him. This, from the creditor's standpoint, is the high-water mark of Anglo-Saxon “acts of bankruptcy.”¹⁸⁰

(4) **SUFFERED OR PERMITTED.**—“Suffered or permitted” includes passive non-resistance as well as non-ability to resist.¹⁸¹ A debtor who does not pay a lawful debt when due, and stands by while his creditor secures a judgment against him, and levies upon his property, “suffers and permits” such judgment to be taken, and such levy to be made, and commits an act of bankruptcy under this clause.¹⁸² The mere fact of resistance by defense conducted in good faith is not material.¹⁸³ And even though an appeal is

179. *Matter of Rung Furniture Co.* (C. C. A., 2d Cir.), 14 Am. B. R. 12, 135 Fed. 526.

Preference by legal proceedings; intent.—While a preference effected through judicial proceedings may constitute an act of bankruptcy either under subdivision a (3) or a (2) of section 3 of the Bankruptcy Act, the two subdivisions do not necessarily overlap. The distinction is to be found in the presence or absence of an actual intent on the part of the debtor to give a preference. If he has acted in such a way as to give a preference with the intent and purpose so to do, it is immaterial by what means such purpose is accomplished. In such case the act falls within subdivision a (2). But, if, through legal proceedings, a preference has in fact been permitted or procured, but without any intent or purpose on the part of the debtor to give it, then the act falls within the terms of subdivision a (3). *Matter of Musgrove Mining Co.* (D. C., Idaho), 37 Am. B. R. 628, 234 Fed. 99. See Am. B. R. Digest, § 175.

180. See further discussion of this subject by Referee Hotchkiss in *Matter of Rung Furniture Co.* (Spec. M., N. Y.), 10 Am. B. R. 44, in which the cases interpreting § 3-a (3) are collated.

181. In re Gallagher (Ref., Mass.), 6 Am. B. R. 255.

182. *Bogen & Trummel v. Protter* (C. C. A., 6th Cir.), 12 Am. B. R. 288, 129 Fed. 533.

An affirmative act on the part of the debtor is not required. If he remains passive and supine and permits his property to be taken by one creditor at the expense of the others, he has “suffered” or “permitted” a preference to be obtained. In re Rome Planing Mills (D. C., N. Y.), 3 Am. B. R. 123, 96 Fed. 812; In re Thomas (D. C., Pa.), 4 Am. B. R. 571, 103 Fed. 272; In re Miller (D. C., N. Y.), 5 Am. B. R. 140, 104 Fed. 764; In re Harper (D. C., Ill.), 5 Am. B. R. 576, 105 Fed. 900. *Contra:* *Duncan v. Landis* (C. C. A., 3d Cir.), 5 Am. B. R. 649, 106 Fed. 839, holding that there must be some act on the part of the alleged bank-

rupt either by way of active procurement or voluntary acquiescence, arising from connivance, co-operation or participation. In re Truitt (D. C., Md.), 29 Am. B. R. 570, 203 Fed. 550.

A petition, alleging that the debtor is insolvent and has suffered and permitted certain of his creditors to obtain a preference through legal proceedings by suffering a judgment and an attachment in execution to be issued thereon against an insurance company as garnishee; that judgment has been obtained against the garnishee in the proceedings; the amount of which is about to be paid over to the creditors thus preferred; and that the debtor has failed to have the preference thus obtained vacated, is sufficient, and alleges an act of bankruptcy. *Matter of Fineman* (D. C., Pa.), 34 Am. B. R. 245, 223 Fed. 652.

183. *Bradley Timber Co. v. White* (C. C. A., 5th Cir.), 10 Am. B. R. 329, 121 Fed. 779.

Fact of resistance.—In the case of *Bradley Timber Co. v. White* (C. C. A., 5th Cir.), 10 Am. B. R. 329, 121 Fed. 779, the court said: “Whether or not an insolvent makes resistance to legal proceedings of a creditor to obtain preference is not very material. It may show good faith on his part, but the act of bankruptcy declared in the law is ‘suffering or permitting,’ a judgment which will result in a preference, and a failure to vacate the same within at least five days before a sale or disposition of the property affected by such preference. The Bankrupt Law seeks to prevent and, if obtained, by any means, to set aside preferences obtained against an insolvent within four months; and, in order to effect an equal distribution of the insolvent's property among creditors, it contemplates a resort to the bankruptcy court in all cases of such preference, no matter whether the bankrupt has consented thereto or opposed the same. If the bankrupt fails to discharge a preference obtained through legal proceedings within at least five days before the property affected by the pref-

taken from the judgment, a failure to vacate it may be a preference, no attempt being made to stay an execution and sale by giving security on appeal, and it appearing *prima facie* that the debtor was insolvent.¹⁸⁴ The failure to vacate or discharge the lien of an attachment at least five days before a sale or final disposition of the property attached, where the lien was created by attachment proceedings instituted more than four months prior to the filing of an involuntary petition, does not constitute an act of bankruptcy.¹⁸⁵

(5) CREDITORS TO BE AFFECTED.—A creditor must have been preferred over other creditors by this act of bankruptcy.¹⁸⁶ The term "creditor" is defined in § 1 (9). The creditor preferred must have a provable claim;¹⁸⁷ a surety on a bond given by a corporation to secure claims for services of laborers on a public work is a creditor, and a judgment and sale in favor of the surety is a preference constituting an act of bankruptcy.¹⁸⁸ Where it is shown that the petitioning creditors induced a judgment creditor to levy execution on his judgment, they are estopped from setting up such levy as an act of bankruptcy.¹⁸⁹

(6) PREFERENCE.—"Preference" as used in this subsection refers to a resultant inequality between creditors of the same class.¹⁹⁰ The intent and purpose of this act of bankruptcy is, like all the others, to avoid a preference and to provide for an equal distribution of the debtor's property among his creditors.¹⁹¹ If the proceedings do not result in such inequality the debtor is not subject to attack.¹⁹² For instance if the property is not subject to sale under execution and the levy is therefore invalid, the proceedings do not result in a preference, and do not fall within this clause.¹⁹³ The preference must be to a creditor over other creditors of the same class, so where a landlord distrains for his rent he does not procure a preference, since he is the only creditor of his class and is entitled to the priority which the law affords him.¹⁹⁴

erence is disposed of, that is an act of bankruptcy, and on proof of the same the insolvent may be adjudged a bankrupt."

Result, a preference.—A preference may consist not only in bankrupt's procuring or suffering a judgment to be entered against him or making a transfer of his property within four months of the filing of the petition in bankruptcy, but also in the creation of a lien by way of attachment, or the confession of a judgment within four months of the filing of the petition, the existence and enforcement of which will work a preference. *Folger v. Putnam* (C. C. A., 9th Cir.), 28 Am. B. R. 173, 194 Fed. 793.

184. *Matter of Rung Furniture Co.* (C. C. A., 2d Cir.), 14 Am. B. R. 12, 139 Fed. 526.

185. *Colston v. Austin Run Mining Co.* (C. C. A., 3d Cir.), 28 Am. B. R. 92, 194 Fed. 929.

186. See discussion, *ante*, under "First act of Bankruptcy."

187. *In re Crafts-Riordan Shoe Co.* (D. C., Mass.), 26 Am. B. R. 449, 185 Fed. 931, in which the court said: "To be creditors of the bankrupt, the plaintiff in the suit must own a demand or claim provable against him in bankruptcy."

188. *United Surety Co. v. Iowa Mfg. Co.* (C. C. A., 8th Cir.), 24 Am. B. R. 726, 179 Fed. 55.

189. *Matter of Marks* (D. C., Pa.), 15 Am. B. R. 457, 142 Fed. 279.

190. *Bankr. Act*, § 60-a, *post*. See also discussion under preceding acts of bankruptcy.

191. *In re Chapman* (D. C., Ga.), 3 Am. B. R. 607, 99 Fed. 395; *Richmond Standard Spike & Iron Co. v. Allen* (C. C. A., 4th Cir.), 17 Am. B. R. 583, 148 Fed. 657; *In re Ferguson* (D. C., N. Y.), 2 Am. B. R. 586, 588, 95 Fed. 429.

192. *In re Chapman* (D. C., Ga.), 3 Am. B. R. 607, 99 Fed. 395.

193. *In Missouri* a mortgagor's equity of redemption, after condition broken and possession is in the mortgagee, is not subject to sale under execution, and a levy thereon is invalid. Hence, the failure of a mortgagor to vacate a levy within five days prior to the sale thereunder does not constitute an act of bankruptcy. *Matter of Moark-Nemo Mining Co.* (D. C., Mo.), 34 Am. B. R. 201, 219 Fed. 340.

194. *In re Belknap* (D. C., Pa.), 12 Am. B. R. 326, 129 Fed. 646. As to whether labor-

(7) **LEGAL PROCEEDINGS.**—(I) *In general.*—“Legal proceedings” means proceedings in a court to assert a legal remedy or obtain an equitable relief.¹⁹⁵ They include all proceedings in a court of justice interlocutory or final, whereby the property of a debtor is seized and diverted from his general creditors.¹⁹⁶ The issuance of execution and a levy under a confession of judgment are “legal proceedings” within the clause.¹⁹⁷

(II) *Attachment proceedings.*—Attachment proceedings are legal proceedings within the meaning of the clause.¹⁹⁸ Attachment proceedings which have not been followed by a judgment are not of themselves sufficient; there must be an actual determination of the claim and the consequent judgment, execution, levy and a day of sale appointed.¹⁹⁹

(III) *Receivership; supplementary proceedings.*—A suit in a State court for the appointment of a receiver whereby certain creditors were preferred is

ers having judgments for wages are in the same class as general creditors, see *Matter of Toledo Portland Cement Co.* (Ref., Mich.), 17 Am. B. R. 375; *Mather v. Coe, Powers & Co.* (D. C., Ohio), 1 Am. B. R. 504, 92 Fed. 333.

195. Compare *In re Emslie* (C. C. A., 2d Cir.), 4 Am. B. R. 126, 102 Fed. 291, revg. 3 Am. B. R. 282, 97 Fed. 929.

196. *In re Rome Planing Mills* (D. C., N. Y.), 3 Am. B. R. 123, 96 Fed. 812.

197. *In re Thomas* (D. C., Pa.), 4 Am. B. R. 571, 103 Fed. 272; *Wilson Bros. v. Nelson*, 183 U. S. 191, 7 Am. B. R. 142.

A confession of judgment by a debtor may under certain circumstances constitute a transfer and if made with intent to prefer would constitute an act of bankruptcy under clause a(2) of this section. *In re Truitt* (D. C., Md.), 29 Am. B. R. 570, 203 Fed. 550; *In re Nusbaum* (D. C., N. Y.), 18 Am. B. R. 598, 152 Fed. 835. See Am. Bankr. R. Dig., § 181.

Allegations as to confession of judgment.—A petition, alleging as an act of bankruptcy, that the debtor confessed a judgment with an intent to prefer, is not insufficient for failure to set forth the facts and circumstances from which such intent may be inferred. *Matter of Musgrove Mining Co.* (D. C., Idaho), 37 Am. B. R. 628, 234 Fed. 99.

198. *In re Putnam* (D. C., Cal.), 27 Am. B. R. 923, 193 Fed. 464.

199. *In re Vetterman* (D. C., N. H.), 14 Am. B. R. 245, 135 Fed. 443; *In re Standard Steel Casting Co.* (D. C., Va.), 10 Am. B. R. 594, 124 Fed. 75.

Attachment proceedings.—In the case of *In re Crafts-Riordan Shoe Co.* (D. C., Mass.), 26 Am. B. R. 449, 185 Fed. 931, it appeared that, within the four months' period, a plaintiff in a suit against the bankrupt had obtained an attachment lien upon property of the bankrupt which was sold simply because it could not be kept without great and disproportionate expense, but no judgment against the bankrupt was obtained prior to bankruptcy. It was held that the fact that bankrupt failed to vacate the attachment at least five days before such sale

did not create a preference constituting an act of bankruptcy within section 3-a (3) since there was no “final disposition” of the property and such section was not intended to include sales which merely substitute money for property without rendering the alleged preference obtained by the attachment any more effective than it was before the sale. In this case the court said: “In the cases which have held preferences to have been obtained through legal proceedings, and an attachment has formed part of the proceedings, the attachment has been either after judgment in the suit, or, if before judgment, has been followed by a judgment before the petition in bankruptcy, so that the attachment lien has passed beyond the stage during which it remains wholly uncertain whether there is really any claim against the defendant or not.”

In the case of *Parmenter Mfg. Co. v. Stoeber* (C. C. A., 1st Cir.), 3 Am. B. R. 220, 97 Fed. 330, 38 C. G. A. 200, there had been such an attachment more than four months before the involuntary petition. This had been followed by judgment, execution, seizure, and sale within the four-month period. In affirming adjudication on the petition, it was said that the preference permitted was the execution sale, and that the four-month period referred to in the statute ran, not from the attachment, but “from a date connected with the proceedings after judgment.” If the sale constituted the preference, no preference was obtained merely by the attachment, and none until there had at least been judgment in the suit. See also *In re Harper* (D. C., Ill.), 5 Am. B. R. 576, 105 Fed. 960; *In re Windt* (D. C., Conn.), 24 Am. B. R. 536, 177 Fed. 584.

Failure to vacate attachment lien.—Although the mere suffering or permitting, while insolvent, a creditor to obtain a preference, alone does not constitute an act of bankruptcy under section 3-a (3), but the debtor must have failed at least five days before a sale or final disposition of the property to have vacated, or discharged such preference, it is incumbent upon an insolvent person to discharge or vacate a lien, secured

such a proceeding,²⁰⁰ and so also are supplementary proceedings whereby a debtor of a judgment debtor is directed to pay a certain amount to the sheriff to apply on the judgment.²⁰¹

(IV) *Distress for rent; statutory liens.*—A distraint of goods under a landlord's warrant is not "a legal proceeding" under this clause.²⁰² Where distraint is allowed it exists because of a lien upon the property found upon the leased premises.²⁰³ The rule is that a proceeding to enforce a statutory lien which is not in any way affected by the adjudication of bankruptcy does not fall within this clause.²⁰⁴

(8) *SALE OR DISPOSITION.*—"Sale or final disposition" as used in this clause means an act having the effect of a sale, whereby the ownership and control of the property is transferred from one person to another;²⁰⁵ an insolvent debtor does not commit an act of bankruptcy, rendering him subject to involuntary adjudication, by mere inaction for the period of four months after the levy of an execution on his real estate. Such inaction does not amount to a "final disposition."²⁰⁶ If the transaction is fictitious, invalid or otherwise ineffectual, because the proceedings are unauthorized so that the estate of the debtor is not depleted, or the rights of creditors affected, it does not constitute a sale or disposition.²⁰⁷ The securing by a creditor of the amount of his claim through attachment in execution proceedings is a "final disposition of any property affected by such preference," as effectually as if he had received payment from the proceeds of a sale under a writ.²⁰⁸ The

by an attachment upon his property, at least five days before a period of four months expires following the date of the levy of such attachment, and if he fails to do so he commits an act of bankruptcy. *Folger v. Putnam* (C. C. A., 9th Cir.), 28 Am. B. R. 173, 194 Fed. 793. This case seems to have been overruled in effect by *Citizens Banking Co. v. Ravenna Nat. Bank*, 234 U. S. 360, 32 Am. B. R. 477.

The failure of an alleged bankrupt to release the levy of an attachment upon his supposed interest in property transferred by him nearly seven years previously does not constitute an act of bankruptcy, even though followed by averments that such transfer was a fraudulent one. *Matter of Murphy* (D. C., Cal.), 35 Am. B. R. 320, 228 Fed. 1018.

200. *In re Kersten* (D. C., Wis.), 6 Am. B. R. 516, 110 Fed. 929; but otherwise where there is no such preference, *In re Empire Metallic Bedstead Co.* (C. C. A., 2d Cir.), 3 Am. B. R. 575, 98 Fed. 981; *Vaccaro v. Security Bank* (C. C. A., 6th Cir.), 4 Am. B. R. 474, 103 Fed. 436.

201. *In re Miller* (D. C., N. Y.), 5 Am. B. R. 140, 104 Fed. 764.

202. *In re Belknap* (D. C., Pa.), 12 Am. B. R. 326, 129 Fed. 646; *Richmond Standard Spike & Iron Co. v. Allen* (C. C. A., 4th Cir.), 17 Am. B. R. 583, 148 Fed. 657.

203. *Distraint by landlord.*—In the case of *Richmond Standard Steel Spike & Iron Co. v. Allen* (C. C. A., 4th Cir.), 17 Am. B. R. 583, 148 Fed. 657, the court said: "Under the law of Virginia, the right of the landlord to distraint the property of the tenant for rent has a priority over any lien created

on such property after it is carried onto the leased premises. In other words, as we understand the Virginia statute, the lien of the landlord for rent attaches to the property of the tenant as soon as it is placed on the premises, and this lien continues and is capable of being enforced in the manner and under the conditions provided in the statute. It has priority over all other liens subsequently created and retains this position of dignity provided the landlord pursues his right in apt time. It has been held that the preference by legal proceedings contemplated by the Bankruptcy Act does not include a levy upon a judgment of foreclosure of a lien which affects only the property bound by the lien."

204. *In re Mero* (D. C., Ct.), 12 Am. B. R. 171, 128 Fed. 630; *Owen v. Brown* (C. C. A., 8th Cir.), 9 Am. B. R. 717, 120 Fed. 812; *In re Chapman* (D. C., Ga.), 3 Am. B. R. 607, 99 Fed. 395. See Bankr. Act, § 67-f, *post*.

205. *Citizens Banking Co. v. Ravenna National Bank*, 234 U. S. 360, 32 Am. B. R. 477, 58 L. Ed. 1352.

206. *Citizens Banking Co. v. Ravenna Nat. Bank*, 234 U. S. 360, 32 Am. B. R. 477, 58 L. Ed. 1352.

207. See under § 60, sub-head "Estate must be diminished," *post*. *Matter of Moark-Nemo Cons. Mining Co.* (D. C., Mo.), 34 Am. B. R. 201, 219 Fed. 340.

208. *Matter of Fineman* (D. C., Pa.), 34 Am. B. R. 245, 223 Fed. 652. And see also *In re Harper* (D. C., Ill.), 5 Am. B. R. 567, 105 Fed. 900; *In re Goldie Fisher* (D. C., Pa.), 33 Am. B. R. 628, 219 Fed. 638.

"final disposition" of the property of the debtor may take place without a sale, in which case the time of the disposition is the day that the property finally passed irrevocably from the control of the debtor.²⁰⁹ But as held by the Supreme Court the term signifies an affirmative act of disposal, not a mere lapse of time which leaves the lien intact and still requiring enforcement.²¹⁰

(9) VACATING OR DISCHARGING PREFERENCE.—(I) *In general*.—It is not the judgment itself, or the levy thereunder, which constitutes the act of bankruptcy, but the failure on the part of the debtor to have the same vacated or discharged five days before a sale or final disposition of the property.²¹¹ The act of bankruptcy seems to be consummated five days before the sale, if at that time the levy has not been lifted; the sale having been noticed, and nothing having been done by the judgment debtor to set aside the preference, the creditors may file a petition against him; they are not required to wait for the sale.²¹²

209. *In re Harper* (D. C., Ill.), 5 Am. B. R. 567, 105 Fed. 900; *In re Miller* (D. C., N. Y.), 5 Am. B. R. 140, 104 Fed. 764, holding that a payment of money on an execution was a technical levy, and was a "final disposition," (although a sale was not had) and constituted an act of bankruptcy. *Scheuer v. Smith & Montgomery Book Co.* (C. C. A., 5th Cir.), 7 Am. B. R. 384, 112 Fed. 407.

Final disposition.—In the case of *In re Tupper* (D. C., N. Y.), 20 Am. B. R. 824, 829, 163 Fed. 766, the court said: "It seems to me that effect is to be given to the words 'the final disposition of any property affected by such preference.' The 'final disposition' is not a gift of the property to some third person, or a voluntary transfer to the creditor in satisfaction of a preferential judgment as that would be merely a sale in payment. Congress had in mind when it enacted this law, the fact that there are different ways or modes of disposing of property, of enforcing executions, judgments, liens, and it referred to the ordinary method of disposition by way of sale, and then used the words 'or final disposition,' to cover every other method of passing the control and dominion of the property from the debtor, insolvent person, to another or to others, either absolutely or as security to the preferred creditor, to the exclusion of his other creditors. The purpose of the law is that no one creditor shall be preferred over the others by an insolvent person, but that all creditors shall share equally, except as to honest liens created more than four months prior to the filing of a petition in bankruptcy. It was not intended that a creditor should obtain a lien on all the real estate of an insolvent person, by a judgment filed and docketed, and then lie still, without issuing execution or making a levy and advertising the property for sale for four months, and until such judgment had become unimpeachable under the bankruptcy act or otherwise, thereby gaining a preference, an absolute security for the debt, and it might be to the extent of the entire

property of the insolvent person, and thus excluding other creditors from any share in the estate. It has been held that the advertised, or even proposed sale is not in all cases necessary under subdivision 3 of § 3." Citing *In re Harper* (D. C., Ill.), 5 Am. B. R. 567, 105 Fed. 900; *In re Miller et al.* (D. C., N. Y.), 5 Am. B. R. 140, 104 Fed. 764; *Scheuer v. Smith & Montgomery Book, etc., Co.*, 7 Am. B. R. 384, 112 Fed. 407, 50 C. C. A. 312. The decision in the *Tupper* case was approved and followed in *Ravenna Nat. Bank v. Curtiss* (D. C., Ohio), 30 Am. B. R. 818; *s. c. sub nom Citizens Banking Co. v. Ravenna Nat. Bank*, 234 U. S. 360, 32 Am. B. R. 477, which in effect renders absolute the rule laid down in the *Tupper* case.

210. *Citizens Banking Co. v. Ravenna Nat. Bank*, 234 U. S. 360, 32 Am. B. R. 477, 58 L. Ed. 1352.

211. *In re Vastbinder* (D. C., Pa.), 11 Am. B. R. 118, 121, 126 Fed. 417; *Matter of Rung Furniture Co.* (C. C. A., 2d Cir.), 14 Am. B. R. 12, 139 Fed. 526; *Folger v. Putnam* (C. C. A., 9th Cir.), 28 Am. B. R. 173, 194 Fed. 793.

Failure to discharge by partnership.—Where an execution was levied upon the property of an insolvent partnership after its dissolution the failure to discharge the levy constitutes an act of bankruptcy by all the members of the firm, for which it and all the partners may be adjudged bankrupt. *Holmes v. Baker & Hamilton* (C. C. A., 9th Cir.), 20 Am. B. R. 252, 160 Fed. 922.

212. *In re National Hotel & Cafe Co.* (D. C., Pa.), 15 Am. B. R. 69, 138 Fed. 947.

Validity of execution.—Where the only ground upon which creditors claimed an adjudication in bankruptcy was that of preferring an execution creditor by failing to discharge the lien, and where the testimony of the deputy sheriff shows clearly that he made on actual levy and the alleged bankrupt protested against the levy from the beginning and had a right to have its validity determined by a proper tribunal,

(II) *Day set for sale.*—It must appear that the sale or final disposition of the property had been arranged for before the act of bankruptcy may be consummated.²¹³ "Five days before a sale" has been held to mean the same as "five days before the day set for the sale."²¹⁴ This enlargement of meaning would seem essential to carry out the clear intent of the act; if a petition could not be filed until after the actual sale, creditors would often be remediless.²¹⁵ The debtor has all of the fifth day prior to the sale or disposition on which to vacate or discharge the preference.²¹⁶ If he fails so to do the act of bankruptcy is then complete and a petition may then be filed against him.²¹⁷ There must be a legal notice or advertisement of the sale specifying the day when it is to take place.²¹⁸ Until some day is authoritatively fixed for the sale or disposition, the time for the consummation of this act of bankruptcy does not commence to run.²¹⁹ It has been held, however, that where a preference was obtained through legal proceedings, and the insolvent debtor has put it out of his power to procure the vacating or discharging of such preferences, an act of bankruptcy has been committed.²²⁰

(III) *Time when lien obtained immaterial.*—There is nothing in the provisions of subdivision a (3) which suggests that the time when the lien is obtained has any bearing upon when the property must be freed from it to avoid an act of bankruptcy. It will suffice if the lien is lifted five days before a sale or final disposition of any of the property affected. This is so notwithstanding the provisions of sections 3-b, 67-c, and 67-f of the bankruptcy act.²²¹

(10) CONSTRUCTION OF SUBSECTION.—The courts have interpreted this subdivision broadly. A payment of money to a sheriff by a debtor of the judgment debtor against whom an execution has been issued is a technical levy and available as an act of bankruptcy.²²² So also is a garnishee process issued after execution unsatisfied.²²³ So also is failure to pay matured judgment

the act of bankruptcy alleged, was not committed. *In re Bodek* (D. C., Pa.), 26 Am. B. R. 476, 188 Fed. 817.

213. *In re Windt* (D. C., Conn.), 24 Am. B. R. 536, 177 Fed. 584.

214. *In re Meyers* (Ref., N. Y.), 1 Am. B. R. 1; *In re Elmira Steel Co.* (D. C., N. Y.), 5 Am. B. R. 484, 109 Fed. 456. And compare *Re North* (1895), 2 Q. B. 264.

215. *Bogen v. Protter* (C. C. A., 6th Cir.), 12 Am. B. R. 288, 129 Fed. 533. See also *In re Miller* (D. C., N. Y.), 5 Am. B. R. 140, 104 Fed. 764; *In re Rome Planing Mills* (D. C., N. Y.), 3 Am. B. R. 123, 96 Fed. 812, in which case the court said: "The act of bankruptcy is not consummated until the expiration of the time in which the debtor may vacate or discharge the lien, and the last day for doing this is five days before the day of sale of the property is advertised."

216. *Pittsburgh Laundry Supply Co. v. Imperial Laundry* (C. C. A., 3d Cir.), 18 Am. B. R. 756, 154 Fed. 662. See also as to computation time, *Bankr. Act*, § 31, *post*.

217. *In re Nusbaum* (D. C., N. Y.), 18 Am. B. R. 598, 152 Fed. 835, in which case Judge Ray says: "I am of the opinion that, while such failure to discharge a levy five days before the sale is an act of bank-

ruptcy, such failure four and three and two days and one day before the sale are also distinct acts of bankruptcy, as is the failure on the day of sale." This is important in determining when the four months' period begins to run.

218. *In re Rome Planing Mills* (D. C., N. Y.), 3 Am. B. R. 123, 96 Fed. 812.

219. *In re Vetterman* (D. C., N. H.), 14 Am. B. R. 245, 135 Fed. 443; *Seaboard Steel Casting Co. v. Trigg* (D. C., Va.), 10 Am. B. R. 594, 124 Fed. 75. Compare *In re Harper* (D. C., Ill.), 5 Am. B. R. 567, 105 Fed. 900, as to meaning of "final disposition."

220. *Scheuer v. Smith & Montgomery Book Co.* (C. C. A., 5th Cir.), 7 Am. B. R. 384, 112 Fed. 407. Compare *In re Moyer* (D. C., Pa.), 1 Am. B. R. 577, 93 Fed. 188; *In re Reichman* (D. C., Mo.), 1 Am. B. R. 17, 91 Fed. 624.

221. *Citizens Banking Co. v. Ravenna Nat. Bank*, 234 U. S. 360, 32 Am. B. R. 477, 58 L. Ed. 1352.

222. *In re Miller* (D. C., N. Y.), 5 Am. B. R. 140, 104 Fed. 764.

223. *In re Harper* (D. C., Ill.), 5 Am. B. R. 567, 105 Fed. 900.

Securing claim through attachment in execution.—The securing of the creditor of

notes followed by entry of judgment and execution issued.²²⁴ Though the judgment is more than four months old, the levy, if within that period, followed by a sale, is an act of bankruptcy.²²⁵ But a mere entry of judgment without the issue of an execution is not.²²⁶ The enforcement of a lien of a judgment obtained prior to the enactment of the bankruptcy act by the issue of an execution is not a preference and the provisions of § 3-a (3) do not apply.²²⁷

d. Fourth act of bankruptcy; a general assignment or receivership.—(1) **IN GENERAL.**—By subsection 4 of this section an act of bankruptcy is committed by a person having made “a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a territory, or of the United States.” The making of a general assignment for the benefit of creditors, with or without preferences, has been an act of bankruptcy for over one hundred years.²²⁸ Though not so in words under the law of 1867, late in the history of that statute it was quite generally held that, being a palpable fraud on the law, it was an act of bankruptcy.²²⁹ While, under the decisions, there would seem little doubt that a general assignment is an act of bankruptcy, because intended to hinder or delay creditors,²³⁰ this new clause, § 3-a (4), removes all question and is an affirmative declaration of great importance to the system. Such an assignment, whether of a person or copartnership, or of one of that class of corporations mentioned in § 4-b, even though without preferences, is now, if made within four months of the filing of the petition, a constructive fraud on the act,²³¹ and, in itself, without either insolvency or intent, an available act of bankruptcy.²³² This does not mean that general assignments are no longer lawful; rather, that the assignor and his counsel thereby set the door of the court of

the amount of his claim through attachment in execution proceedings is a “final disposition of property affected by such preference” as effectively as if he had received payment from the proceeds of a sale under a writ. *Matter of Fineman* (D. C., Pa.), 34 Am. B. R. 245, 223 Fed. 652.

^{224.} *In re Thomas* (D. C., Pa.), 4 Am. B. R. 571, 103 Fed. 272.

Judgment note.—Where a judgment note is given by a debtor to a surety on a bond to secure the payment of claims arising on a government contract, and a transfer by execution subsequently ensues to such surety, in part payment of a sum advanced by the surety under the bond, such transfer was a preference and as it was not subsequently vacated or discharged, it constituted an act of bankruptcy within § 3-a(3) of the act. *United Surety Co. v. Iowa Mfg. Co.* (C. C. A., 8th Cir.), 24 Am. B. R. 726, 179 Fed. 55.

^{225.} *In re Ferguson* (D. C., N. Y.), 2 Am. B. R. 586, 95 Fed. 429.

^{226.} *In re Anderson*, 2 N. B. N. Rep. 1000. Compare also on the general subject, *In re Chapman* (D. C., Ga.), 3 Am. B. R. 607, 99 Fed. 395, and *Parmenter Mfg. Co. v. Stoeve* (C. C. A., 1st Cir.), 3 Am. B. R. 220, 97 Fed. 330.

^{227.} *Owen v. Brown* (C. C. A., 8th Cir.),

9 Am. B. R. 717, 120 Fed. 812, 57 C. C. A. 180.

^{228.} Compare *Jones v. Sleeper*, Fed. Cas. 7,496.

^{229.} Compare *Globe Ins. Co. v. Cleveland Ins. Co.*, Fed. Cas. 5,486; *Platt v. Preston*, Fed. Cas. 11,219; *In re Kasson*, Fed. Cas. 7,617; *In re Mendelsohn*, Fed. Cas. 9,420; *MacDonald v. Moore*, Fed. Cas. 8,763.

^{230.} Bankr. Act, § 3-a(1).

^{231.} *In re Gutwillig* (C. C. A., 2d Cir.), 1 Am. B. R. 388, 92 Fed. 337; *In re Gray*, 3 Am. B. R. 647, 47 N. Y. App. Div. 554, 62 N. Y. Supp. 618.

^{232.} *West Co. v. Lea Bros.*, 174 U. S. 594, 2 Am. B. R. 463, 43 L. Ed. 1098; *Day v. Beck*, etc., Co. (C. C. A., 5th Cir.), 8 Am. B. R. 175, 114 Fed. 834.

Intent of the assignment is immaterial.—The assignment itself is a constructive fraud upon the Bankruptcy Act and constitutes an act of bankruptcy. *Whittlesey v. Becker & Co.*, 25 Am. B. R. 672, 142 N. Y. App. Div. 313, 126 N. Y. Supp. 1046. See also *Gill v. Farmers & Manufacturers Bank* (Mo. Ct. of App.), 189 Mo. Ct. of App. 401, 35 Am. B. R. 91, 176 S. W. 1111; *Hill v. Western Electric Co.* (C. C. A., 6th Cir.), 32 Am. B. R. 332, 214 Fed. 243; *Utz & Dunn Co. v. Regulator Co.* (C. C. A., 8th Cir.), 32 Am. B. R. 167, 213 Fed. 315.

bankruptcy ajar to such creditors as may choose to enter.²³³ Fraud is not imputed by the mere act of making a general assignment; the purpose of the debtor may be laudable, and under certain circumstances will be allowed to stand, so that the debtor's estate may be administered outside of a court of bankruptcy, to the mutual advantage of all concerned.²³⁴

(2) WHAT CONSTITUTES A GENERAL ASSIGNMENT.—A general assignment to constitute an act of bankruptcy under this subsection must be for the benefit "of creditors." A direct transfer to creditors after the intervention of a trustee duly appointed, is not such an assignment.²³⁵ A general assignment for the benefit of creditors is one which transfers all or substantially all of the debtor's property to another person in trust to collect the amounts owing to the assignor, with power to sell and convey the property, to distribute the proceeds among the creditors of the assignor, and to return the surplus, if any, to the debtor.²³⁶ A formal deed of assignment is not required.²³⁷ A debtor may have prepared a deed of assignment with intent to execute it, but so long as he has left it unexecuted or in escrow, the general assignment con-

233. Assignments not unlawful.—In the case of *In re Chase* (C. C. A., 1st Cir.), 10 Am. B. R. 677, 124 Fed. 753, 59 C. C. A. 629, it was held that a general common-law assignment for the benefit of creditors, directing an equal distribution among them, without any attempt to defraud or embarrass persons to whom the assignor is under liability, is not contrary to the policy of the bankruptcy law. See also *Randolph v. Scruggs*, 190 U. S. 533, 10 Am. B. R. 1, holding that an assignment for the benefit of creditors cannot be taken to have been prohibited by the bankruptcy law absolutely in every event. *Summers v. Abbott* (C. C. A., 8th Cir.), 10 Am. B. R. 254, 122 Fed. 36; *In re Fish Bros. Wagon Co.* (C. C. A., 8th Cir.), 21 Am. B. R. 149, 164 Fed. 553.

Accounting by assignee, on commission of new act of bankruptcy.—Where an assignment for benefit of creditors is made under a State law, recognized by the highest court of the State as valid and subsisting, and is assented to by all of the existing creditors, and no petition in bankruptcy is filed within the four months' limit of the Bankruptcy Act, the assignment cannot be set aside and the assignee compelled to account for all the property transferred by the deed of assignment, under a petition for adjudication by a consenting creditor predicated upon new credits and a new act of bankruptcy. *Matter of Bridge* (D. C., Wash.), 37 Am. B. R. 53, 250 Fed. 174.

234. Assignment does not result in bankruptcy.—In the case of *Summers v. Abbott* (C. C. A., 8th Cir.), 10 Am. B. R. 254, 122 Fed. 366, the court said: "The bankrupt act declares the making of a general assignment for the benefit of creditors shall constitute an act of bankruptcy, but it nowhere declares that when the debtor has committed an act of bankruptcy he shall go into the bankrupt court and have himself adjudged a bankrupt. Many debtors who commit acts

of bankruptcy struggle on and finally pay all the debts they owe, which is more than would have been done had they gone into the bankrupt court and had themselves adjudged bankrupts. It is open to the creditors of one who has committed an act of bankruptcy to proceed to have him adjudged a bankrupt, but it is optional and not obligatory upon his creditors to do this. As a matter of fact, thousands of debtors commit acts of bankruptcy who are never adjudged bankrupts; their creditors preferring to let their debtor administer his own estate, rather than turn it over to a bankruptcy court."

Avoiding attachments.—The Bankruptcy Act recognizes the right of the bankrupt to make a voluntary assignment of his property, with the purpose of avoiding attachments, and thereby securing an equal distribution of his property among all his creditors, and it cannot be predicated of such proceeding that its purpose is to defraud the attaching creditors. *Bell v. Blessing* (C. C. A., 9th Cir.), 35 Am. B. R. 672, 225 Fed. 750.

235. Anniston Iron & Supply Co. v. Anniston Rolling Mills Co. (D. C., Ala.), 11 Am. B. R. 200, 125 Fed. 974.

236. Matter of McCrum (C. C. A., 2d Cir.), 32 Am. B. R. 604, 214 Fed. 207.

237. In re Federal Lumber Co. (D. C., Mass.), 26 Am. B. R. 438, 185 Fed. 926.

Formal instrument not required.—The term general assignment, within the meaning of the Bankruptcy Act, is to be taken in its generic sense, and embraces any conveyance at common law or by statute by which one intends an absolute and unconditional appropriation of all his property to pay his creditors, share and share alike. The assignment need not be formal, and it is not necessary that it should be valid for all purposes, but an absolute transfer by the debtor of both the legal and equitable titles is indispensable. *Matter of Matthews & Co.* (D. C., N. J.), 36 Am. B. R. 501, 229 Fed. 309.

templated has not been made.²³⁸ But it is not essential that all the creditors accept the terms imposed by the instrument, if it appears on its face to have been a disposition of all the property of the assignor for the benefit of his creditors.²³⁹ As already indicated the insolvency of the debtor is not an essential fact.²⁴⁰ Whatever may be the form of the conveyance in trust of the debtor's property, if it cover all his property and be for the payment of

238. *In re Federal Lumber Co.* (D. C., Mass.), 26 Am. B. R. 438, 185 Fed. 926.

Delivery of deed of assignment.—Where a deed of assignment for the benefit of creditors has not been delivered, the fact that the assignee acquires possession of a very small part of the property under a misapprehension as to his rights, does not constitute an act of bankruptcy. A general assignment for the benefit of creditors has not been made within the purview of the Bankruptcy Act where the deed of assignment is left in escrow under the condition that it is not to be delivered until all of the creditors agree to the assignment. *Carpenter & Co. v. Lybrand* (C. C. A., 4th Cir.), 36 Am. B. R. 12, 230 Fed. 84.

239. Acceptance of assignment by creditors.—In the case of *In re Courtenay Mercantile Co.* (D. C., N. Dak.), 26 Am. B. R. 365, 186 Fed. 352, it appeared that a corporation made a deed of assignment for the benefit of "those of its creditors who shall become parties thereto;" the assignee accepted the trust, and took possession of the property; some of the creditors did not assent to the terms of the deed. It was held that as to the assignor the assignment was valid and that it therefore constituted a general assignment under the Bankruptcy Act, notwithstanding its invalidity as to dissenting creditors. The court said: "On the face of the instrument here involved, it was a disposition of all the property of the assignor for the benefit of his creditors. All the creditors had a right to accept its benefits. The assignor could in no way control this discretion. Their right to do this would continue until the estate had been distributed. The character of the instrument should be judged as of the time of its execution and delivery. Otherwise the whole estate could be converted into cash, and administered under the deed, without its being possible to ascertain whether it was an assignment for the benefit of creditors, or a security for a part of the creditors. Such a construction of the instrument would make it possible for any creditor to escape the provisions of the Federal Bankruptcy Act by the mere phrasing of a general assignment of his property. When a debtor assigns all his property in trust for the benefit of his creditors, provided they elect to accept the terms of the deed, he makes a general assignment for the benefit of creditors, within the meaning of section 3 of the Bankruptcy Act. It is not necessary that the assignment be valid as to the dissenting creditors. *Griffin v. Dut-*

ton (C. C. A., 1st Cir.), 21 Am. B. R. 449, 165 Fed. 626, 91 C. C. A. 614; *Canner v. Webster-Tapper Co.* (C. C. A., 1st Cir.), 21 Am. B. R. 872, 168 Fed. 519, 93 C. C. A. 541. If it is binding upon the assignor, and has the characteristics mentioned, it subjects the person or corporation making it to an involuntary proceeding under the Federal Bankruptcy Act."

240. Solvency no defense.—In the case of *West Co. v. Lea*, 2 Am. B. R. 463, 174 U. S. 594, the court said: "Our conclusion, then, is that, as a deed of general assignment for the benefit of creditors is made by the Bankruptcy Act alone sufficient to justify an adjudication in involuntary bankruptcy against the debtor making such deed, without reference to his solvency at the time of the filing of the petition, that the denial of insolvency by way of defense to a petition based upon the making of a general assignment is not warranted by the bankruptcy law." See also *Green River Deposit Bank v. Craig Bros.* (D. C., Ky.), 6 Am. B. R. 381, 110 Fed. 137; *Bray v. Cobb* (D. C., N. Car.), 1 Am. B. R. 153, 91 Fed. 102; *Canner v. Tapper Co.* (C. C. A., 1st Cir.), 21 Am. B. R. 872, 168 Fed. 519; *In re Farthing* (D. C., N. Car.), 29 Am. B. R. 732, 202 Fed. 557, *Corbett v. Riddle* (C. C. A., 4th Cir.), 31 Am. B. R. 330, 209 Fed. 811. An assignment for the benefit of creditors is itself an act of bankruptcy, without regard to whether actual fraud was intended by the debtor, or whether he is solvent or insolvent. *Gill v. Farmers' & Manufacturers' Bank* (Mo. (Kan. City) Ct. of App.), 189 Mo. Ct. of App. 401, 35 Am. B. R. 91, 176 S. W. 1111. See Am. B. R. Digest, §§ 157, 184.

Insolvency as element.—The attempt of a debtor through the operation of a general assignment for the benefit of creditors to place his property out of the reach of his creditors, even for the laudable purpose of assuring to them the ultimate payment of their claims, constitutes in itself an act of bankruptcy, irrespective of the question of insolvency. *Matter of Utley* (D. C., Pa.), 37 Am. B. R. 670, 235 Fed. 905.

A general assignment for the benefit of creditors is an act of bankruptcy to which there can be no possible defense, except a denial of the fact. If it is followed by a petition in bankruptcy the bankruptcy court obtains exclusive jurisdiction entirely irrespective of the question of solvency or insolvency. *Matter of Federal Mail & Express Co.* (D. C., N. Y.), 37 Am. B. R. 240, 233 Fed. 691.

his debts, it operates in law as a general assignment for the benefit of creditors.²⁴¹ For instance a confession of judgment by a debtor to a trustee for the benefit of his creditors,²⁴² and any general assignment for the benefit of creditors under a statute regulating this common-law right,²⁴³ have been held to be general assignments within the bankruptcy act. A general assignment for the benefit of creditors may be made by a corporation, by the proper resolution being adopted by directors and stockholders,²⁴⁴ but the act is not consummated so as to constitute an act of bankruptcy, if the proposed plan was never carried into effect.²⁴⁵ An assignment may be invalid as to other

241. *In re Salmon* (D. C., Mo.), 16 Am. B. R. 122, 143 Fed. 395; *In re Hersey* (D. C., Iowa), 22 Am. B. R. 856, 171 Fed. 998; *In re Tomlinson Co.* (C. C. A., 8th Cir.), 18 Am. B. R. 691, 154 Fed. 834, holding that "a general assignment" contemplated by the Act is to be taken in its generic sense and embraces any conveyance at common law or by statute by which the parties intend to make an absolute and unconditional appropriation of the property conveyed to raise funds to pay the debts of the vendor, share and share alike; *Lennox v. Allen Lane Co.* (C. C. A., 1st Cir.), 21 Am. B. R. 648, 167 Fed. 114.

All the property of the debtor must be assigned in trust for distribution among all his creditors. *Missouri Elec. Co. v. Hamilton, etc., Co.* (C. C. A., 8th Cir.), 21 Am. B. R. 270, 165 Fed. 283; an instrument which transfers neither the legal or equitable title is insufficient; *Matter of Matthews & Co.* (D. C., N. J.), 36 Am. B. R. 501, 229 Fed. 309.

The elements of an insolvency law are insolvency, surrender of property, its administration by a receiver or trustee, distribution of the assets among creditors, and a provision for priorities or other matters not permissible in the absence of such a statute; and a provision for the discharge of the debtor from the unpaid balance of his debts is not essential. *In re Weedman Stave Co.* (D. C., Ark.), 29 Am. B. R. 460, 199 Fed. 948; *Matter of Heleker Brothers Co.* (D. C., Kan.), 33 Am. B. R. 503, 216 Fed. 963, quoting text with approval.

A special deposit by a debtor, three days before the institution of bankruptcy proceedings against her, of all her assets with a bank which was one of her creditors, with directions to pay all creditors their pro rata share, constitutes an assignment for the benefit of creditors within the meaning of the Bankruptcy Act, and is void as against the trustee in bankruptcy. *Gill v. Farmers' & Manufacturers' Bank* (Mo. (Kan. City) Ct. of App.), 189 Mo. Ct. of App. 401, 35 Am. B. R. 91, 176 S. W. 1111.

What constitutes general assignment.—The term "general assignment for the benefit of creditors," as used in section 3a (4) of the Bankruptcy Act, does not concern itself merely with such acts of a debtor as would constitute an assignment for the benefit of creditors under the laws of the State in which

it is made or, merely with the form of the written instrument employed to effectuate such purpose; on the contrary, the Act does concern itself with, and does contemplate, all acts of a debtor, regardless of the manner or form of their accomplishment, by which he parts with the title and possession of all his property of every kind and nature for the benefit of his creditors, to be disposed of by any means his trustee or assignee by him selected and named may employ, independent of the Bankruptcy Act. Hence where the effect of an instrument having a defeasance clause and claimed to be mortgage was to pass the legal title to all the property of the bankrupt to trustees named by it, and under which they took actual possession of its property, with full power of disposition and distribution of the proceeds to the creditors, the writing and the entire transaction thereunder constituted a general assignment for the benefit of creditors as contemplated by the Bankruptcy Act, and, hence, was an act of bankruptcy. *Matter of Heleker Brothers Co.* (D. C., Kan.), 33 Am. B. R. 503, 216 Fed. 963.

242. *In re Green & Rogers* (D. C., Pa.), 5 Am. B. R. 848, 106 Fed. 313.

243. *In re Gutwillig* (D. C., N. Y.), 1 Am. B. R. 78, 90 Fed. 425; *In re Sievers* (D. Mo.), 1 Am. B. R. 117, 91 Fed. 366, both of which cases were later affirmed.

244. *Clark v. American Mfg. & Enameling Co.* (C. C. A., 4th Cir.), 4 Am. B. R. 351, 101 Fed. 962.

The action of the stockholders of a corporation at a regular meeting in the adoption of a resolution authorizing its board of directors to appoint a committee to advertise and sell, at public auction, the property of the corporation, valued at \$25,000, for not less than \$22,500, does not constitute a "general assignment for the benefit of creditors." *In re Hartwell Oil Mills* (D. C., Ga.), 21 Am. B. R. 586, 165 Fed. 555.

245. In the case of *In re Federal Lumber Co.* (D. C., Mass.), 26 Am. B. R. 438, 185 Fed. 926, it was held that while a corporation may commit an act of bankruptcy by making an assignment for creditors without a formal deed, and while an assignment, invalid for some purposes, may be sufficient to constitute such an act of bankruptcy, nevertheless the adoption of resolutions instructing the corporation's treasurer to reduce its

members of a firm, being executed only by one of them.²⁴⁶ But a voluntary assignment by one partner of all the assets of a firm for the benefit of firm creditors constitutes an act of bankruptcy for which the firm may be adjudged bankrupt, although the other partner did not participate therein.²⁴⁷ An assignment constitutes an act of bankruptcy, although it be not valid for all purposes, for instance, because of a want of the assent of creditors.²⁴⁸ Neither a bill of sale nor a mortgage is usually a general assignment.²⁴⁹

(3) APPOINTMENT OF RECEIVER OR TRUSTEE.—(I) *In general*.—After *In re Empire Metallic Bedstead Co.*,²⁵⁰ it was long thought to be settled that the voluntary application of an insolvent corporation for a receivership under State laws is not a general assignment, and, therefore, not an act of bankruptcy under § 3-a (4),²⁵¹ though there is now persuasive authority that it is under § 3-a (1). It followed that a suit by one partner against the other for an accounting of their insolvent partnership, resulting in the appointment of a receiver, was not an act of bankruptcy under this subsection.²⁵² Now, a copartnership or a corporation²⁵³ which is insolvent and applies for or, because of insolvency,²⁵⁴ has been put in charge of a receiver or trustee, under the laws of a State, or of a territory, or of the United States, thereby commits an act of bankruptcy. This amendment was intended to place all copartnerships and such corporations as may be adjudged involuntary bankrupts²⁵⁵ on the same footing as individual insolvents who attempt an equivalent fraud on the act.²⁵⁶

assets to cash and deposit it with a certain trust company for the benefit of creditors, will not amount to an act of bankruptcy within § 3-a(4), where the plan was never carried out owing to the failure of creditors to file claims with the trust company as contemplated.

²⁴⁶ *Chemical Nat. Bank v. Meyer* (D. C., N. Y.), 1 Am. B. R. 565, 98 Fed. 976, *affd.* 3 Am. B. R. 559, 98 Fed. 976.

²⁴⁷ *Youngbluth v. Slipper* (C. C. A., 9th Cir.), 26 Am. B. R. 265, 185 Fed. 773.

²⁴⁸ *Griffin v. Dutton* (C. C. A., 1st Cir.), 21 Am. B. R. 449, 165 Fed. 626; *Canner v. Tapper Co.* (C. C. A., 1st Cir.), 21 Am. B. R. 872, 168 Fed. 519; *In re Federal Lumber Co.* (D. C., Mass.), 26 Am. B. R. 438, 185 Fed. 926, holding that if a grantor makes what purports to be and is intended by him to be a general assignment, and is accepted as such by the assignee named, it will constitute an act of bankruptcy though invalid for some purposes; *In re Courtenay Mercantile Co.* (D. C., N. Dak.), 26 Am. B. R. 365, 186 Fed. 352.

²⁴⁹ It may be doubted, however, whether *Rumsey v. Novelty, etc., Co.* (D. C., Mo.), 3 Am. B. R. 704 and footnote, 99 Fed. 699, is safe authority in holding that the deed of trust there given was not a general assignment.

²⁵⁰ (D. C., Or.), 3 Am. B. R. 575, 98 Fed. 981.

²⁵¹ Compare *In re Baker-Ricketson Co.* (D. C., Mass.), 4 Am. B. R. 605, 97 Fed. 489; *Vaccaro v. The Security Bank* (C. C. A., 6th Cir.), 4 Am. B. R. 474, 103 Fed. 436; *Davis v. Stevens* (D. C., S. Dak.), 4 Am. B. R. 763, 104 Fed. 235; *In re Gilbert* (D. C., Or.), 8 Am. B. R. 101, 112 Fed.

951. But see also, as suggesting the doctrine of equivalence, *In re Harper* (D. C., N. Y.), 3 Am. B. R. 804, 100 Fed. 266; *In re Macon Sash, etc., Co.* (D. C., Ga.), 7 Am. B. R. 66, 112 Fed. 323, this case, however, reversed as *Carling v. Seymour Lumber Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 29, 113 Fed. 483; *Scheuer v. Smith* (C. C. A., 5th Cir.), 7 Am. B. R. 384, 112 Fed. 407; *In re Empire Metallic Bedstead Co.* (C. C. A., 2d Cir.), 3 Am. B. R. 575, 98 Fed. 581.

²⁵² But see *Mather v. Coe* (D. C., Ohio), 1 Am. B. R. 504, 92 Fed. 333. Compare also *In re Storm* (D. C., N. Y.) 4 Am. B. R. 601, 103 Fed. 618, and *In re Storck Lumber Co.* (D. C., Md.), 8 Am. B. R. 86, 114 Fed. 860.

²⁵³ See § 1.(9).

²⁵⁴ As to necessity of insolvency, see *In re Douglas Coal, etc., Co.* (D. C., Tenn.), 12 Am. B. R. 539, 131 Fed. 769; *Zugalla v. International Merc. Agency* (C. C. A., 3d Cir.), 16 Am. B. R. 67, 142 Fed. 927; *revg.* 13 Am. B. R. 725. See also under this subsection "(4) *Insolvency essential*," *post*.

²⁵⁵ Bankr. Act, § 4-b. See *Lowenstein v. McShane Mfg. Co.* (D. C., Md.), 12 Am. B. R. 601, 130 Fed. 1007.

²⁵⁶ Some of the reasons for the change have been stated thus:

(1) It is one of the general purposes of the bankruptcy law to provide a uniform national law by which insolvent traders can make a *pro rata* distribution of their assets among creditors, and there is no reason apparent why trading corporations as well as trading copartnerships should not be permitted to avail themselves of this statute.

* (2) In the more important commercial

The amendment of 1903 is not retroactive, and a petition filed after such amendment took effect alleging the appointment of a receiver for an insolvent corporation within the four months' period, but prior to the passage of the amendment, must be dismissed; the fact that the receivership continues after the taking effect of the amendment, is not of itself sufficient to create an act of bankruptcy.²⁵⁷

(II) *Exercise of bankruptcy jurisdiction.*—The law does not necessarily deprive a State court of jurisdiction conferred upon a State court to dissolve a local corporation, even though the reason for exercising such jurisdiction be the insolvency of such corporation.²⁵⁸ The same rule applies to dissolution proceedings as in the case of a general assignment for the benefit of creditors.²⁵⁹ As in the case of a general assignment, proceedings for the dissolution of a corporation and the appointment of a receiver are voidable only in case bankruptcy proceedings are brought seasonably,²⁶⁰ that is within four months after the appointment of a receiver. In case of failure to act within such period, the jurisdiction of the State court, if rightfully acquired, becomes fixed and not subject to interference.²⁶¹

(III) *Application for receivership.*—This clause makes the application for a receiver or trustee by a bankrupt who is insolvent an act of bankruptcy; if such an application is relied upon it must be alleged that the application was made by the debtor.²⁶² The receivership may be on account of a corporation,

States, small corporations, with their limited liability, have practically superseded partnerships. As the law now stands, short of the commission of an act of bankruptcy, these corporations must wind up their affairs under the procedure of the State which created them, a procedure which is everywhere less favorable to creditors.

(3) Owing to the lack of comity between the States, a receiver of an insolvent corporation in one State is rarely recognized in another, with the result that the creditors in that other State, by garnishee process or otherwise, may, unless the corporation commits an act of bankruptcy, secure preferences.

(4) If a corporation seeks to wind up its affairs and distribute its assets by means of a receivership, such a proceeding does not constitute an act of bankruptcy, and, consequently, creditors are entirely deprived of the valuable rights and safeguards provided by the bankruptcy law.

(5) As the law now stands, a corporation which wishes to be administered in bankruptcy is compelled to go through the motions of committing an act of bankruptcy that involuntary bankruptcy may be alleged against it, and it be brought into court apparently against its will. This circumlocution is bad in principle and worse in practice. (Report of Ex. Com. of Nat. Ass'n of Referees in Bankruptcy, of March, 1900.)

²⁵⁷ *Seaboard Steel Casting Co. v. Trigg Co.* (D. C., Va.), 10 Am. B. R. 594, 124 Fed. 75.

²⁵⁸ *Murphy v. Penniman*, 105 Md. 452, 66 Atl. 282; *Singer v. Nat. Bedstead Mfg. Co.*, 65 N. J. Eq. 290, 11 Am. B. R. 276, 55 Atl. 868.

²⁵⁹ See under "d (1) *In general*," *ante*.
²⁶⁰ *Randolph v. Scruggs*, 190 U. S. 533, 10 Am. B. R. 1, 47 L. Ed. 1165.

²⁶¹ *Lyon v. Russell* (Dist. Col., Ct. of App.), 41 App. D. C. 554, 32 Am. B. R. 101, 42 Wash. L. Rep. 110, citing *In re Heckman* (C. C. A., 9th Cir.), 15 Am. B. R. 500, 140 Fed. 859; *In re Knight* (D. C., Ky.), 11 Am. B. R. 1, 125 Fed. 35.

²⁶² *Application by debtor corporation.*—In the case of *Matter of Spaulding* (C. C. A., 2d Cir.), 14 Am. B. R. 129, 139 Fed. 244, revg. 13 Am. B. R. 223 the court said: "Giving subdivision a (4) the construction which its language demands, we are of the opinion that it does not make a receivership an act of bankruptcy unless it was procured upon the application of the insolvent himself and while insolvent, and does not make the putting a receiver in charge of the property of the insolvent an act of bankruptcy, unless this was done because of insolvency; and if the latter provision applies to any case where the trustee has not been put in charge, pursuant to some statute of the State, or a receiver put in charge by court, acting under statutory authority, it certainly applies only when this has been done because of insolvency."

In the case of *Exploration Mercantile Co. v. Pacific, etc., Co.* (C. C. A., 9th Cir.), 24 Am. B. R. 216, 177 Fed. 825, it was held that an application for a receiver by one of the three stockholders, constituting a corporation, was sufficient as an application for a receiver by the corporation; this ruling was based upon proof that the stockholders had conspired to hinder, delay and defraud creditors by securing the appointment of one of them as a receiver. *Matter of Rankin* (D. C.,

or a partnership.²⁶³ If the application for receivership was made by officers, placed in full charge of the affairs of the corporation, and thus clothed in fact with sufficient power to actually accomplish a legally effective receivership, it constitutes an act of bankruptcy, although as against the stockholders, such officers had no legal right to make the application.²⁶⁴ If the application for a receiver or trustee is made by any other person than the bankrupt, it must be alleged and shown that the application was based upon the insolvency of the bankrupt.²⁶⁵ If the proceeding in the State court as a result of which a

Ohio.), 32 Am. B. R. 45, 210 Fed. 529 (quoting text).

263. *Maple Croft Mills v. Childs* (C. C. A., 4th Cir.), 35 Am. B. R. 311, 226 Fed. 415; *In re Beatty* (C. C. A., 1st Cir.), 17 Am. B. R. 738, 150 Fed. 293; although under the law prior to the amendment of 1903, the obtaining of the appointment of a receiver of a partnership through dissolution proceedings in a state court was not an act of bankruptcy. *Matter of Burrell & Corr* (C. C. A., 2d Cir.), 9 Am. B. R. 625, 123 Fed. 414; *Davis v. Stevens* (D. C., So. Dak.), 4 Am. B. R. 764, 104 Fed. 242.

264. *James Supply Co. v. Dayton Coal Co.* (C. C. A., 6th Cir.), 34 Am. B. R. 649, 223 Fed. 991, in which case it appeared that a receivership of a British corporation was applied for by officers having the entire control of the affairs of the corporation in this country, and the court said: "We are not impressed by the proposition that the application for a receiver by this corporation would not be an act of bankruptcy unless shown to have been expressly authorized by formal action of its board of directors or stockholders; and the district judge did not so decide. Not only is there nothing in the record to indicate that the managing director of this British corporation lacked authority to direct such action, but the testimony is inferentially to the contrary, and is specifically that he had complete control of the company's affairs. If Donaldson individually lacked full control, there was testimony that Watson & Company represented the stock control and, inferentially at least, had whatever control Donaldson lacked; and it is perhaps of some interest in this connection that the amended bill in the insolvency proceeding by implication treats the members of Watson & Company as Whitaker's principals. We think the record did not impugn the existence of full authority on the part of Donaldson and Watson & Company to direct the receivership, and thus the commission of an act of bankruptcy. *Exploration Mercantile Co. v. Pacific, etc., Co.* (C. C. A., 9th Cir.), 24 Am. B. R. 216, 177 Fed. 825, 839; *In re Maplecroft Mills* (D. C., S. Car.), 33 Am. B. R. 815, 218 Fed. 659, 673. Moreover, if those placed in full charge of the company's affairs were thus clothed in fact with sufficient power to actually accomplish a legally effective receivership, we cannot think the application therefor was any the less an act of bankruptcy because those responsible

therefor had no right, as against the stockholders, to so act. A somewhat contrary holding was had in *Matter of Butler Co.* (C. C. A., 1st Cir.), 30 Am. B. R. 502, 207 Fed. 705, 713. How far that decision may have been affected by the law under which the corporation was organized does not appear."

Application by officers.—Where the persons who filed a petition in a State court for the appointment of receivers for a corporation were officers and the majority stockholders of the corporation, and the stockholders never objected to the proceedings, and the answer to a petition in bankruptcy subsequently filed against the corporation was verified by the same person who verified the petition in the State court, the filing of the petition for the appointment of receivers will be deemed to have been the act of the corporation. *Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co.* (D. C., Ark.), 30 Am. B. R. 604, 206 Fed. 813. As to acts of agents and officers of corporation, see *Butler & Co. v. Palmenberg* (C. C. A., 1st Cir.), 30 Am. B. R. 502, 207 Fed. 705.

265. *In re Douglas Coal & Coke Co.* (D. C., Tenn.), 12 Am. B. R. 545, 131 Fed. 769. As to the necessity of showing insolvency, see *post*, under (4) *Insolvency essential*, and the cases cited thereunder.

Application for appointment of receiver.—It is only when a receiver of a corporation has been appointed in another court because of insolvency, as that term is defined in the Bankruptcy Act, or where the corporation on its own initiative has applied for the appointment of a receiver or custodian of its property, that an act of bankruptcy under § 3-a (4), has been committed. *In re Edward Ellsworth Co.* (D. C., N. Y.), 23 Am. B. R. 284, 173 Fed. 699; *Matter of Rankin* (D. C., Ohio), 32 Am. B. R. 45, 210 Fed. 529, (quoting the text).

Corporation permitting appointment of receiver.—An involuntary petition against a corporation, filed by an individual stockholder thereof, alleging that it had permitted a receiver of its property to be appointed by a State court because of insolvency, may be deemed sufficient if sustained, although the Bankruptcy Act describes no such act of bankruptcy. Its language is the appointment of a receiver under the laws of a State "because of insolvency." It appeared that the proceeding in the State court was by an officer and stockholder of the corporation and

receiver was appointed, was participated in and encouraged by creditors, they may not insist subsequently that the receivership was an act of bankruptcy for the purpose of transferring the administration of the corporate property to the bankruptcy court.²⁶⁶

(IV) *What constitutes appointment.*—An agreement to wind up the affairs of a corporation and make an assignment of all its property to its directors as trustees to close up its business is an act of bankruptcy.²⁶⁷ It is not essential to constitute an act of bankruptcy under this clause of the section, that the appointment of a receiver was made by a State court under a State statute. The fact that a receiver has been put in charge of the debtor's property by a State court acting under its general equity power will be sufficient to constitute the appointment of a receiver "under the laws of the State," within the meaning of this clause.²⁶⁸ The appointment of a receiver of an insolvent corporation by a State court, by consent of the parties, under a statute providing therefor, is an act of bankruptcy.²⁶⁹ Since the passage of the amendment a State court cannot, by appointing a receiver of an insolvent debtor, obtain priority of jurisdiction to administer the assets of such debtor.²⁷⁰ It is immaterial however, that a proceeding for the dissolution of a corporation was instituted prior to the taking effect of the amendment, if the application for an order appointing a permanent receiver in such proceedings was made subsequent to such amendment.²⁷¹ The application by an administrator of a deceased partner for a receiver to wind up the affairs of an insolvent firm, in which the surviving partner joined, is not an act of bankruptcy.²⁷²

(4) INSOLVENCY ESSENTIAL.—(I) *Insolvency as sole ground.*—The application for the appointment of a receiver or trustee, in order to constitute an act of bankruptcy under this subsection, must be based upon insolvency. If insolvency was one of the substantial reasons for the appointment of a receiver or trustee the case would come within the construction of the statute.²⁷³ Where a statute under which proceedings are taken against an insolvent corporation, authorizes the appointment of a receiver thereof, only after a judicial determination of the insolvency of the corporation, the appointment of a temporary receiver upon the *ex parte* application of a stockholder to restrain the corporation from exercising any of its franchises or privileges, is not an act of bankruptcy.²⁷⁴ An appointment of a receiver *pendente lite* to take possession

no answer was filed. The proof was held insufficient to establish that the receivership was because of insolvency. *Matter of Valentine Bohl Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 855, 224 Fed. 685.

266. *Matter of Commonwealth Lumber Co.* (D. C., Wash.), 35 Am. B. R. 202, 223 Fed. 667.

267. *In re Bennett Shoe Co.* (D. C., Ct.), 15 Am. B. R. 497, 140 Fed. 687; *In re Hercules Atkin Co., Limited* (D. C., Pa.), 13 Am. B. R. 369, 133 Fed. 813; *In re Lisk Mfg. Co.* (D. C., N. Y.), 21 Am. B. R. 674, 167 Fed. 411; *In re Electric Supply Co.* (D. C., Ga.), 23 Am. B. R. 647, 175 Fed. 612.

Bank in hands of State officers.—So also as to a private bank conducted by a partnership placed in the hands of a special agent under a State law, the partnership being insolvent. *In re Salmon* (D. C., Mo.), 16 Am. B. R. 122, 143 Fed. 395.

268. *In re Kennedy Tailoring Co.* (D. C.,

Tenn.), 23 Am. B. R. 656, 175 Fed. 871, citing *Lowenstein v. McShane Mfg. Co.* (D. C., Md.), 12 Am. B. R. 601, 130 Fed. 1007; *Hooks v. Aldridge* (C. C. A., 5th Cir.), 16 Am. B. R. 658, 145 Fed. 965; *In re Beatty* (C. C. A., 1st Cir.), 17 Am. B. R. 738, 150 Fed. 293.

269. *In re Pickens Mfg. Co.* (D. C., Ga.), 20 Am. B. R. 202, 158 Fed. 894; *In re Wenatchee Heights Orchard Co.* (D. C., Wash.), 30 Am. B. R. 401, 204 Fed. 674.

270. *In re Knight* (D. C., Ky.), 11 Am. B. R. 1, 125 Fed. 35; *In re Hecox* (C. C. A., 8th Cir.), 21 Am. B. R. 314, 164 Fed. 823.

271. *Matter of Milbury Co.* (Ref., N. Y.), 11 Am. B. R. 523.

272. *Moss Nat. Bank v. Arend* (C. C. A., 6th Cir.), 16 Am. B. R. 867, 146 Fed. 351.

273. *In re Beatty* (C. C. A., 1st Cir.), 17 Am. B. R. 738, 150 Fed. 293.

274. *Zugalla v. International Merc. Agency* (C. C. A., 3d Cir.), 16 Am. B. R.

of the company's property, in order to prevent mismanagement of its affairs by the majority of its directors, is not an appointment upon the grounds of insolvency and does not constitute an act of bankruptcy.²⁷⁵ If in such a case a permanent receiver be appointed, the receivership is "because of insolvency" of the corporation, and constitutes an act of bankruptcy.²⁷⁶

(II) *Actual insolvency.*—The rule is that the receivership must have been procured because of the actual insolvency of the debtor.²⁷⁷ If the application is made under a State statute on account of a fear that insolvency will ensue, it does not constitute an act of bankruptcy, since the statute requires the existence of actual insolvency as a cause for the application.²⁷⁸ But it has been held that if the receivership was obtained on the ground of insolvency, it is not material that the corporation was not in fact insolvent; the adjudication of insolvency by the State court will give rise to a presumption that the receivership was based on the grounds of insolvency.²⁷⁹

(III) *Allegations as to other grounds where insolvency existed.*—It must appear upon the face of the complaint in the State court that the corporation was insolvent when it was filed; the fact that the corporation deemed it necessary to apply for a receiver to secure temporary relief will not be used to its prejudice in a court of bankruptcy, unless insolvency is alleged at such time.²⁸⁰ Petitioning creditors, relying on this act of bankruptcy, must allege and prove insolvency when the application for a receiver or trustee was made, and if the receivership or trusteeship was secured upon the application of any other person, it must be shown that such receivership or trusteeship was obtained because of insolvency.²⁸¹ There is some confusion as to this question.

67, 142 Fed. 927, revg. 13 Am. B. R. 725; In re Hudson River Elec. Power Co. (D. C., N. Y.), 23 Am. B. R. 191, 173 Fed. 934, in which case it was held that the appointment of a temporary receiver by a Federal circuit court, on allegations of insolvency, mismanagement, etc., which are denied and not yet tried, does not constitute an act of bankruptcy.

275. In re Boston, etc., Mining Co. (D. C., Mass.), 24 Am. B. R. 923, 181 Fed. 422.

276. Hooks v. Aldridge (C. C. A., 5th Cir.), 16 Am. B. R. 658, 145 Fed. 865.

277. Matter of Spalding (C. C. A., 2d Cir.), 14 Am. B. R. 129, 139 Fed. 244, holding that the appointment of a receiver in a creditor's action on the ground that the debtor had disposed, and was threatening to dispose, of his property with intent to defraud his creditors, is not sufficient to constitute an act of bankruptcy under this subsection. See In re Butler & Co. (C. C. A., 1st Cir.), 207 Fed. 705; Blackstone v. Everybody's Store (C. C. A., 1st Cir.), 30 Am. B. R. 497, 207 Fed. 752. In re Columbia Real Estate Co. (D. C., N. J.), 30 Am. B. R. 471, 205 Fed. 980.

Where an order of a State court appointing a receiver for a corporation and the petition upon which such order was made clearly shows that the appointment was made on the ground of insolvency, the creditors of the corporation may insist that its assets be administered by the bankruptcy court. Doyle-Kidd Co. v. Sadler-Luck Co.

(D. C., Ark.), 30 Am. B. R. 602, 206 Fed. 813; Butler & Co. v. Palmenberg (C. C. A., 1st Cir.), 30 Am. B. R. 502, 207 Fed. 705.

278. Maplecroft Mills v. Childs (C. C. A., 4th Cir.), 35 Am. B. R. 311, 226 Fed. 415, holding that it was not the intention of Congress to have the same apply when the facts upon which a receiver was appointed by the State court only show that its assets would not bring enough to pay its debts at a forced sale, or where there was imminent danger of insolvency; revg. 33 Am. B. R. 815, 218 Fed. 619.

279. In re Pickens Mfg. Co. (D. C., Ga.), 20 Am. B. R. 202, 158 Fed. 894.

280. Appointment of receiver of corporation by State court.—The fact that a corporation deemed it necessary to apply to the State court for the appointment of a receiver in order to enable it to secure temporary relief should not be used to its prejudice in a court of bankruptcy, unless it clearly appears upon the face of the complaint filed in the State court that the corporation was insolvent within the meaning of the Bankruptcy Act at the date of the filing of the same. Maplecroft Mills v. Childs et al. (C. C. A., 4th Cir.), 35 Am. B. R. 311, 226 Fed. 415.

281. In re Edward Ellsworth Co. (D. C., N. Y.), 23 Am. B. R. 284, 173 Fed. 699, in which the court said: "The bankruptcy act has not superseded the right and power of a court of equity to take charge of the property of an insolvent corporation for

The district court in the Maplecroft Mills case argued ably that if the real cause of the receivership was the insolvency of the corporation at the time the application for a receiver was made, the allegation of other grounds in such application ought not to control the character of the act.²⁸² And it has been held that if the receivership was at the instance of an insolvent corporation, it is immaterial that the receivership was ordered for a cause other than insolvency, it appearing that the corporation was actually insolvent at the time the application was made.²⁸³ But if it appear upon an application made for a receivership under State laws authorizing such receivership upon the invitation of outside parties, it must appear that insolvency was the cause of the application; if it appear in such a case, from the pleading and the evidence adduced, that the appointment is made for some other cause than the insolvency of the debtor, it is not an act of bankruptcy under this subsection, although it may appear that the debtor was in fact insolvent when the receiver was appointed.²⁸⁴

the protection of stockholders and creditors, marshal the same, recognize and enforce valid liens and priorities and equitably distribute the surplus proceeds among its creditors. It is only where a receiver has been appointed in another court because of insolvency, as that term is defined in the bankruptcy law, or where the corporation on its own initiative has applied for the appointment of a receiver or custodian of its property, that an act of bankruptcy under § 3-a (4) has been committed."

Evidence of insolvency.—The appointment of a receiver of a corporation by the State court of Washington "for the reason that said corporation is utterly insolvent and unable to meet or pay its obligations," in the absence of testimony, is not conclusive of the insolvency of the corporation, within the meaning of section 1(15) of the Bankruptcy Act. Unpaid stock subscriptions of a corporation are assets which must be considered in determining whether or not the corporation is insolvent, within the meaning of the Bankruptcy Act. *Matter of Commonwealth Lumber Co.* (D. C., Wash.), 35 Am. B. R. 202, 226 Fed. 415.

282. Where real ground of appointment is insolvency.—If the effect of the action of the State court in the taking possession of the assets of the corporation be in result to subtract from the operation of the Bankruptcy Act that which would be subject to it, the so wording of the order that the State court's action may be placed on another ground would not be effective to prevent the operation of the Bankruptcy Act. In other words, where the real and substantial result of the State court's order was that a receiver was appointed because of the insolvency of the corporation, and the effect of the proceedings in the State court should logically be to wind up and liquidate the assets of the corporation and distribute them as the assets of an insolvent corporation the operation of the Bankruptcy Act cannot be defeated because in the proceedings or plead-

ings or orders or decrees of the State court its action may be based upon no ground at all, or upon any other ground than insolvency. To hold otherwise would be to allow, in any case where for the purpose of effecting such results pretensive grounds were alleged for appealing to the State court, the whole distribution and liquidation of the assets of an insolvent and bankrupt corporation to be taken away, and creditors to be deprived of that which by paramount statute is intended for their benefit under a general and uniform system of administration of insolvent corporations. *Matter of Maplecroft Mills* (D. C., S. Car.), 33 Am. B. R. 815, 218 Fed. 659, *revd.* 35 Am. B. R. 311, 226 Fed. 415.

283. *James Supply Co. v. Dayton Coal Co.* (C. C. A., 6th Cir.), 34 Am. B. R. 649, 223 Fed. 991; *Hill v. Electric Co.* (C. C. A., 6th Cir.), 32 Am. B. R. 332, 214 Fed. 243.

284. *In re Douglas Coal & Coke Co.* (D. C., Tenn.), 12 Am. B. R. 539, 131 Fed. 769; *In re Spalding* (C. C. A., 2d Cir.), 14 Am. B. R. 129, 139 Fed. 245; *In re Edward Ellsworth Co.* (D. C., N. Y.), 23 Am. B. R. 284, 173 Fed. 699, citing this work, and holding that the court is precluded from considering evidence *abundant* to contradict the decree or judgment of another court appointing receivers and setting forth the basis of such appointment.

Imminent danger of insolvency, as alleged in a bill by a stockholder for the appointment of a receiver, and the subsequent appointment based thereon, is insufficient. *In re Perry Aldrich Co.* (D. C., Mass.), 21 Am. B. R. 244, 165 Fed. 249.

Winding up affairs of partnership.—In the case of *Moss National Bank v. Arend* (C. C. A., 6th Cir.), 16 Am. B. R. 867, 146 Fed. 351, an application was made for the appointment of a receiver by the administrator of a deceased partner under the provisions of the Ohio statute. The court said: "It is conceded that this was not a case where, 'because of insolvency a receiver has

(IV) *Proof of insolvency.*—The burden is upon the petitioning creditors to show insolvency.²⁸⁵ The record of the court appointing the receiver may be used to prove the fact that the receivership was obtained because of the insolvency of the debtor, and if the grounds are stated in the record extrinsic evidence is not admissible to vary the terms thereof.²⁸⁶ It is not sufficient to show that the receiver was appointed under a State statute which authorized a receivership where the directors assert that the corporation is unable to meet its obligations as they mature; this on the assumption that the corporation

been put in charge of property,' because clearly the receiver was not appointed because of insolvency, but because of the death of a partner and to wind up the partnership. But it is submitted that, since the firm and the surviving partner were insolvent, and the latter joined in the application, he 'being insolvent, applied for a receiver or trustee for his property' and therefore committed an act of bankruptcy. But, as held by the court below, the surviving partner never really applied for a receiver. He had no power under the Ohio statute to apply for a receiver. He had the option of taking the interest of the deceased partner at an appraisal. He had thirty days in which to exercise this option. He did not want the interest at the appraisal, so he waived the thirty days and immediately declared his intention of not exercising the option. When he had done this, he had exhausted the power conferred upon him by the statute. It then became the positive duty of the administrator to apply for the appointment of a receiver to wind up the business. This duty was discharged and the receiver was appointed on the application of the administrator and for the purpose of winding up the partnership."

Under these circumstances it was held that the surviving partner did not commit an act of bankruptcy by joining in the application for the appointment of a receiver.

285. *Butler & Co. v. Palmenberg* (C. C. A., 1st Cir.), 30 Am. B. R. 502, 207 Fed. 705; *Maplecroft Mills v. Childs* (C. C. A., 4th Cir.), 35 Am. B. R. 311, 226 Fed. 415.

286. *Record of proceedings in State court.*—In the case of *Blue Mountain Iron & Supply Co. v. Portner* (C. C. A., 4th Cir.), 12 Am. B. R. 559, 131 Fed. 57, the court said: "The essential element in the alleged act of bankruptcy is insolvency. As stated the petitioning creditors have alleged and the jury found by the verdict that the defendant corporation was insolvent on the day the receivers were appointed and on the day the petition in bankruptcy was filed. The jury found as a fact, that it was 'because of insolvency' the receivers were put in charge of the Company's property." And as stated in another place in its opinion: "At all events the issue was made and submitted in the bankrupt court and the best evidence of the appointment of the receivers was the record of the proceedings in equity in the court

which made the appointment. It was the basis of the issue, and could have been proved in no other way. The record was obtained for this purpose, and no authority is cited holding that the best evidence of a proceeding in a court of equity is not the record of the proceeding. The record of the proceeding in court was the best evidence and there was no error in admitting it." See also *In re Spalding* (C. C. A., 2d Cir.), 14 Am. B. R. 129, 139 Fed. 244, in which case it was held that the court could base its determination as to the commission of an act of bankruptcy by the debtor upon the record of the court appointing a receiver and the order of appointment which recited the grounds for the appointment as being a threatened disposition of the debtor's property in fraud of creditors.

In *Matter of Maplecroft Mills* (D. C., S. Car.), 33 Am. B. R. 815, 218 Fed. 659 (reversed on other grounds, 35 Am. B. R. 311, 226 Fed. 415), the court said: "It will be seen by the language of the Bankruptcy Act that under this last clause insolvency itself is not made one of the substantial issues to be tried as an issue of fact in the bankrupt court except in so far as the appointment of a receiver or trustee has been because of insolvency. In other words, if the action of the court appointing a receiver was based upon insolvency, that is the only question for determination, and in itself would appear to determine the question of insolvency as adjudicated in the order making the appointment. It is not necessary under this subdivision that, in addition to evidence showing the appointment of a receiver by the court appointing the receiver because of insolvency, evidence should be additionally produced outside of the action of the court to show that the alleged bankrupt was in fact insolvent. In other words, it is not necessary, upon an application for involuntary bankruptcy under this last clause, to prove both that the alleged bankrupt had had a receiver appointed because of insolvency, and in addition and wholly *dehors* of this order of appointment the alleged bankrupt was actually insolvent, but to establish only that the receiver was appointed by the court appointing him because of insolvency, which involves and establishes the existence of insolvency. This question is to be determined principally by the inspection of the record of the court appointing the receiver."

might be solvent though temporarily unable to meet maturing obligations.²⁸⁷ If the records and findings of the court below show that a receiver of a corporation was appointed because of insolvency it is sufficient although the statutes under which the proceeding for the appointment of a receiver was instituted did not provide that insolvency was the cause of the receivership.²⁸⁸ It has been held, however, that where a petition is filed against a corporation because of the appointment of a receiver in a State court, it is entitled to a hearing on the question of insolvency and is not concluded by the finding of the State court on that issue.²⁸⁹

(5) MEANING OF WORDS.—“Insolvent” has the same meaning here as elsewhere in the statute.²⁹⁰ The amendment thus makes insolvency an essential element of proof in receivership cases.²⁹¹ The insolvency referred to is that which falls within the definition of the term as used in the act; it will not suffice to allege insolvency in the terms of a State statute, as for instance, in the sense of the inability of the alleged bankrupt to meet its current obligations.²⁹² “Applied for” manifestly means the voluntary application of the copartnership or of a corporation under resolution of its board of directors or other governing body, as regulated or prescribed by the State law of which the corporation is the creature.²⁹³ “Been put in charge of” clearly indicates every other means of securing the appointment of a receiver, as when the

287. *Schumert & Warfield, Ltd. v. Security Brewing Co.* (D. C., La.), 28 Am. B. R. 676, 199 Fed. 358, which arose under a Louisiana statute authorizing a receivership for certain enumerated causes, one of which is when the board of directors have declared by resolution that the corporation is unable to meet its obligations as they mature, but the statute does not provide for the appointment of a receiver at the instance of a creditor on the ground of insolvency, unless he has a final and executory judgment. It was held, that conceding that the State court had jurisdiction to appoint a receiver on the ground of insolvency, in the proceedings then before it, it could not be presumed that the receivers were appointed because of insolvency, since the corporation might have been solvent, although unable to meet its debts as they matured.

288. *In re Belfast Mesh Underwear Co.* (D. C., Ct.), 18 Am. B. R. 620, 153 Fed. 224, in which case the court said: “It seems to me that upon this record alone it must be apparent to any reasonable mind that the facts found by the court show that it was ‘because of insolvency’ that the receiver was appointed. The record certainly does not show conclusively that insolvency was not the cause or one of the causes which led to the appointment. It may be said to exhibit a *prima facie* showing of insolvency of sufficient force to put the respondent corporation in this court upon its proofs. If such ruling be adopted no harm can come to any one hereafter. If applications shall be made to the state courts for receivers in cases where, beyond question, the corporation is solvent, the record in the state court will

undoubtedly proclaim the fact in a convincing way.”

289. *In re Pickens Mfg. Co.* (D. C., Ga.), 20 Am. B. R. 202, 158 Fed. 894.

If the record shows facts which do not constitute insolvency under the bankruptcy act, the appointment of a receiver based thereon would not be an act of bankruptcy. *In re Golden Malt Cream Co.* (C. C. A., 7th Cir.), 21 Am. B. R. 36, 164 Fed. 326.

290. See § 1 (15). *Butler & Co. v. Palmenberg* (C. C. A., 1st Cir.), 30 Am. B. R. 502, 307 Fed. 705.

291. As to burden of proof, see “Solvency where Act of Bankruptcy is a Receivership,” *post*, in this Section of this work.

292. *Insolvency as defined under State statute.*—A receivership is not an act of bankruptcy, unless created “because of insolvency,” as insolvency is defined by the Bankruptcy Act. A complaint in a suit in a State court for the appointment of a receiver of a corporation, alleging that the defendant is without money or credit, and “is now and for a considerable time last past has been wholly insolvent and unable to pay its just debts and obligations as they mature and fall due in the regular course of business,” and an order finding all the allegations to be true and appointing a receiver, are insufficient to establish that the receiver was appointed because of insolvency, within the meaning of section 3a (4) of the Bankruptcy Act. *Matter of Butte Duluth Mining Co.* (D. C., Mont.), 36 Am. B. R. 101, 227 Fed. 334.

293. Text cited with approval in *In re Gold Run Mining & Tunnel Co.* (D. C., Col.), 29 Am. B. R. 563, 200 Fed. 162.

State or a creditor proceeds against the corporation for its dissolution.²⁹⁴ "Trustee," of course, means much the same as "receiver;" the nomenclature being different in different States. The intention of the amendment of 1903 being clear, there would appear little doubt that any act, procedure, or process for the winding up of insolvent corporations or copartnerships, which substantially abridges or deprives creditors of the right to a trustee of their own choosing, or of the greater right to compel prorating between all creditors of the same class, or any other right given them by the bankruptcy law, will, provided the alleged bankrupt is insolvent at the time of the commission of the act complained of and that act be within the four months' period, amount to an act of bankruptcy. The importance of this change cannot be overestimated.²⁹⁵

(6) **PRECEDENTS UNDER FORMER LAW.**—The law of 1867 applied to "all moneyed, business, or commercial corporations and joint-stock companies." This section also provided that "upon the petition of any creditor of such corporation or company, the like proceedings shall be had and taken as are provided in the case of debtors." But the corresponding acts of bankruptcy under the former law,²⁹⁶ are not sufficiently analogous to furnish reliable precedents; in each the element of intent was essential. A voluntary receivership of a corporation may, of course, amount to "a transfer of his (its) creditors;" so may it also be "a transfer of money or other property," or "the procuring of its property to be taken on legal process," each with intent to prefer; or "with the intent by such disposition of his (its) property to defeat or delay the operation of the act." But now, not even the result, much less the intent, is the essential test. The mere fact of the appointment of a receiver or trustee, nay, even a mere application for such an appointment coupled with insolvency, is enough. However, it was held under the law of 1867, that the appointment by a State court of a receiver of a corporation is "a taking on legal process;"²⁹⁷ and the fact that the corporation was extinct, it having been dissolved by the State law, was held not a bar to the proceeding in bankruptcy, or to oust the Federal court of jurisdiction.²⁹⁸

(7) **REFERENCE TO OTHER SECTIONS.**—Useful references to other sections will be found in the foot-note.²⁹⁹

e. Fifth act of bankruptcy; a confession of bankruptcy.—(1) **IN GENERAL.**—A person commits an act of bankruptcy by having "admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground." The importance of this act of bankruptcy rests mainly upon its application to a corporation. It is not to be expected that in his correspondence a debtor who is a natural person will, for the purpose of getting into bankruptcy, both confess inability to pay his debts and willingness to be adjudged a bankrupt; the filing of a voluntary petition is more direct. But many corporations are restricted under the act from becoming voluntary

²⁹⁴ *In re Spalding* (C. C. A., 2d Cir.), 14 Am. B. R. 129, 132, 139 Fed. 243.

²⁹⁵ The text is quoted with approval by Judge Speer in *In re Electric Supply Co.* (D. C., Ga.), 23 Am. B. R. 647, 653, 175 Fed. 612.

²⁹⁶ Act of 1867, § 39, R. S., § 5,021.

²⁹⁷ *In re Merchants' Ins. Co.*, Fed. Cas. 9,441.

²⁹⁸ *Thornhill v. Bank of Louisiana*, Fed. Cas. 13,992, affg. s. c. Fed. Cas. 13,990.

²⁹⁹ For estoppel where the creditors have assented to the assignment and later seek to petition the assignor into bankruptcy, see § 59-b. For stays on assignment proceedings in the State courts, see §§ 2(15) and 11-a. For jurisdiction of the court of bankruptcy over the assigned estate, both before and after adjudication, see §§ 2(3); (15), 3-e, 23, and 69-a. For effect of adjudication on title transferred by a general assignment, see § 70-a.

bankrupts except as they confess their inability to pay their debts and their willingness to be adjudged bankrupt under this statute, in which event involuntary proceedings may be instituted against them. Indeed the value of this act of bankruptcy did not appear until the determination that corporations might through it become in effect voluntary bankrupts was generally recognized.³⁰⁰ The amendment of § 4 by the amendatory act of 1910, permitting any business or mercantile corporation except a municipal, railroad, insurance or banking corporation to become a bankrupt has materially lessened the force and effect of this clause of the section.³⁰¹ The filing of a voluntary petition is itself treated as an act of bankruptcy.³⁰²

(2) **ESSENTIAL ELEMENTS.**—(I) *In general.*—Three things seem to be necessary to constitute this act: (1) a writing signed by the debtor or some officer or agent duly authorized; (2) a distinct admission therein of his inability to pay his debts; and (3) an unqualified expression of willingness to be adjudged a bankrupt on that ground. Thus, where the officer of a corporation was deputed to execute such a writing, provided a petition should be filed against it, it is not an act of bankruptcy.³⁰³ If the writing is sufficient, the fact that the debtor requested certain creditors to file a petition against him does not affect the character of the act.³⁰⁴ When this act of bankruptcy is alleged, the question of insolvency is immaterial.³⁰⁵

(II) *Acts of directors of corporation.*—It is sufficient in legal effect if the board of directors of a corporation who were charged with the conduct of its business, declare the inability of the corporation to pay its debts, and its willingness to be adjudged a bankrupt, in accordance with the legal requirements specified.³⁰⁶ Of course the power of a board of directors to bind the

^{300.} In re Marine Machine Co. (D. C., N. Y.), 1 Am. B. R. 421, 100 Fed. 439; In re Kelly Dry Goods Co. (D. C., Wis.), 4 Am. B. R. 528, 102 Fed. 747. *Contra:* In re Bates Machine Co. (D. C., Mass.), 1 Am. B. R. 129, 91 Fed. 625. In the case of In re Moench (C. C. A., 2d Cir.), 12 Am. B. R. 240, 243, 130 Fed. 685, the court stated: "When all commit either the fourth or fifth act of bankruptcy, when three creditors stand ready at once to take advantage of it by filing a petition, the corporation may achieve the object which the act forbids it to secure by its own voluntary petition."

^{301.} See Bankrupt Act, § 4, and discussion thereunder, sub-title "*Voluntary Bankruptcy.*"

^{302.} In re Forbes (D. C., Mass.), 11 Am. B. R. 787, 791, 128 Fed. 137, in which case it was held that a voluntary petition filed by one partner was an act of bankruptcy. In the case of Hanover National Bank v. Moyses, 186 U. S. 181, 8 Am. B. R. 1, '0, 46 L. Ed. 1113, the court said: "The schedules must be verified and the petition must state that 'bankrupt owes debts which he is unable to pay in full,' and 'that he is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law.' This establishes these facts, so far as the degree of bankruptcy is concerned, and he has committed an act of bankruptcy in filing the petition."

^{303.} In re Baker-Ricketson Co. (D. C., Mass.), 4 Am. B. R. 605, 97 Fed. 489.

^{304.} Matter of Duplex Radiator Co. (D. C., N. Y.), 15 Am. B. R. 324, 142 Fed. 906.

^{305.} In re Duplex Radiator Co. (D. C., N. Y.), 15 Am. B. R. 324, 142 Fed. 906.

Insolvency unnecessary.—Where the act of bankruptcy charged is that a corporation has admitted in writing its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground, the question of actual insolvency is immaterial. In re McNally Co. (Ref., N. Y.), 29 Am. B. R. 772.

Admission of insolvency and consent to adjudication.—Although the question of solvency or insolvency is immaterial where the act of bankruptcy is the written admission referred to in the act, the opposing creditors may set up that the proceedings are the result of fraud and collusion between the bankrupt and the petitioners. Such an answer examined and held to be insufficient. Matter of Cohn (C. C. A., 3d Cir.), 35 Am. B. R. 735, 227 Fed. 843.

Solvency is no defense to a petition charging an act of bankruptcy under section 3a(5) of the bankruptcy act, consisting of an admission in writing of the bankrupt's inability to pay its debts and its willingness to be adjudicated a bankrupt on that ground. Matter of Russell Wheel & Foundry Co. (D. C., Mich.), 35 Am. B. R. 66, 222 Fed. 569.

^{306.} In re Moench & Sons Co. (D. C., N.

corporation in this respect will be governed by State statutes and the decisions of the State courts thereunder.³⁰⁷ A State statute limiting the power of a corporation to dispose of its assets without the consent of its stockholders would not prevent directors admitting its insolvency and its willingness to be adjudged a bankrupt.³⁰⁸ Directors holding over because of a failure to elect their successors may, at a legally convened meeting, execute the necessary instru-

Y.), 10 Am. B. R. 656, 123 Fed. 965, in which case it was also held that petitioning creditors are not estopped from alleging a resolution adopted by a board of directors as an act of bankruptcy, on the ground that collusion, charged by an answering creditor, who would obtain a preference by attachment if the petition were dismissed. This case was affirmed in 12 Am. B. R. 240, 130 Fed. 685.

Directors may admit insolvency and willingness although proceedings have been instituted to sell franchises and property of the corporation and distribute the proceeds thereof. *Cresson, etc., Coal & Coke Co. v. Stauffer* (C. C. A., 3d Cir.), 17 Am. B. R. 573, 48 Fed. 981. See also *In re Mutual Mercantile Agency* (D. C., N. Y.), 6 Am. B. R. 607, 111 Fed. 152; *In re Peter Paul Book Co.* (D. C., N. Y.), 5 Am. B. R. 105, 104 Fed. 786; *In re Kelly Dry Goods Co.* (D. C., Wis.), 4 Am. B. R. 528, 102 Fed. 747; *In re Marine Machine & Conveyor Co.* (D. C., N. Y.), 1 Am. B. R. 421, 91 Fed. 630.

Unqualified admission of insolvency.—A resolution of the board of directors of a corporation by which an attorney was authorized to represent it generally in any suit or suits or bankruptcy proceedings then pending or that might be brought, and to agree on behalf of the corporation to the appointment of a receiver, is not the unqualified written admission by the corporation of its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground, required to constitute an act of bankruptcy within the meaning of the statute. *In re Southern Steel Co.* (D. C., Ala.), 22 Am. B. R. 476, 169 Fed. 702. The adoption of a resolution by a board of directors admitting inability to pay debts and expressing a willingness to be adjudged a bankrupt is sufficient to warrant adjudication, although some of the directors received no notice of the meeting, when it appeared that no action had been taken by them to set aside the proceedings based upon such resolution. *In re Lisk Mfg. Co.* (D. C., N. Y.), 21 Am. B. R. 674, 167 Fed. 411.

Validity of resolution admitting insolvency.—Where five of the eight members of the board of directors of a corporation were present and unanimously adopted a resolution admitting the corporation's inability to pay its debts, and its willingness to be adjudged a bankrupt on that ground, the fact that two of the directors voting, whose presence was necessary to constitute a quorum, were creditors and at the time in-

tended to file a petition against the corporation, does not vitiate the resolution which was otherwise valid. *Home Powder Co. v. Geis* (C. C. A., 8th Cir.), 29 Am. B. R. 580, 204 Fed. 568.

307. In Oregon, the board of directors of a private corporation, in the absence of authority specifically conferred by the stockholders, may not commit an act of bankruptcy for the corporation, by adopting a resolution admitting the inability of the corporation to pay its debts and its willingness to be adjudged a bankrupt. *In re Quartz Gold Mining Co.* (D. C., Or.), 19 Am. B. R. 667, 157 Fed. 243.

In Massachusetts.—In the case of *In re Bates Machine Co.* (D. C., Mass.), 1 Am. B. R. 129, 91 Fed. 624, which arose under the Massachusetts statute, it was held that, where by the laws of the State under which the corporation is formed, the powers of its officers and directors are defined and limited, a written admission by the directors of the corporation, which is in excess of their authority, is not sufficient to base an involuntary petition in bankruptcy against the bankrupt.

Under the law of Arizona, which does not prohibit such action, the board of directors of a corporation may, without the consent of the stockholders, make an admission that the corporation is unable to pay its debts, and declare its willingness to be adjudged a bankrupt on that ground. *Home Powder Co. v. Geis* (C. C. A., 8th Cir.), 29 Am. B. R. 580, 204 Fed. 568.

Admission by board of directors of Michigan corporation.—Since the board of directors of a Michigan corporation may make or authorize the making of a common-law assignment they may commit an act of bankruptcy, binding on the corporation, by admitting in writing the inability of the corporation to pay its debts and its willingness to be adjudicated a bankrupt on that ground. *Matter of Russell Wheel & Foundry Co.* (D. C., Mich.), 35 Am. B. R. 66, 222 Fed. 569.

308. Statute preventing transfer.—Authority given by the board of directors of a corporation, one of whom owned nearly all the capital stock, for the making of a voluntary petition in bankruptcy, is sufficient, notwithstanding a State statute prohibiting any sale, assignment, or transfer of the franchise and property of a corporation without the consent of the stockholders holding at least two-thirds of the capital stock. *Bell v. Blessing* (C. C. A., 9th Cir.), 35 Am. B. R. 672, 225 Fed. 750.

ment.³⁰⁹ If a board is enjoined from commencing or prosecuting any proceeding "involving in any way the property or property rights" of the corporation, the adoption of a resolution confessing the inability of the corporation to pay its debts, and signifying its willingness to be adjudged a bankrupt is unauthorized and does not constitute an act of bankruptcy.³¹⁰ While a writing in the exact words of the statute, if authoritatively signed,³¹¹ is surely sufficient; yet it would seem that any writing³¹² which substantially covers the three essentials just stated will be enough.³¹³

(III) *Officers of corporation.*—The treasurer of a corporation cannot admit inability to pay debts and signify the willingness of the corporation to be adjudged a bankrupt;³¹⁴ unless, of course, he is authorized to do so by a resolution passed at a meeting of the stockholders, or of the directors; in such a case the right is not affected by the appointment of a receiver in a State court.³¹⁵

(IV) *Admission by partners.*—A written admission of one member of a firm, purporting to be made on behalf of himself and the other members to the effect that they are unable to pay their debts and are willing to be adjudicated bankrupts, is binding upon the firm unless expressly repudiated.³¹⁶

III. WHEN AND AGAINST WHOM PETITION MAY BE FILED.

a. Against person who is insolvent and has committed act of bankruptcy.—

Subsection *b* of this section authorizes the filing of a petition against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. The word "person" as here used includes a corporation,³¹⁷ officers, partnerships, and women,³¹⁸ but does not include wage-earners or a person engaged chiefly in farming or the tillage of the soil.³¹⁹ An act of bankruptcy may be committed by an officer or agent of a corporation or by a member of a partnership, while acting in behalf of the corporation or partnership and within the scope of his authority.³²⁰ If the

309. Matter of Riley, Talbot & Hunt. (Ref., Mich.), 15 Am. B. R. 159.

310. In re Hudson River Elec. Power Co. (D. C., N. Y.), 23 Am. B. R. 191, 173 Fed. 934.

311. In re Mutual Mercantile Agency (D. C., N. Y.), 6 Am. B. R. 607, 111 Fed. 152.

312. Conway v. German (C. C. A., 4th Cir.), 21 Am. B. R. 577, 166 Fed. 67, holding that the petition must allege that the admission of insolvency and expression of willingness was in writing.

313. In the case of Brinkley v. Smithwick (D. C., N. C.), 11 Am. B. R. 500, 126 Fed. 686, it was held that an insolvent debtor's willingness to be adjudged bankrupt on the ground of insolvency may be inferred from the admission of insolvency in his answer to an involuntary petition.

A resolution of the board of directors of a corporation, authorizing the cashier, treasurer, and bookkeeper to prosecute in the name of the corporation a petition in bankruptcy to final discharge, is sufficient to authorize a voluntary proceeding, and it is unnecessary that the resolution authorize, in strict conformity with section 3a(5) of the bankruptcy

act, an admission in writing on the part of the corporation of its inability to pay its debts, and its willingness to be adjudged a bankrupt on that ground. Bell v. Blessing (C. C. A., 9th Cir.), 35 Am. B. R. 672, 225 Fed. 750.

314. In re Burbank Co. (D. C., N. H.), 21 Am. B. R. 838, 168 Fed. 719. An officer of a corporation may not write a letter in the name of the corporation committing it to an act of bankruptcy unless expressly authorized so to do. In re Southern Steel Co. (J. C., Ala.), 22 Am. B. R. 476, 169 Fed. 702.

315. In re McNally Co. (D. C., N. Y. Ref.), 29 Am. B. R. 772.

316. In re Kersten (D. C., Wis.), 6 Am. B. R. 516, 110 Fed. 929.

317. But only those indicated in Bankr. Act, § 4-b.

318. See Bankr. Act, § 1 (19).

319. Bankr. Act, § 4-b. For persons by whom a creditor's petition may be filed, see under § 59.

320. Richmond Spike & Iron Co. v. Allen (C. C. A., 4th Cir.), 17 Am. B. R. 583, 590, 148 Fed. 657; In re Perley & Hays (D. C., Mo.), 15 Am. B. R. 54, 138 Fed. 927.

act complained of is that of one partner acting individually the partnership cannot be charged with the effect thereof.³²¹ "Insolvent," means what it always does in this statute. Here, also, it means something more, *i. e.*, insolvency at the time of the filing of the petition, and, if the act of bankruptcy is one which can be committed only by an insolvent, at the time of the commission of such act. In most cases, insolvency at both times must, therefore, be distinctly alleged.³²²

b. Time within which petition must be filed.—(1) **WITHIN FOUR MONTHS AFTER THE COMMISSION OF THE ACT.**—The petition must be filed within four months after the commission of the act of bankruptcy. In making the computation the day of filing is excluded and the last day included.³²³ If the last day is a Sunday or a "holiday,"³²⁴ the time does not expire until the next day;³²⁵ and days will not be split into hours.³²⁶ The meaning of "within four months," when applied to transactions other than acts of bankruptcy, is further considered in the discussion under §§ 60, 67 and 70.

(2) **NECESSITY FOR RECORD OR POSSESSION TO START TIME RUNNING.**—A fair statement of its meaning is: a petition cannot be filed more than four months after the recording of the instrument constituting the alleged act of bankruptcy where recording is required or permitted, or, where it is not, more than the same statutory period after the beneficiary takes notorious, exclusive, *and* continuous possession of the property transferred; provided always that prior actual notice shall set the time running in either case.³²⁷ The last four lines, *i. e.*, after the word "required," of the subsection do not recur in the like sentence added to § 60-b by the amendatory act of 1903;³²⁸ doubtless the common rule as to actual notice should be read into it. Their purpose here is clear. Further they seem to make necessary the substitution of "and" for "or" in the phrase "notorious, exclusive, or continuous,"³²⁹ for, if with notice, every possession must be "notorious," and if that alone, and not also a possession that is "exclusive and continuous," were enough to start the time running, the clause as to actual notice would become tautological. If the act of bankruptcy consists of a fraudulent or preferential transfer, the time

³²¹ *Hartman v. Peters* (D. C., Pa.), 17 Am. B. R. 61, 146 Fed. 82; *In re Wing Yick* (D. C., Hawaii), 13 Am. B. R. 755, 2 U. S. D. C. Hawaii 263; *In re Schultz* (D. C., N. Y.), 6 Am. B. R. 91, 109 Fed. 264; *In re Gillette* (D. C., N. Y.), 5 Am. B. R. 119, 104 Fed. 769; *Davis v. Stevens* (D. C., S. Dak.), 4 Am. B. R. 763, 104 Fed. 235. In the case of *In re Redmond*, Fed. Cas. 11,632, it was held that a conveyance by one partner of his individual property although an act of bankruptcy as against him, will not sustain a proceeding in bankruptcy as against the firm, even though such conveyance was made with intent to hinder, delay or defraud firm creditors, or with a view of giving preference to a firm creditor.

³²² See under § 1, *ante*, p. 12.

³²³ See Bankr. Act, § 31, *post*; *In re Dupree*, 97 Fed. 28; *Whitley Grocery Co. v. Roach* (Sup. Ct., Ga.), 115 Ga. 918, 8 Am. B. R. 505, 42 S. E. 282, and foot-note; *In re Warner* (D. C., Ct.), 16 Am. B. R. 519, 144 Fed. 987.

³²⁴ Bankr. Act, § 1 (14).

³²⁵ *Dutcher v. Wright*, 94 U. S. 533, 24

L. Ed. 130; *In re Stevenson* (D. C., Del.), 2 Am. B. R. 66, 94 Fed. 111; *In re Edelstein*, 1 N. B. N. 168; *Parmenter Mfg. Co. v. Stoeve* (C. C. A., 5th Cir.), 3 Am. B. R. 220, 97 Fed. 330.

³²⁶ *In re Tonawanda St. Planing Mill Co.* (D. C., N. Y. Ref.), 6 Am. B. R. 38; *Jones v. Stevens* (Sup. Ct., Me.), 94 Me. 582, 5 Am. B. R. 571, 48 Atl. 170; *In re Warner* (D. C., Conn.), 16 Am. B. R. 519, 144 Fed. 987.

³²⁷ *Little v. Holley Brooks Hardware Co.* (C. C. A., 5th Cir.), 13 Am. B. R. 422, 133 Fed. 874.

³²⁸ For reason for the amendment, see *In re Mersman* (Ref., N. Y.), 7 Am. B. R. 46, and § 60-b as amended by Act of 1903.

³²⁹ For the meaning of "notorious, exclusive, or continuous possession," see *In re Woodward* (D. C., Tex.), 2 Am. B. R. 233, 95 Fed. 260, though this case construes § 3-b as though it were a part of § 60-b before the amendments of 1903. See also *In re Mingo Valley Creamery Assn.* (D. C., Pa.), 4 Am. B. R. 67, 100 Fed. 282.

will begin to run ordinarily from the day when the "beneficiary takes notorious, exclusive or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer or assignment." If the transfer or assignment must be recorded or registered to be effectual the time begins to run from the day of the recording or registering. This is the evident purpose of the act. It will sometimes be difficult to determine what constitutes "notorious, exclusive or continuous possession" of the property. If such possession pertains to intangible forms of personal property it must be construed to mean such possession as the property is susceptible of and such as is usual and ordinary, unaccompanied by acts or conduct tending to conceal its ownership.³³⁰ Where the requisite notoriety of the transferee's possession is shown, it must appear that the petition has been filed within four months of such possession, actual knowledge on the part of the petitioning creditors being unnecessary.³³¹ Possession is not required in every case to be actual; it may be constructive, as where goods were stored in a warehouse or where in the custody of a transportation company, in which cases the delivery of a warehouse receipt or bill of lading would indicate the change in the possession of the property.³³² Where a verbal pledge, followed by manual delivery of the property, is subsequently confirmed by a written instrument, the four months' period begins to run from the date of the verbal pledge, and if the property was transferred more than four months before the petition was filed, such pledge does not constitute an act of bankruptcy.³³³ Where the transaction consists of deeds of real property which

330. *In re Bogen* (D. C., Ohio), 13 Am. B. R. 529, 134 Fed. 1019; *Jones v. Coates* (C. C. A., 8th Cir.), 28 Am. B. R. 249, 196 Fed. 860.

331. *Jones v. Coates* (C. C. A., 8th Cir.), 28 Am. B. R. 249, 196 Fed. 860.

To be "notorious" the possession need not be advertised to the public. All that the statute requires is that there shall be no attempt at concealment of the possession, no effort to prevent its becoming known. *In re Woodward* (D. C., Tex.), 2 Am. B. R. 233, 95 Fed. 260.

332. *In re Bird* (D. C., Minn.), 24 Am. B. R. 24, 180 Fed. 229, in which case it was held that the assignment of an equity in personal property which had been pledged to a bank to secure the payment of a debt, with notice to the bank, operated as a constructive delivery and possession of the property pledged within the meaning of § 3-b.

Change in possession.—In the case of *Ozark Cooperage and Lumber Co.* (C. C. A., 8th Cir.), 24 Am. B. R. 835, 180 Fed. 105, it appeared that a written contract had been made between the bankrupt and a certain lumber company, whereby the company was to purchase lumber at a stipulated price, which was to be sawed and piled at the mills of the bankrupt and as so piled was to be estimated and branded with the petitioner's initials; it was held that such acts constituted a delivery of the possession of the lumber. The court said: "Some kinds of personal property may be readily delivered from hand to hand, and interested persons

may rightfully expect that method to be observed. In other cases the character of the property and the circumstances of its situation preclude such a delivery; and other *indicia* or a change of ownership, such as signs, brands and marks, are generally accepted as sufficient. Each case, however, as it arises, should be determined by its own peculiar facts and circumstances. The contract here contemplated that the newly made lumber should remain for a time at "mills, stacked in a particular way for curing and seasoning before shipment. That was perhaps necessary, at any rate it was entirely proper and it cannot be said that while so situated it was not lawfully the subject of barter and sale."

Constructive knowledge of transfer.—Under section 3-b of the bankruptcy act, providing that the petitioning creditor in involuntary proceedings must file his petition within four months after the beneficiary takes notorious, exclusive, or continuous possession of the property transferred, unless he has received actual knowledge of the transfer before then, where the requisite notoriety of the transferee's possession is shown, in order to sustain an involuntary proceeding, it must appear that the petition has been filed within four months of such possession, actual knowledge on the part of the petitioning creditor being unnecessary. *Jones v. Coates*, (C. C. A., 8th Cir.), 28 Am. B. R. 249, 196 Fed. 860.

333. *Jones v. Coates* (C. C. A., 8th Cir.), 28 Am. B. R. 249, 196 Fed. 860.

under the State statute are either required or permitted to be recorded, the date of the transfer as an act of bankruptcy will be the date of recording the deeds.³³⁴ The interpretation placed upon the language of § 60-a, should also be applied to similar language used in § 3-b; so that if the recording of a deed or other instrument is required for any purpose whatever, it must be admitted to be required within the meaning of both of these sections.³³⁵ The second sentence of this subsection relates to the time when the four months' period will begin to run. It has as yet had comparatively little attention from the courts. The manifest purpose of the subsection is to prevent the escape of alleged bankrupts who have committed or concealed acts of bankruptcy more than four months old.³³⁶

IV. SOLVENCY AS A DEFENSE.

a. When insolvency need not be shown.—As has already been indicated, if a debtor makes a general assignment for the benefit of his creditors,³³⁷ or if he admits in writing his inability to pay his debts and his willingness to be adjudged a bankrupt,³³⁸ the question of insolvency is immaterial. If the act of bankruptcy consists of a transfer with intent to hinder, delay or defraud creditors, the petitioner need not prove insolvency of the debtor,³³⁹ but the debtor himself may allege his solvency as a defense. We have already considered the necessity of proving solvency in a case where a receiver or trustee has been appointed to take charge of the debtor's property.³⁴⁰ Subsections *c* and *d* of § 3 do not apply to this act of bankruptcy. The burden of proving the insolvency of the debtor would, therefore, seem to remain where it usually is, upon the creditor who asserts the insolvency. The reason for this is, perhaps, because the existence of a receivership usually implies insolvency, or perhaps because the papers on which it is granted were thought equivalent of the books and examination called for by § 3-d. In any event to establish this act of bankruptcy it must appear that the receiver or trustee was appointed "because of insolvency." The fact of insolvency will usually appear from the record of the proceedings in which the appointment was made. It would seem necessary for petitioning creditors relying on this act of bankruptcy to allege and prove insolvency, both at the time of the filing and of the commission of the act relied on.³⁴¹ It is not necessary in this place to discuss generally what constitutes insolvency. We have already considered it under § 1 (15) where the term is defined and we will hereafter consider it under § 60 under the subject of "preferences." The rules relating to the proof of the fact of insolvency are similar in all cases.

b. Solvency and the first act of bankruptcy.—It is conceivable that a debtor may have been insolvent at the time of the act of bankruptcy, but not when

334. *Ragan v. Donovan* (D. C., Ohio), 26 Am. B. R. 311, 189 Fed. 138, holding that where a State statute provides that deeds, not recorded, although good as between the parties, are void as to *bona fide* purchasers for value without knowledge, the recording of a deed is "required" within the meaning of § 3-b.

335. *In re Beckhous* (C. C. A., 7th Cir.), 24 Am. B. R. 380, 177 Fed. 141; *Loeser v. Bank & Trust Co.* (C. C. A., 6th Cir.), 17 Am. B. R. 628, 148 Fed. 975, holding that the State statute which requires the convey-

ance or transfer to be recorded in order to be effectual against any class of persons, is a law by which recording is required, within the meaning of § 3-b.

336. *Citizens' Bank v. DePauw Co.* (C. C. A., 7th Cir.), 5 Am. B. R. 345, 105 Fed. 926.

337. See *ante*, p. 116.

338. See *ante*, p. 127.

339. See *ante*, p. 97.

340. See *ante*, p. 121.

341. Text quoted with approval in *In re Pickens Mfg. Co.* (D. C., Ga.), 20 Am. B. R. 202, 204, 158 Fed. 894.

the petition is filed. Insolvency, other than as evidence of intent, being unimportant where the act of bankruptcy consists of hindering, delaying, or defrauding creditors, it was both proper and scientific to insert this subsection.³⁴² It seems, therefore, that, where this act of bankruptcy is relied on, it is not necessary that the petitioning creditors either allege or prove insolvency at either period.³⁴³ Where the act of bankruptcy consists of a transfer with intent to hinder, delay or defraud creditors the debtor may allege and prove that he was not insolvent at the time of filing the petition against him. If his insolvency at such date is proved by the alleged bankrupt the proceedings are to be dismissed. Where solvency is alleged as a defense in such a case the burden of proving solvency is on the alleged bankrupt. On the other hand, it is clear that proof of solvency of the debtor at the time the petition is filed is a complete defense.³⁴⁴ If a solvent person disposes of any of his property with the intent to hinder, delay or defraud his creditors, he commits an act of bankruptcy; and if within the ensuing four months he becomes insolvent, a petition may be filed against him and he may be adjudicated a bankrupt, unless it appears upon proof adduced by the debtor that he was solvent at the time the petition was filed.³⁴⁵ Solvency may be pleaded by a responding creditor as well as by the alleged bankrupt.³⁴⁶ If solvency is relied on by a creditor who opposes the bankruptcy of the debtor, the burden is upon the creditor.³⁴⁷

c. Solvency and the second and third acts of bankruptcy.—(1) **PROOF OF INSOLVENCY.**—Section 3-d has reference to the second and third acts of bankruptcy only. Both of these acts are constructive or legal fraud, but insolvency is an essential element and must be proved before adjudication. The burden of proving insolvency would, therefore, seem to be upon the petitioning creditors.³⁴⁸ Insolvency in both of these cases must be shown to have existed when the acts were committed; solvency or insolvency at the

³⁴². In re Pease (D. C., Mich.), 12 Am. B. R. 66, 129 Fed. 446.

³⁴³. In re West (D. C., Va.), 1 Am. B. R. 261; s. c., West Co. v. Lea, 174 U. S. 590, 2 Am. B. R. 463, 43 L. Ed. 1098; In re Steinger (C. C. A., 5th Cir.); 6 Am. B. R. 68, 108 Fed. 591; In re Pease (D. C., Mich.), 12 Am. B. R. 66, 129 Fed. 446.

³⁴⁴. Elliott v. Teoppner, 9 Am. B. R. 50, 187 U. S. 327.

Solvency when the petition was filed, is important only as a defense to an act of bankruptcy under clause 1 of § 3-a, and the burden of proving this is on the alleged bankrupt. Acme Food Co. v. Meier (C. C. A., 6th Cir.), 18 Am. B. R. 550, 153 Fed. 74, citing West Co. v. Lea, 174 U. S. 590, 2 Am. B. R. 463, 43 L. Ed. 1098.

³⁴⁵. **Insolvency after transfer.**—In the case of In re Larkin (D. C., N. Y.), 21 Am. B. R. 711, 168 Fed. 100, the court said: "The person is not permitted to convey, transfer, conceal or remove any part of his property, with intent to hinder, delay or defraud his creditors and, on becoming insolvent within four months thereafter, escape the bankruptcy law by showing that he was solvent when he so conveyed, transferred, con-

cealed or removed his property." In the case of In re Hughes (D. C., N. Y.), 25 Am. B. R. 556, 183 Fed. 872, it was held that a conveyance made with intent to hinder and delay creditors, although no fraudulent intention was shown or suspected, was *prima facie* a fraudulent transfer constituting an act of bankruptcy, under the first clause of the section, and that the alleged bankrupt must submit to bankruptcy in the absence of proof that he was solvent when the petition was filed.

³⁴⁶. In re West (D. C., Va.), 1 Am. B. R. 261.

³⁴⁷. In re West (C. C. A., 2d Cir.), 5 Am. B. R. 734, 108 Fed. 940.

³⁴⁸. Knittel v. McGowan (D. C., Pa.), 14 Am. B. R. 209, 134 Fed. 498; *revd.* on other grounds in McGowan v. Knittel (C. C. A., 3d Cir.), 15 Am. B. R. 1, 134 Fed. 498; Matter of Electron Chemical Co. (D. C., N. Y.), 31 Am. B. R. 471, 208 Fed. 954. As to uncorroborated testimony of bankrupt proving insolvency, see Collett v. Bronx National Bank (D. C., N. Y.), 29 Am. B. R. 454, 211 Fed. 111.

As to proof of insolvency see cases cited in Am. B. R. Dig., §§ 262-265.

time of the filing of the petition can only have a reflex importance, if any.³⁴⁹ In shady failures, it results in the alleged bankrupt being silent on the question of insolvency, thus eliminating it from the case at the outset. When the bankrupt does put solvency at issue and appears and gives testimony, the burden shifts again to the petitioning creditors.³⁵⁰

(2) PRODUCTION OF BOOKS, PAPERS AND ACCOUNTS.—Under this subsection the alleged bankrupt must appear with his books, papers and accounts and submit to an examination as to all matters tending to establish solvency or insolvency; if he fails so to do the burden is on him.³⁵¹ It is no excuse that a debtor engaged in business kept no books, or that he has lost them; if he does not keep them and know where they are, the burden will rest on him to show that he is solvent.³⁵² The statute does not require that the failure to produce books and papers be wilful or contumacious, in order to throw upon the bankrupt the burden of proving his solvency; the failure to produce, and the absence of a satisfactory explanation is sufficient.³⁵³ The books, papers, and accounts referred to are those material in determining an alleged bankrupt's financial condition.³⁵⁴ The books of the alleged bankrupt are competent, but not conclusive evidence on the question of insolvency.³⁵⁵ The earlier cases where the meaning of this subsection has been in question are cited in the note.³⁵⁶

349. *Acme Food Co. v. Meier* (C. C. A., 6th Cir.), 18 Am. B. R. 550, 153 Fed. 74; *In re Rome Planing Mills* (D. C., N. Y.), 3 Am. B. R. 123, 96 Fed. 812. This distinction is also discussed in considering the essential elements of the second and third acts of bankruptcy. See *ante*, pp. 98, 106.

In the case of *Matter of McCartney* (D. C., Pa.), 26 Am. B. R. 548, 188 Fed. 815, the evidence was held sufficient to sustain a finding that the alleged bankrupt was insolvent at a time when he permitted his wife and another creditor to secure judgments against him and to levy upon his property.

350. *Bogen & Trummell v. Protter* (C. C. A., 3d Cir.), 12 Am. B. R. 288, 129 Fed. 533; *McGowan v. Knittel* (C. C. A., 3d Cir.), 15 Am. B. R. 1, 137 Fed. 1015, revg. 14 Am. B. R. 209, 137 Fed. 453.

351. See *In re Taylor* (C. C. A., 7th Cir.), 4 Am. B. R. 515, 102 Fed. 728; *In re Codrington* (D. C., Pa.), 9 Am. B. R. 243, 123 Fed. 891; *Bogen & Trummell v. Protter* (C. C. A., 6th Cir.), 12 Am. B. R. 288, 129 Fed. 533; *Matter of Rosenblatt* (D. C., Pa.), 16 Am. B. R. 306, 143 Fed. 663.

Failure to produce books and papers.—Where the alleged bankrupt fails to produce certain accounts and notes material on the question of solvency, and stated several times during the trial that he would do so, without at any time making an apparent effort to procure them, the burden of proving his solvency rests upon the bankrupt. *Cummins Grocery Co. v. Talley* (C. C. A., 6th Cir.), 26 Am. B. R. 484, 187 Fed. 507.

352. *Bogen & Trummell v. Protter* (C. C. A., 6th Cir.), 12 Am. B. R. 288, 129 Fed. 533.

353. Books required in business; explanation.—In the case of *Bogen & Trummell v.*

Protter (C. C. A., 6th Cir.), 12 Am. B. R. 288, 129 Fed. 533, it was held that under § 3-d, a merchant is required to produce such books, invoices, etc., as should properly be kept in his business and which are necessary to show the amount of his assets and liabilities, and that his failure to do so, without satisfactory explanation, casts upon him the burden of proving his solvency. In the case of *Cummins Grocery Co. v. Talley* (C. C. A., 6th Cir.), 26 Am. B. R. 484, 187 Fed. 507, the court said: "The evidence in this case does not indicate that there was any intentional refusal on the part of the respondent to produce the papers and accounts relating to the item in question, nor that his failure to do so was contumacious. But the statute does not require that failure be wilful or contumacious, in order to throw upon the bankrupt the burden, which is not a drastic one, of proving his solvency. The failure to make such production must be satisfactorily explained; under the facts stated, the failure was not satisfactorily explained, and it follows that the burden of proof of solvency was, by the statute, thrown upon the alleged bankrupt." The burden is not shifted to the petitioning creditors merely by reason of the fact that the books, etc., are in the possession of the marshal under an order to seize and hold. *In re Desha & Willfong* (D. C., Hawaii), 30 Am. B. R. 130.

354. *Bogen & Trummell v. Protter* (C. C. A., 6th Cir.), 12 Am. B. R. 288, 129 Fed. 533.

355. *In re Docker-Foster Co.* (D. C., Pa.), 10 Am. B. R. 584, 123 Fed. 190.

356. The following will be found of some value: *Lea Bros. v. West Co.* (D. C., Pa.),

V. BOND ON TAKING POSSESSION OF BANKRUPT'S PROPERTY BEFORE ADJUDICATION.

a. Requirement as to bond.—Section 3-e requires a petitioner or applicant to give bond where it is sought to take charge of and hold property of the alleged bankrupt prior to the adjudication and pending a hearing on the petition. This requirement fits into remedies either granted by or implied from § 2.³⁵⁷ It differs from § 69-a, in that there the authority to issue the warrant should rest upon a showing of neglect by the bankrupt of his property. Here, this subsection has to do only with the bond and the remedies thereunder, and limits the power of seizure that flows from § 2 (3) and (15), by requiring the giving by the petitioning creditors of a bond against the possible dismissal of their proceedings.³⁵⁸ The order appointing a receiver of the alleged bankrupt's property should require the petitioners to give the bond before the receiver takes possession.³⁵⁹ Under the general statutes, a bond by a single surety company will be sufficient.³⁶⁰ It should be noted also that, unlike § 69-a, there is here no provision for releasing property seized, on the filing of another bond by the alleged bankrupt. It is presumable; however, that the court, under the broad powers conferred by § 2 (15), could withdraw its officer on receipt of a satisfactory bond or cash indemnity.

b. Remedies under bond; costs.—The purpose of the bond is to indemnify the alleged bankrupt against "all costs, expenses, and damages occasioned by such seizure, taking, and detention," if it should prove upon final trial that the debtor was not a bankrupt and that his custody of the property should not have been disturbed.³⁶¹ The section does not apply to any other kind of a bond, so that the remedy is not applicable in an action upon a bond given to restrain an execution sale of the bankrupt's property.³⁶² Under this subdivision counsel fees, expenses and damages provided for the seizing and holding of the property of an alleged bankrupt are for special services or damages occasioned by reason of the wrongful taking of the property of another.³⁶³ Costs, as in a suit in equity, are also authorized in all involuntary cases by General Order XXXIV. By the last paragraph of the subsection, if the petition is dismissed or withdrawn, the respondent must be "allowed" such "costs." By the last sentence, the same "shall be fixed and allowed by the court." Stripped of surplusage, these words undoubtedly mean that the court, in dismissing or on the withdrawal of the petition, may tax counsel fees, costs, expenses, and damages, and thus liquidate the amount of the liability of the obligors.³⁶⁴ Counsel fees expended and damages provided by

1 Am. B. R. 261, 91 Fed. 237; s. c. on appeal, *supra*; *Bray v. Cobb* (D. C., N. C.), 1 Am. B. R. 153, 91 Fed. 102; *In re Rome Planing Mills* (D. C., N. Y.), 3 Am. B. R. 766, 99 Fed. 137.

³⁵⁷ See Bankr. Act, § 2 (3), and (15), *ante*.

³⁵⁸ For forms, see Forms Nos. 8, 9 and 10.

³⁵⁹ *Matter of Haff* (C. C. A., 2d Cir.), 13 Am. B. R. 354, 135 Fed. 742, 68 C. C. A., 340, in which the order was vacated because of the petitioner's failure to give the bond.

³⁶⁰ See discussion under Section Fifty of this work, *post*. As to sufficiency of

a surety company bond not joined in by the applicants, see discussion of Referee Hotchkiss in *Matter of Sears* (D. C., N. Y.), 10 Am. B. R. 389, 117 Fed. 294.

³⁶¹ *Matter of McKenzie* (D. C., Wash.), 34 Am. B. R. 111, 219 Fed. 630.

³⁶² *In re Hines* (D. C., Or.), 16 Am. B. R. 538, 144 Fed. 147.

³⁶³ *Matter of Wise* (D. C., Wash.), 32 Am. B. R. 510, 212 Fed. 567.

³⁶⁴ *In re Nixon* (D. C., Mont.), 6 Am. B. R. 693, 110 Fed. 633; *Matter of Sears, Humbert & Co.* (D. C., N. Y.), 10 Am. B. R. 389, 128 Fed. 275; *In re R. H. Williams* (D. C., Ark.), 9 Am. B. R. 736, 120 Fed. 34.

Counsel fees.—Special counsel fees in-

this subdivision are not taxable in the bankruptcy proceeding, but are to be recovered in an independent suit upon the bond provided.³⁶⁵ The language of the statute creates a new right which is not dependent upon the existence of either malice or lack of probable cause in instituting the proceedings; damages, costs, counsel fees and expenses, must be allowed by the bankruptcy court alone, upon the dismissal or withdrawal of the petition.³⁶⁶ The only counsel fees allowable are those for services performed in proper efforts to secure the discharge of the property from the writ of seizure.³⁶⁷ Only the costs, expenses and damages resulting from the seizure and detention of the alleged bankrupt's property, may be taxed.³⁶⁸ And the costs should only be allowed against the person upon whose application the property was seized and detained.³⁶⁹ There is no liability except for the usual costs, unless it appears that the petitioners acted without probable cause and maliciously.³⁷⁰ And if it appears that the estate suffered no loss by the seizure, but, on the contrary, resulted in actual gain, none of the costs and expenses incident to the receivership should be charged against the applicant.³⁷¹ Where judgment is awarded against the petitioning creditors and their bondsmen for counsel fees, costs, disbursements and expenses incurred in the proceeding a petition for a claim for damages under § 69-a for a wrongful seizure of the alleged bankrupt's property, will not be sustained.³⁷² The only liability upon a bond given under this subsection is to those who were respondents when the bond was

curring because of the seizure may be allowed. *In re Ghiglione* (D. C., N. Y.), 1 Am. B. R. 580, 93 Fed. 386; *In re Hines* (D. C., Or.), 16 Am. B. R. 538, 541, 144 Fed. 147. If there has been no seizure, counsel fees are not to be awarded and the fact that a temporary injunction was granted restraining certain creditors of the alleged bankrupt from paying over money to him, does not make it a seizure so as to authorize such an allowance. *In re Williams* (D. C., Ark.), 9 Am. B. R. 736, 120 Fed. 34.

365. *Matter of Wise* (D. C., Wash.), 32 Am. B. R. 510, 212 Fed. 567.

366. Right to damages; where suit to be brought.—In the case of *Hill Co. v. Contractors' Supply & Equipment Co.* (App. Ct., Ill.), 156 Ill. App. 270, 24 Am. B. R. 84, the court said: "A new right is created by section 3 (e) Without this provision no damages could be recovered on the dismissal of the petition unless malice and lack of probable cause appeared. The statutory right, however, is not dependent upon the existence of either malice or lack of probable cause. But the statute creating the right also provides a specific remedy; indeed it creates no right distinct from and independent of the remedy. The language is not that the plaintiff shall be entitled to damages which may be allowed by the court, but that he shall be allowed his damages and that these shall be fixed and allowed by the court. This clearly does not mean by any court, but by the bankruptcy court. In other words, the

new right is not to sue for damages, but to have damages allowed in the bankruptcy proceedings by the bankruptcy court."

367. *In re Smith* (D. C., Ga.), 8 Am. B. R. 55, 113 Fed. 993.

368. Allowances for seizure.—In the case of *In re Smith* (D. C., Okl.), 16 Am. B. R. 478, 146 Fed. 923, it was held that the alleged bankrupt, on a dismissal of the petition, cannot be allowed for (1) counsel fees for services rendered in opposing the petition and securing its dismissal, (2) loss of credit claimed to have been occasioned by the seizure of his goods and closing up his business, where by his conduct before the proceedings in bankruptcy, he had destroyed and materially impaired his credit, (3) the costs and expenses allowed to the receiver in bankruptcy for care and sale of the goods taken under the order of seizure, but therefrom should be deducted taxes assessed against the bankrupt, but paid by the receiver. *Selkregg v. Hamilton* (D. C., Pa.), 16 Am. B. R. 474, 144 Fed. 557, awarding damages caused by the freezing and bursting of pipes in the factory while the marshal was in possession.

369. *In re Ward* (D. C., N. J.), 29 Am. B. R. 547, 203 Fed. 769.

370. *Matter of Moehs* (D. C., N. Y.), 22 Am. B. R. 286, 174 Fed. 165.

371. *In re Ward* (D. C., N. J.), 29 Am. B. R. 547, 203 Fed. 769.

372. *Nixon v. Fidelity & Deposit Co.* (C. C. A., 9th Cir.), 18 Am. B. R. 174, 150 Fed. 574.

given; if a subsequent respondent wishes protection he must move for a new bond.³⁷³ The alleged bankrupt should file his bill of costs with the clerk, and give notice to the creditors.³⁷⁴ It has been thought that the court may also enter judgment on the bond. This is doubtful. The obligors are not parties to the proceeding. Besides, a comparison of this paragraph with that of the Henderson bill³⁷⁵ shows that a specific grant of power to that end was dropped out before the bill was passed.

³⁷³. In re Spalding (C. C. A., 2d Cir.),
17 Am. B. R. 667, 150 Fed. 120.

³⁷⁵. Cong. Rec., 55th Cong., 2d Sess., Vol.
31, p. 2039, § 2.

³⁷⁴. In re Haessler-Kohlhoff Carbon Co.
(D. C., Pa.), 14 Am. B. R. 381, 135 Fed.
867.

SECTION FOUR.

WHO MAY BECOME BANKRUPTS.

§ 4. **Who may become bankrupts.**—*a* Any person, except a *municipal, railroad, insurance or banking** corporation, shall be entitled to the benefits of this act as a voluntary bankrupt.

b Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any *moneyed, business, or commercial corporation, except a municipal, railroad, insurance or banking corporation** owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act.

The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States.

Analogous provisions: In U. S.: As to voluntary bankruptcy, Act of 1867, §§ 11, 36, 37; R. S., §§ 5014, 5121, 5122; Act of 1841, §§ 1, 14. As to involuntary bankruptcy, Act of 1867, § 39 (as amended by Act of July 27, 1868); R. S., § 5021 (as amended by Acts of June 22, 1874, and July 26, 1876), § 5122; Act of 1841, §§ 1, 14; Act of 1800, §§ 1, 2.

In Eng.: Act of 1883, §§ 4(1), 115.

Cross-references: To the law: Generally to §§ 1 (6) (19), 2 (1) 3, 5, 6, 7, 18, 19 and 59.

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I. WHO MAY BECOME BANKRUPTS.

a. **History and comparative legislation.**—Originally, bankruptcy was available to traders only. In most of the Latin countries, it is still limited to

those who are "habitually occupied in commercial transactions."¹ This continued to be the law of England until the act of 1861, though prior to that time a remedy somewhat equivalent was granted to non-traders through numerous insolvent debtor acts. To-day, any English "debtor" may be adjudged a bankrupt.² Our first law, being purely involuntary, applied only to "merchants . . . actually using the trade of merchandise, . . . or as a banker, broker, factor, underwriter, or marine insurer"³—the latter clause a somewhat unscientific extension of the meaning of "trader." The voluntary features of the law of 1841 were available to "all persons owing debts,"⁴ and in this it was the exact equivalent of the present law; while the involuntary features were confined to the same persons as the previous statute. Under the act of 1867, any person "owing debts provable in bankruptcy exceeding \$300"⁵ might file a voluntary petition or be thrown into involuntary bankruptcy, the distinction as to traders having, as in England, by this time entirely vanished. Partnerships are, in England, amenable to bankruptcy,⁶ but corporations are not. Our first bankruptcy law seems to have been silent as to both commercial entities. The law of 1841 provided for partnership bankruptcies, but not for those of corporations. Our statute of 1867 put partnerships on the same footing as individuals; and as to corporations was much broader than the present law, as it existed prior to the amendments of 1910.⁷

b. Amendatory act of 1903.—The change as to the bankruptcy of corporations is discussed later in this section.⁸ The Ray amendatory bill added mining corporations to those liable to involuntary bankruptcy, and permitted those classes of corporations which might be petitioned against, to ask for voluntary bankruptcy, provided their stockholders took certain preliminary steps. Corporations are now more general than partnerships, and, even in the smaller communities, are increasing in number and importance; many of them, not being strictly either "trading" or "mercantile" associations, were, without apparent reason, exempted from the operation of this uniform national law. But the Senate amendments struck out even the provisions of the House bill making the voluntary bankruptcy of purely business corporations possible. Thus the only substantial change was the insertion of the word "mining," considered later.

c. Amendatory act of 1910.—The amendatory act of 1910 carried into the bankruptcy law, provisions which were sought to be incorporated by the Ray amendatory bill, introduced in the House in 1903, permitting the voluntary bankruptcy of purely business corporations. The amendment of 1910 has gone farther than this, by making the bankruptcy act applicable in all respects, as regards both involuntary and voluntary bankruptcies, to all business or commercial corporations except "municipal, railroad, insurance or banking corporations." The amendment omitted from clause b, the words "corporations engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits," and inserted in place thereof the provision authorizing the involuntary bankruptcy of any

1. See Dunscomb on "Bankruptcy; a Study in Comparative Legislation."

2. English Bankruptcy Act of 1883, § 4(1).

3. Act of 1800, § 1.

4. Act of 1841, § 1.

5. Act of 1867, § 11; R. S., § 5014, *post*.

6. English Bankruptcy Act of 1883, § 115.

7. See further under heading "Involuntary Bankruptcy."

8. See also under § 3.

"moneyed, business or commercial corporation, except a municipal, railroad, insurance or banking corporation." Except as to the corporations specified, any corporation may become a voluntary bankrupt, or may be adjudged an involuntary bankrupt. In the law as amended the character of the corporation is not material in determining whether such corporation is subject to bankruptcy. If the corporation does not fall within the exception, it may become or be adjudged a bankrupt. The great number of cases which have been decided, involving the question as to the application of the act to certain corporations, are no longer in point. These cases are not germane to the subject except to show the development of the bankruptcy law, or except as to a proceeding now pending which was instituted prior to June 25, 1910, the date of the taking effect of the amendatory act. This amendment may not be given a retroactive effect.⁹

II. VOLUNTARY BANKRUPTCY.

a. Persons who may file petition; debts.—(1) **IN GENERAL.**—Any person who owes debts in any amount, no matter how small, may file a voluntary petition. Such filing is not an act of bankruptcy, as under the law of 1867 and the present English law, but is an *ex parte* application that gives jurisdiction to the court to decree it. A voluntary petitioner may even be solvent.¹⁰ There is nothing in the act which requires the person to be insolvent, and there seems to be no reason why, if a solvent person cares to have his property distributed among his creditors in bankruptcy, he should not be allowed to do so. It will not be necessary to allege insolvency in the petition, nor prove it, to procure an adjudication.¹¹ A creditor may not intervene to oppose the petition.¹²

(2) **JURISDICTIONAL FACTS.**—The court is bound to ascertain whether the required jurisdictional facts exist; it must be alleged in the petition, that the debtor is within the jurisdiction of the court, that he owes debts and

9. *Matter of U. S. Restaurant & Realty Co.* (C. C. A., 2d Cir.), 25 Am. B. R. 915, 187 Fed. 118. *Matter of New Amsterdam Motor Co.* (D. C., N. Y.), 24 Am. B. R. 757, 180 Fed. 943; in this case the court calls attention to § 72 of the original act which expressly provided against the retroactive effect of the act generally, and that it might be argued that the subsequent amendments, which had no such clause, were on that account intended to be retroactive. The court concludes, however, that such section should be construed as a limited retroactive clause, and that the omission of a similar provision in an amendment of the act, is no ground for the inference that such amendment was meant to have a retroactive effect.

10. Compare *In re Fowler*, Fed. Cas. 4,998. The purpose of a voluntary proceeding in bankruptcy is in consideration that the bankrupt promptly surrender all of his non-exempt property to the bankruptcy court, to the end that all of his creditors, without preference or priority, may take share and share alike in percentage of the property thus surrendered; then the bankrupt is given an acquittance of such percentages of

his debts not thus paid and may commence his business life anew. *Baylor v. Rawlings* (C. C. A., 8th Cir.), 28 Am. B. R. 773, 200 Fed. 131; *Matter of Foster Paint & Varnish Co.* (D. C., Pa.), 31 Am. B. R. 548, 210 Fed. 652; *In re Chappell* (D. C., Va.), 7 Am. B. R. 608, 113 Fed. 545.

11. Text cited in *In re Chappell* (D. C., Va.), 7 Am. B. R. 608, 612, 113 Fed. 545. The act does not make it obligatory on an insolvent debtor to take the benefit of the act. *Summers v. Abbott* (C. C. A., 8th Cir.), 10 Am. B. R. 254, 122 Fed. 36, 58 C. C. A. 352; *Richmond, etc., Co. v. Allen* (C. C. A., 4th Cir.), 17 Am. B. R. 583, 148 Fed. 657.

12. *In re Carleton* (D. C., Mass.), 8 Am. B. R. 270, 115 Fed. 246; *Hanover Nat'l Bank v. Moyses*, 186 U. S. 181, 8 Am. B. R. 1, 10, 46 L. Ed. 1113; *In re Ives* (C. C. A., 6th Cir.), 7 Am. B. R. 692, 113 Fed. 911; *In re Jehu* (D. C., Ia.), 2 Am. B. R. 498, 94 Fed. 638, in which the court said: "I know of no provision of the bankruptcy act which authorizes creditors to file answers to a voluntary petition in bankruptcy, such as were filed in this case."

that other essential requirements have been complied with.¹³ Only on these grounds can a creditor vacate the adjudication.¹⁴ "Debts" means debts, demands, or claims provable in bankruptcy.¹⁵ Debts not discharged, unless provable, are thus not debts for the purpose here discussed. A debtor owing but one provable debt may be adjudged a voluntary bankrupt.¹⁶ If the single debt is not dischargeable, because based on fraud or deceit, the proceeding will not lie.¹⁷ It will be noticed that the amendment of 1910 has omitted the words, "owing debts." There seems no good reason for eliminating these words. It is probable that the change was inadvertent and should be considered as an error. It will not materially affect the operation of the act, for it is obvious that there can be no bankruptcy without the existence of debts. It must still be held that a person must owe a debt or debts in order to be qualified to become a voluntary bankrupt. A farmer or wage-earner may be adjudged a voluntary bankrupt, although he is exempt from involuntary bankruptcy.¹⁸

(3) CORPORATIONS MAY BECOME VOLUNTARY BANKRUPTS.—It was the intent of the amendment of 1910 to permit voluntary bankruptcy by all corporations except those specified. The amendment is broad enough to include corporations of every kind except those specified, regardless of their purposes or the laws under which they were incorporated.¹⁹ Under the law prior to the amendment a corporation was not entitled to the benefits of the act as a voluntary bankrupt. It could only by indirection be thrown into bankruptcy by its own act, by admitting in writing its inability to pay its

13. *In re Carbone* (Ref., Wash.), 13 Am. B. R. 55. See also discussion under Section Fifty of this work.

14. *In re Gromme*, 1 Fed. 464; *In re Goodfellow*, Fed. Cas. 5,536; *In re Atlantic Mut. Life Ins. Co.*, Fed. Cas. 628; *In re Carbone* (Ref., Wash.), 13 Am. B. R. 55.

15. *In re Yates* (D. C., Cal.), 8 Am. B. R. 69, 114 Fed. 365. Compare §§ 1(11), 63-a.

16. **Single provable debt.**—In the case of *In re Schwaninger* (D. C., Wis.), 16 Am. B. R. 427, 144 Fed. 555, it appeared from the schedules of the bankrupt that he had but one debt, which was in the form of a judgment. The creditor raised the point that § 4 requires that a person must have "debts," clearly indicating that it was the purpose of the act to apply only to such debtors as have a plurality of debts. The court applied subdivision 29 of § 1, which provides that "words importing the plural number may be applied to and mean only a single person or thing," and it was held that this provision made § 4 applicable to a debtor who owed a single debt. The court said: "It is a difficult to understand why a debtor owing a single obligation should not fall within the merciful policy of the act. It is an accidental circumstance that the indebtedness was not distributed among two or more creditors. His case is clearly within the spirit of the act, and no good reason has been suggested why he should not be within its scope and operation. It is my belief that Congress had not in mind any purpose to discriminate against

an unfortunate debtor who is oppressed by a single obligation, and that the will of Congress will be effectuated by making the definition above recited, applicable to section 4, and treating the term 'debt' where it occurs in such section as equivalent to 'debts.'" See *In re Yates* (D. C., Cal.), 8 Am. B. R. 69, 114 Fed. 365; *In re Maples* (D. C., Mont.), 5 Am. B. R. 426, 105 Fed. 922.

17. Where the only claim has been adjudicated by a State court to be based upon deceit and false representations by the bankrupt inducing the sale of a farm, the court should dismiss the petition. *Matter of Shepardson* (D. C., Vt.), 34 Am. B. R. 284, 220 Fed. 186; *Re Maples* (D. C., Vt.), 5 Am. B. R. 426, 105 Fed. 919; *Re Yates* (D. C., Cal.), 8 Am. B. R. 69, 114 Fed. 365; *Re Colaluca* (D. C., Mass.), 13 Am. B. R. 292, 133 Fed. 255.

18. *Olive v. Armour & Co.* (C. C. A., 5th Cir.), 21 Am. B. R. 901, 167 Fed. 517.

19. **Benevolent orders.**—A local lodge of the Independent Order of Odd Fellows, incorporated under the Benevolent Orders Law of the State of New York, is a corporation within the meaning and intent of the Bankruptcy Act entitled to file a voluntary petition in bankruptcy. *Matter of Carthage Lodge, I. O. O. F.* (D. C., N. Y.), 36 Am. B. R. 873, 230 Fed. 694. In this case Judge Ray discusses at length the laws relating to corporations and concludes that any corporation however incorporated may avail itself of the privilege of becoming a voluntary bankrupt.

debts and its willingness to be adjudged a bankrupt on that ground.²⁰ The amendment does not specify the action to be taken by a corporation to obtain voluntary bankruptcy. In this respect it differs from the act of 1867. This act permitted voluntary bankruptcy by a corporation and prescribed conditions under which it might be obtained.²¹ In the absence of special provisions in the Bankruptcy Act, reference must be made to the State statutes, controlling the authority of officers and directors of corporations to dispose of the property of the corporation for the benefit of its creditors.²² A State statute which prohibits a sale, assignment or transfer of the franchise and property of a corporation without the consent of the stockholders holding at least two-thirds of the capital stock, does not prohibit filing a voluntary petition by the board of directors of a corporation.²³ Under the New York statute a board of directors alone has power to determine whether a general assignment for the benefit of creditors shall be made.²⁴ Under such a statute the president of a corporation has no such power unless authority is conferred upon him by the board of directors.²⁵ Where a petition of a corporation to be adjudged a voluntary bankrupt does not show that corporate action had been taken, authorizing the president of the corporation to execute and file the petition, the court has no jurisdiction to adjudge the corporation a voluntary bankrupt.²⁶ It seems to have been recognized under the original act that a board of directors of a corporation, who are charged with the conduct of its business, may declare the inability of the corporation to pay its debts and its willingness to be adjudged a bankrupt in accordance with clause 5 of § 3-a.²⁷ In analogy to this principle a board of directors of a corporation, having general control of the affairs of the corporation, should be authorized to file a petition for the voluntary bankruptcy of the corporation, in the absence of some statutory provision limiting the powers of the board in this respect.²⁸

20. See Bankruptcy Act, § 3-a (5) and discussion under "*Fifth act of bankruptcy; Confession of Bankruptcy*," ante, p. 126.

In the case of *Matter of New Amsterdam Motor Co.* (D. C., N. Y.), 24 Am. B. R. 757, 180 Fed. 943, it was held that where a corporation is within the classes which may be adjudicated a bankrupt and passes a resolution consenting to be adjudicated in involuntary proceedings, such proceedings, though in form involuntary, become voluntary.

21. The Bankruptcy Act of 1867, § 37, provides that "The provisions of this act shall apply to all moneyed, business or commercial corporations and joint stock companies, and that upon the petition of any officer of any such corporation or company, duly authorized by a vote of a majority of the corporators present, at any legal meeting called for the purpose, or upon the petition of any creditor or creditors of such corporation or company, made and presented in the manner hereinafter provided in respect to debtors, the like proceedings shall be had and taken as are hereinafter provided in the case of debtors."

22. Under the law of Minnesota, the board of directors of a corporation have power, without the sanction of the stockholders, to authorize the filing of a voluntary petition

in bankruptcy. *Dodge v. Kenwood Ice Co.* (C. C. A., 8th Cir.), 29 Am. B. R. 586, 204 Fed. 577, affg. 26 Am. B. R. 499, 189 Fed. 525; *Matter of Foster Paint and Varnish Co.* (D. C., Pa.), 31 Am. B. R. 548, 210 Fed. 652, quoting text.

23. *Bell v. Blessing* (C. C. A., 9th Cir.), 35 Am. B. R. 672, 225 Fed. 750.

24. N. Y. General Corp. Law, § 34.

25. *Schaefer v. Scott*, 40 N. Y. App. Div. 438, 57 N. Y. Supp. 1035.

26. In *re Jefferson Casket Co.* (D. C., N. Y.), 182 Fed. 689, in which case it was held that the president of a New York corporation, who has not been designated by the board of directors to perform the duty, has no power to sign and verify a petition of the corporation to be adjudged a voluntary bankrupt.

27. See cases cited under § 3-a (5), subtitle "*Fifth act of bankruptcy; Confession of bankruptcy*," p. 126.

28. Power of board of directors to petition.—In *re Jefferson Casket Co.*, (D. C., N. Y.), 25 Am. B. R. 663, 182 Fed. 689; In *re Guanacevi Tunnel Co.* (C. C. A., 2d Cir.), 29 Am. B. R. 230, 201 Fed. 316; *Matter of Kenwood Ice Co.* (D. C., Minn.), 26 Am. B. R. 499, 189 Fed. 525, in which case the court had under consideration the powers of a board of directors of a Minnesota

(4) **INFANTS.**—Infants, being persons, it was held under the law of 1841 that they were entitled to the benefits of the act.²⁹ On the other hand, under the next law, it appears that they were not.³⁰ This seems to be the rule under the present act.³¹ It also seems to be the law in England.³² An infant, either petitioning or petitioned against, must appear to have capacity to owe. It is yet a mooted question, however, whether an infant who has either held himself out and traded as an adult, or who alleges only debts for necessities, cannot be adjudged bankrupt on his own petition. The better opinion seems to be that he can.³³ If an infant is liable for the debts which he contracts under the common law, as for necessities, or under a State statute, as for contracts made by him while engaged in business as an adult, there seems no good reason to hold that he is not entitled to the privileges of the act, and that he may not become a voluntary bankrupt.³⁴ Infants with

corporation to petition for the voluntary bankruptcy of the corporation. The court said: "A board of directors ought to have power to put the company into bankruptcy. They have care of the general business of the corporation. They are the persons who know whether the corporation is able to go on or not. It might very well happen, that under the articles and by-laws of the corporation, it would be impossible to hold a meeting of the stockholders for months. Under these circumstances the bankruptcy of the corporation might be delayed so long that in many cases the purpose of the bankrupt law would be defeated and preferences given. I am satisfied that a board of directors at a duly called meeting, has the power to put the corporation into bankruptcy." *Aff'd*. 29 Am. B. R. 586.

The directors of a Pennsylvania corporation may authorize the filing of a voluntary petition in bankruptcy by the president and secretary. *Matter of Foster Paint and Varnish Co.* (D. C., Pa.), 31 Am. B. R. 548, 210 Fed. 652.

Sufficiency of resolution.—A resolution of the board of directors of a corporation, authorizing the cashier, treasurer, and book-keeper to prosecute in the name of the corporation a petition in bankruptcy to final discharge, is sufficient to authorize a voluntary proceeding, and it is unnecessary that the resolution authorize, in strict conformity with section 3a (5) of the Bankruptcy Act, an admission in writing on the part of the corporation of its inability to pay its debts, and its willingness to be adjudged a bankrupt. *Bell v. Blessing* (C. C. A., 9th Cir.), 35 Am. B. R. 672, 225 Fed. 750.

Meeting of directors.—Two of the three directors of a corporation met and adopted a resolution that the corporation go into bankruptcy, without notice to the third director who had quarreled with his associates, had absented himself from all meetings for ten months, had brought suit to rescind his purchase of stock, thus making himself ineligible to be elected a director under the Minnesota law, and had announced his refusal to act as an officer and stockholder.

It appeared that the law of Minnesota provided that the business of the corporation should be managed by a board of at least three directors, elected by the stockholders and that a majority should constitute a quorum for the transaction of business, but there was no special provision for filling vacancies either by directors or stockholders. *Held*, that when the two directors met they constituted a board which had authority to adopt a resolution that the corporation should go into bankruptcy. *Dodge v. Kenwood Ice Co.* (C. C. A., 8th Cir.), 29 Am. B. R. 586, 204 Fed. 577, *aff'd*. 26 Am. B. R. 499, 189 Fed. 525.

²⁹ *In re Book*. Fed. Cas. 1,637.

³⁰ *In re Derby*, Fed. Cas. 3,815.

³¹ *In re Duguid* (D. C., N. C.); 3 Am. B. R. 794, 100 Fed. 274; *In re Eidemiller* (D. C., Ill.), 5 Am. B. R. 570, 105 Fed. 595.

³² *Ex parte Jones*, 18 Ch. D. (Eng.) 109; *Rex v. Cole*, 1 Ld. Raym. (Eng.) 443. An infant who, upon becoming of age, affirms his acts of bankruptcy, may become a bankrupt. *Ex parte Barrow*, 3 Ves. Jr. (Eng.) 554; *Ex parte Barwis*, 6 Ves. Jr. (Eng.) 601; *Ex parte Henderson*, 4 Ves. Jr. (Eng.).

³³ Compare *Ex parte Watson*, 16 Ves. 265, and *Ex parte Margett Re Soltykoff* (1891), 1 Q. B. 413, with *In re Brice* (D. C., Iowa), 2 Am. B. R. 197, 93 Fed. 942. See also *In re Penzansky* (Ref., Mass.), 8 Am. B. R. 99.

³⁴ *In re Bryce* (D. C., Iowa), 2 Am. B. R. 197, 93 Fed. 942, in which case it was held that under the laws of Iowa, providing that if a minor engages in business as an adult, and the party giving him credit has good reason to believe him to be of full age, the minor cannot, upon becoming of age, disaffirm his contracts made while an infant. Such infant may be adjudged a bankrupt upon his own petition.

When infants may petition.—The bankruptcy act nowhere excepts infants from its provisions or benefits, and there is no ground of public policy for excluding them where they owe debts which can be enforced against them and their property, such as

no liabilities, except such as require their ratification on coming of age, are not entitled to the benefits of the act; and this, not so much because they are infants, as because they do not owe debts which they are bound to pay.³⁵ Since general contracts of an infant have no force or validity if disaffirmed by the infant on coming of age, it would be a frivolous act for courts to permit the institution and prosecution of proceedings which might afterward be practically annulled by such disaffirmance.³⁶ Where an involuntary petition is filed against an infant and he alleges infancy as a defense thereto he may be adjudicated a bankrupt if, after becoming of age he ratifies his debts.³⁷ It seems settled that when a partnership adjudication is sought and the only defense is that one partner is an infant, the firm and the solvent partner should be declared bankrupts, but the proceeding dismissed as to the infant.³⁸ Another problem which has arisen in this connection is whether an adjudication can be granted on a copartnership made up of an adult and an infant, without notice to the infant. It seems that no notice is necessary.³⁹

(5) LUNATICS.—A lunatic may not, save in a lucid interval, file a voluntary petition.⁴⁰ The English law and practice seem to provide for intervention by the lunatic's committee, as well as the appointment of a committee *ad litem*; such officer having power to do for the lunatic any act, permitted or required by the bankruptcy law, which the lunatic could have done if sane.⁴¹ This is probably not the law in this country.⁴² In voluntary cases it must, therefore, appear that, both at the time of the verification of the petition and of its filing, the petitioner was *compos mentis*. But it is still doubtful in England, and more doubtful here, whether under any circumstances a person actually insane can be adjudged a bankrupt.⁴³ If the proceeding be involuntary, it must at least appear that he was sane at the time of the commission of the act of bankruptcy.⁴⁴ The insanity of a bankrupt after his adjudication does not, however, abate the proceeding; the bankruptcy court

a judgment in an action for negligence. In *re Walrath* (D. C., N. Y.), 24 Am. B. R. 541, 175 Fed. 243.

The test whether an infant may be the subject of a petition in bankruptcy, seems to be whether the debts from which he seeks to be discharged are based upon contracts or obligations which he can disaffirm upon coming of age, or upon such as render him absolutely liable. In *re Penzansky* (D. C., Mass.), 8 Am. B. R. 99; In *re Eidemiller* (D. C., Ill.), 5 Am. B. R. 570, 105 Fed. 595.

35. In *re Walrath* (D. C., N. Y.), 24 Am. B. R. 541, 175 Fed. 243.

36. See note of In *re Dunnigan Bros.*, 2 Am. B. R. 628, 95 Fed. 428.

37. *Matter of Mandel* (Ref., N. Y.), 33 Am. B. R. 42.

38. In *re Dunnigan Bros.* (D. C., Mass.), 2 Am. B. R. 628, 95 Fed. 428; In *re Duguid* (D. C., N. C.), 3 Am. B. R. 794, 100 Fed. 274.

39. In *re Duguid* (D. C., N. Y.), 3 Am. B. R. 794, 100 Fed. 274. This case follows the analogy of *Lovell v. Beauchamp*, 1 Manson, 467, a leading English case. See also *Belton v. Hodges*, 2 M. & Scott, 496; *Ex parte Monte* 14 Ves. 602; *Ex parte Adam*, 1 Ves. & B. 494.

40. *Rhodes v. Rhodes*, 44 Ch. D. 94; In

re Marvin, Fed. Cas. 9,178; In *re Weitzel*, Fed. Cas. 17,365. See In *re Stein* (C. C. A., 7th Cir.), 11 Am. B. R. 536, 127 Fed. 547.

41. See In *re Farnham* (1895), 2 Ch. D. 779.

42. In *re Eisenberg* (D. C., N. Y.), 8 Am. B. R. 551, 117 Fed. 786.

43. In *re Murphy*, Fed. Cas. 9,946; In *re Funk* (D. C., Iowa), 4 Am. B. R. 96, 101 Fed. 244. *Contra*: In *re Weitzel*, Fed. Cas. 17,365; In *re Pratt*, Fed. Cas. 11,371, holding that an insane person may be made an involuntary bankrupt for acts of bankruptcy committed while sane.

44. In *re Funk* (D. C., Iowa), 4 Am. B. R. 96, 101 Fed. 244, holding that a person judicially declared insane or incapable of managing his affairs cannot commit an act of bankruptcy; In *re Marvin*, Fed. Cas. 9,178. Compare In *re Stein & Co.* (C. C. A., 7th Cir.), 11 Am. B. R. 536, 127 Fed. 547; In *re Burka* (D. C., Tenn.), 5 Am. B. R. 843, 104 Fed. 331.

The insanity of an alleged bankrupt at the time of the commission of the alleged act of bankruptcy is a defense to an involuntary petition in bankruptcy. In *re Ward* (D. C., N. J.), 20 Am. B. R. 482, 161 Fed. 755.

may administer his estate where its jurisdiction is based upon acts of bankruptcy alleged to have been committed while he was sane.⁴⁵

(6) **MARRIED WOMEN.**—They may become bankrupt in all States where they can contract debts.⁴⁶ Where a married woman is liable only in case her separate estate is charged, it must clearly appear that her debts were so charged.⁴⁷ Where a coverture defeats the debt a married woman cannot avail herself of the act.⁴⁸ Disability to contract has been removed by statute in nearly, if not quite, all the States.

(7) **ALIENS.**—Our former acts limited the operation of the law to persons residing within the jurisdiction of the United States.⁴⁹ There is no such limitation in the present law.⁵⁰ But, if not domiciled or with their principal place of business within the United States, they must have property here.⁵¹ The change made in the former laws by the present act is, therefore, of little practical importance.

(8) **INDIANS.**—Whether an Indian may become a bankrupt depends on his "owing debts." Until he becomes a citizen, he is subject to certain statutory disabilities in respect to the making of contracts.⁵² But, aside from this limitation, it seems that he may become either a voluntary or be adjudged an involuntary bankrupt.⁵³

(9) **ESTATES OF DECEDENTS.**—By section 125 of the English act of 1883, the estates of deceased insolvent debtors may be administered in bankruptcy.

45. Act of bankruptcy committed while sane.—In *re Kehler* (D. C., N. Y.), 18 Am. B. R. 596, 153 Fed. 235. This case was affirmed in 19 Am. B. R. 513, 159 Fed. 55, in which the court said: "If he, (Kehler) committed the acts of bankruptcy alleged in the petition while insane, the adjudication is wrong which, irrespective of technical objections to the pleadings and proceedings of his committee, should be righted. If, on the other hand, these acts were committed while sane, there was no error in continuing the case, even though the bankrupt subsequently became insane. Section 8 of the bankruptcy act provides that the insanity of the bankrupt shall not abate the proceedings, and section 1 provides that the word 'bankrupt' shall include a person against whom an involuntary petition has been filed. It is manifest therefore, that if Kehler committed an act of bankruptcy while sane, and by reason of such act the court obtained jurisdiction, it can continue the proceedings notwithstanding the subsequent insanity of the bankrupt. The district judge correctly states the proposition as follows: 'True, an insane person cannot commit an act of bankruptcy, but if Kohler was *compos mentis* at the time the acts were committed, the petition by creditors being filed before he was adjudged insane, I think the court acquired jurisdiction of the proceedings.'"

46. Compare In *re Collins*, Fed. Cas. 3,006; In *re Lyons*, Fed. Cas. 8,649; In *re Kinkead*, Fed. Cas. 7,824; In *re O'Brien*, Fed. Cas. 10,397. See *McDonald v. Tefft-Weller Co.* (C. C. A., 5th Cir.), 11 Am. B. R. 800, 128 Fed. 381, holding that since the

laws of Florida permit a married woman to have a separate estate and to engage in business on her own account, she may be adjudged an involuntary bankrupt.

47. In *re Howland*, Fed. Cas. 6,791; In *re Goodman*, Fed. Cas. 5,540.

In England a married woman cannot be made a bankrupt for non-compliance with a bankruptcy notice founded upon a judgment obtained against her in the name of a trading firm which she is carrying on separately from her husband. In *re Handford*, 6 Mason, 131, 1 Q. B. 566.

48. In *re Slichter*, Fed. Cas. 12,943.

49. Compare In *re Goodfellow*, Fed. Cas. 5,536.

50. In *re Clisdell* (Ref., N. Y.), 2 Am. B. R. 424.

51. Alien bankrupt.—A bankruptcy court has jurisdiction of an alleged bankrupt, although he is an alien living in a foreign country, provided there is "property" within the jurisdiction. Where an alien residing abroad and having a deposit with a bank in New York City made a general assignment in England, and a petition in bankruptcy was filed against him in the district, including New York City, within four months after the assignment, the bankruptcy court has jurisdiction. It seems that a bankruptcy court may decline jurisdiction if the creditors as well as the alleged bankrupt are all aliens residing abroad. *Mater of Berthoud* (D. C., N. Y.), 36 Am. B. R. 555, 231 Fed. 529.

52. R. S., § 2105.

53. In *re Rennie* (Ref., Ind. Ter.), 2 Am. B. R. 182; In *re Russie* (D. C., Or.), 3 Am. B. R. 6, 96 Fed. 608.

The proceeding is analogous to that of a living debtor, save that the decedent's personal representative stands in his stead. The practice is assimilated to that in chancery on the administration of solvent estates. An executor who, as such, has carried on a business and incurred debts pursuant to the will of his testator, may also be adjudged a bankrupt.⁵⁴ None of our bankruptcy laws have had similiar provisions.⁵⁵ It seems, however, that when a surviving partner applies, the partnership may be adjudged bankrupt, and the Federal court thereby acquires jurisdiction over the estate of the deceased partner in process of administration in a probate court.⁵⁶ There being no express power to administer the estates of deceased insolvents, resort must be had in such cases to the usual State tribunals. If, however, death occurs after the adjudication, the estate continues in bankruptcy.⁵⁷

(10) PARTNERSHIPS.—This is fully considered under Section Five.⁵⁸

III. INVOLUNTARY BANKRUPTCY.

a. Persons who may be adjudged involuntary bankrupts.—(1) IN GENERAL.

—Subsection *b* of this section declares what persons and corporations may be adjudged involuntary bankrupts. In discussing the principles applicable to persons who may become voluntary bankrupts, we also considered the jurisdiction of the courts to adjudicate the involuntary bankruptcy of such persons; the rules applicable to the voluntary bankruptcy of infants, lunatics and other persons mentioned under the foregoing head, are applicable to the involuntary bankruptcy of such persons.⁵⁹ The debtor petitioned against must owe at least \$1,000. Two classes of persons cannot be petitioned against — wage-earners and farmers. The word “natural” is used to qualify the word “person,” except for which any corporation might be included, because of the definition of “person” as contained in § 1 (19). The subsection specifically states the classes of corporations which may be adjudged involuntary bankrupts. The words “unincorporated company” are considered later.⁶⁰

(2) STATUS OF ALLEGED BANKRUPT; TIME.—The question as to the status of the alleged bankrupt at a particular time so as to entitle him to exemption from an involuntary proceeding becomes important. When the debts from which the alleged bankrupt will be discharged were contracted, he may have been engaged in business and his occupation may have been changed subsequently to that of a wage-earner or farmer. Or on the other hand his occupation may have changed since the debts were contracted from that of a wage-earner or farmer to that of a business man. In a number of cases, some of them controlling in their respective jurisdictions, it has been ruled that the question whether an insolvent is exempt from involuntary adjudication will depend upon the occupation in which he is engaged at the time the acts of bankruptcy were committed.⁶¹ It is quite apparent that a man should not

54. *Ex parte Garland*, 10 Ves. 110; *Ex parte Richardson*, 3 Madd. 99.

55. *Graves v. Winter*, Fed. Cas. 5,710.

56. *In re Pierce* (D. C., Wash.), 4 Am. B. R. 489, 102 Fed. 977.

57. Bankr. Act, § 8.

58. As to the effect of the infancy of one partner, see p. 145, *ante*.

59. For “infants,” “lunatics,” “married women,” “aliens,” “Indians,” “estates of

decedents,” and “partnerships,” see under this section, *ante*. For who may file involuntary petitions and the practice on the same, see §§ 18 and 59-a, *post*.

60. See discussion in this section, *post*, under heading “Unincorporated Companies.”

61. *Virginia-Carolina Chemical Co. v. Shelhorse* (C. C. A., 4th Cir.), 35 Am. B. R. 720, 228 Fed. 493; *Counts v. Columbus Buggy Co.* (C. C. A., 4th Cir.), 31 Am. B. R. 312,

be permitted to evade bankruptcy by changing his occupation, in which his property was acquired and his debts contracted, to that in which under the statute he would be exempt from adjudication. For instance the property acquired as a merchant may not be exempt from administration in bankruptcy because the merchant becomes subsequently a wage-earner; so that in such a case it is eminently proper to govern the exemption by the status of the alleged bankrupt at the time the debts were contracted.⁶² A person who has acquired property and incurred debts as a merchant may not avoid bankruptcy by becoming a wage-earner, either before or after the act of bankruptcy; it is in such a case the occupation of the debtor at the time the debts were contracted and not at the time the act of bankruptcy was committed which will control.⁶³ But where a wage-earner or farmer becomes a merchant and thus amenable to bankruptcy, his status at the time the act of bankruptcy was committed may

210 Fed. 748; *Harris v. Tapp* (D. C., Ga.), 37 Am. B. R. 564, 235 Fed. 918; *Matter of Leland* (D. C., Mich.), 25 Am. B. R. 209, 185 Fed. 830; *Flickinger v. First National Bank* (C. C. A., 6th Cir.), 16 Am. B. R. 678, 145 Fed. 162, 76 C. C. A. 132.

Change of status before filing petition.—In the case of *In re Burgin* (D. C., Ala.), 22 Am. B. R. 574, 173 Fed. 726, it was held that a change of occupation to one of the exempt pursuits, between the commission of an act of bankruptcy and the filing of a petition against him, will not defeat the operation of the act, as the bankrupt's status is to be determined as of the period during which he contracted the debts and acquired or owned the assets scheduled.

Engaged in farming when act was committed.—In the case of *Matter of Leland* (D. C., Mich.), 25 Am. B. R. 209, 185 Fed. 830, the court said: "It is important to know at what time the exempt status must have existed in order to prevent the adjudication. The natural meaning of the words used by the statute would indicate that they referred to the time of filing the petition, but the necessities of the case have led to the conclusion that this meaning cannot be adopted. There is some authority for dating the question back to the time when the indebtedness was incurred; but this would many times give rise to great confusion: as if, for example, part of the indebtedness of the petitioning creditors had a favorable position under this ruling and part did not; it does not seem necessary in the ordinary case to go back so far. . . . It does not follow that the time when the debts accrued and the nature of the debts of the petitioning creditors, are wholly immaterial. They have accrued in large part or wholly out of business other than farming. This fact may be quite persuasive as indicating that the debtor was not chiefly engaged in farming." *Matter of Desney* (D. C., Md.), 33 Am. B. R. 656, 219 Fed. 294.

⁶² *Tiffany v. Condensed Milk Co.* (D. C., Pa.), 15 Am. B. R. 413, 141 Fed. 444; *In re Crenshaw* (D. C., Ala.), 19 Am. B. R. 502, 156 Fed. 638; *Flickinger v. First National*

Bank (C. C. A., 6th Cir.), 16 Am. B. R. 678, 145 Fed. 162, 76 C. C. A. 132; *In re Burgin* (D. C., Ala.), 22 Am. B. R. 574, 173 Fed. 726, holding that the status of the alleged bankrupt as to his occupation is to be determined as of the period when he contracted the debts to be proved and acquired the property to be administered; and when he was at that time engaged in mercantile pursuits he cannot defeat the operation of the law by thereafter engaging in an exempt occupation. See Am. B. R. Digest, § 122.

Application of rule.—The rule that the status of an alleged involuntary bankrupt is to be determined as of the date when his debts were contracted is not the general rule, and is only to be adopted when the equities of the case require such a construction, it being based on the equitable idea that the exemption from involuntary proceedings allowed by the statute was not intended as a means of escape for insolvents whose property was acquired and whose debts were incurred in a recent non-exempt occupation. *Harris v. Tapp* (D. C., Ga.), 37 Am. B. R. 564, 235 Fed. 918.

⁶³ *In re Wakefield*, 25 Am. B. R. 118, 182 Fed. 247. This case and those cited in the preceding note are opposed in the case of *In re Folkstad* (D. C., Mont.), 29 Am. B. R. 77, 199 Fed. 363, in which the court holds that an "act of bankruptcy" is such when the act is committed, or not at all; and if an act is committed by one who then is not of the class that the Bankruptcy Act says may be adjudicated an involuntary bankrupt, it is not an "act of bankruptcy," and furnishes no foundation for involuntary proceedings, the act taking color from the bona fide occupation of the actor at the time it is committed, and not from his occupation prior or subsequent thereto. Hence, one who incurs debts in a non-exempt occupation, changes to an exempt occupation, and thereafter commits an act that in a non-exempt occupation would be an "act of bankruptcy," is not subject to adjudication as an involuntary bankrupt because thereof, and of debts still existing, or at all.

well be deemed the controlling factor. In any event the circumstances existing in each particular case must be considered. In view of the fact that the main purpose of the Bankruptcy Act is to provide for the distribution of the assets of the bankrupt among his creditors having provable debts and the discharge of the bankrupt from such debts, it seems reasonable to assert that the exemption from bankruptcy should pertain exclusively to the occupation of the bankrupt when the debts were incurred. There is no question, however, that the occupation of the alleged bankrupt at the time the petition is filed is not controlling.⁶⁴ A change in occupation from business to farming since the act of bankruptcy will not avail the debtor.⁶⁵

(3) **WAGE-EARNERS.**—A wage-earner is defined in § 1 (27) as a person who "works for wages, salary, or hire, at a compensation not exceeding one thousand five hundred dollars per year." Under this subsection (§ 4-b) a wage-earner cannot be adjudged an involuntary bankrupt. It is not presumable that, were he not thus excepted, creditors would often resort to a court of bankruptcy against such a debtor.⁶⁶ To bring a person within the exception it should appear that the earning of wages is his paramount occupation.⁶⁷ In considering the definition of "wage-earner" in § 1, cases were cited indicating what constitutes a wage-earner under the statute.⁶⁸

(4) **PERSONS ENGAGED CHIEFLY IN FARMING OR THE TILLAGE OF THE SOIL.**—
(I) *In general.*—No person answering this description can be adjudged an involuntary bankrupt. The phrase seems to be construed strictly. The words "the tillage of the soil" are not used as a definition of what constitutes farming; tillage is a part of farming but is not co-extensive with the whole of farming.⁶⁹ The affairs and occupation of men are of infinite complexity. It is not possible to lay down any precise rule which will in every case enable a court to say with certainty in what occupation a man has been chiefly engaged. It is not permissible to segregate certain facts or circumstances and say that

64. In re Luckhardt, 4 Am. B. R. 307, 101 Fed. 807; In re Mackey (D. C., Del.), 6 Am. B. R. 577, 110 Fed. 355.

65. In re Luckhardt (D. C., Kan.), 4 Am. B. R. 307, 101 Fed. 807; In re Mackey (D. C., Del.), 6 Am. B. R. 577, 110 Fed. 355; Tiffany v. La Plume Condensed Milk Co. (D. C., Pa.), 15 Am. B. R. 413, 141 Fed. 444.

66. For valuable cases under the somewhat similar phrase "workmen, clerks, and servants," see under section sixty-four of this work; also discussion of the definition of "wage-earner" under section one.

Wage-earner.—A teamster working his team for day wages hauling logs and other similar services for different people is within the exception. In re Yoder (D. C., Pa.), 11 Am. B. R. 445, 127 Fed. 894; and so is a bookkeeper having no other business or occupation. In re Pilger (D. C., Wis.), 9 Am. B. R. 244, 118 Fed. 206; a music teacher giving lessons at so much an hour is not a "wage-earner." First Nat. Bank of Wilkes-barre v. Barnum (D. C., Pa.), 20 Am. B. R. 439, 160 Fed. 245.

67. Matter of Remaley (Ref. Pa.), 23 Am. B. R. 29. The wage-earner is an employee, who performs services for another, ex-

clusive of other occupation. Virginia-Carolina Chemical Co. v. Shellhouse (C. C. A., 4th Cir.), 35 Am. B. R. 720, 228 Fed. 493.

68. These cases may all be applied here.

69. In re Dwyer (C. C. A., 7th Cir.), 25 Am. B. R. 913, 184 Fed. 880.

The words "farming or the tillage of the soil" as used in section 4b of the bankruptcy act, expresses the same thought, that is, the word "farming" and the words "tillage of the soil," mean the same thing. Hart-Parr Co. v. Parkley (C. C. A., 8th Cir.), 36 Am. B. R. 540, 231 Fed. 913.

Wage-earner distinguished from farmer.—A farmer is exempt from involuntary proceedings, whatever his other interests, if farming is his chief occupation; a wage-earner is exempt only when he actually pursues the calling which that term describes. The farmer works for himself; the wage-earner is an employee, and this implies service for another which is substantially exclusive. This characteristic difference between farmers and wage-earners is clearly recognized in the language of section 4b of the bankruptcy act. Virginia-Carolina Chemical Co. v. Shellhouse (C. C. A., 4th Cir.), 35 Am. B. R. 720, 228 Fed. 493.

their existence or non-existence settles the question. In answering it all his activities and pursuits must be considered as a whole.⁷⁰

(II) *Chief occupation*.—Farming or tillage of the soil must be the chief occupation. Mere physical exertions are not the determining factor; rather that occupation which the person deems of paramount importance to his welfare.⁷¹ The relative amount of time a man devotes to various lines of endeavor in which he is interested is doubtless one circumstance to be taken into account.⁷² He must be engaged "chiefly" in the business or occupation of farming and must derive therefrom his chief means of livelihood.⁷³ He may be engaged in other enterprises, in which he has invested money and which take considerable of his time, so long as farming constitutes his chief occupation.⁷⁴ When a debtor follows two pursuits the relative amount of his indebtedness contracted in one and the other may be taken into account as an aid in determining in which he was chiefly engaged.⁷⁵ It has been held that a man engaged both in the business of farming and at that of raising cattle on a large scale was, nevertheless, within this exception.⁷⁶ Likewise, perhaps, when the chief occupations is to raise cattle and hogs for the market, provided he raises them on the farm, or feeds them largely from crops raised thereon.⁷⁷ But a cattle buyer is not engaged in farming because he takes cattle, purchased by him for the market, to a farm for feeding.⁷⁸ Dairying is usually a mere

70. *Matter of Disney* (D. C., Md.), 33 Am. B. R. 656, 219 Fed. 294.

Status of debtor engaged in several occupations.—Where an alleged bankrupt is engaged in several occupations at the same time, all his activities and pursuits must be considered as a whole, in passing upon the question of his status at the time the alleged act of bankruptcy was committed. *Harris v. Tapp* (D. C., Ga.), 37 Am. B. R. 564, 235 Fed. 918. See Am. B. R. Dig., § 125.

71. **Chief occupation.**—In the case of *In re Mackey* (D. C., Del.), 6 Am. B. R. 577, 110 Fed. 355, it was held that a "person engaged chiefly in farming," within the meaning of the act, is one whose chief occupation or business is farming; and one's chief occupation or business is that which is of principal concern to him, or some permanency in its nature, which he deems of paramount importance to his welfare, and on which he chiefly relies for his livelihood or as the means of acquiring wealth, great or small. *In re Drake* (D. C., S. C.), 8 Am. B. R. 137, 114 Fed. 229, *affd. sub nom. Wulbern v. Drake* (C. C. A., 4th Cir.), 9 Am. B. R. 695, 120 Fed. 493; *Matter of Disney* (D. C., Md.), 33 Am. B. R. 656, 219 Fed. 294.

72. *Matter of Disney* (D. C., Md.), 33 Am. B. R. 656, 219 Fed. 294.

73. *Bank of Dearborn v. Matney* (D. C., Mo.), 12 Am. B. R. 483, 132 Fed. 75; *Wulbern v. Drake* (C. C. A., 4th Cir.), 9 Am. B. R. 695, 120 Fed. 493, in which case the court said: "It does not matter if the person may have other business or other interests if his principal occupation is that of an agriculturist—if that is the business to which he devotes more largely his time and attention—which he relies upon as a source of income for the support of himself and family, or for the accumulation of wealth."

74. *Counts v. Columbus Buggy Co.* (C. C. A., 4th Cir.), 31 Am. B. R. 812, 210 Fed. 748; *In re Terry* (D. C., Pa.), 30 Am. B. R. 631, 208 Fed. 162; *Harris v. Tapp* (D. C., Ga.), 37 Am. B. R. 564, 235 Fed. 918.

75. *Matter of Disney* (D. C., Md.), 33 Am. B. R. 656, 219 Fed. 294.

76. *In re Thompson* (D. C., Iowa), 4 Am. B. R. 340, 102 Fed. 287. See *Bank of Dearborn v. Matney* (D. C., Mo.), 12 Am. B. R. 482, 132 Fed. 75.

77. *In re Rugsdale*, Fed. Cas. 12,123.

Raising stock for the market.—In the case of *In re Dwyer* (C. C. A., 7th Cir.), 25 Am. B. R. 913, 184 Fed. 880, it appeared that the alleged bankrupt owned and dwelt upon a farm of 160 acres, upon which he raised corn and oats on 46 acres and grass for feeding purposes on the balance; upon this farm he fattened cattle and hogs for the market; he raised some of the stock upon the farm and purchased a considerable number which he brought to the farm; after the cattle and hogs were properly fattened, he sold them to drovers and sometimes shipped them in car-load lots to the market; it was necessary to purchase about four times as much grain as he raised upon his farm to feed the stock; he never bought cattle as a dealer in live stock buys them, with the expectation of speculating and taking advantage of market conditions. It was held that the alleged bankrupt was chiefly engaged in farming and was therefore within the exemption.

78. *In re Brown* (D. C., Iowa), 13 Am. B. R. 140, 132 Fed. 706.

Cattle dealer.—An alleged bankrupt, whose chief occupation was trading in cattle, using his lands as a mere feeding station, relying more upon purchased feed from the market for preparing the cattle for sale than on his own agricultural products, is not a "person

incident of farming, and a farmer who keeps a dairy is subject to the exemption.⁷⁹ One engaged chiefly in farming is within the exception although he at the same time conducts a small business as a private banker,⁸⁰ or is engaged in carrying on a law and collection business on a small scale,⁸¹ or runs a small store yielding a very small income, compared with that from the farm,⁸² or a partnership which conducts a commissary in connection with farming interests, and one member having an agency for fertilizers and plows.⁸³ It has been ruled that an individual farmer who loaned money to and became a member of a partnership composed of farmers which was promoting a canning factory, but who did not personally give much time or thought to the enterprise was not chiefly engaged in it, and, therefore, as an individual was not liable to adjudication.⁸⁴ An alleged bankrupt, although owning a farm, who is chiefly engaged in threshing for others for hire, is not chiefly engaged in "farming or the tillage of the soil."⁸⁵ A woman who owns a farm and permits her husband to run it and treat the products as his own is not a person engaged chiefly in farming, and, therefore, may be adjudicated a bankrupt.⁸⁶ A person engaged chiefly in farming is not subject to adjudication as an involuntary bankrupt, though he makes a general assignment for the benefit of creditors.⁸⁷ The exemption applies to a partnership as well as an individual.⁸⁸

(III) *Lease of farm.*—A resident owner who has leased his farm to another for a money rent is not within the exception,⁸⁹ but otherwise where he leases part of his farm and works the rest of it.⁹⁰ If the owner of a farm leases it upon shares, without himself carrying on the farming operations more than to see that the tenant was doing the work and dividing the proceeds as agreed, he is within the exception.⁹¹

(5) PRACTICE AND PLEADINGS.—The petition in involuntary cases should contain allegations to the effect that the alleged bankrupt was not either a wage-earner or a person chiefly engaged in farming or in tillage of the soil.⁹² But a failure to do so, unless raised by the answer, will be deemed waived.⁹³ It may be sufficient to make such averments as will exclude the idea of the alleged bankrupt being within the excepted classes,⁹⁴ but the better practice is to

chiefly engaged in farming." *Bank of Dearborn v. Matney* (D. C., Mo.), 12 Am. B. R. 482, 132 Fed. 75. See also *Hoffschlaeger Co. v. Young Nap* (D. C., Hawaii), 12 Am. B. R. 510, 2 U. S. D. C., Hawaii 90.

79. *Gregg v. Mitchell* (C. C. A., 6th Cir.), 21 Am. B. R. 659, 166 Fed. 725.

80. *Couts v. Townsend* (D. C., Ky.), 11 Am. B. R. 126, 126 Fed. 249.

81. *In re Hoy* (D. C., Iowa), 14 Am. B. R. 648, 137 Fed. 175.

82. *Rise v. Bordner* (D. C., Pa.), 15 Am. B. R. 297, 140 Fed. 566; *In re Mackey* (D. C., Del.), 6 Am. B. R. 577, 110 Fed. 355; see *In re Duke & Son* (Ref., Ga.), 28 Am. B. R. 195.

83. *Sutherland Medicine Co. v. Rich* (Ref., Ga.), 22 Am. B. R. 85.

84. *Matter of Disney* (D. C., Md.), 33 Am. B. R. 656, 219 Fed. 294.

85. *Hart-Parr Co. v. Barkley* (C. C. A., 8th Cir.), 36 Am. B. R. 540, 231 Fed. 913.

86. *In re Johnson* (D. C., N. Y.), 18 Am. B. R. 74, 149 Fed. 864, in which cases it appeared that the wife had taken title to a farm formerly owned by the husband in order to keep it from his creditors, and it was

held that the fact of ownership was not material. Judge Ray in this case discusses at length and with care the question of what constitutes farming under the statute.

87. *Olive v. Armour & Co.* (C. C. A. 5th Cir.), 21 Am. B. R. 901, 167 Fed. 517.

88. *Still's Sons v. American National Bank* (C. C. A., 4th Cir.), 31 Am. B. R. 320, 209 Fed. 749.

89. *In re Matson* (D. C., Pa.), 10 Am. B. R. 473, 123 Fed. 743.

90. *Wulbern v. Drake* (C. C. A., 4th Cir.), 9 Am. B. R. 695, 120 Fed. 493.

91. *Matter of Leland* (D. C., Mich.), 25 Am. B. R. 209, 185 Fed. 830.

92. *Beach v. Macon Grocery Co.* (C. C. A., 5th Cir.), 9 Am. B. R. 762, 120 Fed. 736.

93. *Green River Deposit Bank v. Craig Bros.* (D. C., Ky.), 6 Am. B. R. 381, 110 Fed. 137; *In re Columbia Real Estate Co.* (D. C., Ind.), 4 Am. B. R. 411, 101 Fed. 965.

94. *Matter of Livingston* (D. C., Hawaii), 13 Am. B. R. 357, 2 U. S. D. C. 254; *In re Brett* (D. C., N. J.), 12 Am. B. R. 492, 130 Fed. 981; *In re White* (D. C., Pa.), 14 Am. B. R. 241, 135 Fed. 199.

include express allegations negating the statutory exceptions. The allegation and proof should also show that the alleged bankrupt was not in one of these excepted classes at the time of the act of bankruptcy.⁹⁵ A defense based on an allegation that he was, may be raised by a responding creditor, and, when raised, goes to the jurisdiction, and, if not met by a replication, is conclusive.⁹⁶ If the petition is defective in that it does not contain allegations to the effect that the alleged bankrupt is not within either of the excepted classes, the defect may be cured by amendment.⁹⁷ Where a person has been adjudged insane at a certain date with lucid intervals until a certain date and without lucid intervals thereafter, a presumption of insanity arises from the date first mentioned, and the burden of proof is upon the petitioning creditors to show that the alleged act of bankruptcy was committed during a lucid interval.⁹⁸

b. Corporations which may be adjudged involuntary bankrupts.—(1) **IN GENERAL.**—The definition of "corporations" will be found in § 1 (6). It does not, of course, include municipal corporations, but it would seem to comprise membership corporations and religious, educational and eleemosynary corporations and the like. But because of the limitation to "moneyed, business or commercial corporations," membership corporations, incorporated for other than business or commercial purposes, may not be adjudicated bankrupts. Under the law of 1867 any business, moneyed or commercial corporation might be thrown into bankruptcy. As has already been seen the amendatory act of 1910 has practically conformed the present bankruptcy act to that of 1867, so far as the persons and corporations who may be adjudicated bankrupts are concerned.⁹⁹ If the act of bankruptcy was committed prior to the taking effect of the amendment of 1910, bankruptcy may not be decreed unless the corporation was one which might have been adjudicated a bankrupt under the laws which existed prior to the amendment.¹⁰⁰

(2) **EXCEPTIONS AS TO INSURANCE AND BANKING CORPORATIONS.**—The exception as to "municipal, railroad, insurance or banking corporations" is absolute. "Moneyed" corporations are usually regarded as including banking and insurance corporations, and are so defined in the laws of New York.¹⁰¹ The fact does not affect the construction or application of the exception, as it is obvious that it was the intent of Congress to exempt such corporations from the operation of the act. The exemption will be limited strictly to corporations which fall within the specified classes. It does not include a fraternal order which as an incident to its corporate existence provides aid for the beneficiaries of its deceased members.¹⁰² There are reasons of policy why banking corporations should be excluded. They are trustees of the people, whose debts are always

95. The burden of proof that an alleged bankrupt is not a person "engaged chiefly in farming" is upon the petitioning creditors. In re Bûrgin (D. C., Ala.), 22 Am. B. R. 574, 173 Fed. 726; Harris v. Tapp (D. C., Ga.), 37 Am. B. R. 564, 235 Fed. 918.

As to status of bankrupt in respect to excepted classes, see discussion under preceding heading a(2) "*Status of alleged bankrupt; time,*" ante.

96. In re Taylor (C. C. A., 7th Cir.), 4 Am. B. R. 515, 102 Fed. 728; Rise v. Bordner (D. C., Pa.), 15 Am. B. R. 297, 140 Fed. 566.

97. In re Crenshaw (D. C., Ala.), 19 Am. B. R. 502, 156 Fed. 638.

98. In re Kehler (C. C. A., 2d Cir.), 19 Am. B. R. 513, 159 Fed. 55.

99. See discussion under *Voluntary Bankruptcy*, ante, p. 141.

100. Matter of U. S. Restaurant & Realty Co. (C. C. A., 2d Cir.), 25 Am. B. R. 915, 187 Fed. 118.

101. See N. Y. General Corporation Law, § 3, subd. 4 which provides that "a 'moneyed corporation' is a corporation formed under or subject to the banking or insurance law."

102. **Insurance corporation.**—The Grand Lodge Ancient Order of United Workmen is not an "insurance corporation" within the meaning of section 4 of the bankruptcy act, and, hence, is not subject to adjudication.

due and whose credit is necessary to trade and industry. They are not only creatures of the State, organized under State statutes, but are supervised and inspected by the State at frequent intervals, thus making it difficult for them to commit preferences.¹⁰³ A national bank incorporated under the national banking act would not, for obvious reasons, be subject to involuntary bankruptcy, although not included within the expressed provisions of this exception.¹⁰⁴ It would seem that only those entities which are strictly banks and thus subject to official espionage, are excepted.¹⁰⁵ Banking corporations do not include private bankers, doing business under State supervision, and no special significance is attributed to the omission by the amendment of 1910 of the reference to private bankers in the original act.¹⁰⁶

(3) **DISSOLUTION OF CORPORATION.**—The attempted dissolution of a corporation having undistributed assets or unpaid debts under a State statute providing for the winding up of a corporation, does not deprive the bankruptcy court of its jurisdiction, when such corporation has committed an act of bankruptcy prior to such dissolution.¹⁰⁷ A corporation having committed an act of bankruptcy, the jurisdiction of a bankruptcy court may not be defeated by prior proceedings for dissolution;¹⁰⁸ or by the appointment of a receiver at the suit of creditors, and this is true although in the suit appointing a receiver the court grants an injunction restraining the corporation, its officers,

This because its only obligation is to collect from such of its members as are willing to contribute funds with which to pay the beneficiaries of deceased members. *Matter of Grand Lodge Ancient Order of United Workmen*, 36 Am. B. R. 634, 232 Fed. 199.

103. *In re Oregon Trust & Savings Bank (D. C., Or.)*, 19 Am. B. R. 484, 156 Fed. 319.
104. See under former law, *In re Manufacturers' Nat'l Bank*, Fed. Cas. 9,051.

105. Compare *Davis v. Stevens (D. C., S. Dak.)*, 4 Am. B. R. 763, 104 Fed. 235. And see *In re Moench & Sons Co. (C. C. A., 2d Cir.)*, 12 Am. B. R. 240, 130 Fed. 685, *affd.* 10 Am. B. R. 656, 123 Fed. 965; *In re White Mountain Paper Co. (C. C. A., 1st Cir.)*, 11 Am. B. R. 491, 127 Fed. 180.

106. *In re Surety & Guarantee Trust Co. (C. C. A., 7th Cir.)*, 9 Am. B. R. 129, 121 Fed. 73; *Matter of Sage (D. C., Mo.)*, 35 Am. B. R. 436, 224 Fed. 525.

Jurisdiction over private bankers.—Since the bankruptcy act confers upon courts of bankruptcy jurisdiction to adjudge private bankers bankrupt and to administer their property, this jurisdiction is not only paramount, but is exclusive, and State laws assuming to confer upon State officers or courts authority to administer the property of such bank are superseded and must give way when the bankruptcy act is properly invoked. *Matter of Sage (D. C., Mo.)*, 35 Am. B. R. 436, 224 Fed. 525.

107. *In re Merchants' Ins. Co.*, Fed. Cas. 9,441; *In re Independent Ins. Co.*, Fed. Cas. 7,018.

Effect of dissolution.—If a corporation suffers or permits some of its creditors to obtain preferences through legal proceedings, and its stockholders subsequently sue for and obtain a dissolution, the effect of which is

to permit the alleged preferences to stand, such corporation has committed an act of bankruptcy and petitioning creditors may have the corporation adjudged a bankrupt, notwithstanding a decree of dissolution in the State court and the appointment therein of a receiver. *Scheuer v. Smith & Montgomery Book Co. (C. C. A., 5th Cir.)*, 7 Am. B. R. 384, 112 Fed. 407. In this case it was argued that as a dissolution of the corporation had been adjudged and decreed in the State court prior to the hearing, although since the institution of the proceedings in the bankruptcy court, such proceedings abated and no adjudication in bankruptcy could be rendered, as the corporation is dead and no judgment can be rendered against a dead man. The court said: "As to this, we think it only necessary to refer to § 8 of the bankrupt act in relation to the death or insanity of the bankrupt and by analogy hold that the section applies to a corporation that seeks by suicide to defeat properly instituted proceedings in bankruptcy."

Tiffany v. Laplume Condensed Milk Co. (D. C., Pa.), 15 Am. B. R. 415, 141 Fed. 444; *In re Moench & Sons Co. (C. C. A., 2d Cir.)*, 12 Am. B. R. 240, 130 Fed. 685, holding that the jurisdiction of the bankruptcy court to adjudicate a corporation bankrupt is not affected by the fact that on the day the petition in bankruptcy was filed, the property of the corporation was in the hands of a State court receiver.

108. *In re Sterlingworth Ry. Supply Co. (D. C., Pa.)*, 21 Am. B. R. 341, 164 Fed. 591; *In re International Coal Mining Co. (D. C., Pa.)*, 16 Am. B. R. 312, 143 Fed. 665, *affd.* 17 Am. B. R. 573, 148 Fed. 981; *In re Munger Vehicle Tire Co. (C. C. A., 2d Cir.)*, 19 Am. B. R. 785, 159 Fed. 901.

agents, or creditors from interfering in any way with the management of the corporation by the receiver, or from prosecuting any action or proceeding against it.¹⁰⁹ Likewise the fact that a corporation after committing an act of bankruptcy, forfeits its franchise, does not deprive the bankruptcy court of jurisdiction.¹¹⁰ If the alleged act of bankruptcy was committed prior to the beginning of proceedings against the corporation for dissolution, and within the four months' period, the corporation may be declared a bankrupt, although dissolution was effected in the State court prior to the beginning of bankruptcy proceedings.¹¹¹ The rule is that an insolvent corporation, having committed an act of bankruptcy, may not defeat the purpose of the bankruptcy act by dissolution proceedings in a State court, but its property must be administered under that act, for the benefit of its creditors, upon the institution of proper proceedings.¹¹²

(4) UNINCORPORATED COMPANIES.—Under this section an "unincorporated company" may be adjudged an involuntary bankrupt. This phrase was inserted while the bankruptcy act was in conference committee, and is not explained by any of the reports which contain the bill in its various stages. The rarity of failures of companies of this character, other than those organized for business purposes, will, however, prevent it from being either dangerous to such bodies or of much value to creditors. The phrase manifestly means all those private bodies which occupy the middle ground between partnerships and stock corporations, possessing some of the powers and privileges of both, and is generally so recognized by the courts.¹¹³ Such

The jurisdiction of the bankruptcy court attached or its right to act arose when the company being insolvent committed the acts of bankruptcy. Any other view of the matter would destroy the effect of the bankruptcy act entirely. This act is the paramount law for the administration of the estate of insolvents. Its provisions which seek to bring about equality among creditors of the same class cannot be avoided in this way. In re Adams & Hoyt Co. (D. C., Ga.), 21 Am. B. R. 161, 164 Fed. 489.

109. Matter of Yaryan Naval Stores Co. (C. C. A., 6th Cir.), 32 Am. B. R. 269, 214 Fed. 563.

110. Matter of Double Star Brick Co. (D. C., Calif.), 32 Am. B. R. 149, 210 Fed. 980.

111. Effect of liquidation in State court.—In re Adams & Hoyt Co. (D. C., Ga.), 21 Am. B. R. 161, 164 Fed. 489; In re Storek Lumber Co. (D. C., Md.), 8 Am. B. R. 86, 114 Fed. 860, in which the court said: "The act of 1898 superseded the state insolvent laws and now when commercial and manufacturing corporations are so numerous, and are sometimes used, as in this case, more as a cover from individual liability than for more legitimate uses, it can scarcely be supposed as the bankrupt act especially provides for proceedings against commercial corporations, that it was intended that such a corporation could commit acts of bankruptcy and escape the provisions of the law by applying to be wound up under the State statute, and thus defeat the operation of the bankrupt law" In re International Coal Mining Co. (D. C., Pa.), 16 Am. B. R. 312,

143 Fed. 665; Bollinger v. Central National Bank (C. C. A., 9th Cir.), 24 Am. B. R. 44, 177 Fed. 609, holding that a corporation which had wholly ceased its business and was engaged in winding up its affairs, may be proceeded against in bankruptcy for an act of bankruptcy committed by it in the course of liquidation. See also State v. Superior Court of Kings County, 20 Wash. 545, 2 Am. B. R. 92, 56 Pac. 35; In re Lengert Wagon Co. (D. C., N. Y.), 6 Am. B. R. 535, 110 Fed. 927.

112. In re Standard Cordage Co. (D. C., N. Y.), 30 Am. B. R. 448, 184 Fed. 156.

113. Burkhart v. German-American Bank (D. C., Ohio), 14 Am. B. R. 222, 137 Fed. 958.

Private bankers.—Unincorporated companies, engaged in business as private bankers under State statutes, are liable to be adjudicated bankrupts under section 4b of the bankruptcy act. Matter of Sage (D. C., Mo.), 35 Am. B. R. 436, 224 Fed. 525.

The meaning of term "unincorporated company."—In the case of Matter of Associated Trust (D. C., Mass.), 34 Am. B. R. 851, 222 Fed. 1012, the court said: "The words 'unincorporated company' are not found in any Massachusetts statute which has been considered in connection with these organizations. Their meaning in the bankruptcy act is by no means certain. The word 'unincorporated' is clear; the word 'company' in this connection is much less definite. It would seem to imply an association of individuals, not partners, carrying on business under a distinct name, and having common

companies include a fire Lloyds Association,¹¹⁴ or a joint-stock association organized under a State law limiting liability to the capital subscribed by the members,¹¹⁵ or a business organization in the nature of a real estate trust where the capital is contributed by certificate holders, who select managers of the trust to represent them in transacting the business thereof, as is common in Massachusetts.¹¹⁶

(5) CASES UNDER ACT PRIOR TO AMENDMENT OF 1910.—This section as it existed prior to the amendatory act of 1910, provided that "any corporation engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits" might be adjudged an involuntary bankrupt. It was important under the law prior to the amendment of 1910 to determine whether a corporation was or was not engaged principally in the prescribed pursuits. Fine distinctions have been drawn in determining the question as to whether or not a certain business was manufacturing or trading. The amendment of 1910 has made many, if not all, of these cases of little practical importance. The principles declared and the cases cited in support thereof will not materially affect the disposition of cases arising under the amendment of 1910. Cases now pending which arose prior to June 25, 1910, will be decided under the law as it existed and was applied prior to that time. These principles and cases have also some historical value. It may be important, or at least interesting, to know the force and effect of the bankruptcy law during all its stages of existence. In view of the possible application of the principles and cases which arose under the former law to cases now pending which arose prior to the taking effect of the amendment, and the fact that such principles and cases may be of historical interest and importance, it has been deemed advisable to retain such principles and cases in this edition. We have therefore inserted them in much the same way as they appeared in former editions as an appendix to this section.

(6) PRACTICE AND PLEADINGS.—If the petition be against the corporation it must distinctly allege that it comes within one or more of the permitted classes.¹¹⁷ The amendment of 1910, extending the law to practically all business and commercial corporations, has not modified the application of this rule. It should still be clearly alleged in the petition that the corporation is a moneyed, business or a commercial corporation, although this is not essential to the sufficiency of the pleading.¹¹⁸ Under the former law it

rights *inter se*, but having no individual ownership in the joint property, no individual control over the business in which their joint capital is embarked, and no direct individual liability for the company's debts. Its use in connection with the word 'unincorporated' would seem to imply that the organization should have some of the attributes usually found in corporations."

114. *Matter of Seaboard Fire Underwriters* (D. C., N. Y.), 13 Am. B. R. 722, 137 Fed. 987.

115. *In re Hercules Atkins Co.* (D. C., Pa.), 13 Am. B. R. 369, 133 Fed. 813.

116. *Matter of Associated Trust* (D. C., Mass.), 34 Am. B. R. 851, 222 Fed. 1012.

117. *In re Elmira Steel Co.* (D. C., N. Y.), 5 Am. B. R. 484, 109 Fed. 456.

118. See discussion under heading of "Cor-

porations which may be adjudged involuntary bankrupt," *ante*, p. 152. As to form of petition against corporation see Hagan & Alexander Bankr. Forms, p. 43, and Supplementary Form, No. 118, *post*.

Sufficiency of petition.—A petition which negatives the exceptions set forth in section 4b of the bankruptcy act and alleges that the alleged bankrupt company was engaged in the "general retail merchandise business," is sufficient although it does not allege that the corporation sought to be adjudged a bankrupt was a "moneyed, business, or commercial" corporation. It seems, however, that it is better practice to set forth, in the phraseology of the bankruptcy act, the character of the business of the alleged bankrupt. *Sabin v. Blake-McFall Co.* (C. C. A., 9th Cir.), 35 Am. B. R. 179, 223 Fed. 501.

was held that if the petition did not contain such an allegation it was demurrable and an assertion of the contrary fact in an answer, if not replied to, was conclusive.¹¹⁹ It was also held that an order of adjudication, showing a like omission, could not be impeached collaterally.¹²⁰ Aside from the allegation as to the character of the corporation the petition and the practice are the same as where petitions are filed against individuals. Under the law as amended controversy will seldom arise as to the sufficiency of the petition and of the proof to show that the alleged bankrupt corporation was either a moneyed, business or commercial corporation. There will not be much difficulty in determining the class in which the corporation is to be placed. If any question does arise in respect to this matter, the rule will doubtless be, as it was under the former law, that the burden of proof is upon the petitioners to show that the alleged bankrupt corporation was in the class specified in this section.¹²¹ Where the issue is raised, evidence is not admissible to show that prior to the incorporation of the company its predecessor in interest had sold merchandise.¹²² Pending the determination of the question as to the character of the corporation, a court of bankruptcy may assume jurisdiction, and appoint receivers to take custody of the property.¹²³ Where proceedings are brought against a corporation and it appears that another corporation was under the same management and the property of the two intermingled, a receiver may be appointed for both corporations. But upon it subsequently appearing that the allied corporation was solvent, its assets should be separated, and claims arising from credit given to such corporation should be paid in full from such assets.¹²⁴

c. Effect of bankruptcy of corporations.—(1) **IN GENERAL.**—A corporation being defined in §. 1 (19) as a person, can apply for and be given a discharge. This seems to have been doubted,¹²⁵ but that corporations may be discharged may now be considered settled. An adjudication in bankruptcy does not of itself dissolve a corporation or terminate its existence.¹²⁶ The reason for their existence being terminated by their insolvency, it is not supposed that many bankrupt corporations will apply.

119. See *In re Taylor* (C. C. A., 7th Cir.), 4 Am. B. R. 515, 102 Fed. 728; *In re Callison* (D. C., Fla.), 12 Am. B. R. 344, 130 Fed. 978; *Beech v. Macon Grocery Co.* (C. C. A., 5th Cir.), 9 Am. B. R. 762, 120 Fed. 736, 57 C. C. A. 150; *In re Mero* (D. C., Conn.), 12 Am. B. R. 171, 128 Fed. 630.

Effect of demurrer.—A judgment of a district court sustaining a demurrer to a petition upon the ground that the alleged bankrupt was not, on the allegations, "a corporation entitled to the benefits of the bankruptcy act," is a bar to a subsequent petition in another district by creditors who intervened in the first proceeding, presenting the same issue raised by the demurrer to the first petition. *Matter of Culgin-Pau Contracting Co.* (D. C., Mass.), 35 Am. B. R. 375, 224 Fed. 245.

120. *In re Columbia Real Estate Co.* (D. C., Ind.), 4 Am. B. R. 411, 101 Fed. 965.

121. *Philpot v. O'Brien* (C. C. A., 1st Cir.), 11 Am. B. R. 205, 126 Fed. 167; *Matter of Hudson River Elec. Power Co.* (D. C., N. Y.), 23 Am. B. R. 191, 173 Fed. 934. See also *Walker Roofing, etc., Co. v. Merchant & Evans Co.* (C. C. A., 4th Cir.), 23 Am. B. R.

185, 173 Fed. 771, holding that upon the issue as to whether a corporation was engaged in a trading and mercantile business, and subject to adjudication, evidence that, prior to its incorporation, its predecessor in interest had sold merchandise, is immaterial; *In re Interstate Paving Co.* (D. C., N. Y.), 22 Am. B. R. 572, 171 Fed. 604.

122. *Walker Roofing, etc., Co. v. Merchant & Evans Co.* (C. C. A., 4th Cir.), 23 Am. B. R. 185, 173 Fed. 771; *In re Interstate Paving Co.* (D. C., N. Y.), 22 Am. B. R. 572, 171 Fed. 604.

123. *In re De Lancey Stables Co.* (D. C., Pa.), 22 Am. B. R. 406, 170 Fed. 860.

124. *Carroll v. Stern & Goldsmith* (C. C. A., 6th Cir.), 34 Am. B. R. 570, 223 Fed. 723.

125. *In re Marshall Paper Co.* (D. C., Mass.), 2 Am. B. R. 653, 95 Fed. 419, but this case was overruled by the Circuit Court of Appeals (C. C. A., 1st Cir.), 4 Am. B. R. 468, 102 Fed. 872.

126. *Matter of Russell Wheel and Foundry Co.* (D. C., Wash.), 35 Am. B. R. 66, 222 Fed. 569.

(2) **LIABILITY OF OFFICERS, DIRECTORS, OR STOCKHOLDERS.**—It has been held that the discharge of a corporation does not prevent creditors taking judgment in a State court against the corporation, at least in so far as to enable them to proceed on a stockholder's or director's liability.¹²⁷ This subsection, inserted by the amendatory act of 1903, is thus probably but declaratory of the law. It is, perhaps, a little broader. The "bankruptcy" of a corporation, which must include all of the steps to and including adjudication, is enough. It is possible that the corporation may not seek a discharge. At any rate, the intention of Congress to save to the creditors of corporations all the rights given them against negligent or dishonest officers, directors, or stockholders by the State or territorial or Federal laws is clear. The reason which induced the prohibition on the discharge of corporations found in the law of 1867 exists no longer.¹²⁸ Where the facts warrant a bankruptcy court has jurisdiction to make a call upon stockholders for unpaid stock subscriptions.¹²⁹ As the stockholders' liability to pay such subscriptions is secondary, *i. e.*, conditioned on insufficiency of corporate assets, such want of assets must be established before demand therefor can be enforced against the stockholders.¹³⁰

APPENDIX.

CORPORATIONS SUBJECT TO BANKRUPTCY PRIOR TO AMENDMENT OF 1910.

a. **"Engaged principally in."**—The section as it existed prior to the amendatory act of 1910 provided that any corporation "engaged principally in" manufacturing, trading, printing, publishing, mining or mercantile pursuits might be adjudged an involuntary bankrupt. The phrase "engaged principally in" has already been frequently considered and interpreted in the courts. The weight of authority declared the test to be: In what pursuit is the corporation chiefly engaged? Thus, prior to the amendment of 1903, a mining company, which also conducted a supply store, was not subject to bankruptcy;¹³¹ on the other hand it was held that a mining company chiefly engaged in smelting was.¹³² The purposes of the corporation, as stated

¹²⁷ In *re* Marshall Paper Co. (D. C., Mass.), 2 Am. B. R. 653, 95 Fed. 419. See also *Irish v. Citizens Trust Co.* (D. C., N. Y.), 21 Am. B. R. 39, 43, 163 Fed. 178; In *re* Flood-Pratt Dairy Co. (Ref., Ohio), 23 Am. B. R. 148; In *re* Alleman Hardware Co. (D. C., Pa.), 22 Am. B. R. 871, 172 Fed. 611.

Action to recover.—The discharge in bankruptcy of a corporation is a sufficient excuse for failure to secure judgment and return of execution unsatisfied, preliminary to bringing action against stockholders. *Firestone Co. v. Agnew* (N. Y. Ct. of App.), 21 Am. B. R. 292, 194 N. Y. 165.

¹²⁸ Compare § 17, *post*, generally, for effect of a discharge.

¹²⁹ *Matter of Munger Vehicle Tire Co.* (C. C. A., 2d Cir.), 21 Am. B. R. 395, 168 Fed. 910.

Assessment upon unpaid capital stock.—The relation to a bankrupt corporation of stockholders is such that, even though they are non-residents, the bankruptcy court has

jurisdiction over them in a proceeding to levy an assessment on the unpaid capital stock of the bankrupt. In *re* Monarch Corporation (D. C., Conn.), 28 Am. B. R. 382, 196 Fed. 252.

¹³⁰ In *re* Newfoundland Syndicate (D. C., N. J.), 28 Am. B. R. 119, 196 Fed. 443 (affd. 29 Am. B. R. 858, 201 Fed. 917), holding that to establish a want of corporate assets for the purpose of levying assessments on unpaid stock of a corporation, it is not necessary to institute plenary suit against the stockholders, but the trustee in bankruptcy of the corporation may file a petition in the bankruptcy court for leave to make an assessment and call upon the unpaid stock of the corporation for the purpose of paying its debts.

¹³¹ *McNamara v. Helena Coal Co.* (D. C., Ala.), 5 Am. B. R. 48.

¹³² In *re* Teopha Mining & Smelting Co. (D. C., Cal.), 6 Am. B. R. 250, 110 Fed. 120.

in its charter, are not necessarily controlling,¹³³ but where a corporation was organized to manufacture and sell paper made from wood pulp, and had purchased timber and erected mills but had not actually manufactured any paper, it was held subject to involuntary bankruptcy.¹³⁴ Where a corporation is organized and makes preparation for carrying out the objects of its charter, acquiring and equipping itself with the necessary plant and appliances, it thereby engages in that which it is incorporated to do,—whether manufacturing, or mining, or whatever it may be,—within the meaning of the act.¹³⁵ What a corporation is in fact doing is what will determine whether it is engaged in manufacturing, trading or mercantile pursuits;¹³⁶ if it be engaged in several different occupations, some within and some without the specified classes, the debts will be the aggregate of business in the specified classes as compared with that within those classes not specified.¹³⁷

b. Manufacturing corporations.—The word “manufacturing” as used in the act prior to the amendment of 1910 has presumably its popular meaning, that is, the making of products from raw or prepared materials by hand or machinery.¹³⁸ As a general rule, a natural product if only rendered more suitable for use by an artificial process is not a manufactured article.¹³⁹ Some difficulty has arisen in determining whether a given corporation is principally engaged in manufacturing. Precedents under the corporation tax law of the several States, and the internal revenue laws will prove valuable. A laundry company engaged in laundering shirts, collars, etc., for manufacturers, prior to their being sold in the market, is engaged in manu-

133. *In re Chicago-Joplin Lead & Zinc Co.* (D. C., Mo.), 4 Am. B. R. 712, 104 Fed. 67; *Matter of Quimby* (D. C., Mass.), 10 Am. B. R. 424, 121 Fed. 139.

134. *In re White Mountain Paper Co.* (C. C. A., 1st Cir.), 11 Am. B. R. 633, 127 Fed. 643, affg. 11 Am. B. R. 491, 127 Fed. 180.

135. *In re Bloomsburg Brewing Co.* (D. C., Pa.), 22 Am. B. R. 625, 172 Fed. 174.

136. *In re Chicago-Joplin Lead & Zinc Co.* (D. C., Mo.), 4 Am. B. R. 712, 104 Fed. 67; *In re Tontine Surety Co.* (D. C., N. J.), 8 Am. B. R. 421, 116 Fed. 460.

A corporation, as apparent owner of a business, which subjects it to bankruptcy, or the unknown equitable owners of the business, which permits the corporation to act as the principal, may be proceeded against by an involuntary petition for adjudication. *Calnan Co. v. Doherty* (C. C. A., 1st Cir.), 23 Am. B. R. 297, 174 Fed. 222.

137. *Matter of Matthews Consolidated Slate Co.* (C. C. A., 1st Cir.), 16 Am. B. R. 407, 144 Fed. 734.

138. *Lawrence v. Allen*, 7 How. 785; *People ex rel. U. P. T. Co. v. Roberts*, 145 N. Y. 375; *Matter of Concord Motor Car Co.* (C. C. A., 1st Cir.), 23 Am. B. R. 73, 173 Fed. 445.

What constitutes “manufacture.”—In the case of *Butt v. Construction Co.* (C. C. A., 4th Cir.), 15 Am. B. R. 515, 140 Fed. 840, the court quoted the following language from the case of *In re Capital Publishing Co.*, 3 MacArthur, 405, 40 Am. Rep. 446: “There can be no doubt that the word ‘manufacture’ was used in the statute in the limited sense in which it is commonly understood. The in-

dustries to which the dictionaries and the writers on political economy limit this term are where the raw materials or natural substances are wrought by hand, art or machinery into commodities for use; and the examples given are cloths, iron, shoes, cabinet work, glass, cotton and silk goods, etc. This limitation of the term manufacture is to be adopted as the true meaning of the bankruptcy law.” See also *In re Niagara Contracting Co.* (D. C., N. Y.), 11 Am. B. R. 643, 127 Fed. 782; *Friday v. Hall & Kaul Co.* (Sup. Ct.), 216 U. S. 449, 23 Am. B. R. 610, 54 L. Ed. 562, where the court said: “Manufacturing has no technical meaning. It is not limited by the means used in making, nor by the kind of product produced.” Compare *In re First Nat’l Bank of Belle Fourche* (C. C. A., 8th Cir.), 18 Am. B. R. 265, 269, 152 Fed. 64, in which the court said: “The word ‘manufacture’ is a generic term of broad significance, advisedly used by Congress to include many species of corporations, and its comprehensive meaning ought not to be whittled away by fine distinctions. Derivatively meaning making with the hand, its ordinary significance is producing a new article of use or ornament by the application of skill and labor to the raw materials of which it is composed.”

139. Thus, he who slaughters and refrigerates mutton (*People ex rel. New England Dressed Meat Co. v. Roberts*, 155 N. Y. 408), or who mines coal (*Byres v. Franklin Coal Co.*, 106 Mass. 131), is not a manufacturer; but he who works up standing timber on his own land is (*In re Cowles*, Fed. Cas. 3,297).

facturing.¹⁴⁰ Although it may be otherwise in respect to a corporation where the company was engaged simply in the doing of laundry work for ordinary customers.¹⁴¹ A shipbuilding corporation is a manufacturing corporation, but a corporation engaged in constructing bridges, wharves and bulkheads and in driving piles for foundations for buildings is not included within the meaning of the word.¹⁴² It has been held, however, in apparent conflict with this proposition, that a corporation principally engaged in constructing concrete arches, bridges and dressing stone is engaged in a manufacturing pursuit and is subject to adjudication in involuntary bankruptcy.¹⁴³ A corporation organized for the purpose of the manufacture and sale of paper made from wood pulp and which owns large tracts of timber land on which it had made various large expenditures in the prosecution of its general plan of manufacturing paper, is subject to involuntary bankruptcy, although no manufacturing had been actually done.¹⁴⁴ A corporation engaged chiefly in manufacturing and selling paper, paper bags, etc., is a manufacturing corporation, although its charter granted it the right to operate water works and electric lights.¹⁴⁵ A corporation which operates a plant for carrying on the process of preserving, packing and marketing salt water fish caught by it is engaged in manufacturing.¹⁴⁶ A corporation engaged in the erection of buildings has been held to be a manufacturing corporation although weighty authority is opposed to this doctrine.¹⁴⁷ A corporation engaged in the building of houses is not a manufacturing corporation within the act.¹⁴⁸ Where the only manufacturing done by a corporation chartered to engaged in the business of roofing buildings and installing steam-heat therein, was such as was incident to a particular job, the corporation is not subject to adjudication as a bankrupt.¹⁴⁹

140. *In re Troy Steam Laundering Co.* (D. C., N. Y.), 13 Am. B. R. 97, 132 Fed. 266.

141. *In re White Star Laundry Co.* (D. C., Wis.), 9 Am. B. R. 30, 117 Fed. 570. In the case of *In re Steam Laundry Co. of Queens Co.* (D. C., N. Y.), 24 Am. B. R. 457, 178 Fed. 308, it was held that a corporation engaged principally in the business of running a laundry, is not subject to adjudication in bankruptcy.

142. *Butt v. MacNichol Const. Co.* (C. C. A., 4th Cir.), 15 Am. B. R. 515, 140 Fed. 840, affg. 14 Am. B. R. 188, 134 Fed. 979. But see *In re Niagara Contracting Co.* (D. C., N. Y.), 11 Am. B. R. 643, 127 Fed. 782.

143. *In re First Nat'l Bank of Belle Fourche* (C. C. A., 8th Cir.), 18 Am. B. R. 265, 152 Fed. 64; *Friday v. Hall & Kaul Co.* (Sup. Ct.), 216 U. S. 449, 23 Am. B. R. 610, 54 L. Ed. 562, in which case it was held that a corporation engaged in the business of "making, constructing and erecting concrete arches, bridges, buildings, walls and other structures," which, when erected *in situ*, were attached to and became a part of the real estate, is "engaged principally in manufacturing," and therefore subject to adjudication.

144. *White Mountain Paper Co. v. Morse* (C. C. A., 1st Cir.), 11 Am. B. R. 633, 127 Fed. 644; *In re Bloomsburg Brewing Co.* (D. C., Pa.), 22 Am. B. R. 625, 172 Fed. 174.

145. *In re Georgia Mfg. & Public Service*

Co. (D. C., Ga.), 21 Am. B. R. 878, 166 Fed. 964.

146. *In re Alaska-American Fish Co.* (D. C., Wash.), 20 Am. B. R. 712, 162 Fed. 498.

147. *In re Rutland Realty Co.* (D. C., N. Y.), 19 Am. B. R. 546, 157 Fed. 296. *Contra*: *Matter of Kingston Realty Co.* (C. C. A., 2d Cir.), 19 Am. B. R. 845, 160 Fed. 445, revg. 19 Am. B. R. 465, 157 Fed. 299; *Matter of New York Tunnel Co.* (C. C. A., 2d Cir.), 21 Am. B. R. 531, 166 Fed. 284.

148. *Matter of Kingston Realty Co.* (C. C. A., 2d Cir.), 19 Am. B. R. 845, 160 Fed. 445, revg. 19 Am. B. R. 546. *Contra*: *In re Rutland Realty Co.* (D. C., N. Y.), 19 Am. B. R. 546, 157 Fed. 296; *In re Church Construction Co.* (D. C., N. Y.), 19 Am. B. R. 549, 157 Fed. 298.

149. *Walker Roofing, etc., Co. v. Merchant & Evans Co.* (C. C. A., 4th Cir.), 23 Am. B. R. 185, 173 Fed. 771.

Construction company.—Where the business actually transacted by a corporation consists of installing heat and power plants, constructing conduits, water works and sewers, buying, selling, and erecting steam engines and occasionally making reports with reference to the proposed construction of electric light and power plants, such corporation is engaged in "manufacturing, trading or mercantile pursuits," within the meaning of § 4-b, as it existed prior to the amendment of 1910. *United Surety Co. v. Iowa Mfg. Co.* (C. C. A., 8th Cir.), 24 Am. B. R. 726, 179 Fed. 55.

Where a corporation organized for the purpose of making and selling cement, but which had never exercised its franchise and had never actually engaged in the practice of manufacturing, is not subject to adjudication as an involuntary bankrupt.¹⁵⁰ The business of repairing automobiles is not manufacturing.¹⁵¹ Nor is the business of generating and transmitting electricity.¹⁵² The term "manufacturing" has been held to include cutting of trees into timber.¹⁵³ The words "engaged principally in manufacturing" have reference to the time when the petition was filed and a reasonable time prior thereto and not to some prior time in the history of the corporation.¹⁵⁴ From the various instances here cited it will be noticed that there is not much uniformity in the conclusions of the bankruptcy courts as to what constitutes manufacturing. There seems to be, however, a gradual relinquishment of the restrictive interpretation which was originally applied to the term.

c. Trading corporations.—A corporation engaged principally in trading may be adjudged an involuntary bankrupt. Under the law of 1867 it was a corporation engaged in "business;" in the law of 1841 it was a corporation "using the trade of merchandise." The meaning of "trader" in England has been well defined for centuries. The cases interpreting the meaning of this term in the English act will be found interesting and often valuable.¹⁵⁵ The term connotes the idea of buying merchandise for the purpose of selling it for gain.¹⁵⁶ Illustrative cases under the law of 1867 will be found in the foot-note.¹⁵⁷ Under the present law, prior to the amendment of 1910, cor-

150. *In re Toledo Portland Cement Co.* (D. C., Mich.), 19 Am. B. R. 117, 156 Fed. 83, revg. 17 Am. B. R. 375; *Matter of Concord Motor Car Co.* (C. C. A., 1st Cir.), 23 Am. B. R. 73, 173 Fed. 445, holding that whether a corporation is subject to the bankruptcy act depends upon the actual business transacted by it at or about the time a bankruptcy petition was filed against it, and not upon the business authorized by its charter.

151. *Matter of Concord Motor Car Co.* (C. C. A., 1st Cir.), 23 Am. B. R. 73, 173 Fed. 445.

152. *In re Hudson River Elec. Power Co.* (D. C., N. Y.), 23 Am. B. R. 191, 173 Fed. 934. This case is opposed by the case of *Charlestown Light & Power Co.* (D. C., W. Va.), 25 Am. B. R. 687, 183 Fed. 160, holding that electricity is a commercial commodity that can be manufactured in form to be bought and sold in commerce, and that therefore a corporation engaged in the business of selling electricity is a trading corporation, within the meaning of the former law.

But see *Matter of Wilkes-Barre Light Co.* (D. C., Pa.), 34 Am. B. R. 697, 224 Fed. 248, which commends and follows the opinion of Judge Ray in *In re Hudson River Elec. Power Co.*, *supra*.

153. *In re Chandler*, Fed. Cas. 2,591.

154. *In re Interstate Paving Co.* (D. C., N. Y.), 22 Am. B. R. 572, 171 Fed. 604.

Where a corporation has once engaged in manufacturing it may be proceeded against in bankruptcy regardless of the period of time between its cessation of operation and the filing of the creditor's petition, and the

claims of the petitioning creditors need not have arisen during the period in which the corporation was so engaged. *Robertson v. Union Potteries Co.* (D. C., Pa.), 22 Am. B. R. 121, 43 Pittsb. L. J. 342, 177 Fed. 270.

A corporation "engaged principally in manufacturing" is subject to adjudication under the bankruptcy act as it stood on September 21, 1908. *Matter of Culgin-Pau Contracting Co.* (D. C., Mass.), 35 Am. B. R. 375, 224 Fed. 245.

155. A trader is one who buys and sells goods or merchandise ordinarily the subject of traffic (*Sutton v. Weeley*, 7 East, 442, 3 Smith K. B. 445). An innkeeper was held not to be a trader (*Sanderson v. Rowles*, 4 Burr. 2064), nor is a lodging-house keeper a trader (*Ex parte Bowers*, 2 Deac. 99). A physician who held an apothecary's license and transacted business as such was held to be a trader. *Ex parte Crabb*, 8 DeGex, M. & G. 277; *Ex parte Danbenny*, 3 Mont. & Ayr. 16. See also *Ex parte Moule*, 14 Bes. 602; *Ex parte Lavender*, 4 Deac. & Ch. 484.

156. *Wakeman v. Hoyt*, Fed. Cas. 17,051; *In re Eeles*, Fed. Cas. 4,302.

157. The following were held traders: A baker (*In re Cocks*, Fed. Cas. 2,936); a furniture dealer (*In re Newman*, Fed. Cas. 10,175); a merchant tailor (*In re Archibrown*, Fed. Cas. 505); a saloon-keeper (*In re Sherwood*, Fed. Cas. 12,733); but a stockholder (*In re Moss*, Fed. Cas. 9,877), a lessor of oil lands (*In re Woods*, Fed. Cas. 17,990), and a railroad company (*In re Union Pacific R. R. Co.*, Fed. Cas. 14,376), were not.

porations engaged in furnishing water to cities,¹⁵⁸ in giving theatrical performances solely,¹⁵⁹ in conducting a hotel,¹⁶⁰ in conducting a saloon and restaurant business,¹⁶¹ a water transportation company,¹⁶² a social club,¹⁶³ an advertising company,¹⁶⁴ a mutual fire insurance company,¹⁶⁵ a building and loan association,¹⁶⁶ a real estate company,¹⁶⁷ a company organized to buy and sell stocks, bonds and securities,¹⁶⁸ a warehouse company,¹⁶⁹ a corporation chartered as a common carrier,¹⁷⁰ a corporation conducting a circulating library,¹⁷¹ an irrigation company,¹⁷² a breeders' club,¹⁷³ a laundry corporation,¹⁷⁴ an electric power company,¹⁷⁵ and a mercantile agency,¹⁷⁶ have been refused adjudication because not trading corporations; while a sanitarium,¹⁷⁷ a livery-stable company,¹⁷⁸ a mercantile agency,¹⁷⁹ a company buy-

158. In re New York & Westchester Water Co. (D. C., N. Y.), 3 Am. B. R. 508, 98 Fed. 711, subsequently affirmed on appeal.

159. In re Oriental Society (D. C., Pa.), 5 Am. B. R. 219, 104 Fed. 975; In re Reisler Amusement Co. (D. C., N. Y.), 22 Am. B. R. 501, 171 Fed. 283. See under former law, In re Duff, 4 Fed. 519.

160. In re United States Hotel Co. (C. C. A., 6th Cir.), 13 Am. B. R. 403, 134 Fed. 225, 67 C. C. A. 153. See under former law, In re Ryan, Fed. Cas. 12,183, where an inn-keeper was held to be a trader.

161. In re Chesapeake Oyster & Fish Co. (D. C., Col.), 7 Am. B. R. 173, 112 Fed. 960. But see In re Barton Hotel Co. (Dist. Col.), 12 Am. B. R. 335.

Restaurant corporation.—A company authorized by its certificate of incorporation to manage, conduct and carry on a restaurant and saloon wherein are distributed foods and liquors at retail to be consumed upon the premises, is not subject to adjudication as a bankrupt. Matter of Wentworth Lunch Co. (C. C. A., 2d Cir.), 20 Am. B. R. 29, 159 Fed. 413.

162. In re Phila., etc., Co. (D. C., Pa.), 7 Am. B. R. 707, 114 Fed. 403.

163. In re Fulton Club (D. C., Ga.), 7 Am. B. R. 670, 113 Fed. 997.

164. In re Snyder & Johnson Co. (D. C., Ill.), 13 Am. B. R. 325, 133 Fed. 806.

165. In re Cameron Town Mut. Fire Ins. Co. (D. C., Mo.), 2 Am. B. R. 372, 96 Fed. 756. See also In re Tontine, etc., Co. (D. C., N. J.), 8 Am. B. R. 421, 116 Fed. 400; In re Moore & Muir Co. (D. C., N. Y.), 23 Am. B. R. 122, 173 Fed. 732.

166. Matter of N. Y. Bldg. & Loan Bank Co. (D. C., N. Y.), 11 Am. B. R. 51, 127 Fed. 471.

167. Matter of Altonwood Park Co. (C. C., 2d Cir.), 20 Am. B. R. 31, 160 Fed. 148; Matter of Kingston Realty Co., 19 Am. B. R. 845, 160 Fed. 445.

168. In re Surety & Guarantee Trust Co. (C. C. A., 7th Cir.), 9 Am. B. R. 129, 121 Fed. 73. Compare In re Leighton & Co. (D. C., W. Va.), 17 Am. B. R. 275, 147 Fed. 311, in which a stock, bond, grain and brokerage company was held to be within the act. A stock broker was held not to be

a trader under former bankruptcy act. In re Woodward Fed. Cas. 18,001; In re Marston, Fed. Cas. 9,142; In re Moss, Fed. Cas. 4,877.

169. In re Pacific Coast Warehouse Co. (D. C., Cal.), 10 Am. B. R. 474, 123 Fed. 749.

170. In re Quimby Freight Forwarding Co. (D. C., Mass.), 10 Am. B. R. 424, 121 Fed. 139; Philpot v. O'Brien (C. C. A., 1st Cir.), 11 Am. B. R. 205, 126 Fed. 167; In re Philadelphia & L. Trans. Co. (D. C., Pa.), 7 Am. B. R. 707, 114 Fed. 403. Otherwise under former law, Winter v. Iowa, M. & N. P. R. R. Co., Fed. Cas. 17,890.

171. In re Parmelee Library Co. (C. C. A., 7th Cir.), 9 Am. B. R. 568, 120 Fed. 235, 56 C. C. A. 583.

172. Matter of Bay City Irrigation Co. (D. C., Tex.), 14 Am. B. R. 370, 135 Fed. 850.

173. In re New England Breeders' Club (D. C., N. H.), 21 Am. B. R. 349, 165 Fed. 517.

174. In re White Star Laundry Co. (D. C., Wis.), 9 Am. B. R. 30, 117 Fed. 570.

175. In re Hudson River Elec. Power Co. (D. C., N. Y.), 23 Am. B. R. 191, 173 Fed. 934. This case is opposed by Charlestown Light & Power Co. (D. C., W. Va.), 25 Am. B. R. 687, 183 Fed. 160.

176. Zugalla v. International Mercantile Agency (C. C. A., 3d Cir.), 16 Am. B. R. 67, 142 Fed. 927.

177. In re San Gabriel Sanitarium Co. (D. C., Cal.), 2 Am. B. R. 408, 95 Fed. 271. But see In re Elk Park Min., etc., Co. (D. C., Cal.), 4 Am. B. R. 131, 101 Fed. 422.

178. In re Morton Boarding Stables (D. C., N. Y.), 5 Am. B. R. 763, 108 Fed. 791; In re Odell, Fed. Cas. 10,426; *Contra*: under law of 1841, Hall v. Cooley, Fed. Cas. 5,928; under present law, Gallagher v. DeLancy Stables Co. (D. C., Pa.), 19 Am. B. R. 801, 158 Fed. 381, holding that a corporation formed for the purpose of conducting a general livery and boarding stables business is not subject to involuntary bankruptcy.

179. In re Mutual Mercantile Agency (D. C., N. Y.), 6 Am. B. R. 607, 111 Fed. 152.

ing and selling ice,¹⁸⁰ a company incorporated to conduct a grain and stock brokerage business,¹⁸¹ have been held either trading corporations or engaged principally in mercantile pursuits. In analogy to cases arising under former bankruptcy acts a corporation, not otherwise engaged in trade or mercantile pursuits, which incidentally purchases or sells property will not be deemed to be subject to involuntary bankruptcy.¹⁸² Nor is a corporation which sells the natural products of its own land a trading corporation.¹⁸³ Public service corporations, such as water, gas or electric companies, are not subject to adjudication as bankrupts.¹⁸⁴ The amendment of 1910 has effectually reconciled these decisions with each other. As the law now stands it will not be important to determine whether a corporation is a trading or manufacturing corporation. If it is engaged in business or commercial enterprises it is amenable to the bankruptcy law.

d. "Printing" and "publishing."—There are few cases construing these words. They were inserted doubtless to meet the decisions under the former law that such corporations were not manufacturing companies. A company publishing ratings of business men for commercial use—the books remaining the property of the company, is not engaged in the printing or publishing business.¹⁸⁵

e. *Mercantile pursuits*.—The words "mercantile pursuits" as formerly used in this section appear to be by way of emphasis or explanation of the word "trading" which goes before. The word "mercantile" like the word "trading" connotes the buying and selling of commodities.¹⁸⁶ It is possible, however, that it has a broader significance and may have been used to enlarge the meaning of the word "trading."¹⁸⁷

f. *Mining corporations*.—The word mining was inserted in subd. b of this section by the amendatory act of 1903, to meet the quite uniform holdings that such companies were neither manufacturing nor trading corporations.¹⁸⁸ The meaning of the word is undoubtedly the common one, and a company engaged in taking from the earth any mineral or natural product for the

180. *First Nat. Bank of Wilkesbarre v. Wyoming Valley Ice Co.* (D. C. Pa.), 14 Am. B. R. 448, 136 Fed. 466; but where the proof shows that a company harvests its ice for sale to its customers, it is not a trader. *Matter of New York & New Jersey Ice Lines* (C. C. A., 2d Cir.), 16 Am. B. R. 832, 147 Fed. 214, affg. 14 Am. B. R. 61.

181. *In re Leighton* (D. C., W. Va.), 17 Am. B. R. 275, 147 Fed. 311; *Laker v. Stapely Co.* (D. C., Ohio), 21 Am. B. R. 303.

182. *In re Kimball*, 7 Fed. 461; *In re Duff*, 4 Fed. 519; *In re Rogers*, Fed. Cas. 1,301; *In re Chapman*, Fed. Cas. 2,601.

183. *In re Woods*, Fed. Cas. 17,990; *In re Clelland*, 2 Ch. App. (Eng.) 466.

184. *Matter of Hudson River Elec. Power Co.* (D. C., N. Y.), 23 Am. B. R. 191, 173 Fed. 934.

185. *Zugalla v. International Mercantile Agency* (C. C. A., 3d Cir.), 16 Am. B. R. 67, 142 Fed. 927, revg. 13 Am. B. R. 725.

186. *Zugalla v. Mercantile Agency* (C. C. A., 3d Cir.), 16 Am. B. R. 67, 142 Fed. 927.

187. *In re N. Y. & Westchester Water Co.* (D. C., N. Y.), 3 Am. B. R. 508, 98 Fed. 711; which declares that "The business of a trader includes both buying and selling either goods or merchandise or other goods ordinarily the subject of traffic; and the term 'mercantile pursuits' means the buying or selling of goods or merchandise or dealing in the purchase or sale of commodities." *In re Surety & Guarantee Trust Co.* (C. C. A., 7th Cir.), 9 Am. B. R. 129, 121 Fed. 73.

188. *In re Tecopa Mining & Smelting Co.* (D. C., Cal.), 6 Am. B. R. 250, 110 Fed. 120; *In re Keystone Coal Co.* (D. C., Pa.), 6 Am. B. R. 377, 109 Fed. 872; *McNamara v. Helena Coal Co.* (D. C., Ala.), 5 Am. B. R. 48; *In re Woodside Coal Co.* (D. C., Pa.), 5 Am. B. R. 186, 105 Fed. 56; *In re Chicago-Joplin Lead & Zinc Co.* (D. C., Mo.), 4 Am. B. R. 712, 104 Fed. 67; *In re Rollins Gold & Silver Mining Co.* (D. C., N. Y.), 4 Am. B. R. 327, 102 Fed. 982; *In re Elk Park Mining & M. Co.* (D. C., Col.), 4 Am. B. R. 131, 101 Fed. 422.

purpose of selling or reducing it or working it up into a salable article was subject to adjudication. The word "mining" as used in the original act was sufficiently broad in its meaning to include the quarrying of slate, granite and stone.¹⁸⁹

189. Matter of Matthews Consolidated Slate Co. (C. C. A., 1st Cir.), 16 Am. B. R. 407, 144 Fed. 737, affg. 16 Am. B. R. 350; In re Quincy Granite Quarries Co. (D. C., Mass.), 16 Am. B. R. 823, 147 Fed. 279; Burdick v. Dillon, 16 Am. B. R. 407, 144 Fed. 737.

SECTION FIVE.

PARTNERS.

§ 5. **Partners.**—*a* A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

b The creditors of the partnership shall appoint the trustee: in other respects so far as possible the estate shall be administered as herein provided for other estates.

c The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.

d The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

e The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.

f The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

g The court may permit the proof of the claim of the partnership estate against the individual estates, and *vice versa*, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

h In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not

adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.

Analogous provisions: In U. S.: Act of 1867, § 36; R. S., § 5121; Act of 1841, § 14.

In Eng.: Act of 1883, §§ 110, 112, 113, 115; General Rules 258-270.

Cross-references: To the law: §§ 1(19), 2(1), 3, 4, 6, 7, 8, 18, 19, 32, and 59.

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I. BANKRUPT PARTNERSHIP.

a. **Historical and general.**—General Order VIII, relating to proceedings in partnership cases, should be read in connection with this section.¹ All bankruptcy laws have specific provisions regulating the adjudication of partnerships and the interrelation of the debts and assets of the partnership and its members. The English statute here resembles our present and past laws;

1. See General Orders in Bankruptcy, VIII, *post*.

the interpretation of the two statutes is not, however, always identical. Section 36 of our law of 1867 is strikingly similar to § 14 of its predecessor of 1841. The present section expresses in fewer words all that those sections did, and something more.

b. What constitutes a partnership.—(1) **DEFINITION.**—The term “partnership” is not specifically defined in this act. By § 1 (19) it is included in the meaning of the term “person” and it is also provided in § 1 (6) that “corporations” include “limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association.”

(2) **PARTNERSHIPS AFFECTED BY ACT.**—The section under discussion applies only to general partnerships. It does not extend to partnerships by estoppel but such as are partnerships as to creditors only.² The existence of a partnership must be shown to be an actual status, valid as against creditors, and not a status created by estoppel against a former partner.³ Under all the cases it is necessary in order to proceed to adjudication that an actual partnership be shown.⁴ The provisions of the section relate to a partnership between the parties where there may be both joint and individual assets.⁵ The mere “holding out” of a person to be a partner is not of itself sufficient to

2. In re Kenney (D. C., N. Y.), 3 Am. B. R. 353, 97 Fed. 554; Lott v. Young (C. C. A., 9th Cir.), 6 Am. B. R. 436, 109 Fed. 798. As to what is a partnership, see In re Beckwith (D. C., Pa.), 12 Am. B. R. 453, 130 Fed. 475; In re Alden (Ref., Ohio), 16 Am. B. R. 362. See Am. Bankr. Dig. § 134.

A partnership is a “person” under the definition in § 1(19) and may be adjudged a bankrupt irrespective of any adjudication against the individual members: Mills v. J. H. Fisher & Co. (C. C. A., 6th Cir.), 20 Am. B. R. 237, 159 Fed. 897.

3. **Status at time of filing petition.**—In the case of In re Pinson (D. C., Ala.), 24 Am. B. R. 804, 180 Fed. 787, the court said: “The existence of a partnership within the meaning of this section is its actual status, as distinguished from a status created by estoppel against a former partner. If it has been dissolved by the partners *inter sese* before the filing of the petition, it is not thereafter an existing partnership, and the proceedings in bankruptcy cannot be said to have been instituted ‘during the continuation of the partnership business,’ nor can debts created thereafter by the continuing partner be considered partnership debts. The jurisdiction of the bankruptcy court to adjudicate and administer attaches only upon the showing of the actually existing partnership, constituting a legal entity at the time of the filing of the petition.”

Rule in Montana.—The rule of law that where there is no partnership in fact, there can be none as to third persons, unless the party sought to be held as a partner has, by his acts, put himself in such a position that he is estopped from denying that he is a partner, obtains in the State of Montana. Lott v. Young (C. C. A., 6th Cir.), 6 Am. B. R. 436, 109 Fed. 798.

4. In re Hudson Clothing Co. (D. C., Me.), 17 Am. B. R. 826, 148 Fed. 305; Rush v. Lake (C. C. A., 9th Cir.), 10 Am. B. R. 455, 122 Fed. 561; Buckingham v. First Natl. Bank (C. C. A., 6th Cir.), 12 Am. B. R. 465, 131 Fed. 192; In re Beckwith & Co. (D. C., Pa.), 12 Am. B. R. 453, 130 Fed. 475; Lott v. Young (C. C. A., 9th Cir.), 6 Am. B. R. 436, 109 Fed. 798; Buffalo Milling Co. v. Lewisburg Dairy Co. (D. C., Pa.), 20 Am. B. R. 279, 159 Fed. 319.

An association formed for the purpose of dealing in real estate, taking title thereto in the name of a trustee under a trust deed wherein the members agreed to share in the profits and losses, is a partnership. Matter of Alden (Ref., Ohio), 16 Am. B. R. 362. Where two persons intending to form a corporation, which was never organized, associate themselves in a mercantile business, one contributing goods and the other cash, which was deposited in bank and used for the business, there is a partnership in fact, which may be adjudicated bankrupt. Manson v. Williams (C. C. A., 1st Cir.), 18 Am. B. R. 674, 153 Fed. 525, affg. 17 Am. B. R. 826, 148 Fed. 305, affd. 213 U. S. 453, 22 Am. B. R. 22, 53 L. Ed. 869.

Proof of existence of partnership.—To justify the adjudication of a member of a firm as a partner there must be evidence from which the court may find as a fact that such member was a partner; it is insufficient that to various creditors such member had held himself out as a partner, because while an estoppel may give rights to those who were misled, in order to give rights to all creditors he must be in fact a partner. Matter of Kaplan (C. C. A., 7th Cir.), 37 Am. B. R. 104, 234 Fed. 866.

5. In re Kenney (D. C., N. Y.), 3 Am. B. R. 353, 97 Fed. 554.

bring the alleged partnership within the act.⁶ With this limitation, however, the State decisions on partnership law seem controlling. An unincorporated company doing business as a private bank under a State law giving it some of the privileges of a corporation is, nevertheless, a partnership.⁷ The fact that one person, having the title to real estate in his own name, pays some portion of the income thereof to another person does not establish that they are partners.⁸ A partnership which has ceased to exist, but has remaining assets and debts, is considered as subsisting as to its creditors until its property is subjected to the satisfaction of their debts.⁹

c. **The entity doctrine.**—(1) **IN GENERAL.**—A partnership now is something other than that under the law of 1867. There the words were, “two or more persons who are partners in trade.” Now it is “a partnership” that “may be adjudged a bankrupt.” This phrasing, coupled with other clauses, has led to the doctrine that a partnership is in bankruptcy a legal entity¹⁰—a joint relation where the identity of the members has been lost—and that, therefore, the individuals and the partnership are entities separate and distinct from each other.¹¹

(2) **APPLICATION OF DOCTRINE.**—A partnership being a distinct entity, it owns its property and owes its debts apart from the individual property of its members which it does not own, and apart from the individual debts of its members which it does not owe. It may be adjudged bankrupt, although the partners who compose it are not so adjudicated.¹² In other words, the firm

6. *Jones v. Burnham, Williams & Co.* (C. C. A., 3d Cir.), 15 Am. B. R. 85, 138 Fed. 986.

7. *Burkhart v. German-American Bank* (D. C., Ohio), 14 Am. B. R. 222, 137 Fed. 958.

8. *In re Lamon* (D. C., N. Y.), 22 Am. B. R. 635, 171 Fed. 516.

9. *Holmes v. Baker & Hamilton* (C. C. A., 9th Cir.), 20 Am. B. R. 252, 160 Fed. 922; *In re Hirsch* (D. C., N. Y.), 3 Am. B. R. 44, 97 Fed. 571.

10. See *In re Meyers* (C. C. A., 2d Cir.), 3 Am. B. R. 559, 98 Fed. 976; *In re Stein* (C. C. A., 6th Cir.), 11 Am. B. R. 536, 127 Fed. 547; *In re McLaren* (D. C., N. Y.), 11 Am. B. R. 141, 125 Fed. 835; *In re Perley* (D. C., Mo.), 15 Am. B. R. 54, 138 Fed. 927. See cases cited under following notes and in Am. Bankr. Dig., § 133.

11. *In re Sanderlin* (D. C., N. Car.), 6 Am. B. R. 384, 109 Fed. 857; *In re McMurtrey* (D. C., Tex.), 15 Am. B. R. 427, 142 Fed. 853.

The partnership is an entity for certain purposes, but not necessarily to avoid consideration of the available resources of solvent partners in determining the bankruptcy of the partnership. *Francis v. McNeal* 228 U. S. 695, 700, 30 Am. B. R. 244, 57 L. Ed. 1029; *Matter of Samuels and Lesser* (C. C. A., 2d Cir.), 32 Am. B. R. 436, 215 Fed. 845.

12. *In re Bertenshaw* (C. C. A., 8th Cir.), 19 Am. B. R. 577, 157 Fed. 363. The following cases are cited as establishing this proposition: *In re Corcoran* (Ref., Ohio), 12 Am. B. R. 283; *In re Stein & Co.*

(C. C. A., 7th Cir.), 11 Am. B. R. 536, 538, 127 Fed. 547, 62 C. C. A. 272; *In re Mercur* (C. C. A., 3d Cir.), 10 Am. B. R. 505, 122 Fed. 384, 58 C. C. A. 472; *In re Farley* (D. C., Va.), 8 Am. B. R. 266, 115 Fed. 359; *In re Sanderlin* (D. C., N. C.), 6 Am. B. R. 384, 109 Fed. 857; *Green River Deposit Bank v. Craig* (D. C., Ky.), 6 Am. B. R. 381, 110 Fed. 137; *In re Hale* (D. C., N. C.), 6 Am. B. R. 35, 107 Fed. 432; *Strause v. Hooper* (D. C., N. C.), 5 Am. B. R. 225, 105 Fed. 590; *In re Barden* (D. C., N. C.), 4 Am. B. R. 31, 101 Fed. 553; *In re Meyer* (C. C. A., 2d Cir.), 3 Am. B. R. 559, 98 Fed. 976, 39 C. C. A. 368; *In re Russell* (D. C., Iowa), 3 Am. B. R. 91, 97 Fed. 32; *In re McFaun* (D. C., Iowa), 3 Am. B. R. 66, 96 Fed. 592; *In re Meyers* (D. C., N. Y.), 2 Am. B. R. 707, 96 Fed. 408; *In re Cebalos & Co.* (D. C., N. J.), 20 Am. B. R. 459, 464, 161 Fed. 445; *Matter of Everybody's Market* (D. C., Okl.), 21 Am. B. R. 925, 173 Fed. 492; *In re Junck & Balthazard* (D. C., W. Va.), 22 Am. B. R. 298, 169 Fed. 481.

A partnership is a distinct entity, a “person” under § 1(19). *Mills v. Fisher & Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 237, 239, 159 Fed. 897.

The adjudication of a partnership draws to the court for administration the individual estate of the partners, though as individuals they have not been adjudicated. *Matter of Latimer* (D. C., Pa.), 23 Am. B. R. 388, 174 Fed. 824; *In re Stokes* (D. C., Pa.), 6 Am. B. R. 262, 106 Fed. 312; *Compare Matter of Samuels & Lesser* (C. C. A., 2d Cir.), 32 Am. B. R. 436, 215 Fed. 845, revg. 30 Am. B. R. 203, 207 Fed. 195.

must petition or be petitioned against; if the latter, the firm, or a member of it acting within the scope of the partnership, must have committed the act of bankruptcy; and, if adjudication follows, the firm, *so nomine*, must be adjudicated.¹³ Under this principle a partnership as an entity may be adjudged to be a bankrupt, irrespective of any adjudication against the individual members.¹⁴

(3) EFFECT OF DOCTRINE ON RIGHTS OF PARTNERS AND CREDITORS.—This doctrine is essentially different from that of the English law, where even if the firm be proceeded against, the adjudication must be against the partners individually.¹⁵ Our law and practice, prior to the present statute, were to the same effect. This new doctrine of entity, however, has already led to some decisions of far-reaching importance, and should be kept continually in mind by the student or practitioner who would understand one of the most confusing branches of the law of bankruptcy.¹⁶ The entity doctrine permits of the adjudication in bankruptcy of a partnership one of the members of which is insane,¹⁷ but will not justify an adjudication where some of the alleged members deny the existence and composition of the partnership.¹⁸

Opposition to entity doctrine.—In the case of *In re Forbes* (D. C., Mass.), 11 Am. B. R. 787, 128 Fed. 137, "For some purposes a partnership has been treated as an entity apart from the partners; for other purposes it has been treated as a congeries to partners. Some courts have suggested that the Act of 1898 has adopted for bankruptcy the theory of an entity separate from the partners. Yet this treatment of a partnership is irreconcilable with other provisions of the statute. Section 5-h of the act provides that the partnership property (except in case of consent) shall not be administered in bankruptcy unless all the partners are adjudged bankrupt. This is in effect a provision that the partnership shall not be made bankrupt, except by the adjudication of all its partners. Adjudication without accompanying distribution of the bankrupt estate would be worse than a vain form, for it would confuse inextricably questions of preference, lien, attachment and the like. . . . Section 5-b contemplates that the adjudication under a joint petition shall be both joint and several. If the adjudication were joint only, there would be no object in providing that the joint creditors alone shall elect the trustee. Still again, section 5-c gives to the court which has jurisdiction of one partner 'jurisdiction of all the partners' and says nothing about jurisdiction of the partnership as an entity. Read as a whole, Form No. 2 agrees with section 5-h, and not with the theory of entity. It is in terms the petition of individuals. It sets out that they owe debts which they cannot pay and that they desire the benefits of the bankrupt act." And see *Abbott v. Anderson*, 265 Ill 285, 33 Am. B. R. 383, 106 N. E. 782.

13. Where there is no adjudication against the firm, assets may not be administered by the bankruptcy court, if there be one member not adjudicated, unless he consent. In such cases the unadjudicated partner has the right

to wind up the firm, paying over only the share of the bankrupt partner to his trustee. *Mills v. Fisher & Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 237, 159 Fed. 897.

14. *Mills v. Fisher & Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 237, 159 Fed. 897; *Matter of Union Bank* (C. C. A., 6th Cir.), 25 Am. B. R. 148, 184 Fed. 224, in which case the court said: "The difference in this regard between section 5 of the present bankruptcy act on the one hand, and section 14 of the act of 1841, and section 36 of the act of 1867 on the other, is enough to show that Congress intended by the present act to treat partnerships as entities, distinct from their members, for the purpose at least of permitting partnerships to be adjudicated bankrupts either through voluntary or involuntary proceedings." In *re Meyer* (C. C. A., 2d Cir.), 3 Am. B. R. 559, 98 Fed. 976; *Matter of Hansley & Adams* (D. C., Cal.) 36 Am. B. R. 1, 228 Fed. 564, holding that a partnership is an entity to the extent that it may be declared a voluntary or an involuntary bankrupt without the necessity of the individual partners being adjudicated bankrupts.

15. Act of 1883, § 115; General Rules 264.

16. In *re Pincus* (D. C., N. Y.), 17 Am. B. R. 331, 337, 147 Fed. 621, in which the court said: "The right to proceed in bankruptcy against a partnership as a legal entity is new, and before the act of 1898 was unheard of." For interesting case relative to the result of a literal application of the doctrine of entity to partnerships in bankruptcy, see *In re Forbes* (D. C., Mass.), 11 Am. B. R. 787, 128 Fed. 138.

17. In *re Stein & Co.* (C. C. A., 7th Cir.), 11 Am. B. R. 536, 127 Fed. 547.

18. In *re McLaren* (D. C., N. Y.), 11 Am. B. R. 141, 125 Fed. 835.

Adjudication of individual as partner.—When no petition in bankruptcy has been filed against him, an individual who asserts under oath that he is not a partner cannot

This doctrine prevents, in considering the value of the partnership property, the including of the homestead of one of the partners in the assets.¹⁹ The recognition and application of this doctrine does not modify in any way the established rule, fixing the substantive rights of creditors, irrespective of the partnership and of its individual members.²⁰ The full force and application of the doctrine is in connection with the adjudication of the partnership, separate and distinct from the adjudication of the several partners.²¹ The rule seems firmly established that the partnership as a distinct entity may be adjudicated a bankrupt, without a proceeding being prosecuted against the other members of the partnership, and on the other hand proceedings may be instituted against the individual members of the partnership without in any way involving the partnership itself.²²

d. Receivership as act of bankruptcy.—Under the original law, following the analogy of the corporation cases, it was held that the consent to or the

be summarily adjudicated a partner in an inquiry before a referee in bankruptcy to which he does not consent. *Matter of Samuels and Lesser* (C. C. A., 2d Cir.), 32 Am. B. R. 436, 215 Fed. 845, revg. 30 Am. B. R. 293, 207 Fed. 195.

19. *In re McMurray* (D. C., Tex.), 15 Am. B. R. 427, 142 Fed. 853. This doctrine has been carried even so far as to require the payment of the statutory fees for partnerships and each of the individuals in *In re Barden* (D. C., N. C.), 4 Am. B. R. 31, 101 Fed. 553, and *In re Farley* (D. C., Va.), 8 Am. B. R. 266, 115 Fed. 359, though the soundness of these rulings has been frequently challenged.

20. *Matter of Union Bank* (C. C. A., 6th Cir.), 25 Am. B. R. 148, 184 Fed. 224.

Notwithstanding the entity doctrine "the fact remains as true as ever that partnership debts are debts of members of the firm, and that the individual liability of the members is not collateral like that of a surety, but primary and direct, whatever privities there may be in the marshalling of assets." *Mr. Justice Holmes in Francis v. McNeal*, 228 U. S. 695, 30 Am. B. R. 244, 57 L. Ed. 1029, affg. 26 Am. B. R. 555, 186 Fed. 481, 108 C. C. A. 459.

21. **Adjudication of partnership apart from members.**—*Mills v. Fisher & Co.* (C. C. A., 6th Cir.), 23 Am. B. R. 237, 159 Fed. 897, in which case the court held that the partnership as an entity may be adjudged to be a bankrupt, irrespective of any adjudication against the individual members; *In re Bertenshaw* (C. C., 8th Cir.), 19 Am. B. R. 577, 157 Fed. 363, in which case the court said: "The uniform current of authority is that under this act a partnership is a distinct entity, separate from the individuals who compose it; that it owns its property and owes its debts which are respectively separate and distinct from the individual property and the individual debts of its partners, and that the adjudication of the partnership a bankrupt apart from or in addition to the adjudication of its partners bankrupts is indispensable to the jurisdic-

tion of the court of bankruptcy to administer the partnership property." See *Fidelity Trust Co. v. Gaskell* (C. C. A., 8th Cir.), 28 Am. B. R. 4, 195 Fed. 865, in which the court said: "A partnership is a distinct entity, a person separate from the partners who compose it and from all other partnerships. It owns its property apart from the individual property of its members and apart from the property of every other partnership of which any of its members happen to be members and it owes its debts apart from the individual debts of its members, and from the debts of other partnerships of which any of its members are members. . . . A receiver or trustee of a partnership adjudged a bankrupt is not the receiver or trustee of the property of another unadjudicated partnership in which the members of the bankrupt partnership were also members, and he has no more right to seize or to administer such property than he has to take and distribute the property of any other stranger."

22. *Am. Steel & Wire Co. v. Coover* (Okla., Sup. Ct.), 27 Okl. 131, 25 Am. B. R. 58, 111 Pac. 217, citing *In re Meyer* (C. C. A., 2d Cir.), 3 Am. B. R. 559, 98 Fed. 976, 39 C. C. A. 368; *In re Stein & Co.* (C. C. A., 7th Cir.), 11 Am. B. R. 536, 127 Fed. 547, 62 C. C. A. 272. *In re Bertenshaw* (C. C. A., 8th Cir.), 19 Am. B. R. 577, 157 Fed. 363; *Francis v. McNeal* (C. C. A., 3d Cir.), 26 Am. B. R. 555, 186 Fed. 481, 108 C. C. A. 459, holding that a partnership is a legal entity that may be adjudged a bankrupt either in a voluntary or an involuntary proceeding irrespective of the adjudication against any of its members, but where in an involuntary proceeding an act of bankruptcy charged involves the insolvency of the partnership there can be no adjudication unless it and all its members are insolvent; affd. 228 U. S. 695, 30 Am. B. R. 244, 57 L. Ed. 1029, and see *In re City Contracting & Bldg. Co.* (D. C., Hawaii), 30 Am. B. R. 133; *Matter of Samuels and Lesser* (C. C. A., 2d Cir.), 32 Am. B. R. 436, 215 Fed. 845, revg. 30 Am. B. R. 293, 207 Fed. 195.

appointment of receivers of a partnership was not an act of bankruptcy.²³ This is no longer true. Section 3-a (4), as amended, means that the appointment of a receiver of an insolvent partnership is an act of bankruptcy.²⁴

II. WHEN PARTNERSHIP MAY BE ADJUDGED BANKRUPT.

a. Statutory provision.—The statute provides that: "A partnership during the continuation of the partnership business or after its dissolution and before the final settlement thereof may be adjudged a bankrupt." During the continuation of the partnership business the partnership may be adjudged bankrupt. The limitation of the filing of petitions by or against a partnership found in the words "after the dissolution and before the final settlement thereof," is of little importance. It has been held that there can be no final settlement until all the debts are paid.²⁵ The partnership affairs are unsettled within the meaning of this provision so long as partnership debts are left unpaid.²⁶ It is doubtless true that the existence of assets is not essential to a partnership adjudication. It has been questioned whether a partner can in an individual proceeding, secure a discharge that will be effective against his partnership liability.²⁷ If this be so, it may be questioned whether either the bankrupt or his creditors would be beneficially affected by the adjudication of a partnership which has no assets. The only benefit to accrue to the creditors of the firm would be the appointment of a trustee who, in the exercise of the powers conferred upon him, might discover assets of the firm which had not been disclosed.²⁸ In other words, the limitation stated above may, in actual practice, where the partnership has no assets, amount to an absurdity. In other respects the limitation is declaratory of the law. The mere dissolution of a copartnership does not destroy its existence as to its creditors. It was otherwise under the law of 1867.²⁹ But even after dissolution a partnership may not be adjudicated a bankrupt so long as there is a solvent

23. *Vaccaro v. Bank* (C. C. A., 6th Cir.), 4 Am. B. R. 474, 103 Fed. 436; *Davis v. Stevens* (D. C., S. Dak.), 4 Am. B. R. 763, 104 Fed. 235. See also *In re Mercur* (D. C., Pa.), 8 Am. B. R. 275, 116 Fed. 655.

24. Compare discussion under § 3-a (4), *ante*.

25. *In re Levy, etc.* (D. C., N. Y.), 2 Am. B. R. 21, 95 Fed. 812; *In re Meyers*, 2 Am. B. R. 707, 96 Fed. 408; *In re Hirsch* (D. C., N. Y.), 3 Am. B. R. 344, 97 Fed. 571. But *Royston v. Wies* (C. C. A., 5th Cir.), 7 Am. B. R. 584, 112 Fed. 962, seems to imply that lapse of time is equivalent to a settlement. Compare *Holmes v. Baker & Hamilton* (C. C. A., 9th Cir.), 20 Am. B. R. 252, 160 Fed. 922.

26. **Settlement of affairs.**—In the case of *In re Pinson* (D. C., Ala.), 24 Am. B. R. 804, 180 Fed. 787, the court said: "The act also provides for the adjudication of a partnership so long as its affairs are unsettled. If there are outstanding firm debts at the time of the filing of the petition in a requisite amount, a proper case is made for adjudication, the other elements being present, though the partnership has long ceased to do business; otherwise not. The partnership affairs are unsettled within the

meaning of this section so long as partnership debts are left unpaid. Debts which are binding upon the partners only by estoppel as to creditors without notice of dissolution are not firm debts. The administration might be of no avail if there were no assets, partnership or individual, for distribution; but the jurisdiction of the court to adjudicate would exist nevertheless, and it would be properly exercised for the purpose of affording opportunity to the firm creditors through the appointment of a trustee to discover such assets."

27. See discussion and cases cited under Section Fourteen of this work, subtitle "*Application for Discharge; Who may Apply.*" See also *In re Feigenbaum* (D. C., N. Y.), 7 Am. B. R. 339, 151 Fed. 508.

28. *In re Pinson* (D. C., Ala.), 24 Am. B. R. 804, 180 Fed. 787.

29. See cases cited in *In re Hirsch* (D. C., N. Y.), 3 Am. B. R. 344, 97 Fed. 571. In the case of *Holmes v. Baker & Hamilton* (C. C. A., 9th Cir.), 20 Am. B. R. 252, 160 Fed. 922, it was held that where assets or debts of a partnership remain after dissolution, the partnership is considered as subsisting as to its creditors, until its property is subjected to the satisfaction of other claims.

member.³⁰ The individual assets of members of a firm may be administered by the court so far as may be necessary to settle the partnership affairs, although such members are not individually declared to be bankrupt.³¹

b. Acts of bankruptcy by a partnership.—(1) **IN GENERAL.**—The general rule that whatever a partner does within the scope of the partnership binds the other partners applies to the commission of acts of bankruptcy. Since a partnership is now an entity, petitions which, under the previous law, would not confer jurisdiction because the act of bankruptcy was not committed by all the partners, are now sufficient.³²

(2) **COMMISSION OF ACT OF BANKRUPTCY BY ONE PARTNER.**—Generally speaking, the commission of an act of bankruptcy as to the partnership property by either partner amounts to an act of bankruptcy by the firm.³³ An act of bankruptcy by a single partner in respect to partnership property, within the legitimate scope of his authority, will bind the partnership and warrant an adjudication; his act must be such as to be imputed to the partnership.³⁴ For instance a voluntary assignment of all the assets of a firm, by one of the partners, constitutes an act of bankruptcy for which the firm may be adjudged a bankrupt, for the reason that it affected the partnership business and disposed of its assets.³⁵ If the act pertains to individual property with the intent to hinder, delay or defraud individual creditors, it does not bind the partnership.³⁶ It has been held that even the fifth act of bankruptcy, when com-

30. *Matter of Young* (D. C., Mass.), 35 Am. B. R. 200, 223 Fed. 659.

31. *Dickas v. Barnes* (C. C. A., 6th Cir.), 15 Am. B. R. 566, 72 C. C. A. 261, 140 Fed. 849; *Matter of Wing Yick Co.* (D. C., Hawaii), 2 U. S., D. C. Hawaii 259, 13 Am. B. R. 757; *Abbott v. Anderson* (Sup. Ct., Ill.), 265 Ill. 285, 33 Am. B. R. 383, 106 N. E. 782.

32. Compare *In re Richmond* Fed. Cas. 11,632.

Scope of partnership.—Where the act complained of was in the scope of the partnership business it may constitute an act of the firm and be sufficient to justify the adjudication in bankruptcy of the firm. *In re Kersten* (D. C., Wis.), 6 Am. B. R. 516, 110 Fed. 929; *In re Duguid* (D. C., N. C.), 3 Am. B. R. 794, 100 Fed. 274; *In re Shapiro* (D. C., N. Y.), 5 Am. B. R. 839, 106 Fed. 839.

33. *In re Meyer* (C. C. A., 2d Cir.), 3 Am. B. R. 559, 98 Fed. 976, affg. *Bank v. Meyer* (D. C., N. Y.), 1 Am. B. R. 565, 92 Fed. 896. To same effect, *In re Grant Bros.* (D. C., N. Y.), 5 Am. B. R. 837, 98 Fed. 976; *In re Borelli* (D. C., Ct.), 16 Am. B. R. 115, 142 Fed. 296; *In re Perlheffer* (D. C., N. Y.), 25 Am. B. R. 576, 177 Fed. 299.

34. *In re Perley & Hays* (D. C., Mo.), 15 Am. B. R. 54, 138 Fed. 927; *In re Kersten* (D. C., Wis.), 6 Am. B. R. 516, 110 Fed. 929.

35. **Disposition of firm assets by one partner.**—In the case of *Yungbluth v. Slipper* (C. C. A., 9th Cir.), 26 Am. B. R. 265, 185 Fed. 773, the court said: "The only question which requires any extended discussion is presented by the contention that the appellant could not be adjudged a bankrupt on account of the individual act of bank-

ruptcy of his copartner *Schafer* made the assignment for creditors, and there is no proof that the appellant assented to it. There can be no doubt that *Schafer's* act was an act of bankruptcy for which the partnership was properly adjudged bankrupt, for it was an act which affected the partnership business and disposed of the partnership assets. *In re Meyer* (C. C. A., 2d Cir.), 3 Am. B. R. 559, 98 Fed. 976, 39 C. C. A. 368; *In re Kersten* (D. C., Wis.), 6 Am. B. R. 516, 110 Fed. 929; *In re Borelli* (D. C., Ct.), 16 Am. B. R. 115, 142 Fed. 296. But the proceeding in this case was not only against the partnership, but was also against each individual member. In some of the decisions it has been said broadly that one partner may not be adjudged bankrupt for the act of his copartner, and undoubtedly the statement is true as to certain acts of individual partners. Thus it has been held that neither a firm nor the other partners may be adjudged bankrupt for the act of a partner in preferring out of his individual estate one of his own or the firm's creditors. *Mills v. J. H. Fisher & Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 237, 159 Fed. 897, 87 C. C. A. 77, 16 L. R. A. (N. S.) 656. But we think the true doctrine is that, if the act of the individual partner is one for which the partnership itself may be adjudged bankrupt, the other members of the firm may also be adjudged bankrupt unless they can show in defense that the property of the firm, together with that of all the partners applicable to the payment of the partnership debts, is sufficient to pay the same."

36. *In re Hovall Grocery Co.* (D. C., Ga.), 20 Am. B. R. 537, 161 Fed. 882; *Hartman*

mitted by one partner, binds the copartnership;³⁷ on the other hand, the embezzlement of the funds of the partnership by an absconding partner is not an act of bankruptcy.³⁸ If a partner out of his individual estate prefers one of his own or one of the firm creditors, it is not an act of bankruptcy for which the firm may be adjudged bankrupt.³⁹ Where the administrator of a deceased partner applies for the appointment of a receiver to wind up the partnership, upon the surviving partner announcing his intention of not exercising his statutory right to take the interest of his deceased partner at the appraised value, such surviving partner does not commit an act of bankruptcy by joining in the application for the receiver.⁴⁰

(3) WHAT CONSTITUTE ACTS OF BANKRUPTCY.—If the insolvency of the partnership was one of the substantial reasons for the appointment of a receiver the partnership may be adjudicated a bankrupt.⁴¹ A general assignment by a partnership and each of the individual members thereof is an act of bankruptcy by the partnership and the partners.⁴² The filing of a petition in bankruptcy by one partner against his copartnership is not an act of bankruptcy on the part of the partnership.⁴³ Where an execution was levied after the dissolution of a partnership, the failure to discharge it is an act of bankruptcy by all the members of the firm, for which it and all the partners may be adjudged bankrupt.⁴⁴

c. *Insolvency*.—In determining the question of insolvency the individual property of the partners should be considered.⁴⁵ Where the assets of a partnership, together with the individual properties of each partner, exceeds their liabilities, the partnership is not insolvent.⁴⁶ It has been well said that this principle is at variance with the universal doctrine that under the

v. John Peters & Co. (D. C., Pa.), 19 Am. B. R. 61, 146 Fed. 82.

A conveyance by one partner of his individual property, although an act of bankruptcy as against him, will not sustain a proceeding in bankruptcy as against the firm, even though such conveyance was made with intent to hinder, delay or defraud firm creditors, or with a view of giving preference to a firm creditor. In such case the proceedings must be against such partner alone. In re Redmond, 9 Nat. Bankr. Reg. 408, Fed. Cas. 11,632.

37. In re Kersten (D. C., Wis.), 6 Am. B. R. 516, 110 Fed. 929.

38. Davis v. Stevens (D. C., S. Dak.), 4 Am. B. R. 763, 104 Fed. 235.

39. Mills v. Fisher & Co. (C. C. A., 6th Cir.), 20 Am. B. R. 237, 241, 159 Fed. 897, in which the court said: "The application by one partner of his individual property to the payment of one firm creditor would be an individual act, and not the joint act of the firm, and therefore not an act for which the firm could be adjudged bankrupt."

40. Moss Nat'l Bank v. Arend (C. C. A., 6th Cir.), 16 Am. B. R. 867, 146 Fed. 351.

41. In re Beatty (C. C. A., 1st Cir.), 17 Am. B. R. 738, 150 Fed. 293.

42. Green River Deposit Bank v. Craig Bros. (D. C., Ky.), 6 Am. B. R. 381, 110 Fed. 137. Where such an assignment is made the partnership should be adjudged bankrupt irrespective of the question of its

insolvency. West Co. v. Lea, 174 U. S. 590, 2 Am. B. R. 463, 43 L. Ed. 1098.

Where an application for a receiver is made by a partnership under a State law, and a temporary receiver is appointed, it is not equivalent to a general assignment and will not support an involuntary adjudication in bankruptcy of the partnership. In re Boyd v. Boyd Fry Stove & China Co. (Ref., Ga.), 20 Am. B. R. 330.

43. In re Ceballos & Co. (D. C., N. J.), 20 Am. B. R. 459, 161 Fed. 445.

44. Holmes v. Baker & Hamilton (C. C. A., 9th Cir.), 20 Am. B. R. 252, 160 Fed. 922.

45. In re Perley (D. C., Mo.), 15 Am. B. R. 54, 138 Fed. 927.

Insolvency; one solvent partner.—Where a partnership is insolvent at the time of the commission of acts of bankruptcy, the acts proven will be acts of bankruptcy as against the partners, but will not be acts of bankruptcy as against one partner individually whose estate is sufficient to meet the partnership deficit. Matter of Kobre et al. (D. C., N. Y.), 35 Am. B. R. 389, 224 Fed. 106.

46. Vaccaro v. Security Bank of Memphis (C. C. A., 6th Cir.), 4 Am. B. R. 474, 103 Fed. 436, 43 C. C. A. 279. See also In re Forbes (D. C., Mass.), 11 Am. B. R. 787, 791, 128 Fed. 137; Davis v. Stevens (D. C., S. Dak.), 4 Am. B. R. 763, 772, 104 Fed. 235; In re Blair (D. C., N. Y.), 3 Am. B. R. 588, 99 Fed. 76; In re Boyd v. Boyd

present bankruptcy act a partnership is a legal entity, separate from the partners who compose it.⁴⁷ But it is now well settled by the weight of authority that if the act of bankruptcy charged is one involving insolvency, the individual property of the partners must be combined with the property of the partnership in determining the insolvency of the partnership;⁴⁸ and that a partnership

Fry Stone & China Co. (Ref., Ga.), 20 Am. B. R. 330; In re Duke & Son (D. C., Ga. Ref.), 28 Am. B. R. 195; Abbott v. Anderson (Sup. Ct., Ill.), 265 Ill. 285, 33 Am. B. R. 383, 106 N. E. 782; Matter of Samuels and Lesser (C. C. A., 2d Cir.), 32 Am. B. R. 436, 215 Fed. 845, revg. 30 Am. B. R. 293, 207 Fed. 195.

47. In re Bertenshaw (C. C. A., 8th Cir.), 19 Am. B. R. 577, 588, 157 Fed. 363; Matter of Everybody's Market (D. C., Okl.), 21 Am. B. R. 925, 173 Fed. 492.

Only property of partnership to be considered.—The case of In re McMurtrey v. Smith (D. C., Tex.), 15 Am. B. R. 427, 142 Fed. 853, is analogous to the case last cited. It was there held that upon the question of the insolvency of a partnership, sought to be adjudged bankrupt, the firm and its individual members are strangers to each other, and a homestead, the individual property of one partner, may not be counted as part of the partnership property. In the case of In re Morgan & Williams (D. C., Ga.), 25 Am. B. R. 861, 184 Fed. 938, the court said: "Assuming the entity doctrine to prevail under the more recent decisions of the courts, as contended by counsel for petitioning creditors, and that the firm's assets and liabilities would be the test of solvency or insolvency as against the firm, and that notwithstanding the fact that the individuals composing the firm are proceeded against also, still it must appear, to justify an adjudication in bankruptcy, that the real indebtedness on the part of the alleged bankrupt firm to the petitioning creditor or creditors exceeds the aggregate, at a fair valuation, of the alleged bankrupt firm's property."

48. **Insolvency of partnership and of partners.**—In the case of Francis v. McNeal (C. C. A., 3d Cir.), 26 Am. B. R. 555, 186 Fed. 481, affd. 228 U. S. 695, 30 Am. B. R. 240, 57 L. Ed. 1029, the court cited the authorities and said: "A partnership cannot be adjudged a bankrupt, in an involuntary proceeding, unless it has committed an act of bankruptcy. If the act charged be one involving insolvency, since every partner is liable in solido for all the partnership debts, the adjudication against the partnership must be based on allegations and proofs that the assets of its members, in excess of their individual debts, plus the assets of the partnership, are insufficient to pay the partnership debts. Otherwise there is no partnership insolvency, notwithstanding the entity doctrine. In re Blair (D. C., N. Y.), 3 Am. B. R. 588, 99 Fed. 76; Vaccaro Security Bank (C. C. A.,

6th Cir.), 4 Am. B. R. 474, 103 Fed. 436, 43 C. C. A. 279; Davis v. Stevens (D. C., S. D.), 4 Am. B. R. 763, 104 Fed. 235; In re Forbes (D. C., Mass.), 11 Am. B. R. 787, 128 Fed. 137; In re Perley & Hays (D. C., Mo.), 15 Am. B. R. 54, 138 Fed. 927; Dickas v. Barnes (C. C. A., 6th Cir.), 15 Am. B. R. 566, 140 Fed. 849, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654; Tumlin v. Bryan (C. C. A., 5th Cir.), 21 Am. B. R. 319, 165 Fed. 166, 91 C. C. A. 200, 21 L. R. A. (N. S.) 960; Worrell v. Whitney (D. C., Pa.), 24 Am. B. R. 749, 179 Fed. 1014. That doctrine furnishes a direct proceeding against the partnership as a legal entity, but it does not authorize an adjudication of bankruptcy against a partnership, where the act of bankruptcy charged is one involving insolvency, unless as above stated, it is shown that there is an insufficiency of partnership and individual assets to pay the partnership debts. If a partnership is insolvent, in the sense above explained, all the assets of the partnership and its members are needed for the proper winding up of the partnership affairs."

In the case of Tumlin v. Bryan (C. C. A., 5th Cir.), 21 Am. B. R. 319, 165 Fed. 166, 91 C. C. A. 200, 21 L. R. A. (N. S.) 960, the court said: "If the component parts of the firm may be made to pay the firm's debts, the suit lacks reason and substance, and it cannot be held that the defendant has obtained a greater percentage of his debts than other creditors of the same class. If the members of the firm are solvent, all creditors may be paid in full. If the individual members of the partnership are not shown to be insolvent at the date of the payments, the preference is not voidable." This case pertained to the recovery of a preference, but the reasoning is applicable to the question of insolvency where an act of bankruptcy is alleged. See also In re Perlhefter v. Shatz (D. C., N. Y.), 25 Am. B. R. 576, 585, 177 Fed. 295; Crancer & Co. v. Wade (Okla. Sup. Ct.), 26 Okl. 757, 25 Am. B. R. 880, 110 Pac. 778; In re Samuels & Lesser (C. C. A., 2d Cir.), 32 Am. B. R. 436, 215 Fed. 845 (revg. 30 Am. B. R. 293, 207 Fed. 195); In re Duke & Son (Ref., Ga.), 29 Am. B. R. 93. A partnership cannot be compulsorily adjudicated a bankrupt where any partner appears to be solvent to the extent of having a surplus of property over the debts for which he is personally liable and the debts for which he is liable as a member of the firm. Matter of Kobre (D. C., N. Y.), 35 Am. B. R. 389, 224 Fed. 116.

is not bankrupt so long as one of the members who compose it is individually solvent.⁴⁹

d. Death, insanity, or infancy of a partner.—(1) **DEATH OF PARTNER.**—The estate of a deceased debtor cannot in this country be adjudged a bankrupt.⁵⁰ It follows that there can be no partnership adjudication against a firm, one member of which is dead.⁵¹ The surviving partner can still be adjudged either a voluntary or an involuntary bankrupt as an individual and as survivor.⁵² The court of bankruptcy may thereby obtain jurisdiction of the partnership estate, or by consent, if in the hands of an administrator;⁵³ and the estate of the deceased partner is in any event still liable to pay the firm debts.⁵⁴ A trustee in bankruptcy of a surviving partner may not close the affairs of the partnership and proceed as though the surviving partner was not a bankrupt; all that the trustee can do is to take the remaining interest of the bankrupt partner after the firm obligations have been paid.⁵⁵ This doctrine of the lack of jurisdiction of the court of bankruptcy to adjudicate as to the bankruptcy of a partnership after the death of one partner is not recognized or upheld by some of the later cases. There is an apparent conflict of authority upon this question.⁵⁶ The only difficulty attending upon adjudication in such a case is the consequent interference with the administration of the probate court of the estate of the deceased partner. In the absence of express statutory authority it would seem more consistent to leave the creditors to their remedy in the probate court. The apparent lack of jurisdiction in the bankruptcy court to adjudicate the bankruptcy of a partnership where one of the members is dead is unfortunate, but it leads to confusion rather than denial of justice. The rights of creditors, in all ordinary cases, are fully conserved even though the administration of assets may be in two courts. The death of a partner after adjudication does not affect the proceeding.⁵⁷

(2) **INSANITY OF PARTNER.**—The effect of insanity of the alleged bankrupt on the jurisdiction of the court has already been noted.⁵⁸ Conceding that an insane person may not be adjudicated a bankrupt it has been held, nevertheless, that a partnership of which he was or is a member may be so adjudicated.

49. *Matter of Samuels & Lesser* (C. C. A., 2d Cir.), 32 Am. B. R. 436, 215 Fed. 845, revg. 30 Am. B. R. 293, 207 Fed. 195.

50. See as to estates of bankrupt decedents *ante*, p. 146.

Where a partnership is dissolved by death of a partner it is not subject to bankruptcy, and the voluntary petition in bankruptcy of the surviving partner only affects his individual estate. *In re Evans* (D. C., Ga.), 20 Am. B. R. 406, 161 Fed. 590.

51. *In re Temple*, Fed. Cas. 13,825; *Adams v. Terro*, 4 Fed. 802; *Vaccaro v. Security Bank* (C. C. A., 6th Cir.), 4 Am. B. R. 474, 103 Fed. 436, 43 C. C. A. 279.

Contract providing for continuance in case of death.—Where a partnership contract provided that upon the death of one partner, the partnership should be continued by the survivors for a certain period, the partnership and the surviving partners may be adjudicated involuntary bankrupts. *In re Coe* (D. C., N. Y.), 19 Am. B. R. 618, 154 Fed. 162. If the adjudication has been made, it cannot be attacked collaterally.

Wilson v. Parr, 115 Ga. 629, 8 Am. B. R. 230, 42 S. E. 5.

52. *In re Pierce* (D. C., Wash.), 4 Am. B. R. 489, 102 Fed. 977; *Vaccaro v. Security Bank* (C. C. A., 6th Cir.), 4 Am. B. R. 474, 103 Fed. 436; *Briswalter v. Long*, 14 Fed. 153; *In re Stevens*, Fed. Cas. 13,393.

53. *In re Pierce* (D. C., Wash.), 4 Am. B. R. 489, 102 Fed. 977; *Briswalter v. Long*, 14 Fed. 153.

54. *Vaccaro v. Security Bank* (C. C. A., 6th Cir.), 4 Am. B. R. 474, 103 Fed. 436.

55. *Moses v. Pond* (Sup. Ct., Spec. T. N. Y.), 4 Am. B. R. 655, 32 Misc. (N. Y.), 406, 66 N. Y. Supp. 600.

56. *In re Stein & Co.* (C. C. A., 7th Cir.), 11 Am. B. R. 536, 127 Fed. 547; *In re Coe* (D. C., N. Y.), 19 Am. B. R. 618, 154 Fed. 162, although in this case the partnership agreement expressly provided for the continuance of the partnership business for a certain period after the death of either partner.

57. See Bankr. Act, § 8, *post*.

58. See Bankr. Act, § 4, *ante*.

cated, and the firm property applied to the payment of the firm debts.⁵⁹ There is the same difficulty with this question as there is with that relating to the effect of the death of one of the partners upon the jurisdiction of the court. The statute does not apparently authorize the intervention of committees in involuntary proceedings against the lunatics they represent, so that where such committees have been appointed in proceedings to determine judicially the incompetency of a person, the jurisdiction of the State court would seem to supersede that of a court of bankruptcy and thus preclude the administration of the lunatic's estate in a proceeding instituted to adjudicate the bankruptcy of a partnership of which he was a member.

(3) **INFANCY OF PARTNER.**—If one of the partners is an infant the partnership itself may be adjudicated bankrupt and so may the individual members thereof who are of age, or the petition will be dismissed as to the partner who is an infant.⁶⁰

(4) **EXEMPTION OF PARTNER.**—A partnership and some of its members may be adjudicated involuntary bankrupts, although the other members belong to the exempt classes.⁶¹

III. PRACTICE BEFORE ADJUDICATION.

a. **In general.**—If all the partners petition voluntarily, the proceeding prior to adjudication is identical with an individual petition. The owing of debts,⁶² and the facts as to residence, domicile, or principal place of business,⁶³ must at least appear on the face of the petition to confer jurisdiction. Conversely, if the petition be involuntary, the facts as to the partners not being included in either of the excepted classes and owing at least \$1,000,⁶⁴ as to the provable debts of the petitioners and the number of the creditors,⁶⁵ as to the commission of an act of bankruptcy within four months,⁶⁶ and, in cases where insolvency is necessary to the act, that it existed at the time of its commission and also at the time of the filing⁶⁷ must clearly appear or the court will not acquire jurisdiction. It must also appear affirmatively that both the partnership as an entity and the individuals composing it were and are insolvent at the times mentioned.⁶⁸ A petition to have a partnership adjudicated bankrupt *nunc pro tunc*, for the purpose of which is to overturn transactions already closed, will usually be refused.⁶⁹ If an issue is raised as to the partnership in an involuntary proceeding, the burden is on the petitioners to show that there was a partnership.⁷⁰

59. In re Stein & Co. (C. C. A., 7th Cir.), 11 Am. B. R. 536, 127 Fed. 547. See also In re Ives (C. C. A., 6th Cir.), 7 Am. B. R. 692, 113 Fed. 911.

60. In re Duguid (D. C., N. C.), 3 Am. B. R. 794, 100 Fed. 274; In re Dunningan (D. C., Mass.), 2 Am. B. R. 628, 95 Fed. 428.

61. Matter of Disney (D. C., Md.), 33 Am. B. R. 656, 219 Fed. 294.

62. Bankr. Act, § 4-a.

63. Bankr. Act, § 2(1).

64. Bankr. Act, § 4-b.

65. Bankr. Act, § 59-b.

66. Bankr. Act, § 3-a. See In re Shapiro (D. C., N. Y.), 5 Am. B. R. 839, 106 Fed. 495; In re Grant (D. C., N. Y.), 5 Am. B. R. 837, 106 Fed. 496; In re Meyer (C. C. A., 2d Cir.), 3 Am. B. R. 559, 98 Fed. 976.

67. See p. 173, *ante*.

68. In re Blair (D. C., N. Y.), 3 Am. B. R. 588, 99 Fed. 76; In re Meyer (C. C. A., 2d Cir.), 3 Am. B. R. 559, 98 Fed. 976; In re Miller, 104 Fed. 764; Vaccaro v. Security Bank (C. C. A., 6th Cir.), 4 Am. B. R. 474, 103 Fed. 436; Matter of Samuels & Lessers (C. C. A., 2d Cir.), 32 Am. B. R. 436, 215 Fed. 845, revg. 30 Am. B. R. 293, 207 Fed. 195; Compare In re Bertenshaw (C. C. A., 8th Cir.), 19 Am. B. R. 577, 157 Fed. 363.

69. In re Mercur (D. C., Pa.), 8 Am. B. R. 275, 116 Fed. 655.

70. Jones v. Burnham (C. C. A., 3d Cir.), 15 Am. B. R. 85, 138 Fed. 986. See under heading "What constitutes bankruptcy," *ante*.

b. Petition by partners where all do not join.—(1) **IN GENERAL.**—It has been held, following the entity doctrine, that separate petitions must be filed by the firm and by the individuals.⁷¹ The better opinion is, however, to the contrary, viz., that but one petition need be filed.⁷² Where some but not all the partners file a voluntary petition the proceeding is voluntary as to the petitioning partners, but involuntary as to the nonjoining partners who, upon notification, do not join therein.⁷³ In such a case it is not necessary to allege or prove as to non-consenting partners the commission of an act of bankruptcy, or, in fact, any of the jurisdictional facts peculiar to involuntary applications;⁷⁴ but such partner may set up the defense of solvency, and upon that issue he is entitled to trial by jury.⁷⁵

(2) **RIGHTS OF NON-JOINING PARTNER.**—Under General Order VIII, the non-joining or absentee partner is entitled to the same notice as if petitioned against, and to answer to the petition and to allege and prove any of the facts which would be pertinent to a proceeding against the partnership.⁷⁶ A convenient form for notice to the non-consenting partners is found in the case of *In re Murray*.⁷⁷ This notice, of course, may be given by publication;⁷⁸ but such notice is so far jurisdictional that the consent of non-joining partners after adjudication of the bankruptcy of the firm will not render it valid.⁷⁹ It seems that immediately the partnership adjudication is granted, the proceeding becomes strictly voluntary.⁸⁰ It may be doubted whether the court has jurisdiction to adjudge the non-consenting insolvent partner a bankrupt individually unless the prayer of the petition asks individual adjudication,⁸¹

71. *In re Farley* (D. C., Va.), 8 Am. B. R. 266, 115 Fed. 359; *In re Barden* (D. C., N. C.), 4 Am. B. R. 31, 101 Fed. 53.

72. *In re Gray* (D. C., N. H.), 3 Am. B. R. 529, 98 Fed. 870; *In re Langslow* (D. C., N. Y.), 1 Am. B. R. 258, 98 Fed. 969.

73. *In re Murray* (D. C., Iowa), 3 Am. B. R. 601, 96 Fed. 600; *In re Carleton* (D. C., Mass.), 8 Am. B. R. 270, 115 Fed. 246.

Petition by continuing partner.—Where B., who had purchased the interest of his copartner E., filed a petition in bankruptcy signed B. & E. by B., the proceeding should be regarded as having been instituted by B., doing business as B. & E. *Matter of Baker & Edwards* (D. C., N. Car.), 35 Am. B. R. 469, 224 Fed. 611.

74. *In re Carleton* (D. C., Mass.), 8 Am. B. R. 270, 115 Fed. 246.

75. *In re Forbes* (D. C., Mass.), 11 Am. B. R. 787, 128 Fed. 137.

76. **Notice to non-joining partner.**—It seems that notice to an undisclosed partner is not necessary. *In re Harris* (D. C., Ohio), 4 Am. B. R. 132, 108 Fed. 517. As to non-joining partner being entitled to notice of proceeding, etc., see *In re Russell* (D. C., Iowa), 3 Am. B. R. 91, 97 Fed. 32; *In re Elliott*, 2 N. B. N. 350; *In re Moore*, Fed. Cas. 9,750, 5 Biss. 79; *In re Prankard*, Fed. Cas. 1,136, 1 N. B. R. 297; *In re Lewis*, Fed. Cas. 8,311, 2 Ben. 96; *In re Fowler*, Fed. Cas. 4,998, 1 Low. 161.

A petition to adjudge a partnership a voluntary bankrupt which is made by some of the partners without notice to the non-

joining partner is irregular and will not warrant the adjudication of the firm as bankrupts; such a defect is not cured by subsequent unverified consent signed by the attorneys for the non-joining partners. *In re Altman* (D. C., N. Y.), 2 Am. B. R. 407, 95 Fed. 263; *Matter of City Contracting & Bldg. Co.* (D. C., Hawaii), 29 Am. B. R. 171; *Armstrong v. Fisher* (C. C. A., 8th Cir.), 34 Am. B. R. 701, 224 Fed. 97.

77. (D. C., Iowa), 3 Am. B. R. 601, 96 Fed. 600.

78. See Bankr. Act, § 18, *post*.

79. *In re Russell* (D. C., Iowa), 3 Am. B. R. 91, 97 Fed. 32; *In re Murray* (D. C., Iowa), 3 Am. B. R. 601, 96 Fed. 600; *In re Altman* (D. C., N. Y.), 2 Am. B. R. 407, 95 Fed. 263.

80. Compare *In re Murray* (D. C., Iowa), 3 Am. B. R. 601, 96 Fed. 600, with *Metsker v. Bonebrake*, 108 U. S. 66, 27 L. Ed. 654.

81. *Chemical Bank v. Meyer*, *affd.* in *In re Meyer* (C. C. A., 2d Cir.), 3 Am. B. R. 559, 98 Fed. 976.

Rights of objecting partner.—In the case of *In re Junck v. Balthazard* (D. C., Wis.), 22 Am. B. R. 289, 169 Fed. 481, the court said: "It seems to me that the following conclusions are sustained by fair construction of the Bankrupt Act of 1898. First, that the objecting partner cannot be adjudicated against his will. Second, that such non-consenting partner does not hold a veto on the jurisdiction of the court over the partnership, as an entity. If this concession were made, the objecting partner

but, under principles discussed later in this section, that would seem immaterial, the partnership adjudication drawing to itself of necessity the administration of the individual estates as well. The rule is different where the non-consenting partner proves to be solvent. Where the same persons are members of distinct firms, it was held under the former law that they could not petition together.⁸² The entity doctrine seems to intensify rather than weaken this ruling. An alleged partner is not entitled to a jury trial of the question as to whether he was a partner at the time the petition was filed.⁸³ Where the petitioners are members of different partnerships with others who do not join, adjudication will undoubtedly be refused, but with leave to refile in the form of separate petitions.⁸⁴ It has been held that a partner may file a petition praying for adjudication against his partnership, either on the sole ground of the insolvency of the partnership and all its partners or on the sole ground that the partnership has, through one or more of the non-joining partners, committed an act of bankruptcy.⁸⁵

(3) INTERVENTION BY CREDITORS.—While the proceeding as to the non-joining partner may be involuntary, it is not involuntary so as to enable the creditor to intervene to resist the adjudication of the partnership.⁸⁶

c. Form of petition.—Form No. 2 should not be relied on too implicitly. The prayer of the petition should at least ask for an adjudication of the individuals as well as of the firm.⁸⁷ Careful practice also seems to com-

might bar the way to any discharge from partnership debts, and thus neutralize section 4-a of the act, which expressly confers 'the benefits of this act,' on any person who owes debts. Third, that the inherent right of the solvent partner to close up the affairs of the firm must be recognized by the court of bankruptcy. This right was not conferred by the bankruptcy act, neither can it be abridged or taken away by it. Balthazard, the surviving partner, might defeat the jurisdiction of the bankruptcy court in two ways: First, by proving the solvency of the firm; Second, by showing himself solvent, and agreeing to take upon himself the settlement of the partnership business, reporting to the court, according to the equitable rule of residuum, all assets remaining to be distributed by the court among the partnership creditors."

82. *In re Wallace*, Fed. Cas. 17,095.

83. *In re Samuels & Lesser* (D. C., N. Y.), 30 Am. B. R. 293, 207 Fed. 195, (revd. on other grounds, 32 Am. B. R. 436, 215 Fed. 845).

84. As to the amendment of petitions in these cases, see *In re Freund* (Ref., Iowa), 1 Am. B. R. 25; *In re McFaun* (D. C., Iowa), 3 Am. B. R. 66, 96 Fed. 592.

85. *In re Ceballos & Co.* (D. C., N. J.), 20 Am. B. R. 459, 161 Fed. 445.

86. Intervention by creditors.—In the case of *In re Carleton* (D. C., Mass.), 8 Am. B. R. 270, 115 Fed. 246, the court said: "Notwithstanding the decisions of the Supreme Court in *Metsker v. Bonebrake*, 108 U. S. 66, 2 Sup. Ct. 351, 27 L. Ed. 654, it appears to me that this court is not compelled to hold, either under the Act of 1867 and General Order 18, or under the Act of

1898 and General Order 8, that this petition is so far involuntary as to permit a creditor of the firm to intervene in order to resist adjudication. See *In re Murray* (D. C., Iowa), 3 Am. B. R. 601, 96 Fed. 600. As to the petitioner these proceedings are purely voluntary. As to him a creditor has no more right to intervene than in the case of any other voluntary petition. As to the non-joining partner, the proceedings are in some sense involuntary. As to intervention by creditors it is most convenient and most consistent with justice and the general scheme of the act, to hold that the right 'to make all defenses which any debtor proceeded against has a right to make,' is confined to the non-joining partner. If he makes any objection then, so far as adjudication is concerned, the petition is to be treated generally as if it were altogether voluntary. Had this been an ordinary voluntary petition by both partners the creditor could not have intervened to contest the adjudication. If partners are willing to be adjudicated bankrupt, whether on the petition of one or on that of all of them, they are to have their way." In the case of *In re Junck v. Balthazard* (D. C., Wis.), 22 Am. B. R. 289, 169 Fed. 481, the court said: "In the case of the non-consenting partner, the procedure as to him, is the same as in an involuntary case; but as to creditors, the petition is voluntary, and there is no room for the issue which the creditor attempts to raise by his intervention, and his answer may be stricken from the files."

87. *Matter of Wing Yick Co.* (D. C., Hawaii), 13 Am. B. R. 757, 2 U. S., D. C., Hawaii 259.

Petition to follow official form; amend-

mand that words indicating that both the partners and the individuals owe debts that they cannot pay in full, and offering to surrender both firm and individual properties, be inserted. It may be that the mere statement that debts are owed is sufficient to cover the jurisdictional requirement that partnerships cannot be adjudged bankrupt after the final settlement thereof, but it is better to allege that there has been no such settlement in very words; it has been held insufficient to state that the "copartners are insolvent."⁸⁸ If an act of bankruptcy is alleged in a petition against a partnership, consisting of a preferential transfer and a transfer with intent to hinder and delay creditors, the petition is sufficient though it neither alleges the insolvency of the individual partners, nor that the solvent partners, if any, consent to the adjudication.⁸⁹ If one partner lives in another jurisdiction, that fact should be stated. If a partner refuses to join, that fact should also be stated, and the prayer of the petition should include a request for the issue of the usual subpoena to him as if to an alleged bankrupt. The schedules should be complete,⁹⁰ both for the firm and for each partner. Where the petition is against a copartnership even greater care should be used. Here Form No. 3 is not reliable other than by way of suggestion; it does not contain all the jurisdictional allegations.⁹¹

IV. ADJUDICATION.

a. In general.—A partnership may be adjudicated bankrupt irrespective of any adjudication as to the individual partners.⁹² The adjudication may be in the name of an ostensible partner, where it appears that such name is

ment.—Where an adjudication is desired of petitioning partners as individuals as well as the firm, official Form No. 2 should not be literally followed, but there should be inserted in the prayer of the petition a request for an adjudication of the petitioning partners as well as of the firm. The omission of such an allegation may be supplied by amendment. *Matter of Lenoir-Cross & Co.* (D. C., Tenn.), 35 Am. B. R. 774, 226 Fed. 227.

Involuntary proceedings; petition.—Where a partnership has been dissolved and one partner has transferred his interest in the firm to his copartner, a petition in involuntary bankruptcy against the firm and the members thereof may be amended by striking out the firm and the partner so that an adjudication may be had against the copartner, although the partner opposes the amendment because he has claims against the copartner which came into existence after the date of the petition. *Matter of Young* (D. C., Mass.), 35 Am. B. R. 200, 223 Fed. 659.

88. *Matter of Wing Yick Co.* (D. C., Hawaii), 13 Am. B. R. 757, 2 U. S., D. C., Hawaii 259.

Petition not to allege act of bankruptcy.—Where a petition for voluntary bankruptcy is filed by one partner and opposed by another partner it is not required to allege that the firm had committed an act of bankruptcy. The better rule seems to be that in such case the ordinary averment that the firm has not sufficient assets to pay its obligations and is willing to submit its prop-

erty for distribution, is sufficient, and the filing of such a petition by one of the partners is of itself considered the equivalent to an act of bankruptcy. In *re Junck v. Baltazard* (D. C., Wis.), 22 Am. B. R. 289, 169 Fed. 481.

89. *Matter of Everybody's Market* (D. C., Okl.), 21 Am. B. R. 925, 173 Fed. 492.

90. This is Form No. 1, Schedule A (1), (2), (3), (4), (5), and B (1), (2), (3), (4), (5), and (6), with the summary.

Schedules by non-joining partner.—Upon an adjudication of bankruptcy against a firm the non-joining partner, although not liable to adjudication where there is no allegation of an act of bankruptcy committed by him individually, may be required to file a schedule of his debts and an inventory of his property, in accordance with the eighth General Order. *Matter of Lenoir-Cross & Co.* (D. C., Tenn.), 35 Am. B. R. 774, 226 Fed. 227.

91. As to these allegations, see *ante*, and compare "*Acts of Bankruptcy by a Partnership*," and similar paragraphs in this section, *post*.

92. In *re Meyer* (C. C. A., 2d Cir.), 3 Am. B. R. 559, 98 Fed. 977. See also *Matter of Livingston* (D. C., Hawaii), 13 Am. B. R. 357, 2 U. S. D. C., Hawaii 254. Text cited in *Matter of Latimer* (D. C., Pa.), 23 Am. B. R. 388, 174 Fed. 824.

When individual cannot be summarily adjudicated liable as partner.—A court of bankruptcy in proceedings against a partnership has no jurisdiction to administer upon the

that under which the partnership does business.⁹³ The entity doctrine requires that the adjudication, while substantially as prescribed by Form No. 12, should declare, after modifying its recitals slightly, that "The copartnership known as Smith & Jones, composed of John Smith and George Jones, and the said John Smith and George Jones as individuals⁹⁴ be and each is hereby declared and adjudged bankrupt." If, however, the petition asks for a partnership adjudication only, that alone should be granted.⁹⁵ The form of the adjudication is, however, important only to the bankrupts. The adjudication should conform to the contents of the petition and that which is not asked for should not be granted; so where the bankruptcy of the partnership itself is sought independent of that of the individual partners, adjudication should not be granted in respect to the partners although it may have been shown that the partners were each of them insolvent.⁹⁶ Where the partnership and the partners are insolvent, and one of them dies, the adjudication of the surviving partner, carries with it the entire rights and obligations of the partnership as it existed prior to the death of the other partner.⁹⁷ The order of adjudication is only conclusive against those entitled to be heard in the proceedings; it is not conclusive as to the existence of a partnership or the title to its assets as against a trustee, of one of the alleged partners who was not permitted to intervene.⁹⁸

b. Effect of adjudication on discharge.—(1) **IN GENERAL.**—If the adjudication is of the firm only, the discharge following it will be a bar only to firm debts.⁹⁹ If the application is for individual bankruptcies only, the discharge will not affect firm liabilities.¹⁰⁰ But, while in the first case it would seem necessary that the individuals file new separate petitions, in the latter case an amendment of the petition and adjudication praying for the partnership bankruptcy has been allowed. Where new individual petitions are filed, they may be consolidated with the pending partnership proceeding. Where,

estate of an alleged secret partner without declaring him a bankrupt or finding him insolvent. Matter of Kramer & Muchuck (D. C., Pa.), 33 Am. B. R. 223, 218 Fed. 138.

^{93.} Matter of Harris (D. C., Ohio), 4 Am. B. R. 132, 108 Fed. 517.

^{94.} This latter only if individual bankruptcy has been asked. See Hagar & Alexander Bankr. Forms, 2d Ed., p. 73.

^{95.} See Bank v. Meyer (D. C., N. Y.), 1 Am. B. R. 565, 92 Fed. 896, and In re Sanderlin (D. C., N. C.), 6 Am. B. R. 384, 109 Fed. 857; though the doctrine of the former case seems to be accepted with caution in In re Stokes (D. C., Pa.), 6 Am. B. R. 262, 106 Fed. 312.

^{96.} See In re Meyer (C. C. A., 2d Cir.), 3 Am. B. R. 559, 98 Fed. 976; In re Ceballos & Co. (D. C., N. J.), 20 Am. B. R. 467, 161 Fed. 451.

For form of order of adjudication, see Hagar & Alexander Bankr. Forms, 2d Ed., p. 69.

^{97.} Matter of Stringer (D. C., N. Y.), 37 Am. B. R. 713, 234 Fed. 454.

^{98.} Manson v. Williams, 213 U. S. 453, 22 Am. B. R. 22, 53 L. Ed. 869, affg. 18 Am. B. R. 674, 153 Fed. 525.

^{99.} In re Hale (D. C., N. C.), 6 Am. B. R. 35, 107 Fed. 432; Dodge v. Kaufman (Sup. Ct., N. Y.), 15 Am. B. R. 542, 46 N. Y. Misc. 248. Where there is only a partnership adjudication, individual discharges cannot be granted. In re Pincus (D. C., N. Y.), 17 Am. B. R. 331, 147 Fed. 621; In re Bertenshaw (C. C. A., 8th Cir.), 19 Am. B. R. 577, 157 Fed. 363.

Individual estates.—The decisions to the effect that the bankruptcy of a partnership does not necessarily draw to the court of bankruptcy the administration of the individual estates of the partners are in point upon this proposition. In re Stein (C. C. A., 7th Cir.), 11 Am. B. R. 536, 127 Fed. 547, 62 C. C. A. 272; Strause v. Hooper (D. C., N. C.), 5 Am. B. R. 225, 105 Fed. 590; In re Duguid (D. C., N. C.), 3 Am. B. R. 794, 799, 100 Fed. 274; In re Blair (D. C., N. Y.), 3 Am. B. R. 588, 99 Fed. 76.

^{100.} In re Myers (D. C., N. Y.), 3 Am. B. R. 260, 97 Fed. 753; In re Morrison (D. C., Tex.), 11 Am. B. R. 498, 127 Fed. 186. But compare In re Feigenbaum (D. C., N. Y.), 7 Am. B. R. 339, 151 Fed. 508.

however, the adjudication is of the individual partners only, a question has arisen which is still undetermined.

(2) **DISCHARGE OF PARTNERSHIP DEBTS.**—Following the entity doctrine and the controlling authorities under the former law,¹⁰¹ the earlier cases held that to cut partnership debts there must be a partnership adjudication.¹⁰² The later cases, however, seem to hold that a discharge resting on an individual adjudication will, provided there be no firm assets and the firm creditors are scheduled and receive notice, be an available bar to subsequent suits on the bankrupt's partnership liabilities.¹⁰³ While such a view is necessarily an exception to the entity doctrine, it seems more reasonable. The Meyers case¹⁰⁴ is clearly distinguishable, for in that case there were firm assets.¹⁰⁵ If there are no firm assets and the firm is insolvent, a judgment on a partnership debt may be released by the discharge of an individual partner.¹⁰⁶ It has also been held that where a partner is adjudicated a bankrupt upon his individual petition, which is silent as to partnership assets and liabilities, although his schedules disclose both individual and firm debts, the bankrupt is not entitled to a discharge from partnership debts, although the firm no longer exists and is without assets.¹⁰⁷ It is difficult to declare a rule based upon the majority of the cases. A very unsatisfactory conflict exists among the authorities. It may be asserted, however, in view of the reasoning in nearly all the cases, that where there are no firm assets and the firm creditors are duly scheduled and receive notice, the individual discharge of a bankrupt partner should operate as a discharge from partnership debts.¹⁰⁸ The scheduling of the firm debts

101. See *Amsinck v. Bean*, 22 Wall. 395-405, and other cases cited in Judge Brown's opinion in the Meyers case, immediately *post*.

102. In *re Freund* (Ref., Iowa), 1 Am. B. R. 25; In *re Meyers* (D. C., N. Y.), 2 Am. B. R. 707, 96 Fed. 408. In the case of *In re Mercur* (C. C. A., 3d Cir.), 10 Am. B. R. 505, 122 Fed. 384, 58 C. C. A. 472, it was held that a trustee in bankruptcy of the individual estates of all the partners who had been adjudged bankrupts could not draw to himself and administer the property of the unadjudicated partnership.

103. In *re Laughlin* (D. C., Iowa), 3 Am. B. R. 1, 96 Fed. 589; *Jarecki Mfg. Co. v. McElwaine* (D. C., Ind.), 5 Am. B. R. 751, 107 Fed. 249; In *re Feigenbaum* (D. C., N. Y.), 7 Am. B. R. 339, 151 Fed. 508; In *re Kaufman* (D. C., N. Y.), 14 Am. B. R. 393, 136 Fed. 262; *Loomis v. Wallblom* (Sup. Ct., Minn.), 94 Minn. 392, 13 Am. B. R. 687, 102 N. W. 1114; *Dodge v. Kaufman* (Sup. Ct., N. Y.), 15 Am. B. R. 542, 46 N. Y. Misc. 248, 91 N. Y. Supp. 727; *N. Y. Institution for the Deaf & Dumb v. Crockett* (Sup. Ct., N. Y.), 17 Am. B. R. 233, 117 N. Y. App. Div. 269, 102 N. Y. Supp. 412.

104. 2 Am. B. R. 707, 96 Fed. 408.

105. Likewise of *In re McFaun* (D. C., Iowa), 3 Am. B. R. 66, 96 Fed. 592, where there was no notice to firm creditors.

106. *Berry Bros. v. Sheehan* (Sup. Ct., N. Y.), 17 Am. B. R. 322, 115 N. Y. App. Div. 488.

107. In *re Morrison* (D. C., Tex.), 11 Am.

B. R. 498, 127 Fed. 186; In *re Laughlin* (D. C., Iowa), 3 Am. B. R. 1, 96 Fed. 589.

108. **Discharge from partnership debts.**—In *re McFaun* (D. C., Iowa), 3 Am. B. R. 66, 96 Fed. 592; *New York Institution for the Deaf and Dumb v. Crockett*, 17 Am. B. R. 233, 117 N. Y. App. Div. 269, 102 N. Y. Supp. 412, in which case the court states, that the tendency of the decisions in the State courts is toward holding that where a court acquires jurisdiction and grants a full discharge, in the language of the statute, from all provable debts properly scheduled, that joint as well as individual debts are discharged; In *re Kaufman* (D. C., N. Y.), 14 Am. B. R. 393, 136 Fed. 262, holding that where an individual partner on adjudication, schedules firm debts his discharge releases him from liability thereon, and after the term at which it was granted, may be amended so as to discharge him as an individual from any liability on account of the debts of the firm.

In the case of *Jarecki Mfg. Co. v. McElwain* (C. C. A., Ind.), 5 Am. B. R. 751, 107 Fed. 249, the court said: "There is some disagreement in the authorities as to whether a discharge of an individual partner releases him from liability upon partnership debts. The great weight of authority is in favor of the doctrine that the discharge of a partner on his individual petition operates as a release both from individual and his partnership indebtedness. The cases which held to the contrary seemed to be based upon a misconception of the extent of the rights of the trustee over the bankrupt's

and notice to creditors are prerequisites to a discharge of an individual partnership from firm debts.¹⁰⁹ Of course, if the adjudication is of the partnership but not of all the partners, individual creditors of the non-consenting insolvent partner are not affected by the discharge.¹¹⁰

V. JURISDICTION WHERE PARTNERS ARE DOMICILED IN DIFFERENT DISTRICTS.

Subsection *c* provides that: "The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property." The analogous provision in the law of 1867 was: "If such copartners reside in different districts, that court in which the petition was first filed shall retain exclusive jurisdiction over the case." This clause did not occur in the law of 1841. General Order XVI under the law of 1867 is substantially the same as present General Order VI, the last two sentences of which are as follows: "In case two or more petitions shall be filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed having jurisdiction shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should

estate and as to the effect upon the firm of the bankruptcy of one of its members. The cases holding that a discharge granted to one member of a firm does not release him from partnership indebtedness, where he alone is adjudged a bankrupt, proceed on the principle that a trustee could not acquire possession of and administer the assets of the firm. In so holding, it seems to have been overlooked, that the bankruptcy of one member is *ipso facto* a dissolution of the firm, and that while the solvent partner would be allowed to administer the partnership assets, yet the trustee in bankruptcy is entitled to the bankrupt's share of the partnership assets, after the payment of the partnership debts. The separate estate of the bankrupt partner and his beneficial interests in the firm, after the payment of firm debts, is to be administered by the trustee for the payment of the bankrupt's individual debts. The adjudication of one partner as a bankrupt, brings within the jurisdiction of the court his entire estate for administration, and if, after the payment of his individual debts out of his individual estate, any surplus remains, it will be applicable to the payment of firm indebtedness. For the purpose of reaching any such surplus, firm creditors may prove against the estate of the bankrupt partner. The most elaborate and exhaustive discussion of the subject under the bankrupt act of 1867, is found in the case of *Wilkins v. Davis*, Fed. Cas. 17,664, and in my opinion, the reasoning in that case as applied to the present bankrupt act, clearly demonstrates

that the discharge of one partner, releases him from all partnership indebtedness."

109. Petition and schedules.—In the case of *In re Laughlin* (D. C., Ia.), 3 Am. B. R. 1, 96 Fed. 591, the court said: "To become entitled to a discharge barring the firm creditors under such circumstances, the proper foundation must be laid in the proceedings instituted on behalf of the bankrupt partnership. In the petition originally filed it should be averred that the petitioner is indebted in his individual capacity, if such be the fact, and also as a member of a firm, naming it and giving the names of the several partners; and the petition should pray for the discharge from the firm as well as his individual debts. To this petition should be attached the proper schedules setting forth the firm debts, the firm property, if any, and all other matters, the same as is required in the case of a proceeding brought by one of the partners." (See also *In re Meyers* (D. C., N. Y.), 3 Am. B. R. 260, 97 Fed. 757.)

Notice to firm creditors.—Where one of the members of a firm desires a discharge from firm as well as individual debts, a notice to that effect must be contained in the notice given of the first meeting of creditors, in the petition for a discharge, and in the notice to creditors therefor. In *re Russell* (D. C., Ia.), 3 Am. B. R. 91, 97 Fed. 32. See also *In re Morrison* (D. C., Tex.), 11 Am. B. R. 498, 127 Fed. 186.

110. Compare, for collateral attack and generally on the effect of discharges on partnership liabilities, discussion under Sections Fourteen and Seventeen of this work.

proceed with the case, order them to be transferred to that court." It will be noticed that this provision supplements subdivision *c* and gives it effect. The statute and the general order modified the rigid rule of the former law, that the court which has acquired jurisdiction of one of the partners had exclusive jurisdiction over both subject-matter and of the partners.¹¹¹ Under the general order the court retaining jurisdiction may transfer the case to another court for the greater convenience of the parties in interest, thus substituting the flexible rule of convenience of parties in the place of the rigid rule of the former law.¹¹² The proceeding may be brought in another district where the partner might have petitioned as an individual.¹¹³

VI. TRUSTEES OF BANKRUPT PARTNERSHIPS.

a. In general.—This section contains certain special provisions applicable to trustees of bankrupt partnerships. Except as otherwise expressly provided in this section the powers and duties of such trustees are the same as in the case of trustees of individuals. It will not be attempted under this section to declare rules governing in all respects partnership trustees in the performance of their duties. Subdivision *b* provides that: "In other respects (except as to the appointment of trustees) so far as possible the estate shall be administered as herein provided for other estates."

b. Choice of trustees.—Subdivision *b* provides that "The creditors of the partnership shall appoint the trustee." This preference in the choice of the trustee was also contained in the acts of 1841 and 1867.¹¹⁴ There is here an apparent discrimination in favor of the joint creditor, for the individual creditor has a petitioning creditor's debt in proceedings against the copartnership;¹¹⁵ so also firm creditors can vote for the trustees of the individual estates;¹¹⁶ but an individual creditor of one of the partners may not vote at a meeting of the firm creditors for a partnership trustee.¹¹⁷ This restriction only applies in the case of a joint petition and not where a petition is separately brought against an individual partner.¹¹⁸ The reason for the apparent preference of firm over individual creditors will appear hereafter.¹¹⁹ Where possible and convenient the same trustees should be appointed for partnership and individual estates; but separate trustees may be appointed in the discretion of the court where the circumstances demand it.¹²⁰

c. Powers in respect to individual estates.—On the appointment of a trustee of a partnership, he may take possession and administer the property of one

111. *In re Boylan*, Fed. Cas. 1,757; *In re Penn*, Fed. Cas. 10,927.

Where the partner resided in districts other than that which was the place of the partnership business, it was held under the former law that an involuntary petition against the firm could be filed only in the district where the business was conducted. *Cameron v. Canieo*, Fed. Cas. 2,340.

112. *In re Waxelbaum* (D. C., N. Y.), 3 Am. B. R. 392, 98 Fed. 589.

As to the transfer of cases where petitions are filed against partners in different districts, see Bankr. Act, § 32, *post*. This whole question of transfer for the convenience of parties is ably discussed in the case of *In re Sears* (D. C., N. Y.), 7 Am. B. R. 279, 112 Fed. 58.

113. *In re Blair* (D. C., N. Y.), 3 Am. B. R. 588, 99 Fed. 76, holding also that the petition may be amended to show jurisdiction; *In re Sears* (C. C. A., 2d Cir.), 8 Am. B. R. 713, 117 Fed. 294.

114. Compare *In re Phelps*, Fed. Cas. 11,071.

115. *In re Mercur* (D. C., Pa.), 2 Am. B. R. 626, 95 Fed. 634.

116. *In re Webb*, Fed. Cas. 17,317.

117. *In re Eagles & Crisp* (D. C., N. C.), 3 Am. B. R. 733, 99 Fed. 696.

118. *In re Beck* (D. C., Mass.), 6 Am. B. R. 554, 110 Fed. 140.

119. For the method of choosing the trustee, see Bankr. Act, §§ 44 and 56, *post*.

120. *In re Currie* (D. C., Mich.), 28 Am. B. R. 834, 197 Fed. 1012.

of the partners so far as is necessary to settle the partnership estate.¹²¹ He becomes, by virtue of his office, the trustee of the separate estates of the individual partners, for the purpose of paying the partnership debts.¹²² Where the adjudication is that of a bankrupt partner, the trustee may not administer the affairs of solvent members of the firm, and his duties will be restricted to the ascertained interest of the bankrupt partner in the partnership; if any controversy arises as to such interest the solvent partner's claim is adverse, and he may insist that such claim be adjudicated out of bankruptcy.¹²³

d. Separate account.—Subdivision *d* of this section requires the trustee to keep separate accounts of the partnership property and of the property belonging to the individual partners. This follows from the very nature of his duties and the interrelation of the debts and assets over which he is given charge. There were similar clauses in the laws of 1841 and 1867. The necessity of keeping separate accounts is obvious.¹²⁴

e. Expenses and fees.—It is provided in subdivision *e* that "the expenses shall be paid from the partnership property and the individual property in such proportion as the court shall determine." There are few reported cases under the present law.¹²⁵ In computing trustees fees where the partnership and its members are joined in one petition, the proceeding is regarded as a single proceeding, and allowances are not to be made from partnership and individual estates, separately computed.¹²⁶

VII. PROVABILITY OF DEBTS.

a. In general.—The provisions of § 63 of the bankruptcy act declaring the debts which may be proved and allowed against a bankrupt estate are applicable to debts against a partnership. A member of a partnership being liable for all of the partnership debts, a debt against the partnership is provable against the individual estate of the bankrupt member.¹²⁷

b. Claims of partnership against individual partners and vice versa.—(1) **STATUTORY PROVISION.**—Subsection *g* provides that "the court may permit the proof of the claim of the partnership estate against individual assets and *vice versa*." But this subsection does not permit a solvent partner to prove against the separate estate of his bankrupt partner until all the partnership creditors have been paid in full;¹²⁸ nor a retired partner on notes received by him for his interest in the firm.¹²⁹

^{121.} *Dickas v. Barnes* (C. C. A., 6th Cir.), 15 Am. B. R. 566, 140 Fed. 849; *Matter of Latimer* (D. C., Pa.), 23 Am. B. R. 388, 174 Fed. 824; *Tate v. Brinser* (D. C., Pa.), 34 Am. B. R. 660, 226 Fed. 878; *Francis v. McNeal* (C. C. A., 3d Cir.), 26 Am. B. R. 555, 186 Fed. 481, *affd.* 228 U. S. 695, 30 Am. B. R. 244, 57 L. Ed. 1029.

^{122.} *In re Stokes* (D. C., Pa.), 6 Am. B. R. 262, 106 Fed. 312; *In re Smith* (D. C., Ind.), 2 Am. B. R. 9, 92 Fed. 35; *Francis v. McNeal* (C. C. A., 3d Cir.), 26 Am. B. R. 555, 186 Fed. 481, *affd.* 228 U. S. 695, 30 Am. B. R. 244, 57 L. Ed. 1029.

^{123.} *Tate v. Brinser* (D. C., Pa.), 34 Am. B. R. 660, 226 Fed. 878. See *Marnet Oil & Gas Co. v. Haley* (C. C. A., 5th Cir.), 33 Am. B. R. 266, 218 Fed. 45.

^{124.} *In re Denning* (D. C., Mass.), 8 Am. B. R. 133, 114 Fed. 219.

^{125.} For expenses of administration in general, see *Bankr. Act*, §§ 63 and 64, *post*. See *In re City Contracting & Bldg. Co.* (D. C., Hawaii), 30 Am. B. R. 133.

^{126.} *Matter of Rider* (D. C., Mont.), 34 Am. B. R. 280, 220 Fed. 193; *In re McMurtrey* (D. C., Tex.), 15 Am. B. R. 427, 142 Fed. 853; *In re Barden* (D. C., N. C.), 4 Am. B. R. 31, 101 Fed. 553; *In re Farley* (D. C., Va.), 8 Am. B. R. 266, 115 Fed. 359.

^{127.} *In re Hee* (D. C., Hawaii), 13 Am. B. R. 8, 2 U. S., D. C., Hawaii 159; *In re Webb*, Fed. Cas. 17,317; *Wilkins v. Davis*, Fed. Cas. 17,664; *In re Frear*, Fed. Cas. 5,074.

^{128.} *In re Stevens* (D. C., Vt.), 5 Am. B. R. 9, 104 Fed. 323; *Emery v. Bank*, Fed. Cas. 4,446.

^{129.} *In re Denning* (D. C., Mass.), 8 Am. B. R. 133, 114 Fed. 219.

(2) PRIOR PAYMENT OF CREDITORS.—The general rule is that the separate estate of one partner shall not claim against the joint estate of the partnership in competition with joint creditors, nor shall the joint estate claim against the separate estate in competition with the separate creditors.¹³⁰ One principle may be deduced from the cases to the effect, that where the partnership and the individual members thereof are all adjudged bankrupts and the estates of all are before the court, the rule of distribution prescribed by § 5 (f), is not to be varied by the proof of the claim of a partnership estate against an individual estate and *vice versa*, as provided in § 5(g). In other words, the joint creditors of a bankrupt partnership must be paid before the claim of an individual partner may be paid, and, on the other hand, the individual creditors of the bankrupt partners must be paid before the claim of the partnership against the partner will be allowed.¹³¹ The claim of a partner for money advanced to the firm in excess of his agreed contribution to the capital of the firm is subject to this principle; such claim may not share in the distribution of the estate of the bankrupt partnership until all the joint creditors are paid.¹³² Subsection g of this section was evidently not intended to modify the rule that before claims of partners against a partnership may be paid firm debts must be disposed of. There must be some clearly expressed statutory provision in order that the partner may have this privilege. This subsection is to be construed as consummating the evident purpose of the act to secure to creditors of the firm and all the members thereof an equitable distribution of the assets belonging to the respective estates. This distribution must be made in accordance with well recognized principles, applicable to the rights and liabilities of partnerships and the partners comprising the same.¹³³ A

130. *Amsinck v. Bean*, 22 Wall. 395, 402, 22 L. Ed. 801. See as to construction of subsection g in connection with sub-section f. *Farmers & Mechanics Nat. Bank of Philadelphia v. Ridge Ave. Bank*, 240 U. S. 498, 36 Am. B. R. 728; 60 L. Ed. 767.

131. *In re Filmar* (C. C. A., 7th Cir.), 24 Am. B. R. 194, 177 Fed. 170; *In re Terens* (D. C., Wis.), 23 Am. B. R. 680, 175 Fed. 495; *In re Ervin* (D. C., Pa.), 6 Am. B. R. 356, 109 Fed. 135, *affd.* 7 Am. B. R. 256, 112 Fed. 124.

Claim of partner against partnership estate.—*In the case of In re Denning* (D. C., Mass.), 8 Am. B. R. 133, 114 Fed. 219, the court said: "It is plain that the bankrupt's former partner cannot be allowed to prove in this case. To permit him to do so, would permit him to compete with his own creditors. There are joint creditors in this case who have proved, and until the claims of the joint creditors are settled, the partner cannot share in the distribution of his former partner's estate. There is nothing in section 5 (g) of the act to change this well-established rule."

In the case of Matter of Union Bank (C. C. A., 6th Cir.), 25 Am. B. R. 148, 184 Fed. 224, it was held that while the trustee of a bankrupt partnership is entitled to prove a claim of the partnership against the individual estate of one of the bankrupt partners, his claim cannot share therein *pari passu* with the claims of other individual

creditors, but only after the other individual creditors have been paid in full. It was further held that the claim of the partnership cannot share *pari passu* with the claims of other creditors of one of the bankrupt partners, on the principle that a partnership is an entity distinct from its membership, since the recognition of the partnership as an entity cannot, in the absence of express statutory authority, be said to work a change in the rule fixing the substantial rights of creditors respectively of the partnership and of its individual members.

132. *In re Effinger* (D. C., Md.), 25 Am. B. R. 930, 184 Fed. 728, in which case this entire question has been carefully considered and the authorities cited and applied.

133. Construction of subsection (g).—There is no indication in this subsection taken as a whole, that there was any intent on the part of Congress to change the rule of distribution which had heretofore been held to be equitable. The intent was simply to remove all arbitrary rules of practice and procedure which had interfered with the distribution of the estates of bankrupt partnerships and partners, in accordance with the settled rules of equity. The subsection does not change the previously existing rules of distribution, but merely abolishes certain technical rules of procedure to secure equitable distribution of such estates. *In re Effinger* (D. C., Md.), 25 Am. B. R. 930, 184 Fed. 728; *Farmers & Mechanics' Nat. Bank of*

solvent partner cannot prove his own separate debt against the separate estate of the bankrupt partner so as to come into competition with the joint creditors of the partnership.¹³⁴ But this rule would probably not apply where a creditor of a bankrupt estate becomes, after the debt is incurred, a joint partner of the bankrupt in an entirely separate and distinct enterprise.¹³⁵

(3) SUBROGATION OF PARTNER.—It is, however, well settled that the right of subrogation exists between a partnership estate and the estate of a partner.¹³⁶ Hence, when a retired partner is later compelled to respond to his partnership liability, because the continuing partner is unable to do so, he becomes subrogated to the claim of the creditors *pro tanto*, and thus may prove against the partnership estate as well as the separate estate of the bankrupt partner.¹³⁷ Where a retired partner left the money which he had invested in the firm as a loan, and provides in his will that such money should be permitted to remain in the firm for five years after his death, the legatee is entitled to prove the claim against the partnership, upon its being adjudicated a bankrupt some years after the death of the testator; under such circumstances, the interest of the decedent did not remain in the firm as capital at the risk of the business but was a loan to the firm.¹³⁸ Where one partner pays all the debts of a partnership, whose other member has been adjudged a bankrupt, the sum which may be shown to be due him upon a partnership accounting is a debt which may be proved against the estate of the bankrupt partner.¹³⁹

VIII. MARSHALLING ASSETS AND DISTRIBUTION.

a. So as to prevent preferences.—The court is authorized by subsection *g* of this section to “marshal the assets of the partnership estate and individual estates so as to prevent preference.” These words and the clause in which they are found supplement and emphasize the first clause of the subsection. Whether “preferences” here means a bankruptcy preference as defined in § 60-a is doubtful. Yet the estate of the individual being often a creditor of the copartnership and *vice versa*, it is possible that the definition of “preference” there phrased may apply. It has been said to be “aimed at the fraud brought about by partners agreeing just before bankruptcy to change joint into separate estates,” thus accomplishing preferences to the separate creditors.¹⁴⁰ But it is hardly supposable that the partners so agreeing will be able

Philadelphia v. Ridge Ave. Bank, 240 U. S. 728, 36 Am. B. R. 728, 60 L. Ed. 767.

In the case of *In re Henderson* (D. C., W. Va.), 16 Am. B. R. 91, 142 Fed. 588, *affd.* 17 Am. B. R. 838, 149 Fed. 975, 79 C. C. A. 485, the court said: “Clause (f) states the precepts of the law. Clause (g) relates to the procedure under it. The law in (f) demands that ‘the net proceeds shall be appropriated’ as directed by it, while (g) provides simply that in carrying out these precepts and as an aid in doing so, the court may do certain things, to-wit: permit proof of claims of partnership estates against individual estates and *vice versa* and marshal the assets of such estates so as to prevent preferences and secure equitable distribution of such estates.”

134. *Amsinck v. Bean*, 22 Wall. 395, 402, 22 L. Ed. 801, in which the reason was stated as being that the solvent partner is himself liable to all the joint creditors which is suffi-

cient to show that in equity he cannot be permitted to claim any part of the funds of the bankrupt partner before all the creditors to whom he is liable are fully paid.

135. *Matter of Strawbridge* (Ref., Pa.), 25 Am. B. R. 355.

136. *In re Dillon* (D. C., Mass.), 4 Am. B. R. 63, 100 Fed. 627; *In re Bates* (D. C., Vt.), 4 Am. B. R. 56, 100 Fed. 263; *In re May*, Fed. Cas. 9,327; *In re Foot*, Fed. Cas. 4,906.

137. Compare generally on this subject § 40(3) of the English Act of 1883, General Rule No. 293, and cases cited in *Baldwin on Bankruptcy* (8th Ed.), pp. 510-520.

138. *Matter of Lough & Burrows* (C. C. A., 2d Cir.), 25 Am. B. R. 597, 182 Fed. 961.

139. *Matter of Hirth* (D. C., Minn.), 26 Am. B. R. 666, 189 Fed. 926.

140. The preferences supposed to interfere with a just and equitable distribution may result from the action of partners calculated

to show themselves solvent at the time and, unless they can, the transaction becomes actually fraudulent and may be disregarded. The evident purpose of the subsection is not only to prevent preferences, in the technical meaning of that word, but also secure the equitable distribution of the assets of the several estates among both firm and individual creditors.¹⁴¹

b. Marshalling estate of unadjudicated partner against his consent.—Subsection *g* authorizes the court to marshal and distribute the assets of the partnership estate and individual estates. Subsection *h* provides in effect that where one or more but not all of the members of a partnership are adjudged bankrupt, the partnership property shall not be administered in bankruptcy unless by the consent of the unadjudicated partner. This provision is for the purpose, as will hereafter be considered, of enabling a solvent partner to settle the partnership business outside of bankruptcy. The consent here referred to is only required to prevent bankruptcy where a proceeding is against one or more of the partners but not against the partnership. Such consent is not required when the proceedings are against the partnership and one of its members.¹⁴² If the proceeding is directed against the partnership, subsection *g* permits the marshalling of the assets of the partnership and of the individual partners so as to provide for the payment of the partnership debts.¹⁴³ The subsection declares a rule of administration and does not apply until the partnership property is placed in *custodia legis*.¹⁴⁴ The language of this subsection must be reasonably construed with the view to carrying into effect its obvious purpose. It does not provide for the adjudication of an individual partner who does not consent thereto.¹⁴⁵ Under the entity doctrine a partnership may be adjudged a bankrupt, irrespective of an adjudication of bankruptcy against any of its members. But this doctrine may not be applied so as to prevent the exercise of the power expressly conferred upon a court to “marshal” the estates of the partnership and of the partners. Where the circumstances demand it, the court will upon adjudication of partnership, administer not only the estate of the partnership, but also the estates of partners who have not been adjudicated bankrupts.¹⁴⁶ So that where the partnership has been

to convert partnership property into individual assets, thus giving undue advantage to individual creditors. In *re Terens* (D. C., W. Va.), 23 Am. B. R. 680, 688, 175 Fed. 495.

141. In *re Denning* (D. C., Mass.), 8 Am. B. R. 133, 113 Fed. 219; In *re Effinger* (D. C., Md.), 25 Am. B. R. 930, 184 Fed. 728.

142. *Armstrong v. Fisher* (C. C. A., 8th Cir.), 34 Am. B. R. 701, 224 Fed. 97, in which case it was held that § 5h, requiring consent of the solvent partner is inapplicable to a case of this character, is limited in its effect to those cases in which one or more but not all of the partners have been, and the partnership has not been, adjudged bankrupt, and that even if such a case as that in hand were governed by section 5-h the failure of the petitioner to object to the administration of the partnership property in bankruptcy and himself to settle the partnership business, would estop him from successfully claiming that his individual estate could not be drawn into and administered by the bankruptcy court. Citing *Francis v. McNeal*,

228 U. S. 695, 700, 701, 30 Am. B. R. 244, 57 L. Ed. 1020.

143. In *re Meyer* (C. C. A., 2d Cir.), 3 Am. B. R. 559, 98 Fed. 976; *Dickas v. Barnes* (C. C. A., 6th Cir.), 15 Am. B. R. 566, 140 Fed. 849.

144. *Matter of McConnell & Williams* (D. C., Cal. Ref.), 32 Am. B. R. 589.

145. In *re Bertenshaw* (C. C. A., 8th Cir.), 19 Am. B. R. 577, 157 Fed. 363, in which the court said: “No express provision can be found in this legislation and no indication or implication is perceived in it that the adjudication of a partnership draws into the administration of its estate in the court of bankruptcy, the property of the solvent partners who are not adjudged bankrupts.”

146. In *re Meyer* (C. C. A., 2d Cir.), 3 Am. B. R. 559, 98 Fed. 976; *Dickas v. Barnes* (C. C. A., 6th Cir.), 15 Am. B. R. 566, 140 Fed. 849; *Francis v. McNeal* (C. C. A., 3d Cir.), 26 Am. B. R. 555, 186 Fed. 481. *affd.* 228 U. S. 695, 30 Am. B. R. 244, 57 L. Ed. 1020, in which case the court said: “It is settled that a partnership is an entity

adjudicated in bankruptcy, an estate of one of the partners, who is solvent and has not been adjudged a bankrupt, may be administered by the trustee, when necessary for the payment of the partnership debts.¹⁴⁷ As has already been indicated, a partnership may not be adjudicated a bankrupt unless the partnership and all its members are insolvent, in those cases where insolvency is an essential element in the act of bankruptcy.¹⁴⁸ In such cases, it appearing that the partnership and the members thereof are insolvent, the assets of all the members are drawn into the proceeding for administration, although adjudication be against the bankrupt partnership only.¹⁴⁹ And even though one of the partners was chiefly engaged in farming, and therefore not subject to bankruptcy, his estate, he being insolvent, may be brought into the proceeding for adjudication.¹⁵⁰ While the court has jurisdiction over the interest of the bankrupt partners in the partnership property, the solvent partner, may, after that interest has been ascertained and set apart, insist that the partnership property be administered elsewhere than in bankruptcy.¹⁵¹

c. Distribution.—(1) **IN GENERAL.**—It is provided in subsection *g* that the court may marshal the partnership and individual estates, “and secure the equitable distribution of the property of the several estates,” and subsection *f* provides for the appropriation of the net proceeds of the several estates to the payment of the debts either of the partnership or of the partner as therein directed. Where the adjudication is of the partnership only and

which may be adjudged a bankrupt, irrespective of the adjudication of bankruptcy against any of its members. Undoubtedly, in a case where a partnership and all its members have been adjudged bankrupts, the trustee of the partnership may administer the estates of the partnership and its members, and as we read section 5, the trustee of the partnership which has been adjudged a bankrupt, may, in certain cases, to be hereafter mentioned, administer the estates of its undjudicated members;” *Matter of Latimer* (D. C., Pa.), 23 Am. B. R. 388, 174 Fed. 824, holding that the adjudication of a partnership draws to the court of bankruptcy, for administration, the individual estates of the partners, though as individuals they have not been adjudicated bankrupt. See *In re Duke & Son* (D. C., Ga.), 29 Am. B. R. 93, 199 Fed. 199.

147. *Tate v. Brinser* (D. C., Pa.), 34 Am. B. R. 660, 226 Fed. 878; citing *Francis v. McNeal* (C. C. A., 3d Cir.), 26 Am. B. R. 555, 186 Fed. 481, *affd.* 228 U. S. 695, 30 Am. B. R. 244, 57 L. Ed. 1020.

148. See discussion under sub-heading “Insolvency,” *ante*, p. 173.

149. *Francis v. McNeal* (C. C. A., 3d Cir.), 26 Am. B. R. 555, 186 Fed. 481, *affd.* (U. S. Sup. Ct.), 228 U. S. 695, 30 Am. B. R. 244, 57 L. Ed. 1020.

The adjudication of individual members of the partnership does not draw into the bankruptcy proceedings the assets of the partnership of which the bankrupt is a member, but against which no bankruptcy proceedings are pending. *American Steel & Wire Co. v. Coover* (Okla. Sup. Ct.), 27 Okl. 131, 25 Am. B. R. 58, 111 Pac. 217; *In re Mercur* (C. C.

A., 3d Cir.), 10 Am. B. R. 505, 122 Fed. 384, 56 C. C. A. 472, in which case the court said: “There has been no adjudication against the firm and the trustee was not appointed to represent it, but only the two members who happened to oppose it in their separate and individual capacity. Under such circumstances, the trustee has no authority to demand or interfere with the firm assets. In the case of *Amsinck v. Bean*, 22 Wall. 395, 402, which arose under the act of 1867, it was held that while the assignee in bankruptcy of the joint stock and property of a partnership is required by the statute to administer the separate estate of the individual members, as well as that of the firm, there is no reciprocal regulation with regard to the estate of the partnership, where an individual member of it has alone been adjudged a bankrupt.” See *In re City Contracting & Bldg. Co.* (D. C., Hawaii), 30 Am. B. R. 133.

150. **Administration of estate of nonadjudicated member.**—Where an act of bankruptcy has been committed by a partnership whose individual members, as well as the firm, are insolvent, the fact that one of the partners cannot be adjudicated an involuntary bankrupt because chiefly engaged in farming, does not prevent the adjudication of the firm and its other member; and, in such case, the estate of the nonadjudicated member is brought into the proceeding for administration. *In re Duke & Son* (D. C., Ga.), 29 Am. B. R. 93, 199 Fed. 199.

151. *Tate v. Brinser* (D. C., Pa.), 34 Am. B. R. 660, 226 Fed. 878; *Marnet Oil & Gas Co. v. Staley* (C. C. A., 5th Cir.), 33 Am. B. R. 266, 218 Fed. 45.

there are no separate assets belonging to the individuals, administration and distribution follow the same practice and rules as in individual cases. Where however, there are both joint and separate estates, especially where the court has not jurisdiction of all the members, complications result which may be troublesome and require careful treatment.¹⁵²

(2) **PARTNERSHIP AND INDIVIDUAL CREDITORS.**—Subsection *f* provides that the net proceeds of the partnership property shall be appropriated to the payment of the partnership debts and the net proceeds of the individual estate of each partner to the payment of his individual debts. The surplus remaining after the payment of individual debts may be distributed among partnership creditors; and the surplus remaining after the payment of partnership debts may be distributed among the individual creditors in proportion to the interest of each partner in the partnership assets.¹⁵³ The rule of law phrased in the present statute is declaratory of the equitable rule that partnership property is primarily a fund for the payment of partnership debts,¹⁵⁴ and that

152. Some of these complications have already been discussed; another class of them will be found under subsection *h*, *post*.

153. *In re James* (C. C. A., 2d Cir.), 13 Am. B. R. 341, 133 Fed. 912; *In re Groetzinger* (C. C. A., 3d Cir.), 11 Am. B. R. 723, 127 Fed. 814; *In re Denning* (D. C., Mass.), 8 Am. B. R. 133, 114 Fed. 219; *Jarecki Mfg. Co. v. McElwaine* (D. C., Ind.), 5 Am. B. R. 751, 107 Fed. 249; *In re Wilcox* (D. C., Mass.), 2 Am. B. R. 117, 94 Fed. 84; *In re Rice* (D. C., Pa.), 21 Am. B. R. 205, 164 Fed. 514; *Miller v. New Orleans Acid & Fertilizer Co.* (Sup. Ct.), 211 U. S. 496, 21 Am. B. R. 417, 53 L. Ed. 300.

A claim for personal taxes due a city from a member of a firm cannot be enforced out of firm assets until the firm creditors have been paid in full. *Matter of Flatau & Stern* (Ref., N. Y.), 21 Am. B. R. 352.

In the administration of partnership property in the courts, the creditors of the partnership have the right to the application of the partnership property to the payment of the partnership debts in preference to individual debts of the respective partners. *Sargent v. Blake* (C. C. A., 8th Cir.), 20 Am. B. R. 115, 160 Fed. 57; *In re Terens* (D. C., W. Va.), 23 Am. B. R. 680, 175 Fed. 495. Where a bankrupt, prior to his adjudication, took over partnership property, agreeing to pay partnership debts, the partnership creditors are entitled to payment out of the partnership property in advance of his individual creditors. *In re Filmar* (C. C. A., 7th Cir.), 24 Am. B. R. 194, 177 Fed. 770.

Allowances to the widow and children of a deceased member of a bankrupt partnership cannot be made by a trustee out of the firm assets before the firm debts are paid, and a probate court has no authority to decree that such allowances be made. *In re Dobert & Son* (D. C., Tex.), 21 Am. B. R. 634, 165 Fed. 749.

Money advanced by partner.—In the case of *In re Effinger* (D. C., Md.), 25 Am. B. R. 990, 184 Fed. 728, it was insisted that if a

partner has advanced money to the partnership beyond his agreed contribution to its capital, his individual creditors are entitled to have his claim against the partnership proved and allowed, and to have it participate in the distribution of the firm assets on equal terms with the other firm creditors. The court on this question said: "Partnership creditors have a right to insist that assets which have been paid by a partner into a firm, and which are found in the firm at the time of its bankruptcy, shall, as against him and his individual creditors, be held to be partnership property. A partner cannot swell the assets of his firm by contributing money or property to it, and then when the firm becomes insolvent, assert therein his own interest or that of his individual creditors for what he had paid into the firm was a mere loan to it, and was not part of its assets. If the contention of the individual creditor in this case is sound, little reliance could in practice be placed on partnership statements."

Bankrupt firm composed of individual and partnership conducting a separate business.—Where a bankrupt partnership is composed of an individual and a separate partnership doing business in another State, under whose laws it had made an assignment for the benefit of creditors, and the assignee of the partnership member, having liquidated its assets, has turned over the proceeds to bankrupt's trustee, although bankrupt's creditors may prove against such fund, the creditors of the partnership member have a prior claim thereon which must first be satisfied. *In re Knowlton & Co.* (D. C., Pa.), 28 Am. B. R. 140, 196 Fed. 837, aff'd. 29 Am. B. R. 729, 202 Fed. 480.

154. *In re Stein & Co.* (C. C. A., 7th Cir.), 11 Am. B. R. 536, 127 Fed. 547, in which the court said: "The present Bankruptcy Act recognizes the equitable rule that partnership property is primarily a fund for the payment of co-partnership debts, and that the interest of a co-partner is subject to that

the individual debts of a partner are entitled to be first paid out of his individual property.¹⁵⁵ It is found in substantially the same language in the statutes of 1841 and 1867.¹⁵⁶ The English act contains practically the same provision.¹⁵⁷

(3) EFFECT OF WAIVER OR RELEASE PRIOR TO BANKRUPTCY.—The right of the creditor of the partnership to payment out of the partnership property in preference to the individual creditor is derivative in nature, and is worked out by subrogation to the existing rights of one of the partners to assert this equitable principle. Until the assets have been brought into the custody of the law, each partner has plenary power at any time to release or waive his right; and if no partner retains this right, then no creditor of the partnership has it. However this release or waiver must have been bona fide on the part of the partners and without any intent to hinder, delay or defraud creditors.¹⁵⁸

(4) SOLVENCY OF PARTNERS; NO FIRM ASSETS.—The rule has been held to be subject to the exception that where there are no firm assets and no solvent living partner, the firm creditors share *pari passu* with the individual creditors.¹⁵⁹ The exception itself is qualified by cases (1) which seem to overlook the necessity of the existence of a solvent living partner,¹⁶⁰ and (2) which question whether it is absolutely essential that there be no assets or merely not sufficient assets to pay expenses of administration.¹⁶¹ The tendency is, however, to cast aside this ancient and inequitable exception.¹⁶² The opinion of Judge Lowell in the Wilcox case is an historical monograph of great value. It is to be hoped that it has sounded the knell of all exceptions to the broad rule that joint creditors share in joint assets and individual creditors in individual assets.¹⁶³ The Supreme Court in the case of Farmers and Mechanics' Nat. Bank v. Ridge Ave. Bank¹⁶⁴ has expressly approved the opinion of Judge

special equity and attaches only to the surplus remaining after the payment of the co-partnership debts."

155. *Vaccaro v. Security Bank* (C. C. A., 6th Cir.), 4 Am. B. R. 474, 482, 103 Fed. 436.

156. See Bankr. Act of 1867, § 36; Bankr. Act of 1841, § 14.

157. The corresponding section of the English Act of 1883, § 40 (3), is as follows:

(3) In the case of partners the joint estate shall be applicable in the first instance in the payment of their joint debts, and the separate estate of each partner shall be applicable in the first instance in payment of his separate debts. If there is a surplus of the separate estates, it shall be dealt with as a part of the joint estate. If there is a surplus of the joint estate it shall be dealt with as a part of the respective separate estate in proportion to the right and interest of each partner in the joint estate. (See also § 59 of the same act.)

158. *Matter of McConnell & Williams* (Ref., Cal.), 32 Am. B. R. 589.

159. *Story on Part.*, § 380; *Ex parte Sadler*, 15 Ves. 52; *Conrader v. Cohen* (C. C. A., 3d Cir.), 9 Am. B. R. 619, 121 Fed. 801, 58 C. C. A. 249, affg. *In re Conrader* (D. C., Pa.), 9 Am. B. R. 85, 118 Fed. 676; *In re Green* (D. C., Iowa), 8 Am. B. R. 553, 116 Fed. 118; *In re Gray* (D. C., Pa.), 31 Am. B. R. 146, 208 Fed. 959.

160. *In re Mills*, Fed. Cas. 9,611; *In re Knight*, Fed. Cas. 7,880; *In re Downing*, Fed. Cas. 4,044.

161. *In re Goedde*, Fed. Cas. 5,500; *In re McEwan*, Fed. Cas. 8,783.

Any firm assets available for distribution will defeat the right of firm creditors to dividends from the separate estates of the members until after the individual debts are paid. *In re Blumer*, 12 Fed. 489; *In re Litchfield*, 5 Fed. 47; *In re Smith*, Fed. Cas. 12,987; *In re Warwick*, Fed. Cas. 9,181; *In re Morse*, Fed. Cas. 9,854.

162. *In re Wilcox* (D. C., Mass.), 2 Am. B. R. 117, 94 Fed. 84; *In re Mills* (D. C., Ind.), 2 Am. B. R. 667, 95 Fed. 269; *In re Daniels* (D. C., R. I.), 6 Am. B. R. 699, 110 Fed. 745; *In re Corcoran* (Ref., Ohio), 12 Am. B. R. 283; *In re Henderson* (D. C., W. Va.), 16 Am. B. R. 91, 128 Fed. 527.

163. *In re Mosier* (D. C., Va.), 7 Am. B. R. 268, 112 Fed. 138. The view expressed in the text was approved by Mack, referee, in *In re Corcoran* (Ref., Ohio), 12 Am. B. R. 283.

164. 240 U. S. 498, 36 Am. B. R. 728, 60 L. Ed. 767, in which Chief Justice White, commended the conclusion of Judge Lowell and it was held that when a partnership, as such, is insolvent and each individual member is also insolvent, and the only fund for distribution is produced by the individual estate of one member, the individual creditors

Lowell and the rule now is established firmly that although there are no firm assets and no solvent partner, the firm creditors may only participate in the surplus of individual assets after the payment of individual debts.¹⁶⁵ The result is that where one member of a firm is adjudicated a bankrupt and there are no firm assets, the firm creditors may not participate in the distribution of the individual estate of the partner until his individual creditors have been paid in full.¹⁶⁶ Regard must be had for the plain and unequivocal language of subsection *f* which provides for the payment of partnership debts out of partnership property, and of individual debts out of individual property; individual debts may only be paid out of the surplus remaining after the payment of partnership debts, and, on the other hand, partnership debts may only be paid out of the surplus of the individual estate remaining after the payment of individual debts. The statute must not be construed to admit of exceptions which do not exist. If it had been intended to make an exception in a case where there are no partnership assets or where the partnership and all the members thereof are insolvent, provision would have been made therefor.¹⁶⁷ The character of a partnership debt is not changed by its reduction to judgment; judgment creditors of a partnership do not become creditors of the individual partners so as to permit them to share equally with individual creditors in the distribution of individual assets.¹⁶⁸ This subsection

of such member are entitled to priority in the distribution of the fund.

165. In *re James* (C. C. A., 2d Cir.), 13 Am. B. R. 341, 133 Fed. 912; In *re Henderson* (D. C., W. Va.), 16 Am. B. R. 91, 142 Fed. 568, *affd. sub nom. Euclid Nat'l Bank v. Union Trust Co.* (C. C. A., 4th Cir.), 17 Am. B. R. 834, 149 Fed. 975. In the cases last cited the Circuit Court of Appeals calls attention to the conflicting decisions on these questions and says: "The decision of Judge Lowell in *In re Wilcox* (D. C., Mass.), 2 Am. B. R. 177, 94 Fed. 84, contains an extended review of the entire subject and especially a history of the law, to which we take the liberty of referring. The Circuit Court of Appeals of two of the circuits have taken antagonistic views under the present bankruptcy act. In *Conrader v. Cohen*, 9 Am. B. R. 619, 121 Fed. 801, a decision of the Circuit Court of Appeals for the 3d Circuit, the petitioner's right to share as partnership creditors in the individual assets of the bankrupt, is fully recognized; and in *re James*, 13 Am. B. R. 341, 133 Fed. 912, a decision of the Circuit Court of Appeals for the 2d Circuit, a contrary view is taken. A careful consideration of the entire subject and review of the authorities, convinces this court that whatever may have been the correct rule under the former bankruptcy acts, the latter case presents the correct construction of the law under the present act; and however much force there may have been in the contention made by petitioners under the former bankruptcy acts, or what may be the correct general doctrine applicable to the settlement and distribution of partnership estates, that it was clearly within the power of Congress to adopt a method for marshalling such assets, to be applied to the respective classes

of creditors, which it has done, and in terms too clear and comprehensive to admit of the necessity for interpretation further than to adopt and follow its plain mandates." See *Matter of Hull* (D. C., Ohio), 34 Am. B. R. 447, 224 Fed. 796.

166. In *re Daniels* (D. C., R. I.), 6 Am. B. R. 699, 110 Fed. 745; In *re Corcoran* (Ref., Ohio), 12 Am. B. R. 283; In *re James* (C. C. A., 2d Cir.), 13 Am. B. R. 341, 133 Fed. 912.

167. This is the definite result of the determination of the Supreme Court in the case of *Farmers & Mechanics Nat. Bank of Philadelphia v. Ridge Ave. Bank*, 240 U. S. 498, 36 Am. B. R. 728, 60 L. Ed. 767; In *re Mills* (D. C., Ind.), 2 Am. B. R. 667, 95 Fed. 269; *Buckingham v. First National Bank* (C. C. A., 6th Cir.), 12 Am. B. R. 465, 131 Fed. 192.

Exception to rule.—In the case of *In re Henderson* (D. C., W. Va.), 16 Am. B. R. 91, 142 Fed. 468, *affd.* 17 Am. B. R. 834, 149 Fed. 975, the court in speaking of the exception says: "It is admitted to be an exception to the general rule, which rule in plain, clear, apt and in unambiguous language is written in the law itself, while the exception is not; on the contrary it must depend solely upon judicial construction, which, because it in effect provides a different method of distribution from that provided by the law itself cannot be considered short of mere judicial legislation. It is to be recalled how easily the Congress, had it designed such exception to be made, could have incorporated it as such in the law itself."

168. **Effect of reducing claims to judgment.**—The reduction of claims to judgment by partnership creditors, within four months of the bankruptcy of the partnership, does not change the character of such indebtedness

treats of administration in the bankruptcy court, and hence of the partnership and individual property, the title to which is in the bankrupt at the time the petition against him is presented to the court.¹⁶⁹ It has been held that the interest on a note given to a bank by a partner should not be paid out of the assets of the partner, where it appears that the whole net proceeds of the individual and partnership assets are insufficient to meet the partnership debts.¹⁷⁰

d. What are firm assets and what are individual assets.—Questions of this character frequently arise, sometimes from the nature of the property, but more often from transactions between the partners, or between the firm and one partner. Again, the test is substantially *bona fides*. If the firm be solvent and the transaction be in good faith, one member can purchase the assets or buy out the interest of the other partners.¹⁷¹ But if the firm be insolvent, or if for any reason the transaction would be inequitable, it will be treated as void.¹⁷² It is well settled also that real property purchased for partnership purposes with partnership funds, even though held in the name of an individual, is, as to the firm's creditors, personal property.¹⁷³ Premises used by the partnership for partnership purposes are presumptively partnership property.¹⁷⁴ Generally speaking, the partnership property consists of its money, its stock in trade, its outstanding accounts, and all other property purchased by the firm's money;¹⁷⁵ while the individual property consists of those chattels or rights possessed by the individual partner solely.¹⁷⁶ The fact that a life insurance policy was pledged to secure the payment of a partnership debt, does not make the policy partnership property.¹⁷⁷ Property originally owned

from a partnership debt to an individual debt, but changes the form of the debt only. Its character as a partnership debt remains as before, and for which each member of the partnership may be liable, if the partnership assets are insufficient to pay the sum; and section 5f of the Bankruptcy Act, providing how the distribution of the assets of the partnership and of the individual members thereof shall be made among their creditors, controls in the distribution of such assets. *Matter of Haeker & Co.* (D. C., Ia.), 35 Am. B. R. 647, 225 Fed. 869.

169. *Sergeant v. Blake* (C. C. A., 8th Cir.), 20 Am. B. R. 115, 123, 160 Fed. 57.

170. *In re Chandler* (C. C. A., 7th Cir.), 25 Am. B. R. 865, 184 Fed. 887.

171. *In re Collier*, Fed. Cas. 3,002; *In re Long*, Fed. Cas. 8,476; *In re Wiley*, Fed. Cas. 17,656; *In re Montgomery*, Fed. Cas. 9,727; *In re McEwen*, Fed. Cas. 8,783; *In re Lane*, Fed. Cas. 8,044; *In re Rahley*, Fed. Cas. 7,593.

Title to firm property purchased by partner more than four months prior to his bankruptcy.—The title to firm property, purchased by a partner over four months prior to his bankruptcy, vests in him subject to *no lien* in favor of partnership creditors, and passes to his trustee in bankruptcy, and firm creditors cannot interfere with such property, or levy upon it, or sell it, or enforce any levy made within the four months preceding the bankruptcy of the purchasing partner. Such property must remain in the possession of

the bankruptcy court for purposes of administration and distribution. *Matter of Suprenant* (D. C., N. Y.), 33 Am. B. R. 454, 217 Fed. 470.

172. Compare § 5-g. And see *In re Rudwick* (D. C., Wash.), 4 Am. B. R. 531, 102 Fed. 750; *In re Byrne*, Fed. Cas. 2,270; *In re Cook*, Fed. Cas. 3,150; *Collins v. Hood*, Fed. Cas. 3,015; *In re Zug*, Fed. Cas. 18,222.

173. Thus, for instance, *Greenwood v. Martin*, 111 N. Y. 423. See *In re Groetzing* (C. C. A., 3d Cir.), 11 Am. B. R. 723, 127 Fed. 814, affg. 6 Am. B. R. 399, 110 Fed. 366; *Taylor v. Rasch*, Fed. Cas. 13,801. And under the English Bankr. Act see *Smith v. Smith*, 5 Ves. 193; *Ex parte Hinds*, 3 DeGex & S. 613; *Ex parte Connell*, 3 Deac. 201.

174. *Osborn v. McBride*, Fed. Cas. 10,593; *Featherstonhaugh v. Fenwick*, 17 Ves. (Eng.) 308.

175. See *Hiscock v. Jaycox*, Fed. Cas. 6,531; *Osborn v. McBride*, Fed. Cas. 10,593.

176. *In re Lowe*, Fed. Cas. 8,564; *In re Clark*, Fed. Cas. 2,798.

177. *Matter of Mertens* (C. C. A., 2d Cir.), 15 Am. B. R. 362, 142 Fed. 445, affd. *sub nom.* *Hiscock v. Varick Bank*, 206 U. S. 28, 18 Am. B. R. 1, 51 L. Ed. 945.

Insurance policy on life of one partner in favor of other.—Where, in Tennessee, a bankrupt and his wife are partners in a mercantile business, the proceeds of a policy of insurance on his life in her favor, do not, under the State law, constitute a trust fund held

by one or more partners and used for partnership purposes may be joint or separate estate as agreed between the parties.¹⁷⁸ A seat or membership in the New York Stock Exchange, held in the name of one of the members of a firm, is partnership property, it appearing from the articles of partnership that such seat or membership was held and used for the benefit of the firm, and was actually the property of the firm.¹⁷⁹

e. Firm debts and individual debts.—(1) **IN GENERAL.**—As a rule it will not be difficult to distinguish between firm obligations and individual obligations.¹⁸⁰ Some of the numerous authorities relative to the provability of individual partnership debts are cited and considered in the foot-note.¹⁸¹

by her for the benefit of herself and children, free from the claims of the partnership creditors. In re Day (D. C., Tenn.), 23 Am. B. R. 785, 176 Fed. 377.

178. In re Swift (D. C., Mass.), 9 Am. B. R. 237, 114 Fed. 947 in which case the evidence was considered and held sufficient to justify a finding that seats in a stock exchange, owned by the members and never transferred to the firm, but used for firm business, were a part of a joint estate. See Buckingham v. Bank (C. C. A., 6th Cir.), 12 Am. B. R. 465, 131 Fed. 192.

179. Matter of Hurlbutt, Hatch & Co. (C. C. A., 2d Cir.), 13 Am. B. R. 50, 135 Fed. 504.

180. Compare also for firm debts, In re Holbrook, Fed. Cas. 6,588; In re Tesson, Fed. Cas. 13,844; In re Kitzineer, Fed. Cas. 7,861; Taylor v. Rasch, Fed. Cas. 13,800; and, for individual debts, In re Mills, Fed. Cas. 9,611; In re Bucyrus Machine Co., Fed. Cas. 2,100; In re Dell, Fed. Cas. 2,774.

A mortgage of partnership property, given by one partner to secure his individual indebtedness, with the consent of the other partner, is not enforceable in bankruptcy against firm creditors. In re Blanchard (D. C., N. C.), 20 Am. B. R. 417, 161 Fed. 793.

181. See §§ 555-564 of the title "Bankruptcy" in the American Digest Century edition (Vol. 6, pp. 595-606), and Am. Bankr. Dig. §§ 854-857. The treatises on the English bankruptcy law, of which Baldwin's and Williams' and Robson's are typical, should be consulted for analogous cases arising under the system from which our doctrine of distribution has been inherited. Liability under contract executed by one of the members held to be a partnership debt, see Adams v. Deckers Valley Lumber Co. (C. C. A., 4th Cir.), 29 Am. B. R. 42, 202 Fed. 48.

Cases on provability of partnership debts.—Our courts, under the present law, have held, among other things, as follows:

(1) **As to individual debts not provable against firm assets**, that, where a firm indorsement on an individual note was made while the firm was embarrassed, and without any new consideration, the claim should not be allowed against the partnership estate (In re Jones [D. C., Mo.], 4 Am. B. R. 1441, 100 Fed. 781; In re Hardie & Co.

[D. C., Tex.], 16 Am. B. R. 381, 143 Fed. 553); and that the surrender of the firm note more than four months before the bankruptcy and the taking of an individual note instead, makes the holder a creditor of the individual estate only, even though the firm continued to pay the interest (In re Lehigh Lumber Co. [D. C., Pa.], 4 Am. B. R. 221, 101 Fed. 216); that a solvent partner is as to the partnership and individual estates an individual creditor (In re Stevens [D. C., Vt.], 5 Am. B. R. 9, 104 Fed. 323); and that under the laws of South Carolina a sealed note given by one member of a firm without authority from his copartners and not confirmed or ratified by them is not provable against the firm (Pollock v. Jones [C. C. A., 4th Cir.], 10 Am. B. R. 616, 124 Fed. 163, affg. 9 Am. B. R. 262); as to proof of notes signed by individual members of a firm under seal, see Davis v. Turner (C. C. A., 4th Cir.), 9 Am. B. R. 704, 120 Fed. 605, 56 C. C. A. 669. See also Merchants' Bank v. Thomas (C. C. A., 5th Cir.), 10 Am. B. R. 299, 121 Fed. 306, 57 C. C. A. 374.

(2) **As to firm debts not provable against individual assets**, that, where partnership creditors have received 55 per cent. from a proceeding in the State court, they cannot prove claims in the individual bankruptcy of one of the partners unless they surrender such 55 per cent. (In re Mills [D. C., Ind.], 2 Am. B. R. 667, 95 Fed. 269); and that a suit by the solvent partner on a partnership debt is an election of remedies, and a claim cannot thereafter be proven against the individual estate of the bankrupt partner (In re Polidori, 2 N. B. N. 922. See also on the question of jurisdiction, where a firm creditor presents a claim against the individual estate (In re Sanderlin [D. C., N. C.], 6 Am. B. R. 384, 109 Fed. 857); and where real estate was in the name of the bankrupt, but as between the partners it appeared to have been firm property, individual creditors have no claim on the proceeds (In re Groetzinger [D. C., Pa.], 6 Am. B. R. 399, 110 Fed. 366).

(3) **In general**, a firm creditor may prove against the individual estate on individual notes taken by him and credited on the partnership debt (In re Stevens, [D. C., Pa.], 4 Am. B. R. 221, 101 Fed. 216; a

(2) **COMMERCIAL PAPER; FIRM AS MAKER OR INDORSER.**—Whenever a partnership name appears on commercial paper the firm is presumably bound, and the burden is on the firm to show that it is not liable.¹⁸² So where a partnership indorses a promissory note for the accommodation of the maker the obligation is presumably that of the partnership and it becomes allowable against the partnership estate, in favor of a *bona fide* holder of the note.¹⁸³ Any note or other obligation signed or indorsed in the firm name, the benefits of which accrued to the firm, is a partnership debt.¹⁸⁴ The note or other obligation of one of the individual partners, although given for a consideration moving to the partnership, may nevertheless be treated as an individual debt.¹⁸⁵

partner who purchases judgments against his firm may prove them against the individual estates to the amount of his partners' respective shares (In re Carmichael [D. C., Iowa], 2 Am. B. R. 815, 96 Fed. 594); a note made by the firm and indorsed by a member of it continues to be the obligation of the firm, whether the individual bankrupt's liability as indorser is fixed or not (Lamoille Bank v. Stevens' Estate [D. C., Vt.], 6 Am. B. R. 164, 107 Fed. 245); notes taken by a partner in payment of his interest in the firm within four months of the bankruptcy of the continuing partner are not provable against the latter until all the firm creditors are paid (In re Denning [D. C., Mass.], 8 Am. B. R. 133, 114 Fed. 219). Where the surviving member of a solvent partnership upon its dissolution, immediately formed a new firm and took over the assets of the old firm and placed them in the new firm and assumed therewith the debts of the old firm, the debts of the old firm may be proven against the bankrupt estate of the new firm. Matter of Stringer (D. C., N. Y.), 37 Am. B. R. 713, 234 Fed. 454.

182. Winship v. Bank, 5 Peters, 529, 8 L. Ed. 216.

183. Union Nat'l Bank v. Neill (C. C. A., 5th Cir.), 17 Am. B. R. 841, 149 Fed. 720; Merchants' Bank v. Thomas (C. C. A., 5th Cir.), 10 Am. B. R. 299, 121 Fed. 306. See also McDaniel v. Straud (C. C. A., 4th Cir.), 5 Am. B. R. 685, 106 Fed. 486.

184. Gauss v. Schrader, 48 Fed. 816; Bush v. Crawford, Fed. Cas. 2,224.

Firm indorsements.—In the cases of In re Norris, Fed. Cas. 10,302 and In re Morse, Fed. Cas. 9,853, firm indorsements were made at the time the firm was in an embarrassed financial condition, and it was held that they were not new considerations moving from the individual creditor to the firm, within the four months' period, and the claim should be disallowed against the partnership estate.

Bankrupt firm as makers. The claim arising from a note signed by the bankrupt firm as makers and indorsed by the individual bankrupt, one of the members of the firm, remains a firm obligation whether the individual bankrupt's liability as indorsed has been fixed or not. Lamoille County Nat'l

Bank v. Stevens (D. C., Vt.), 6 Am. B. R. 164, 107 Fed. 245.

Power of partner to bind firm by indorsement.—In an ordinary trading partnership, one partner has implied authority as to transactions within the scope of the partnership business, to borrow money on the credit of the firm, to draw and accept, make and indorse bills of exchange and promissory notes in the name of the firm. Such partner has no implied authority to sign the firm name as an accommodation indorser to a negotiable promissory note, but where he does so the partnership is liable thereon to an innocent indorsee who acquired the note in the usual course of trade for value and before maturity. Union National Bank v. Neill (C. C. A., 5th Cir.), 17 Am. B. R. 841, 149 Fed. 720.

Notes signed by partners.—When persons who are partners unite in making notes; though they sign their several names instead of the partnership name, if the note is one given in a partnership transaction and the partnership receives the consideration, they should be proved and allowed as a partnership obligation in bankruptcy. Matter of Kendrick & Co. (D. C., Vt.), 35 Am. B. R. 628, 226 Fed. 978.

A joint and several note, signed by all the members of a partnership in their individual capacity, constitutes two contracts, and a holder thereof is entitled to prove his claim against and participate in the distribution of both the estate of the partnership and of the individual composing it. Where notes have been signed by one or the other member of a partnership, entered upon the partnership books, and treated as partnership transactions, and the partnership has received the benefit, claimants may treat the notes as the obligations of individuals and claim against the individual estate, or may treat the signatures of the individuals as the signature of the partnership by said individuals as the agents of the partnership, and so claim against the partnership. Matter of Kuhn & Co. (D. C., Ref. Pa.), 36 Am. B. R. 615, 64 Pittsburgh Leg. News 161.

185. In re Lehigh Lumber Co. (D. C., Pa.), 4 Am. B. R. 221, 101 Fed. 216. In the case of In re Jones (D. C., N. C.), 8 Am. B. R. 626, 116 Fed. 341, it was held

But where the note or obligation, although signed or indorsed by an individual partner, is for the sole benefit of the firm, it is a partnership debt;¹⁸⁶ and it may be shown by parol evidence that notes signed by the individual members of a firm were partnership obligations.¹⁸⁷

(3) PARTNER SIGNING INDIVIDUAL NAME.—The question as to the character of the debt will also arise where each member of the firm has in its behalf incurred an individual liability by signing his name instead of the firm name. The debt thereby becomes individual only.¹⁸⁸ The fact that the proceeds of a loan to a partner went into the partnership business and was utilized by the partnership for partnership purposes does not make the loan a partnership debt; the question is in each case was credit given to a partner or to the partnership?¹⁸⁹ An individual debt is none the less such because

that a note made by an individual partner, which on its face did not indicate that it constituted a partnership liability, was not a partnership debt. See also *In re Lamon* (D. C., N. Y.), 22 Am. B. R. 635, 171 Fed. 516; *In re Stevens* (D. C., Vt.), 5 Am. B. R. 9, 104 Fed. 323; *In re Webb*, Fed. Cas. 17,313; *In re Robbin*, Fed. Cas. 11,989.

186. *In re Warren*, Fed. Cas. 17,191; *Davis v. Turner* (C. C. A., 4th Cir.), 9 Am. B. R. 704, 120 Fed. 605; *In re Culver* (D. C., Minn.), 23 Am. B. R. 779, 176 Fed. 450.

187. *In re Stoddard Bros. Lumber Co.* (D. C., Idaho), 22 Am. B. R. 435, 169 Fed. 190, affd. *sub nom.* *Mock v. Stoddard* (C. C. A., 9th Cir.), 24 Am. B. R. 403, 177 Fed. 611.

188. *In re Webb*, Fed. Cas. 17,313; *In re Herrick*, Fed. Cas. 6,420; *Strause v. Hooper* (D. C., N. C.), 5 Am. B. R. 225, 105 Fed. 590.

189. *Strause v. Hooper* (D. C., N. C.), 5 Am. B. R. 225, 105 Fed. 590, in which case the respective fathers of the two partners of the bankrupt firm, had, prior to bankruptcy, each loaned a sum of money, with intent to set up their respective sons in business, and taken as security, bonds or notes signed by both partners individually. It was held that the notes were the individual debts of the partners.

Notes signed by partner in his own name.

—In the case of *In re Lehigh Lumber Co.* (D. C., Pa.), 4 Am. B. R. 221, 101 Fed. 216, it appeared that more than four months prior to bankruptcy, a creditor of the bankrupt firm surrendered a claim against the firm and took the note of one of the partners in lieu thereof, which was renewed from time to time and judgment finally entered thereon within four months of the bankruptcy of the firm; it was held that such creditor ceased to be a creditor of the firm upon taking the individual note and the giving of such note and the judgment thereon did not constitute a voidable preference as against the firm.

The question whether an indebtedness is a firm or individual indebtedness often arises in cases where all the members have incurred a written obligation by signing their respective individual names instead of the firm

name. Where this is the case the weight of authority is that it is the individual indebtedness of each of the members of the firm and not a partnership indebtedness. The following authorities under former bankruptcy act are in point. *In re Webb*, Fed. Cas. 17,313; *In re Bucyrus Machine Co.*, Fed. Cas. 2,100; *In re Miller*, 1 N. Y. Leg. Obs. 38; *In re Herrick*, Fed. Cas. 6,420; *In re Roddin*, Fed. Cas. 11,989. See also *In re Waren*, Fed. Cas. 17,191, holding that in such case there is merely a presumption that the obligation is individual rather than firm, and that the presumption may be rebutted if in fact it is a firm obligation. In the case of *In re Thomas*, Fed. Cas. 13,886, 8 Biss. 139, a note was signed by the partners individually for a loan, the proceeds of which went to the partnership. The court cited the above cases and said: "Thus it results that after the indorsement or individual signature of one of the firm, the firm creditor would have no right to claim against the individual assets until individual creditors have been first satisfied. But holding the individual indorsement or signature the firm creditor may in the first instance prove against the separate as well as the joint estate. Now such separate liability would seem to be at least in the nature of security, though differing radically it is true, in character and form, from that of a mortgage, and yet double proof by the firm creditor in such cases may be made without any abatement of advantage which his diligence has secured."

Mortgage of individual property to secure partnership obligation.—The bankrupts, who were joint partners, contracted as individuals for the purchase of certain goods on the instalment plan. One of the partners gave a bond and mortgage on his individual property as security for the payment thereof, binding himself to pay the obligation to the mortgagee. Contract of sale, bond and mortgage were assigned for valuable consideration before any default. It was held that under the State law which made joint partners severally liable for partnership obligations, the partner giving the mortgage was a principal debtor, and not a guarantor or

it is entered on the firm books with the knowledge of the creditor and payments have been made thereon by checks on partnership funds.¹⁹⁰

(4) ASSUMPTION OF PARTNERSHIP DEBTS.—The question as to whether a debt is a firm or an individual debt arises where one partner has bought out the other and assumed the partnership debts. The debts thereby become the individual debts of the continuing partner, provided the firm was solvent and the transaction was not tainted with fraud.¹⁹¹ It does not necessarily follow that the creditors of the firm must look to the continuing partner for the payment of their debts. If the bankruptcy of the continuing partner ensues, the creditors of the partnership may not have lost their lien but may follow the firm assets and assert the priority of their liens in respect thereto.¹⁹² If the partnership creditors either impliedly or expressly consent to the assumption of the debts by the continuing partner they become individual creditors and the debts are provable in the same manner as the other individual debts.¹⁹³ If the retiring partner is, notwithstanding the transfer of his interest in the firm assets, compelled to pay any of the debts of the firm,

surety. That the bond and mortgage were assignable with the debt before default in payment on the contract of sale; and that the assignee was entitled to the surplus proceeds of the sale of the mortgaged property, as against the trustee in bankruptcy of the individual mortgagor. *In re Forse & Roseboom* (D. C., N. Y.), 25 Am. B. R. 843, 184 Fed. 85.

Individual notes of partner pledged as security for firm obligation.—A partner under a firm contract made by him personally with a firm creditor, pledged as collateral for a firm obligation on which he was indorser certain notes made by him individually to the firm for personal loans, and after the bankruptcy of the firm and its members, the creditor sold the collateral, pursuant to the terms of the contract. It was held that the obligation of the partner on his notes to the firm was wholly independent of his obligation as indorser on the firm notes, and that the purchaser of the individual notes was entitled to prove a claim thereon against the individual estate of such partner. *In re White* (C. C. A., 7th Cir.), 25 Am. B. R. 541, 183 Fed. 310. See also *In re Effinger* (D. C., Md.), 25 Am. B. R. 930, 184 Fed. 728. Claims against a partnership based on notes examined and held to be provable. *Frederick v. Citizens National Bank* (C. C. A., 3d Cir.), 37 Am. B. R. 22, 231 Fed. 667.

The wife of a partner loaned to him \$2,000, of which he paid \$1,500 into the business, and loaned his copartner the remaining \$500, which he put into the business. Thereafter the wife purchased her husband's interest in the firm which was of value, and within a few days sold her interest to the copartner for \$1,500 taking his notes. About four months thereafter the copartner filed a petition in bankruptcy. Held, that the wife of the partner was entitled to prove her claims against the firm assets, as the partner-

ship creditors had no lien on the property. *Matter of Baker & Edwards* (D. C., N. Car.), 35 Am. B. R. 469, 224 Fed. 611.

190. *Hibberd v. McGill* (C. C. A., 3d Cir.), 12 Am. B. R. 101, 129 Fed. 590, affg. 10 Am. B. R. 550, 123 Fed. 187. See *First Nat. Bank v. Bank* (C. C. A., 9th Cir.), 12 Am. B. R. 429, 131 Fed. 422.

191. *In re Downing*, Fed. Cas. 4,044; *In re Collier*, Fed. Cas. 3,002; *In re Rice*, Fed. Cas. 11,750; *In re Long*, Fed. Cas. 8,476; *In re Pease*, Fed. Cas. 10,881. Compare also *In re Denning* (D. C., Mass.), 8 Am. B. R. 133, 114 Fed. 219.

192. *In re Gillette* (D. C., N. Y.), 5 Am. B. R. 123, 104 Fed. 769; *N. Y. Institution for Deaf & Dumb v. Crockett*, 17 Am. B. R. 233, 241, 117 N. Y. App. Div. 269, 102 N. Y. Supp. 412; *In re Pease*, Fed. Cas. 10,881; *In re Lloyd*, 22 Fed. 88; *In re Downing*, Fed. Cas. 4,044; *In re Rice*, Fed. Cas. 11,750; *In re De Mare* (Ref., Miss.), 28 Am. B. R. 297.

193. *In re Denning* (D. C., Mass.), 8 Am. B. R. 133, 114 Fed. 219; *In re Keller* (D. C., Iowa), 6 Am. B. R. 334, 336, 109 Fed. 118.

If the creditor does not assent to a dissolution of the partnership and the assumption of its liabilities by one of the partners, his debt remains a partnership debt and a lien upon partnership assets; in respect to him the several estates are to be treated as though the transaction had not taken place. *In re Worth* (D. C., Iowa), 12 Am. B. R. 566, 130 Fed. 927.

No trust or lien in favor of partnership creditors.—The assumption of payment of partnership debts by one partner in consideration of an absolute conveyance of the partnership property to him by the other creates no trust in and fastens no lien upon the property thus conveyed in favor of the partnership creditors prior to any request for the interposition of a court to administer the partnership property. *Sargent v. Blake* (C. C. A., 8th Cir.), 20 Am. B. R. 115, 160 Fed. 57.

he is subrogated to the rights of the firm creditors whose debts were paid by him, and the amount thereof becomes a debt against the continuing partner.¹⁹⁴

(5) ASSUMPTION OF INDIVIDUAL DEBTS.—Where debts of an individual member of the firm are assumed by the firm, and sufficient consideration is shown to support the assumption, such debts may become partnership debts.¹⁹⁵ Where the creditor had no notice of the assumption of the individual debt by the partnership and did not acquiesce therein, the character of the debt remains unchanged.¹⁹⁶

f. Proof against and dividends from each estate.—Since the act of 1861, in England, joint and several creditors have been permitted to prove against and receive dividends from both joint and separate estates.¹⁹⁷ The weight of American authority has always been in favor of this rule.¹⁹⁸ Though at first glance this rule seems inequitable, the firm and the individuals are separate entities and have made separate contracts and may, therefore, be held to the performance of them. It follows, therefore, that under certain circumstances there may be a joint and several liability on the part of the partners, in which case a creditor may file double proof, both against the partnership assets and against the individual assets of each partner.¹⁹⁹ Where notes or other obligations for a partnership debt are signed or assumed by the partnership, and by one or more of the partners individually, the debt is both joint and several, and may be proved both against the estates of the partnership and of the partners.²⁰⁰ This principle may not be carried to the extent of permitting double proof against the estates of the partnership and the partners, where the partnership in the course of firm business converted securities belonging

194. In re Dillon (D. C., Mass.), 4 Am. B. R. 63, 100 Fed. 627; In re Carmichael (D. C., Iowa), 2 Am. B. R. 815, 96 Fed. 594.

195. In re Dresser (C. C. A., 2d Cir.), 13 Am. B. R. 747, 135 Fed. 495; Merchants' Nat'l Bank v. Thomas (C. C. A., 5th Cir.), 10 Am. B. R. 299, 121 Fed. 306; Dacovich v. Schley (C. C. A., 5th Cir.), 13 Am. B. R. 752, 134 Fed. 72; In re Speer Bros. (D. C., Or.), 16 Am. B. R. 524, 144 Fed. 910; First Nat'l Bank of Miles City v. State Nat'l Bank (C. C. A., 9th Cir.), 12 Am. B. R. 429, 131 Fed. 422, in which it was held that where there was no sufficient evidence to sustain a finding that a partnership assumed the indebtedness of one partner at the formation of the partnership, the notes of the firm given to a bank in renewal of the individual partner's indebtedness, are not partnership debts, where the bank had notice.

196. Hibberd v. McGill (C. C. A., 3d Cir.), 12 Am. B. R. 101, 129 Fed. 590.

197. Compare Baldwin on Bankruptcy (8th ed.), p. 518.

198. In re Bigelow, Fed. Cas. 1,397; Mead v. Bank, Fed. Cas. 9,366; Emery v. Canal Bank, Fed. Cas. 4,446.

199. In re Cole (C. C. A., 2d Cir.), 26 Am. B. R. 352, affg. 22 Am. B. R. 384, 169 Fed. 1002.

200. Buckingham v. First Nat. Bank (C. C. A., 6th Cir.), 12 Am. B. R. 465, 131 Fed. 192.

Double proof of debts.—In the case of

In re McCoy (C. C. A., 7th Cir.), 17 Am. B. R. 760, 150 Fed. 106, it was held that where partners for the benefit of the firm borrowed money upon their individual credit, the lender, after the receipt of a dividend from the partnership estate, might prove for the balance of his claim against the bankrupt estate of the individual partners. In this case the court said: "In England the old rule was that in administering the bankrupt laws of that country double proof against the partnership estate and the individual estate was not allowed. This rule has not been followed in this country and there is nothing in the bankruptcy act showing that this English rule was intended to be embodied in our act. Indeed it is doubtful if the old rule is now in force in England." Citing Emery v. Canal National Bank, Fed. Cas. 4,446; In re Bradley, Fed. Cas. 1,772; In re Farnum, Fed. Cas. 4,674; Mead v. National Bank of Lafayette, Fed. Cas. 9,366, 6 Blatchf. 180; In re Bigelow, Fed. Cas. 1,397, 3 Ben. 146.

Proof against partner individually.—Proof of claim against a bankrupt partnership upon a note of the firm, endorsed by a member thereof, and also upon an open account, examined, and held not to constitute a proof of claim against the member of the firm individually. Adams v. Brown & Hill (C. C. A., 4th Cir.), 35 Am. B. R. 302, 226 Fed. 688.

to a claimant, who, waiving the tort, proved a claim based upon an implied contract against the partnership estate. Such contract is an obligation of the firm and not of the individual members.²⁰¹

IX. WHERE ONE OR MORE PARTNERS ARE SOLVENT.

a. In general.— Subsection *h* of this section provides that "In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt;" in such case it is made the duty of the solvent partner to settle the partnership business and account for the interest of the partner adjudged bankrupt. This provision is new, but is declaratory of the practice under the former law. The subdivision contemplates a case where one or more, but not all, of the members of a partnership are adjudged bankrupt, while the partnership as such is not before the court.²⁰² This doctrine seems to spring from the fact that bankruptcy works a dissolution of the firm, and the solvent partner may, therefore, close up the business of the firm as if the bankrupt member were actually dead. The provision commanding expedition and an accounting to the trustee should also be noted.

b. Waiver of consent.— The right to administer is absolute, unless waived by the solvent partner.²⁰³ It would seem that, by allowing an adjudication of partnership bankruptcy, as by making no response when served with notice as provided in General Order VIII, or by failing to disclose the relation and knowingly permitting an adjudication, this right to administer will be deemed waived. It can also be waived by a writing or declaration to that effect.²⁰⁴ If he stands by without protest and allows the assets of the partnership to be taken into the custody and control of the bankruptcy court, he may be deemed to have given his consent.²⁰⁵ But his participation in the bankruptcy proceeding against his partner by the presentation of an alleged provable claim upon which he attempted to vote for a trustee will not constitute a waiver.²⁰⁶

201. Conversion by partnership.— In the case of *Reynolds v. N. Y. Trust Co.* (C. C. A., 1st Cir.), 26 Am. B. R. 698, 188 Fed. 611, the court said: "Where there are separate and distinct express contracts of the firm and of a copartner to pay a debt contracted by the firm, the right to prove against both estates may be conceded. If one dealing with a firm procures also the individual undertaking of a partner to answer for a firm debt, there are substantial reasons for permitting him to resort to both estates. An additional several contract of a partner is not implied from the firm transaction, but may be created by a distinct act of the copartner. As the conversion in the present case was by the firm in the course of firm business, as the actual participation of the partner is not proved, as there is no evidence that his individual estate benefited by the firm conversion . . . there is difficulty in finding any substantial ground to imply from the circumstances a separate contract of the partner, which corresponds to an express individual contract to answer for a firm debt."

202. *In re Junck & Balthazard* (D. C. W. Va.), 22 Am. B. R. 298, 169 Fed. 481.

Construction of Section 5 (h).— Subsection *h* of Section 5 is not applicable to a cause where a partnership has been adjudged a bankrupt. It applies only where less than all of the members of the partnership, but not the partnership itself, have been so adjudged. *Francis v. McNeal* (C. C. A., 3d Cir.), 26 Am. B. R. 555, 186 Fed. 481, 108 C. C. A. 459, *affd.* 228 U. S. 695, 30 Am. B. R. 244, 57 L. Ed. 1029; *Marnet Oil and Gas Co. v. Staley* (C. C. A., 5th Cir.), 33 Am. B. R. 266, 218 Fed. 45.

203. *Marnet Oil and Gas Co. v. Staley* (C. C. A., 5th Cir.), 33 Am. B. R. 266, 218 Fed. 45.

204. *In re Harris* (D. C., Ohio), 4 Am. B. R. 132, 108 Fed. 517; *In re Meyer* (C. C. A., 2d Cir.), 3 Am. B. R. 559, 98 Fed. 976.

205. *In re Harris* (Ref., Ohio), 4 Am. B. R. 132.

206. *Tate v. Brinser* (D. C., Pa.), 34 Am. B. R. 660, 226 Fed. 878.

c. Application and effect of subsection.—This subsection does not apply where the solvent partner retired shortly before the bankruptcy and holds the continuing partner's notes for his interest in the firm.²⁰⁷ It merely preserves to an existing solvent partner the right to administer the affairs of the partnership if he so desires; it has no application to a case where distinct proceedings are instituted against the individual members of a partnership but not against the partnership itself.²⁰⁸ The connection between subsections *h* and *c* should be noted. When construed together they provide in effect that when a partnership and one or more of the partners, but not all of them are adjudged bankrupt, those who are not so adjudged may administer the partnership property, and *a fortiori* their individual property, and the court may not do so without their consent, but, if the unadjudicated members consent, the court may administer the partnership property and their individual estates.²⁰⁹

^{207.} In re Denning (D. C., Mass.), 8 Am. B. R. 133, 114 Fed. 219.

^{208.} In re Mercur (C. C. A., 3d Cir.), 10 Am. B. R. 505, 122 Fed. 384; Mahoney v. Ward (D. C., N. C.), 3 Am. B. R. 770, 100 Fed. 278.

^{209.} **Rights of solvent partner.**—In the case of In re Bertenshaw (C. C. A., 8th Cir.), 19 Am. B. R. 577, 583, 157 Fed. 363, the court said: "These provisions thus interpreted are fair, just and reasonable. The solvent partner cannot in any event escape payment of the debts of the partnership. His individual property is subject to attachment, execution, and to the processes of the law to satisfy them. He is more competent to manage the individual property and the property of his firm which he had the shrewdness and ability to accumulate, more competent to convert them into money and to apply them upon his obligations, than any trustee chosen by his creditors can be. He knows the property, its value, its availability for various uses, its market. He has a vital interest in securing the best price for it, and the fact that it is his property, that it is to be applied to his debts, gives him a preferential equity to apply it speedily and efficiently to the payment of his obligations. The opposite process would be unreasonable, unfair to those who have accumulated and preserved the property, and liable to much injustice." See also Matter of Solomon (D. C., N. Y.), 20 Am. B. R. 488, 163 Fed. 140;

In re Junck & Balthazard (D. C., W. Va.), 22 Am. B. R. 298, 169 Fed. 481.

Right of firm trustee to administer separate estate of partner not separately adjudicated.—In an involuntary proceeding against a partnership which is unable to pay its debts in full even with separate estates of the partners, an adjudication against the partnership alone authorizes the administration of the separate estate of one of the partners by the trustee in bankruptcy of the firm, particularly where such partner has neither objected to the firm property being administered nor to failure to adjudicate him but on the contrary consents to turn over his property for administration. Francis v. McNeal 228 U. S. 695, 30 Am. B. R. 244, 57 L. Ed. 1029, affg. 26 Am. B. R. 555, 186 Fed. 481, 108 C. C. A. 459. See also In re Samuels & Lesser (C. C. A., 2d Cir.), 32 Am. B. R. 436, 215 Fed. 845, revg. 30 Am. B. R. 293, 207 Fed. 195.

Appointment of solvent member as trustee.—Where a partnership and two of its three members are insolvent and the third member, although solvent, consents to the administration of the firm and individual assets, section 5h of the Bankruptcy Act applies, and an adjudication against the firm and the two members thereof may be had, and all the assets administered in the bankruptcy court, and the solvent partner will be entitled to share in the administration and may be appointed trustee. Matter of Kobre et al. (D. C., N. Y.), 35 Am. B. R. 389, 224 Fed. 106.

SECTION SIX.

EXEMPTION OF BANKRUPTS

§ 6. **Exemption of Bankrupts.**—*a.* This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

Analogous provisions: In U. S.: Act of 1867, § 14 (as amended by Act of June 8, 1872; and by Act of March 23, 1873), R. S., § 5045; Act of 1841, § 3; Act of 1800, § 34, 35, 53.

In Eng.: Act of 1883, § 64(2).

Cross-references: **To the law:** Power of court of bankruptcy to determine exemptions, § 2(11). Schedules of bankrupt to contain claim of exemptions, § 7-a(8). Schedules to be prepared by referee in case of bankrupt's failure, § 39-a (6). Trustee to set apart bankrupt's exemptions, § 47-a(11). Property recovered by trustee to be part of estate of bankrupt unless exempt, § 67-e. Exempt property not to pass to trustee, § 70-a.

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a. **History in general.**—Ever since bankruptcy laws ceased to be essentially penal, allowances or exemptions to the bankrupt have been sanctioned by statute. The law takes his property from him and gives it to his creditors. Anglo-Saxon jurisprudence, however, has for nearly two centuries decreed either that the creditors shall make the bankrupt an allowance such as will keep him and his family from want until he can begin again, or else shall permit him to retain a specific sum to the same end. The former is at present the English method; the latter the American. By § 64(2) of the English act of 1883 the trustee, with the permission of the committee of inspection, may from time to time make an allowance to the bankrupt for his support and that of his family. Formerly, the English bankrupt was given a certain proportion of his assets for the same purpose.¹

b. **In the United States.**—Our first law, besides exempting wearing apparel and beds and bedding (§ 18) and giving an allowance for the necessary support of the debtor and his family during the pendency of his proceeding (§ 53), allowed him a small percentage of the assets, with an upward limit as to the total, but on a sliding scale dependent on dividends paid to creditors. This, though generous, was at least uniform throughout the country. The law of 1841 was also uniform; under it (§ 3) wearing apparel, household furniture, and other necessary articles to the value of not over \$300, were set aside by the assignee for the bankrupt. The law of 1867, as amended (R. S., § 5045), re-enacted the provisions of the previous law, though increasing the upward limit to \$500, and, in addition, after exempting the arms and equipment of one who had served as a soldier, gave effect to the exemption laws of the States to such extent as such laws were more liberal than the bankruptcy law. From this latter idea, our present far-reaching clause on exemption sprang. In a country where trade is necessarily liquid, and, owing to our division into States, the dangers from diverse exemption laws great, by the express provision of the Federal statute, the State and not the Federal law determines what portion of his estate a bankrupt may retain. The law as to exemptions remains as originally passed. That the result is inequitable is as true as it is that a remedy in the nature of a uniform national exemption law is for the time impossible. Thus, to-day, in some States the law's allow-

1. Compare Massachusetts Insolvency Law, c. 163, Revised Laws of 1901.

ance of bread money is the same as that under the law of 1841; in others, it is so large as often to exhaust the estate.

c. **Constitutionality.**—One ground of attack on the constitutionality of the bankruptcy law of 1867 was that it was not uniform as to exemptions. There was no authoritative determination of this question by the Supreme Court. The lower courts, however, almost without exception, held that the uniformity required by the constitution was geographical only, and that the law was uniform, though, in this particular, giving effect to the local statutes of the debtor's domicile.² The Supreme Court has already settled the question under the present law, by declaring that law constitutional in spite of its want of uniformity as to exemptions,³ and holding that the system is, in a constitutional sense, uniform throughout the United States, when the trustee takes in each State whatever would have been available to creditors if the bankrupt law had not been passed.⁴

II. JURISDICTION AND GENERAL RULES GOVERNING EXEMPTIONS.

a. **In general.**—It is the purpose of this subdivision to set forth the general principles as found in the numerous cases on the subject. For decisions under the laws of 1867 and 1841, resort should be had to the text books and digests of the periods.⁵

b. **State statutes and decisions control.**—The State law controls and its meaning is fixed by the interpretation of the highest courts of the State.⁶ It

2. In re Everett, Fed. Cas. 4,579, 9 N. B. R. 90; In re Beckerford, Fed. Cas. 1,209; In re Jordan, Fed. Cas. 7,514; In re Smith, Fed. Cas. 12,996; Darling v. Berry, 13 Fed. 659; Dozier v. Wilson, 84 Ga. 301. *Contra*, In re Deckert, Fed. Cas. 3,728; In re Duereson, Fed. Cas. 4,117, 13 N. B. R. 183.

3. Hanover Nat. Bank v. Moyses, 186 U. S. 181, 8 Am. B. R. 1; In re Richard (D. C., N. C.), 2 Am. B. R. 506, 94 Fed. 633; In re Buelow, 2 N. B. R. Rep. 26, 98 Fed. 286; In re Kean, Fed. Cas. 7,630, 8 N. B. R. 401.

4. **Constitutionality of section as to exemptions.**—The Supreme Court in the case of Hanover Nat. Bank v. Moyses, 186 U. S. 181, 8 Am. B. R. 1, 46 L. Ed. 1113, concurs in the view expressed by Chief Justice Waite in In re Deckert, 2 Hughes, 186, where he said: "The power to except from the operation of the law property liable to exception under the exemption laws of the several states, as they were actually enforced, was at one time questioned upon the ground that it was a violation of the constructional requirement of uniformity, but it has thus far been sustained for the reason that it was made a rule of the law to subject to the payment of debts under its operation only such property as could by judicial process be made available for the same purpose. This is not unjust, as every debt is contracted with reference to the rights of the parties thereto under existing exemption laws, and no creditor can reasonably complain if he gets his full share of all that the law, for the time being, places at the disposal of creditors. One of the effects of a

bankrupt law is that of a general execution issued in favor of all the creditors of the bankrupt, reaching all his property subject to levy, and applying it to the payment of all his debts according to their respective priorities. It is quite proper, therefore, to confine its operation to such property as other legal process could reach. A rule which operates to this effect throughout the United States is uniform within the meaning of that term as used in the Constitution."

5. See for instance American Digest, Century Edition, "Bankruptcy," §§ 656-678.

6. In re Duerson, Fed. Cas. 4,117; In re Camp (D. C., Ga.), 1 Am. B. R. 165, 91 Fed. 145; In re Stevenson & King (D. C., N. C.), 2 Am. B. R. 230, 93 Fed. 789; In re Buelow, 98 Fed. 86; In re Tobias (D. C., Va.), 4 Am. B. R. 555, 103 Fed. 68; Richardson v. Woodward (C. C. A., 4th Cir.), 5 Am. B. R. 94, 104 Fed. 873; In re Anderson (D. C., Mass.), 6 Am. B. R. 555, 110 Fed. 141; In re Manning (D. C., Pa.), 7 Am. B. R. 571, 112 Fed. 948; In re Stone (D. C., Ark.), 8 Am. B. R. 416, 116 Fed. 35; Page v. Edmunds, 187 U. S. 596, 9 Am. B. R. 277, 47 L. Ed. 318; In re Wood (D. C., Wis.), 17 Am. B. R. 93, 147 Fed. 877; In re Stein (D. C., Pa.), 12 Am. B. R. 384, 130 Fed. 377; In re Owlings (D. C., N. C.), 15 Am. B. R. 472, 140 Fed. 739; In re Paramore v. Bicks (D. C., N. C.), 19 Am. B. R. 130, 156 Fed. 208; In re Pfeiffer (D. C., Pa.), 19 Am. B. R. 230, 155 Fed. 892; In re Burke (D. C., Ga.), 22 Am. B. R. 69, 168 Fed. 994; In re McCrary Bros. (D. C., Ala.), 22 Am. B. R. 161, 169 Fed. 485; In re Hast-

has always been the policy of Congress, both in general legislation and in bankrupt acts, to give effect to the State exemption laws.⁷ But a court of bankruptcy will not enforce an unconstitutional State law;⁸ for example, where it impairs the obligation of contracts.⁹ Nor will a State court review a determination by the bankruptcy court as to what property is exempt.¹⁰ But if there are no State decisions construing a State law, or such decisions are conflicting, a court of bankruptcy will, if a proper case is presented, construe and apply the law with a view of carrying out the purpose and intent of the bankruptcy act.¹¹ Exemption laws should be liberally construed.¹² If the decisions are interpretations of State statutes they will control; but if they are declarations of general law — mere definitions of property — they may be disregarded.¹³

ings (C. C. A., 6th Cir.), 24 Am. B. R. 360, 181 Fed. 33; *In re Baker* (C. C. A., 6th Cir.), 24 Am. B. R. 411, 182 Fed. 392; *In re Bassett* (D. C., Wash.), 26 Am. B. R. 800, 189 Fed. 410; *In re Thetford* (Ref. Tex.), 28 Am. B. R. 191; *People's Natl. Bank v. Maxson* (Sup. Ct., Iowa), 168 Iowa 318, 33 Am. B. R. 765, 150 N. W. 601; *Matter of Crum* (D. C., Ohio), 34 Am. B. R. 586, 221 Fed. 729; *Grattan v. Trego* (C. C. A., 8th Cir.), 34 Am. B. R. 889, 225 Fed. 705; *Matter of Dean* (D. C., Cal. Ref.), 34 Am. B. R. 156; *Eaton v. Boston Safe Deposit and Trust Co.*, 240 U. S. 427, 36 Am. B. R. 701, 60 L. Ed. 723; *Olmsted-Stevenson Co. v. Miller* (C. C. A., 9th Cir.), 36 Am. B. R. 816, 231 Fed. 69; *Matter of Malone's Estate* (D. C., Idaho), 36 Am. B. R. 364, 228 Fed. 566; *Matter of Safady Bros.* (D. C., Wis.), 36 Am. B. R. 6, 228 Fed. 538. But not by *obiter dicta*. *In re Sullivan* (C. C. A., 8th Cir.), 17 Am. B. R. 578, 148 Fed. 115.

The construction of the highest judicial tribunal of a State, of its constitution and of its statutes which establish a rule of property, is controlling authority in the courts of the United States, where no question of right under the constitution and laws of the nation is involved. *In re Wood* (D. C., Wis.), 17 Am. B. R. 93, 147 Fed. 877. It is well settled that the debtor must comply with the State law in order to claim exemptions. *In re Farish*, Fed. Cas. 4,657, 2 N. B. R. 168; *In re Gainey*, Fed. Cas. 5,181, 2 N. B. R. 525; *In re Jackson*, Fed. Cas. 7,127, 2 N. B. R. 508; *Guise v. State*, 41 Ark. 249; *Briggs v. McCullough*, 36 Cal. 542; *Griffin v. Sutherland*, 14 Barb. (N. Y.) 456, as to effect of decisions of state courts, see Am. Bankr. Dig. § 944.

Decisions of territorial courts.—How far the decision of the Supreme Court of the territory is binding on this court may admit of question; but it would seem that the decision of the highest court of the Territory construing a territorial statute should have the same force and effect as a decision of the Supreme Court of the State. This is especially true where the decision establishes or relates to a rule of property. *In re Scheir* (D. C., Wash.), 26 Am. B. R. 739, 188 Fed. 744.

7. *Holden v. Stratton*, 198 U. S. 202, 14 Am. B. R. 94, 49 L. Ed. 1018. As to effect of state statutes on exemptions, see Am. Bankr. Dig. § 944.

Force of State exemption laws.—From the organization of the Federal courts under the judiciary act of 1789, the law has been that creditors suing in these courts could not subject to execution property of their debtor, exempt to him by the laws of the State. The same rule has obtained under the bankrupt acts, which have sometimes increased the exemptions, notably so under the act of 1867, but have never lessened or diminished them. An intention on the part of Congress to violate or abolish this wise and uniform rule observed from the creation of our Federal system should be made to appear by clear and unmistakable language. It will not be presumed from a doubtful or ambiguous provision fairly susceptible of any other construction. *Steele v. Buel* (C. C. A., 8th Cir.), 5 Am. B. R. 169, 104 Fed. 972.

8. *In re Everitt*, Fed. Cas. 4,579, 9 N. B. R. 90; *In re Dillard*, Fed. Cas. 3,912, 2 Hughes, 190.

9. *Gunn v. Barry*, 15 Wall, 610, 21 L. Ed. 212.

10. *Woolfolk v. Murray*, 44 Ga. 133; *Maxwell v. McCune*, 37 Tex. 515.

11. *Richardson v. Woodward* (C. C. A., 4th Cir.), 5 Am. B. R. 94, 104 Fed. 873, citing *Marly v. Lake Shore R. Co.*, 146 U. S. 162, 36 L. Ed. 925; *Provident Sav. Institution v. Massachusetts*, 6 Wall. 630, 18 L. Ed. 907; *Randall v. Bingham*, 7 Wall. 541, 19 L. Ed. 285.

12. *Matter of Irving* (D. C., Ariz.), 34 Am. B. R. 399, 220 Fed. 969; *In re Andrews & Simonds* (D. C., Mich.), 27 Am. B. R. 116, 193 Fed. 776. The spirit of the Bankrupt Law in the matter of exemptions is one of liability, and, under facts as presented herein, the bankruptcy court will allow the homestead exemption recognized by the state. *In re Culwell* (D. C., Mont.), 21 Am. B. R. 614, 165 Fed. 828; *Brandt v. Mahew* (C. C. A., 9th Cir.), 33 Am. B. R. 845, 218 Fed. 422.

13. *Page v. Edmunds*, 187 U. S. 596, 9 Am. B. R. 277.

c. Residence of bankrupt.—The section provides that the laws of the State where the bankrupt had his domicile “for the six months or the greater portion thereof immediately preceding the filing of the petition” shall control.¹⁴ It makes no difference where the property is situated, if it is exempt under the law of the bankrupt’s domicile.¹⁵ The right of the bankrupt to his exemption will depend upon his place of residence at the time the petition is filed against him.¹⁶

d. Claiming exemption.—The time and manner of claiming exemptions are regulated by the bankruptcy act, and the general orders and forms applicable thereto.¹⁷ Where the right exists it must be claimed as prescribed by the act.¹⁸ It was not the intent of the section to enlarge the exemptions available to the bankrupt under the State law;¹⁹ if exempt property is not subject to levy and sale under a State statute, it cannot be made to respond under the Federal act.²⁰

e. Jurisdiction of court of bankruptcy.—(1) IN GENERAL.—A court of bankruptcy has jurisdiction to determine the merits of the bankrupt’s claim to exemptions, but, as a rule, has no jurisdiction over the property claimed, except to set it aside for his use²¹ and cannot order its sale,²² or enforce a

14. *In re Grimes* (D. C., N. C.), 2 Am. B. R. 160, 94 Fed. 800; *In re Woodard* (D. C., N. C.), 2 Am. B. R. 339, 95 Fed. 260; *In re Buelow* (D. C., Wash.), 3 Am. B. R. 389, 98 Fed. 86; *In re McCutchen* (D. C., S. C.), 4 Am. B. R. 81, 100 Fed. 779; *In re Lynch* (D. C., Ga.), 4 Am. B. R. 262, 101 Fed. 579; *McCarty v. Coffin* (C. C. A., 5th Cir.), 18 Am. B. R. 148, 150 Fed. 307; *Duncan v. Ferguson-McKinney Co.* (C. C. A., 5th Cir.), 18 Am. B. R. 155, 150 Fed. 269; *In re O’Hara* (D. C., Pa.), 20 Am. B. R. 714, 162 Fed. 325.

15. *In re Stevens*, 2 Biss. 373, Fed. Cas. 13,392.

16. *In re Bassett* (D. C., Wash.), 26 Am. B. R. 800, 189 Fed. 410. See cases cited under “*Right of Bankrupt to Exemptions*” *post*, p. 212.

17. *In re Friedrich* (C. C. A., 2d Cir.), 3 Am. B. R. 801, 100 Fed. 284; *In re Kane* (C. C. A., 7th Cir.), 11 Am. B. R. 533, 127 Fed. 552; *Matter of McClintock* (D. C., Ohio, Ref.), 13 Am. B. R. 606; *Lipman v. Stein* (C. C. A., 3d Cir.), 14 Am. B. R. 30, 134 Fed. 235; *Burke v. Guarantee T. & T. Co.* (C. C. A., 3d Cir.), 14 Am. B. R. 31, 134 Fed. 562. *In re Culwell* (D. C., Mon.), 21 Am. B. R. 614, 165 Fed. 828; *In re Burnham* (D. C., Wash.), 30 Am. B. R. 270, 202 Fed. 762; *Brandt v. Mayhew* (C. C. A., 9th Cir.), 33 Am. B. R. 845, 218 Fed. 422.

The rules and forms in regard to exemptions prescribed by the Supreme Court under the bankruptcy act have the force and effect of law, and where a bankrupt fails to make claim for exemption in the manner and within the time legally prescribed therefor, he thereby waives any right to the exemption that he might have. *In re Gerber* (C. C. A., 9th Cir.), 26 Am. B. R. 608, 186 Fed. 693.

18. *In re Kane* (C. C. A., 7th Cir.), 11

Am. B. R. 533, 127 Fed. 552, in which the court says: “Courts of bankruptcy are not controlled as to the time or the manner in which claims for exemptions may be preferred in bankruptcy. The exemptions provided by the law of the state are allowed by the bankruptcy act, but the manner of claiming such exemptions, and of setting them apart and awarding them, is regulated by the bankruptcy act.” *In re Friedrich* (C. C. A., 6th Cir.), 3 Am. B. R. 801, 100 Fed. 284; *Lipman v. Stein* (C. C. A., 3d Cir.), 14 Am. B. R. 30, 134 Fed. 235; *In re Le Vay* (D. C., Pa.), 11 Am. B. R. 114, 125 Fed. 920.

19. *In re Boyd* (D. C., Iowa), 10 Am. B. R. 337, 120 Fed. 999.

20. *Smalley v. Laugenour*, 196 U. S. 93, 49 L. E. 400, 13 Am. B. R. 692; *In re Fisher* (D. C., Va.), 15 Am. B. R. 652, 142 Fed. 205.

21. *In re Camp* (D. C., Ga.), 1 Am. B. R. 165, 91 Fed. 749; *In re Hatch* (D. C., Iowa), 4 Am. B. R. 349, 102 Fed. 280; *In re Hill* (D. C., Ga.), 2 Am. B. R. 798, 96 Fed. 185; *Woodruff v. Cheeves* (C. C. A., 5th Cir.), 5 Am. B. R. 296, 105 Fed. 601, *revd.* *In re Woodruff* (D. C., Ga.), 2 Am. B. R. 678, 96 Fed. 317; *In re Little* (D. C., Iowa), 6 Am. B. R. 681, 110 Fed. 621; *Powers Dry Goods Co. v. Nelson* (D. C., N. D.), 10 N. Dak. 580, 88 N. W. 703, 7 Am. B. R. 506, and *foot-note*; *In re Jackson* (D. C., Pa.), 8 Am. B. R. 594, 116 Fed. 46; *Lockwood v. Exchange Bank*, 190 U. S. 294, 10 Am. B. R. 107, 47 L. Ed. 1061; *In re Brumbaugh* (D. C., Pa.), 12 Am. B. R. 204, 128 Fed. 971; *In re Boyd* (D. C., Iowa), 10 Am. B. R. 337, 120 Fed. 999; *McKenney v. Cheney*, 118 Ga. 387, 11 Am. B. R. 54, 45 S. E. 433; *In re Hartsell* (D. C., Ala.), 15 Am. B. R. 177, 140 Fed. 30; *In re Castleberry* (D. C., Ga.), 16 Am. B. R. 159, 143 Fed. 1,018; *In re*

mortgage against it.²³ This jurisdiction, so far as it goes, is exclusive.²⁴ The Federal courts are not bound to follow the State courts in the matter of the time of filing the declaration of the claim of exemptions and may allow amendment of the claim after the original schedule has been filed.²⁵

(2) ADMINISTRATION OF EXEMPT PROPERTY.—As soon as the right of the bankrupt to the exemption claimed is determined, the court's jurisdiction over the exempt property ceases. The bankruptcy court has no further control over it. The court has no power to administer or distribute it, with the other assets of the bankrupt estate.²⁶ Where the exempt property is commingled

Highfield (D. C., Pa.), 21 Am. B. R. 92, 163 Fed. 784; In re McCrary Bros. (D. C., Ala.), 22 Am. B. R. 61, 169 Fed. 485; In re MacKissic (D. C., Pa.), 22 Am. B. R. 817, 171 Fed. 219; Matter of Cheatham (D. C., Ky.), 31 Am. B. R. 520, 210 Fed. 370; Matter of Haas (D. C., Pa.), 32 Am. B. R. 284, 213 Fed. 694. Bank of Mendon v. Mell (Kan. City Ct. of App., Mo.), 185 Mo. App. 510, 33 Am. B. R. 777, 172 S. W. 484; Trust Natl. Bank v. Orten (Okla. Sup. Ct.), 43 Okl. 325, 33 Am. B. R. 108, 142 Pac. 1096; Matter of Dean (D. C., Cal. Ref.), 34 Am. B. R. 156; Matter of Brown (D. C., Ky.), 35 Am. B. R. 826, 228 Fed. 533.

Exempt property not in possession of court.—Exempt property is never really in the bankruptcy court, nor is the owner divested of his title where he properly urges his claim for exemption. The court has no jurisdiction of it except to set it aside as exempt property. Bogart v. Cowboy State Bank and Trust Co. (Tex. Civ. App.), 37 Am. B. R. 387, 182 S. W. 678.

22. Ingram v. Wilson (C. C. A., 8th Cir.), 11 Am. B. R. 192, 125 Fed. 913.

23. In re Hatch (D. C., Iowa), 4 Am. B. R. 349, 102 Fed. 280, and note.

24. In re Overstreet (D. C., Ark. Ref.), 2 Am. B. R. 486; In re Bragg, 2 N. B. N. Rep. 82; In re Nunn (Ref. Ga.), 2 Am. B. R. 664; McGahan v. Anderson (C. C. A., 4th Cir.), 7 Am. B. R. 641, 113 Fed. 115; In re Lucius (D. C., Ala.), 10 Am. B. R. 653, 124 Fed. 455, and cases cited; Lun v. Henry (Hawaii Sup. Ct.), 35 Am. B. R. 795, 22 Haw. 160.

25. Matter of Irving (D. C., Ariz.), 34 Am. B. R. 399, 220 Fed. 969.

26. Bell v. Dawson Grocery Co., 12 Am. B. R. 161, 120 Fed. 628; In re Lucius (D. C., Ala.), 10 Am. B. R. 653, 124 Fed. 455; Ingram v. Wilson (C. C. A., 8th Cir.), 11 Am. B. R. 192, 125 Fed. 913; In re Paramore & Ricks (D. C., No. Car.), 19 Am. B. R. 130, 156 Fed. 208; In re Blanchard & Howard (D. C., N. Car.), 20 Am. B. R. 422, 161 Fed. 797; First National Bank of Cleveland v. Orten (Okla. Sup. Ct.), 43 Okl. 325, 33 Am. B. R. 108, 142 Pac. 1096.

Bankruptcy court may not administer.—Exempt property never becomes assets in the bankruptcy court for administration. Beyond setting it aside the trustee has no concern with it. In re Edwards (D. C., Ala.),

19 Am. B. R. 632, 156 Fed. 794; In re Seaboldt (D. C., N. Car.), 8 Am. B. R. 57, 113 Fed. 766; In re Wells (D. C., Mo.), 8 Am. B. R. 75, 105 Fed. 762; In re Seydel (D. C., Iowa), 9 Am. B. R. 255, 118 Fed. 208; In re Hill (D. C., Ga.), 2 Am. B. R. 798, 96 Fed. 185; Sharp v. Woolslare (Sup. Ct., Pa.), 25 Pa. Super. Ct. 251, 21 Am. B. R. 88; In re Culwell (D. C., Mon.), 21 Am. B. R. 614, 165 Fed. 828; In re MacKissic (D. C., Pa.), 22 Am. B. R. 817, 171 Fed. 259.

Control ceases on setting apart exempt property.—In the case of Lockwood v. Exchange Bank, 190 U. S. 294, 10 Am. B. R. 107, 47 L. Ed. 1061, the court said: "The fact that the Act of 1898 confers upon the court of bankruptcy authority to control exempt property, in order to set aside and thus exclude it from the assets of the bankrupt estate to be administered, offers no ground for holding that the court of bankruptcy must administer and distribute, as included in the assets of the estate, the very property which the act in unambiguous language declares shall not pass from the bankrupt or become part of the bankrupt assets. The two provisions of the statute must be construed together and both be given effect. Moreover, the want of power in the court of bankruptcy to administer exempt property, is shown by the context of the act, since throughout its text exempt property is contrasted with property not exempt, the latter alone constituting the assets of the bankrupt estate subject to administration."

The bankruptcy court may exercise jurisdiction over exempt property only to the extent necessary to see that the trustee sets it aside and to dispose of such questions as may arise incident to that process. In re Jackson (D. C., Pa.), 8 Am. B. R. 594, 116 Fed. 46. The language in section 6, together with that used in 70-a, leaves no room to doubt that exempt property which has been set apart to the bankrupt is not subject to administration by the trustee or by a court of bankruptcy. Woodruff v. Cheeves (C. C. A., 5th Cir.), 5 Am. B. R. 296, 105 Fed. 601; In re Remmerde (D. C., Iowa), 30 Am. B. R. 701, 206 Fed. 826.

Jurisdiction of bankruptcy court over exempt property.—The action of the trustee in bankruptcy in setting apart to the bankrupt property exempt under the State law may be excepted to and the propriety of his

and undivided from other property of the bankrupt estate, the bankruptcy court retains jurisdiction of the property until separation is made.²⁷ A court of bankruptcy has no jurisdiction to protect or enforce against exempt property, which has been set apart to the bankrupt liens or other rights of creditors pertaining to such property.²⁸ It cannot enforce even an admitted lien on exempt property,²⁹ or defend such property from adverse claims that may or may not be extinguished by the bankruptcy proceedings.³⁰ Until the bankrupt has established what, if any, of the property belongs to him as exempt, freed from the claim of his trustee in bankruptcy, he is in no position to maintain trover in the State court for the conversion of such property.³¹

(3) **EXEMPT PROPERTY NO PART OF BANKRUPT ESTATE.**—The cases already cited lead to the conclusion that property set apart to a bankrupt under his claim to exemption forms no part of his estate in bankruptcy.³² Having set

action, either as to whether the exemption was lawful or whether too little of the property of the bankrupt has been set apart is open to final determination by the bankruptcy court; but after the property is set apart as exempt neither the trustee nor the bankruptcy court has any further authority over it. *Matter of Cheatham* (D. C., Ky.), 31 Am. B. R. 520, 210 Fed. 370.

Title to exempt property.—Exempt property does not constitute any part of the estate in bankruptcy. Exemptions are created by the State law, and the function of the bankruptcy court is to sever the property found to be an exemption from the estate of the bankrupt, the title remaining in the bankrupt. *Matter of Elkin* (D. C., N. J.), 34 Am. B. R. 134, 218 Fed. 971.

27. *Bank of Nez Perce v. Pindel* (C. C. A., 9th Cir.), 28 Am. B. R. 69, 193 Fed. 917.

28. *Bogart v. Cowboy State Bank & Trust Co.*, (Tex. Civ. App.), 37 Am. B. R. 387, 182 S. W. 678; *Woodruff v. Cheeves* (C. C. A., 5th Cir.), 5 Am. B. R. 296, 105 Fed. 601; *Matter of Anderson* (D. C., Ga.), 35 Am. B. R. 487, 224 Fed. 790.

Enforcement of liens. The better opinion is that the bankruptcy court has no jurisdiction either to enforce a lien upon exempt property, nor to determine the rights of creditors asserting a waiver against such property; *In re Hatch* (D. C., Ia.), 4 Am. B. R. 349, 102 Fed. 280; *In re Grimes* (D. C., N. C.), 2 Am. B. R. 730, 96 Fed. 529, holding that when the exempt property has passed out of the possession and control of the bankruptcy court, such court has no longer any jurisdiction to defend the property from adverse claims or liens that may not have been extinguished by the bankruptcy proceedings, nor can it entertain a proceeding to enforce a lien upon such property; *In re Camp* (D. C., Ga.), 1 Am. B. R. 165, 91 Fed. 745.

Whether any creditor has, under certain conditions, a superior right in or to the exempt property of a bankrupt is a question to be litigated in the State courts and not in the bankruptcy courts. *Matter of Brown* (D. C., Ky.), 35 Am. B. R. 826, 228 Fed. 533.

Sale of a homestead, which has been set aside as exempt, cannot be ordered by a bankruptcy court. Exempt property constitutes no part of the bankrupt's assets. *Matter of Yungbluth* (C. C. A., 9th Cir.), 34 Am. B. R. 299, 220 Fed. 110.

29. *In re Hartsell* (D. C., Ala.), 15 Am. B. R. 177, 140 Fed. 30; *In re Castleberry* (D. C. Ga.), 16 Am. B. R. 159, 143 Fed. 1,018; *First National Bank of Portal v. Lee* (N. Dak. Sup. Ct.), 25 N. Dak. 197, 34 Am. B. R. 555, 141 N. W. 716, holding that an attachment lien against exempt property is not affected by bankruptcy.

30. *Jeffries v. Bartlett*, 20 Fed. 496; *Lockwood v. Exchange Bank*, 190 U. S. 294, 10 Am. B. R. 107, 47 L. Ed. 1061.

31. *Lun v. Henry* (Hawaii Sup. Ct.), 35 Am. B. R. 795, 22 Haw. 160.

32. *Lockwood v. Exchange Bank*, 190 U. S. 294, 10 Am. B. R. 107, 47 L. Ed. 1061; *In re Brumbaugh* (D. C., Pa.), 12 Am. B. R. 204, 128 Fed. 971; *In re Le Vay* (D. C., Pa.), 11 Am. B. R. 114, 125 Fed. 990; *Jewett v. Huffman*, 14 N. Dak. 110, 13 Am. B. R. 738, 103 N. W. 408; *In re Edwards* (D. C., Ala.), 19 Am. B. R. 632, 156 Fed. 794; *Matter of Snyder* (D. C., Pa.), 32 Am. B. R. 500, 216 Fed. 989; *First National Bank v. Orten* (Okla. Sup. Ct.), 43 Okl. 325, 33 Am. B. R. 108, 142 Pac. 1096. (See Am. Bankr. Dig. § 950.)

In re Yager (D. C., Pa.), 25 Am. B. R. 51, 182 Fed. 951, the court holds that property set apart to a bankrupt under his claim to exemptions, forms no part of the estate, and the referee had no right to diminish it by allowing therefrom among other things, his own commissions and expenses, the trustee's commissions and counsel fees of the attorneys, both for the bankrupt and the trustee.

A homestead is not an asset of a bankrupt estate, and is beyond the reach of creditors and likewise of the trustee who represents them. A voluntary conveyance of a homestead is not fraudulent as to creditors, who cannot take the homestead and have no concern about what the grantor receives. *Seig v. Greene* (C. C. A., 8th Cir.), 35 Am. B. R. 150, 225 Fed. 955.

it aside for his use any creditor desiring to subject the property to the payment of a debt must pursue his remedy in the State court.³³ A decree of the Federal court setting aside to a bankrupt and his wife certain land as a homestead is not binding upon a creditor who was not a party to the bankruptcy proceeding.³⁴ The trustee has no title to the exempt property, but only a qualified right to possession.³⁵ The title to such property is in the bankrupt,³⁶ and descends to his heirs or legal representatives upon his death.³⁷ For instance, a policy of life insurance for the benefit of the wife of the insured, which is protected from the creditors of her husband by a State

33. *Newberry Shoe Co. v. Collier* (Sup. Ct., Va.), 111 Va. 288, 25 Am. B. R. 130, 68 S. E. 974; *In re Bass*, Fed. Cas. 1,091, in which Judge Bradley said: "In other words it is made as clear as anything can be, that such exempted property constitutes no part of the assets in bankruptcy. The exemption is created by the state law and the assignee acquires no title to the exempt property. If the creditor has a claim against it, he must prosecute that claim in the court which has jurisdiction over the property which the bankrupt court has not." See *In re Remmerde* (D. C., Iowa), 30 Am. B. R. 701, 206 Fed. 826; *Matter of Elkin* (D. C., N. J.), 34 Am. B. R. 134, 218 Fed. 971.

Enforcement of chattel mortgage against exempt property.—Where a debtor within four months of bankruptcy executed a chattel mortgage on a stock of merchandise which was declared to be an unlawful preference and an act of bankruptcy and the property placed in the possession of the trustee but the bankrupt allowed under the State law to select \$300 worth of the merchandise as an exemption, the property selected remained unaffected by the bankruptcy proceeding and consequently subject to the mortgage. *Bank of Mendon v. Mell* (Kan. City, Ct. of App., Mo.), 185 Mo. App. 510, 33 Am. B. R. 777, 172 S. W. 484.

34. *Bogart v. Cowboy State Bank & Trust Co.* (Tex. Civ. App.), 37 Am. B. R. 387, 182 S. W. 678.

35. See § 70-a; *In re Hill* (D. C., Ga.), 2 Am. B. R. 798, 96 Fed. 185; *In re Durham* (D. C., Ark.), 4 Am. B. R. 760, 104 Fed. 231; *In re Wells* (D. C., Ark.), 5 Am. B. R. 308, 105 Fed. 762; *In re Mayer* (C. C. A., 7th Cir.), 6 Am. B. R. 117, 108 Fed. 599; *In re Seabolt* (D. C., N. C.), 8 Am. B. R. 57, 113 Fed. 766; *In re Nye* (C. C. A., 8th Cir.), 13 Am. B. R. 142, 133 Fed. 33; *Lockwood v. Exchange Bank*, 190 U. S. 294, 10 Am. B. R. 107, 47 L. Ed. 1061; *In re Edwards* (D. C., Ala.), 19 Am. B. R. 632, 156 Fed. 794; *Pineus v. Meinhard & Bro.* (Ga. Sup. Ct.), 139 Ga. 365, 32 Am. B. R. 123, 77 S. E. 82; *Matter of French* (D. C., N. Y.), 37 Am. B. R. 289, 231 Fed. 255.

36. *Schlitz v. Schatz*, Fed. Cas. 12,459, 2 Biss. 248; *In re Hester*, Fed. Cas. 6,437, 5 N. B. R. 285; *In re Hunt*, Fed. Cas. 6,883, 5 N. B. R. 493; *Bush v. Lester*, 55 Ga. 579, 15 N. B. R. 36; *Simpson v. Houston*, 97 N. C. 344; *Wilkinson v. Waite*, 44 Vt. 508;

Bank of Nez Perce v. Pindel (C. C. A., 9th Cir.), 28 Am. B. R. 69, 193 Fed. 917.

The title to property of the bankrupt, which is generally exempted by the law of the State of domicile of the bankrupt, remains in the bankrupt and does not pass to the trustee. *Ingram v. Wilson* (C. C. A., 8th Cir.), 11 Am. B. R. 192, 125 Fed. 913; *In re Nye* (C. C. A., 8th Cir.), 13 Am. B. R. 142, 133 Fed. 33; *In re Orear* (C. C. A., 8th Cir.), 26 Am. B. R. 521, 189 Fed. 888; *The Gregory Co. v. Bristol* (C. C. A., 8th Cir.), 26 Am. B. R. 938, 191 Fed. 31; *Pineus v. Meinhard & Bro.* (Ga. Sup. Ct.), 139 Ga. 365, 32 Am. B. R. 123, 77 S. E. 82.

Right to alienate before property set apart.

—A bankrupt may alienate the property set apart by the bankruptcy court before such time as he applies for and obtains a homestead or exemption under and by virtue of the constitution and laws of Georgia. *Pineus v. Meinhard & Bro.* (Ga. Sup. Ct.), 139 Ga. 365, 32 Am. B. R. 123, 77 S. E. 82.

Homestead, transfer by bankrupt.—A bankrupt's homestead exemption when set apart by the trustee is inchoate and not fully fixed in him so that he can transfer title, until approved by the referee, or until at least twenty days have elapsed without any objections being filed to the allowance. A bankrupt, to whom a homestead exemption has been set apart, will not be permitted to immediately, before the approval of the referee, transfer the amount received to one of several creditors to whom he had given notes with a waiver of homestead attached. *Matter of Anderson* (D. C., Ga.), 35 Am. B. R. 487, 224 Fed. 790.

Right of bankrupt to assign exemptions prior to expiration of time to file exceptions.

—As soon as property is set aside to a bankrupt he has an assignable interest therein and he may assign the property in good faith, for application to pre-existing debts, although the assignment is made before the expiration of the twenty days allowed, under General Order No. 17, within which to file exceptions. *Taylor v. Williams* (Ga. Sup. Ct.), 139 Ga. 581, 32 Am. B. R. 131, 77 S. E. 386.

37. *In re Hester*, Fed. Cas. 6,427, 5 N. B. R. 285; *In re Lambert*, Fed. Cas. 8,026, 2 N. B. R. 426; *Rix v. Bank*, Fed. Cas. 11,869, 2 Dill. 367; *Bullymore v. Cooper*, 46 N. Y. 236; *Fehley v. Barr*, 66 Penn. 196.

statute, never passes to the trustee in bankruptcy of the husband.³⁸ The fact that property was subject to certain claims of creditors, does not make such property assets, to pass to the trustee and to be administered by him with the other assets of the estate.³⁹

(4) DETERMINATION AS TO WAIVER OF CLAIM.—The jurisdiction of the bankruptcy court to determine a claim that the bankrupt has waived his exemption has been declared in a number of cases, notwithstanding the principles hereinbefore annunciated.⁴⁰ As the law now stands, however, the court of bankruptcy has no jurisdiction, save by consent, to determine the claim of a creditor under a waiver contained in a note or other instrument; such creditor must pursue his remedy in the State courts.⁴¹ This principle may not be applied to its full extent in a case where the question of the validity or priority of a lien on both exempt and nonexempt property is involved.⁴²

38. *In re Orear* (C. C. A., 8th Cir.), 26 Am. B. R. 521, 189 Fed. 888, in which the court says: "The trustee is seeking to obtain property, the title to which he never took. This is not an ordinary claim of exemption. The trustee, it is true, is seeking to obtain exempt property, but the trouble with his claim is that he has no title to the property he seeks to hold. That, of course, ends his contention. The property is not only exempt, but never passed to him and is not his. The statute, while in the nature of the exemption law, is more than that; it declares that this property shall inure to the separate benefit of the wife. Ordinary exemption laws leave the full right and title to the property in the debtor."

39. *In re Bailey* (D. C., Utah), 24 Am. B. R. 201, 176 Fed. 990, holding that the title to homestead property did not pass to the trustee because it was mortgaged to certain creditors together with non-exempt property belonging to the bankrupt, which mortgage constituted an unlawful preference; a mortgage constituting an unlawful preference, covering both exempt and nonexempt property, is only voidable as to nonexempt property and remains valid as to exempt property; *In re Wells* (D. C., Kan.), 5 Am. B. R. 308, 105 Fed. 762; *In re Remmerde* (D. C., Iowa), 30 Am. B. R. 701, 206 Fed. 826; *Bank of Mendon v. Mell* (Mo., Kan. City Ct. of App.), 185 Mo. App. 510, 33 Am. B. R. 777, 172 S. W. 484.

40. *In re Boyd* (D. C., Ia.), 10 Am. B. R. 337, 120 Fed. 999; *In re Campbell* (D. C., Va.), 10 Am. B. R. 723, 124 Fed. 417; *In re Gordon* (D. C., Vt.), 8 Am. B. R. 255, 115 Fed. 445; *In re Garden* (D. C., Ala.), 1 Am. B. R. 582, 93 Fed. 423; *In re Woodruff* (D. C., Ga.), 2 Am. B. R. 678, 96 Fed. 317; *In re Sisler* (D. C., Va.), 2 Am. B. R. 760, 96 Fed. 402.

41. *Woodruff v. Cheeves* (C. C. A., 5th Cir.), 5 Am. B. R. 296, 105 Fed. 601, revg. *In re Woodruff* (D. C., Ga.), 2 Am. B. R. 678, 96 Fed. 317; *In re Black* (D. C., Pa.), 4 Am. B. R. 776, 104 Fed. 28; *Sellers v. Bell* (C. C. A., 5th Cir.), 2 Am. B. R. 529, 94 Fed. 801; *In re Ogilvie* (Ref., Ga.), 5 Am. B. R. 374; *In re Little* (D. C., Iowa), 6 Am.

B. R. 681, 110 Fed. 621; *In re Swords* (D. C., Ga.), 7 Am. B. R. 436, 112 Fed. 661; *Lockwood v. Exchange Bank*, 190 U. S. 294, 10 Am. B. R. 107, 47 L. Ed. 1061; *Ingram v. Wilson* (C. C. A., 8th Cir.), 11 Am. B. R. 192, 125 Fed. 913; *Bell v. Dawson* (Ga. Sup.), 120 Ga. 628, 12 Am. B. R. 159, 48 S. E. 150. A valuable contribution to the discussion of this question will be found *In re Tune* (D. C., Ala.), 8 Am. B. R. 285, 115 Fed. 906.

Jurisdiction in respect to waive-notes.—A Federal trustee in bankruptcy is not entitled to the bankrupt's exemption against a creditor who has attached the same by an attachment execution issued and served within four months prior to bankruptcy on a judgment waiving exemption. *Sharp v. Woolslare*, 25 Pa. Super. Ct. 251, 12 Am. B. R. 396. Money allowed a bankrupt "in lieu of his exemption" may be attached in the hands of the trustee on a judgment rendered against a bankrupt on a note wherein the bankrupt waived his exemption. *Zumpfe v. Schultz*, 35 Pa. Super. Ct. 106, 20 Am. B. R. 916. In the case of *In re Edwards* (D. C., Ala.), 19 Am. B. R. 632, 156 Fed. 794, it was held that a bankruptcy court had no jurisdiction to compel the return of money received by a judgment creditor as the proceeds of an execution sale of exempt property under a judgment on a promissory note secured prior to adjudication in which note the bankrupt waived all claim of exemption.

A judgment creditor of a bankrupt, who holds a waiver of exemption, may have the sheriff levy upon and sell the exempt property of the bankrupt at any time before his final discharge. *First Nat. Bank v. Bartlett* (Sup. Ct., Pa.), 35 Pa. Super. Ct. 593, 21 Am. B. R. 88.

The amendment of 1910 to section 47a (2) of the bankruptcy act does not affect the provision of section 6, in which the intention of Congress is plainly expressed, that the bankruptcy act shall not affect the allowance to bankrupts of the exemptions which are prescribed by State laws. *Brandt v. Mayhew* (C. C. A., 9th Cir.), 33 Am. B. R. 845, 218 Fed. 422.

42. *In re Soper* (D. C., Neb.), 22 Am. B. R. 868, 173 Fed. 924.

(5) JURISDICTION IN RESPECT TO EXEMPT PROPERTY AND CLAIMS THEREON. — When the exemption has been set apart by the trustee, and he has reported it to the court for its approval, and when approved and the bankrupt's right to it has been finally determined, the property embraced in the exemption ceases to be a part of the assets to be administered by the court in connection with the bankrupt's estate, and the bankruptcy court would have no jurisdiction to entertain a plenary suit in equity by a creditor of the bankrupt to reach and subject such exempt property to his claim.⁴³ So where property claimed to be exempt is attached in a State court, such property may be held under the attachment until it is determined in bankruptcy proceedings what part of the attached property has passed to the trustee, freed from the claim of exemption,⁴⁴ and the court may not restrain the suit in which the property was attached; nor determine whether such property was within a waiver contract which is the subject of the suit.⁴⁵ A voluntary bankrupt cannot abandon his bankruptcy proceeding after receiving all of his property as an exemption, and prevent his creditor from procuring that property, where he does not have the exemption allowed in the bankruptcy court set apart as a homestead in the State court.⁴⁶ Where after a court of bankruptcy has set apart to a bankrupt his exemptions, including a note due the bankrupt, the trustee, without authority, "by mistake or oversight," as he claims, proceeds to collect it, the State court has jurisdiction of a garnishment proceeding by a judgment creditor of the bankrupt against the trustee.⁴⁷ Prior to *Bardes v. Bank*,⁴⁸ it was thought in some districts that the still more general power conferred on courts of bankruptcy to "determine controversies" gave the Federal courts jurisdiction to pass on the validity of liens on the exempt property; that case, however, clearly negated such a view.⁴⁹ And it has not been superseded by the amendment of § 23-b,⁵⁰ which even now has only to do with suits to recover property.⁵¹

f. Trustees; rights and duties. — The rights and duties of trustees in respect to exemptions of bankrupts are indicated in § 47-a (11) as supplemented by General Order XVII.⁵² In brief, if the bankrupt has duly asserted his claim to exemptions,⁵³ the trustee must estimate and determine the value of the

43. In re Lucius (D. C., Ala.), 10 Am. B. R. 653, 124 Fed. 455; Woodruff v. Cheeves (C. C. A., 5th Cir.), 5 Am. B. R. 296, 105 Fed. 601; In re Seydel (D. C., Iowa), 9 Am. B. R. 255, 118 Fed. 207; Vitzthum v. Large (D. C., Iowa), 20 Am. B. R. 666, 162 Fed. 685.

44. Jewett v. Huffman (Sup. Ct., N. Dak.), 14 N. Dak. 110, 13 Am. B. R. 738, 103 N. W. 408.

45. Roden Grocery Co. v. Bacon (C. C. A., 5th Cir.), 13 Am. B. R. 251, 133 Fed. 515.

46. Liability to execution of property exempted in bankruptcy but not set aside by State court. — A bankrupt on his own petition was adjudicated a bankrupt, and had all of his property, consisting of a stock of merchandise, exempted in bankruptcy. The property was turned over to the bankrupt, who did not have it set apart as a homestead to him and his family in the State court. More than three years after the adjudication in bankruptcy, and after the exemption of the property in the bankruptcy court, a creditor whose claim was listed in the bankruptcy application brought suit on his claim. There was no plea or suggestion of bankruptcy.

The suit eventuated in a judgment, and an execution based thereon was levied on the property exempted in the bankruptcy court, and a claim was interposed by the bankrupt as head of the family. No discharge has been granted to the bankrupt. *Held*, that the property is subject to the *fi. fa.* *Baltimore Bargain House v. Busby* (Ga. Sup. Ct.), 143 Ga. 734, 35 Am. B. R. 119, 85 S. E. 875.

47. *Barker-Bond Lumber Co. v. Whaley* (Va. Sup. Ct.), 117 Va. 642, 35 Am. B. R. 331, 86 S. E. 160.

48. 178 U. S. 524, 4 Am. B. R. 163, 44 L. Ed. 1175. For an exceptional case, see *In re Gordon* (D. C., Vt.), 8 Am. B. R. 255, 115 Fed. 445.

49. In re Hartsell (D. C., Ala.), 15 Am. B. R. 177, 140 Fed. 30.

50. See discussion under Section Twenty-three of this work.

51. In re Brumbaugh (D. C., Pa.), 12 Am. B. R. 204, 128 Fed. 971.

52. See "Practice" under this section, *post*; and also under § 47 of this work. See also "Supplementary Forms," *post*.

53. § 7-a(8), Form 1, Schedule B (5).

exemptions claimed,⁵⁴ and make an itemized report setting them off, within twenty days,⁵⁵ whereupon any creditor⁵⁶ may except, and the exceptions will be argued before the referee. It has been held that the trustee may set apart the bankrupt's exemption as a ministerial act and then except to the allowance of the claim under General Order XVII.⁵⁷ Since he has no title, he may not retain exempt property and deprive the bankrupt of his exemption on the ground that assets have been withheld.⁵⁸ The right of exemption will depend upon conditions existing at the time the petition in bankruptcy is filed.⁵⁹ The trustee has no title to the exempt property of the bankrupt, but it remains in the bankrupt. Where property has been set off to the bankrupt as a homestead it cannot be sold by the bankruptcy court, nor has a trustee any equity therein that can be made the subject of sale.⁶⁰ Appraisers cannot therefore fix the value of the exemptions claimed;⁶¹ their services will, however, often be availed of by the trustee. Indeed, this practice is sometimes sanctioned by district rules. Until the exemptions are fixed, the trustee has the right to possession of the property claimed, and the bankrupt will not be allowed compensation for caring for it.⁶² The trustee may not deduct therefrom the costs and expenses incurred by the bankrupt prior to bankruptcy, on account of the bankruptcy proceedings.⁶³ As soon as the claim is determined in favor of the bankrupt, the trustee should at once surrender possession, for an exemption is a matter of right and the trustee may not withhold it from him.⁶⁴ The duties imposed upon the trustee in respect to the allotment of exemption may not be neglected, or their discharge postponed until an issue of fraud in regard to the disposition of the property is determined.⁶⁵ A trustee may, however, retain possession of the fund which has been allowed to the bankrupt as an exemption for a reasonable time, so as to give opportunity to creditors claiming liens against the fund to take steps to enforce such liens.⁶⁶ The mere act of the

54. *In re Friedrich* (C. C. A., 7th Cir.), 3 Am. B. R. 801, 100 Fed. 284; *In re Finklestein* (D. C., Pa.), 27 Am. B. R. 229, 192 Fed. 738.

55. General Order XVII, Form 47. See *In re Manning* (D. C., Pa.), 7 Am. B. R. 571, 112 Fed. 948; *In re Reese* (D. C., Ala.), 8 Am. B. R. 411, 115 Fed. 993.

56. *In re White* (D. C., Vt.), 4 Am. B. R. 613, 103 Fed. 774.

57. The trustee is a creditor, within the meaning of the provision to General Order 17, that "any creditor may except to the determination of the trustee" in allowing the claim of exemption on the ground of the bankrupt's fraud. *In re Rice* (D. C., Pa.), 21 Am. B. R. 202, 164 Fed. 589.

58. *Matter of Elkin* (D. C., N. J.), 34 Am. B. R. 134, 218 Fed. 971.

59. *Matter of Crum* (D. C., Ohio), 34 Am. B. R. 586, 221 Fed. 729.

60. *Sullivan v. Mussey* (C. C. A., 5th Cir.), 25 Am. B. R. 781, 184 Fed. 60, affg. 25 Am. B. R. 91, 179 Fed. 1,007.

61. *In re Grimes* (D. C., N. Car.), 2 Am. B. R. 735, 96 Fed. 529. *Contra*: *In re McCutchen* (D. C., S. Car.), 4 Am. B. R. 81, 100 Fed. 779.

62. *In re Groves* (Ref., Ohio), 6 Am. B. R. 728.

63. *Matter of Humphreys* (D. C., N. Car.), 34 Am. B. R. 655, 221 Fed. 997.

64. *In re Brown* (D. C., Pa.), 4 Am. B. R. 46, 100 Fed. 441.

65. *Matter of Harrell* (D. C., N. Car.), 34 Am. B. R. 809, 222 Fed. 160.

To set apart exempt property.—One of the first concerns of the trustee should always be promptly to set aside to the bankrupt any exempt property. *Matter of Brown* (D. C., Ky.), 35 Am. B. R. 826, 228 Fed. 533. It is the duty of the trustee in bankruptcy to set apart the bankrupt's exemptions from his property as soon as practicable, but it is improper where the bankrupt's goods have been sold for about twenty-five per cent. of their invoice to pay \$500 in cash from this amount on account of exemptions, thus absorbing about \$2,000 of the invoice value of the property. *Matter of Shrimmer* (D. C., N. Car.), 36 Am. B. R. 404, 228 Fed. 794.

66. Retention of fund.—*Matter of Barnett* (D. C., Ga.), 32 Am. B. R. 585, 214 Fed. 263.

In the case of *In re Maynard & Co.* (D. C., Ga.), 25 Am. B. R. 732, the court said: "The exemption being in cash, and it appearing that there will be creditors with claims which they will desire an opportunity to enforce against the fund, notwithstanding its being set apart as an exemption under the constitution and laws of Georgia, the fund will be held by the trustee for a reasonable time, to give opportunity to creditors

trustee in setting apart exempt property has not been given the force of an adjudication. He is required to report the items of exempt property, with the estimated values thereof, to the court. This report may be contested, and, as between the creditor and the bankrupt, does not become final and conclusive until the court shall have acted thereon.⁶⁷ The requirements of the State law in respect to claiming the exemption must be complied with, or the property will pass to the trustee freed from the exemption.⁶⁸ But where the bankrupt made claim to a share of the proceeds of the sale of a homestead prior to the approval by the State court, it was held that he had not waived his rights to the exemption.⁶⁹ Where a bankrupt has clearly indicated his intention not to waive his exemption, and has also specified the particular class of property owned by him, from which he claims his exemption, it then becomes the duty of the trustee to select and sever the exemption from the mass of property, belonging to the estate, of the character and the class indicated.⁷⁰ Where a trustee in good faith sells all the bankrupt's property, including the articles which a bankrupt has claimed as exempt, upon the assumption that the property would bring a better price when sold as a whole than when sold in parcels, he is justified in turning over to the bankrupt or his assignee the full amount allowed as an exemption by the State law.⁷¹

III. RIGHT OF BANKRUPT TO EXEMPTIONS.

a. Domicile; time and place.—Domicile as used in this section means what it would mean were the question one affecting jurisdiction to adjudge.⁷² Thus, the law of the domicile may be different from the law of the forum; as, where the place of business is in one State and the residence in another. Domicile usually connotes personal presence in a fixed and permanent abode.⁷³ A person must have a legal domicile,⁷⁴ and the old one always remains until a new one is acquired.⁷⁵ Where a man leaves his family to avoid arrest his

having such claims, to take steps to enforce the same. This the court did in the case of *In re Castlebury* (D. C., Ga.), 16 Am. B. R. 430, 143 Fed. 1,018, and I think it is in line with the views of the Supreme Court in the case of *Lockwood v. Exchange Bank*, 190 U. S. 294, 10 Am. B. R. 107, 47 L. Ed. 1061."

67. *Seedig v. First Nat'l Bank* (Tex. Civ. App.), 33 Am. B. R. 99, 168 S. W. 445, holding that where in an action by a former bankrupt to recover damages for an alleged wrongful levy on property claimed as exempt, the plaintiff alleges that his duly appointed trustee in bankruptcy had set aside the property described in his petition as being exempt and not subject to be administered as part of the bankrupt estate, such allegation, standing alone, does not charge that the fact that the property is exempt is *res adjudicata*, since the report of a trustee in bankruptcy setting aside exemptions, in compliance with section 47 (11) of the bankruptcy act, does not become final and conclusive as between creditors and the bankrupt until acted upon by the court.

68. *In re Stephens* (D. C., Ga.), 8 Am. B. R. 53, 114 Fed. 192; *In re Boorstin* (D. C., Ga.), 8 Am. B. R. 89, 114 Fed. 696; *In re West* (D. C., Ga.), 8 Am. B. R. 564,

116 Fed. 767; *In re Wunder* (D. C., Pa.), 13 Am. B. R. 701, 133 Fed. 821.

Failure to comply.—Where a bankrupt makes a claim for exemptions in his schedules, but in doing so does not comply with the requirements of the State law in regard to the manner of making such claim and fails to designate the specific articles claimed as exempt, his claim will not be allowed. *In re Matthews* (Ref., Okl.), 20 Am. B. R. 369.

69. *In re Eash* (D. C., Iowa), 19 Am. B. R. 738, 157 Fed. 996.

70. *In re Andrews & Simonds* (D. C., Mich.), 27 Am. B. R. 116, 193 Fed. 776.

71. *In re Hutchinson* (D. C., Mich.), 28 Am. B. R. 405, 197 Fed. 1021.

72. Bankr. Act, § 2 (1).

73. *Mitchell v. U. S.*, 21 Wall. 352-353, 22 L. Ed. 584; *Morris v. Gilmer*, 129 U. S. 328, 32 L. Ed. 690; *In re Dinglehoefer Bros.* (D. C., N. Car.), 6 Am. B. R. 242, 109 Fed. 866.

74. *Desmare v. U. S.*, 93 U. S. 610, 23 L. Ed. 959.

75. *Mitchell v. U. S.*, 21 Wall. 353, 22 L. Ed. 584; *Morris v. Gilmer*, 129 U. S. 328, 32 L. Ed. 690; *In re Schulz* (D. C., Or.), 14 Am. B. R. 317, 135 Fed. 228.

domicile does not change.⁷⁶ The domicile of a corporation is in the State of its organization, and cannot be changed.⁷⁷ The burden of proving a change of domicile by the bankrupt lies unquestionably upon the party who asserts the change.⁷⁸ The time of residence, both as to existing State statutes and the property claimed, is the time when, under the statute, he is required to assert his claim of exemption.⁷⁹ His right to such exemptions as are permitted by State laws, is referable to the condition of things as they existed at the time of the filing of the petition.⁸⁰

b. Assertion of claim.—(1) **NECESSITY OF ASSERTION.**—While an exemption is a matter of right,⁸¹ it, being personal to the bankrupt, must be asserted or he will be deemed to have waived it.⁸² What he does not claim for himself and his family, he leaves in the general fund for distribution.⁸³

(2) **COMPLIANCE WITH STATE STATUTE.**—Whether an exemption is a mere personal privilege which must be claimed by the bankrupt, or is a property interest accruing from the statute itself, will determine the necessity of claiming the exemption. If the exemption is of the former class it must be asserted with the formality required by the State statute; if it is of the latter class, the statute executes itself.⁸⁴ This only pertains to the necessity of complying

76. *In re Filer* (D. C., N. Y.), 5 Am. B. R. 332, 108 Fed. 209.

77. *Bank of Augusta v. Earl*, 13 Pet. 585, 10 L. Ed. 274; *Lafayette Ins. Co. v. French*, 18 How. 484, 15 L. Ed. 451; *Shaw v. Quincy Mining Co.*, 145 U. S. 450, 36 L. Ed. 758.

78. *In re Grimes* (D. C., N. C.), 2 Am. B. R. 160, 94 Fed. 800.

Burden of proving change of residence.—In the case of *In re Bassett* (D. C., Wash.), 26 Am. B. R. 800, 189 Fed. 410, the court said: "Under this testimony I am of the opinion that the referee properly found that the bankrupt was a resident of this State. He was unquestionably a resident of the State for a considerable period of time preceding the filing of the petition in bankruptcy, and the burden of proving a change of residence is upon those asserting the change."

79. See *Bankr. Act*, § 7 (8); *In re Groves* (Ref., Ohio), 6 Am. B. R. 728; *In re Miller* (Ref., Mo.), 1 Am. B. R. 64. But see *Matter of Fletcher* (Ref., Ohio), 16 Am. B. R. 491; *In re Fisher* (D. C., Va.), 15 Am. B. R. 652, 142 Fed. 205; *In re O'Hara* (D. C., Pa.), 20 Am. B. R. 714, 162 Fed. 325, holding that a bankrupt's right to exemption must be determined as of the date when claimed; if he is not then a resident of the State his claim for exemption will be denied, even though he was a resident of the State, before and since; *In re Donahey* (D. C., Pa.), 23 Am. B. R. 796, 176 Fed. 458, holding that a bankrupt's claim of an exemption is to be determined as of the date when it is asserted, and his absence thereafter from the State as a fugitive from justice is immaterial.

80. *Mullinix v. Simon* (C. C. A., 8th Cir.) 28 Am. B. R. 1, 196 Fed. 775; *Matter of Crum* (D. C., Ohio), 34 Am. B. R. 586, 221 Fed. 729; *In re Bassett* (D. C., Wash.), 26

Am. B. R. 800, 189 Fed. 410. See *Am. Bankr. Dig.*, § 945.

81. *In re Brown* (D. C., Pa.), 4 Am. B. R. 46, 100 Fed. 441.

82. *In re Bolinger* (D. C., Pa.), 6 Am. B. R. 171, 108 Fed. 374.

Necessity to claim exemption.—In the case of *In re Baughman* (D. C., Pa.), 25 Am. B. R. 167, 183 Fed. 668, the court said: "It is said that the bankruptcy court has no jurisdiction over exempt property except to set it aside. No doubt, to a qualified extent, that is true, but it does not apply here. In order to get the benefit of the exemption, it must be claimed. And until it is, and specific property has been set off under it, the court has full authority to consider and dispose of what is involved. It may deny the bankrupt his exemption, where he has waived or forfeited it, or for any reason it cannot be rightly claimed. It is only after the bankrupt has been found, entitled to it and it has been set off to him, that the court loses its hold." Citing *In re Highfield* (D. C., Pa.), 21 Am. B. R. 92, 163 Fed. 924.

83. *In re Sloan* (D. C., Pa.), 14 Am. B. R. 435, 135 Fed. 873.

84. *Moran v. King*, 7 Am. B. R. 176, 111 Fed. 730; *Matter of French* (D. C., N. Y.), 37 Am. B. R. 289, 299, 231 Fed. 255, citing text.

Filing claim in probate court under Alabama civil code.—Section 4168 of the Alabama civil code, requiring a claim of exemption to be filed in the probate court of the proper county, only applies where selection of the exemption is made essential by the bankrupt's ownership of property in excess of the amount allowed him as exempt. *Matter of Ziff* (D. C., Ala.), 35 Am. B. R. 83, 225 Fed. 323.

with the provisions of the State statute relative to asserting a claim of exemption.⁸⁵

(3) **TIME OF ASSERTION.**—He must assert his claim to exemptions in a court of bankruptcy before his discharge,⁸⁶ and he will not be entitled to such a claim in a State court after his discharge.⁸⁷ It has been held that he may claim his exemptions at any time before the sale of the property.⁸⁸ An extension of the time for filing a bankrupt's schedules extends his time to claim his exemption.⁸⁹

(4) **MANNER OF ASSERTION.**—If a voluntary bankrupt, he should assert it in the first instance in Schedule B (5) attached to his petition; if an involuntary bankrupt, in the same schedule when filed after his adjudication.⁹⁰ If the claim of the bankrupt as contained in his schedules, does not describe or designate any particular property, such claim is invalid.⁹¹ But under a State statute allowing a certain sum in lieu of homestead, a claim need not specify articles amounting to the sum allowed, but may ask for a deduction to that amount from a stock of merchandise or its equivalent in cash out of the proceeds of the estate.⁹² The manner in which the claim for exemption shall be made is a mere matter of procedure, and, as in other cases, amendments may be allowed to effect justice between the parties.⁹³

c. Waiver of claim.—(1) **IN GENERAL.**—The principle that a debtor may

85. In the case of *In re Fisher* (D. C., Va.), 15 Am. B. R. 652, 142 Fed. 205, the court stated: "In a laudable effort to follow the supposed views of this court, the referee has, it appears, been misled by the opinion in *In re Garner* (D. C., Va.), 8 Am. B. R. 263, 115 Fed. 200. By that opinion, nothing more was intended than was expressed. The state law makes the execution and filing for record of a homestead deed, a condition precedent to the right of such exemption. In that case no such deed had been executed, and the only claim to homestead was that made in the bankruptcy schedules."

86. In *re Kean*, Fed. Cas. 7,630, 2 Hughes, 322.

87. *Steel v. Moody*, 53 Ala. 418; *Gayle v. Randall*, 71 Ala. 469; *Woolfolk v. Murray*, 44 Ga. 133; *Maxwell v. McCune*, 37 Tex. 515.

The proper time to claim an exemption is at the time the bankrupt's schedules are filed. In a voluntary case it should be a part of the schedules accompanying the application, and in an involuntary case it should be made at the time he filed his schedules. *Matter of Webb* (D. C., Ga.), 34 Am. B. R. 204, 219 Fed. 349.

88. *Bartholomew v. West*, Fed. Cas. 1,071, 2 Dill. 290; *Toenes v. Moog*, 78 Ala. 558; *McClusky v. McNeely*, 8 Ill. 578; *Slaughter v. Detiney*, 15 Ind. 49; *Shepherd v. Murrill*, 90 N. C. 208; *Weaver's Appeal*, 18 Pa. St. 307; *Yost v. Heffner*, 69 Pa. St. 68.

89. In *re O'Hara* (D. C., Pa.), 20 Am. B. R. 714, 162 Fed. 325.

90. See Bankr. Act, § 47(11); In *re Friedrich* (C. C. A., 7th Cir.), 3 Am. B. R. 801,

100 Fed. 284; In *re Groves* (Ref., Ohio), 6 Am. B. R. 728; In *re Lucius* (D. C., Ala.), 10 Am. B. R. 653, 124 Fed. 455; *Matter of Webb* (D. C., Ga.), 34 Am. B. R. 204, 219 Fed. 349. Under the Virginia statute this is not enough. In *re Garner* (D. C., Va.), 8 Am. B. R. 263, 116 Fed. 200.

A bankrupt's schedules must contain his claim to exemptions, and the trustee must set them apart and report to the court. Whether a specific item of property shall go to creditors or be reserved by the bankrupt, as exempt, is not for him to constitute himself the judge; but it is his duty to disclose the transaction, that the bankruptcy court may determine the right. *Matter of Brincab* (D. C., Ala.), 37 Am. B. R. 587, 233 Fed. 811. See Am. Bankr. Dig., § 988.

When bankrupt need not itemize claim in schedules.—Where a bankrupt owns personal property of a value less than the amount to which he is entitled as an exemption, he need not file with his schedules an itemized list of the property claimed by him as exempt. This because he is entitled to all the property. *Matter of Ziff* (D. C., Ala.), 35 Am. B. R. 83, 225 Fed. 323.

91. In *re Baughman* (D. C., Pa.), 25 Am. B. R. 167, 183 Fed. 668; In *re Pfeiffer* (D. C., Pa.), 19 Am. B. R. 230, 155 Fed. 892.

92. *Smith v. Thompson* (C. C. A., 8th Cir.), 32 Am. B. R. 165, 213 Fed. 335.

93. In *re Maxson* (D. C., Ia.), 22 Am. B. R. 424, 170 Fed. 356. Claims may be amended if reasonably made; but it is too late if the bankrupt wait until after his discharge. *Matter of Webb* (D. C., Ga.), 34 Am. B. R. 204, 219 Fed. 349. See discussion *post*, subtitle, "Practice."

waive his right to exemptions is well settled,⁹⁴ and a waiver may arise either from the bankrupt's failure to claim exemptions,⁹⁵ or by a general⁹⁶ or specific surrender of them. If the latter, the usual method is by a waive-note. In such cases, the waiver is personal to the creditor thus favored, and, if not asserted by him, inures to the benefit of the bankrupt.⁹⁷ A waiver cannot inure to the benefit of a general creditor.⁹⁸ A bankrupt is not entitled to an exemption in the proceeds arising from the sale of property over the objection of a creditor, where more than four months before filing his petition in bankruptcy, he gave a note and mortgage to secure the creditor's claim, containing an express waiver of his homestead exemptions.⁹⁹ But a bankrupt may assert his right against a seeming but not actual waiver prior to the bankruptcy.¹⁰⁰ If a note containing a waiver is void for usury or other cause, the bankrupt's exemption is not affected, and a judgment for the amount of such note may not be enforced against exempt property.¹⁰¹ A waiver of homestead rights in favor of all creditors cannot be worked out through a waiver made to one creditor only, nor can the latter form of waiver entitle all creditors to a right to marshal securities or funds.¹⁰²

94. *Spitley v. Frost*, 15 Fed. 304, *revd.* on other grounds 121 U. S. 552; *People v. Palmer*, 46 Ill. 398; *Green v. Blunt*, 59 Iowa 79, 12 N. W. 762; *Pond v. Kimball*, 101 Mass. 105; *Brackett v. Watkins*, 21 Wend. 68; *Louck's Appeal*, 24 Pa. St. 426; *Matter of Liby* (D. C., Pa.), 33 Am. B. R. 312, 218 Fed. 90. See Am. B. R. Dig. § 975.

95. *In re Nunn* (D. C., Ga.), 2 Am. B. R. 664; *In re Haskin* (D. C., Pa.), 6 Am. B. R. 485, 109 Fed. 789; *In re Manning* (D. C., Pa.), 7 Am. B. R. 571, 112 Fed. 949; *In re Prince & Walter* (D. C., Pa.), 12 Am. B. R. 675, 131 Fed. 546; *In re Wunder* (D. C., Pa.), 13 Am. B. R. 701, 133 Fed. 821; *In re Von Kerm* (D. C., Pa.), 14 Am. B. R. 403, 135 Fed. 447. In Georgia a head of a family cannot waive the statutory homestead exemption for the benefit of a creditor. *In re Reinhart* (D. C., Ga.), 12 Am. B. R. 78, 129 Fed. 510.

Where a bankrupt filed no exception to an order of the referee, as to his right of exemptions, he cannot be heard to object to any of its provisions on certificate of review upon exceptions of a creditor to the order. *In re Cohn* (D. C., N. Dak.), 22 Am. B. R. 761, 171 Fed. 568.

96. Compare *In re Mayer* (C. C. A., 7th Cir.), 6 Am. B. R. 117, 108 Fed. 599.

97. *In re Black* (D. C., Pa.), 4 Am. B. R. 776, 104 Fed. 28; *In re Nye* (C. C. A., 6th Cir.), 13 Am. B. R. 142, 133 Fed. 33, holding in the case of a waiver of homestead in a mortgage that the rights of other creditors are subordinate to both the mortgage lien and the payment of the bankrupt's exemption allowance; *In re Baughman* (D. C., Pa.), 25 Am. B. R. 167, 183 Fed. 668.

98. *In re Camp* (D. C., Ga.), 1 Am. B. R. 165, 91 Fed. 745; *In re Osborn* (D. C., N. Y.), 5 Am. B. R. 111, 104 Fed. 780; *In re Bolinger* (D. C., Pa.), 6 Am. B. R. 171, 108 Fed. 374. But see *contra*: *In re Garner* (D. C., Va.), 8 Am. B. R. 263, 115 Fed. 200.

99. *Matter of Hargraves* (D. C., Ga., Ref.)

19 Am. B. R. 238, distinguishing *In re Reinhart* (D. C., Ga.), 12 Am. B. R. 78, 129 Fed. 510; *Citizens' Bank v. Hargraves* (C. C. A. 5th Cir.), 21 Am. B. R. 323, 164 Fed. 613.

Waiver by chattel mortgage.—Since under section 1391 of the New York Code of Civil Procedure, an election is necessary in order to have the exemption applied where the property mentioned exceeds \$250 in value, a bankrupt waives his right of exemption as to all such property mentioned and described in chattel mortgages executed by him, and it is immaterial that one of the mortgages was executed more than four months before the filing of the petition in bankruptcy. *Matter of French* (D. C., N. Y.), 37 Am. B. R. 289, 231 Fed. 255.

Waiver contained in financial statement.—Where a person on a request for a financial statement furnished the same, together with a waiver of homestead and exemptions, and partly on the faith of such waiver the creditor accepted an order for goods which he thereafter delivered, the waiver of homestead was held to be contemporaneous with the offer to buy and its acceptance and was a valid contract of waiver. *Pincus v. Meinhard & Bro.* (Ga. Sup. Ct.), 139 Ga. 365, 32 Am. B. R. 123, 77 S. E. 82.

100. *In re Osborn* (D. C., N. Y.), 5 Am. B. R. 111, 104 Fed. 780.

101. *Floyd v. Johnson* (Ga. Sup. Ct.), 142 Ga. 833, 34 Am. B. R. 431, 83 S. E. 943.

102. A waiver of exemption rights contained in a mortgage of real property is solely for the benefit of the mortgagee and for the security of his debt alone. Where a mortgagor waives his exemptions the mortgagee is not thereby confined, in case of bankruptcy of the mortgagor, to enforcing his security against the exemption only but may enforce his mortgage against the entire property. *Matter of Brown* (D. C., Ky.), 35 Am. B. R. 826, 228 Fed. 533.

(2) **EFFECT OF WAIVER.**—If a bankrupt waives his claim to an exemption he thereby leaves the property and the proceeds thereof in the general fund for distribution among the general creditors.¹⁰³ An execution creditor whose judgment is based upon a waiver of exemption may not proceed by execution against the property of the bankrupt where the bankrupt has waived his exemption and the property has not been set off to him as exempt; the exemption having been waived the property passes to the trustee to be administered for the benefit of all the bankrupt's creditors.¹⁰⁴ But it has been held that a bankrupt who has, under a State statute authorizing it, transferred his claim of exemption as security for a debt and therein authorized the transferee to select the exempt property, may not defeat the transfer by an express waiver of exemption in his petition for adjudication in bankruptcy.¹⁰⁵

(3) **EFFECT OF WAIVE-NOTE.**—The fact that a bankrupt has given a waive-note does not affect his right to have his exempt property set apart.¹⁰⁶ The decisions are not uniform as to the remedy of a creditor holding a waive-note.¹⁰⁷ It has been held that the claim may not be asserted until the note is reduced to judgment;¹⁰⁸ also that such a creditor must look to the exempt property before asserting his claim against the general estate.¹⁰⁹

(4) **WITHHOLDING DISCHARGE.**—The bankrupt's discharge should be withheld until a creditor claiming under a waiver has had time to resort to remedies allowable in State courts.¹¹⁰ Exempt property, or the proceeds thereof, do not

103. *In re Sloan* (D. C., Pa.), 14 Am. B. R. 435, 135 Fed. 873.

104. **Right of execution creditor holding waiver.**—In the case of *In re Baughman* (D. C., Pa.), 25 Am. B. R. 187, 183 Fed. 668, it appeared that at the time the petition in bankruptcy was filed, the goods of the bankrupt were under levy by the sheriff on an execution in which the \$300 State exemption was waived. The bankrupt amended his schedules by withdrawing the claim therein made. The court said. "The claim of the bankrupt, as made in his schedules, was invalid, no particular property having been designated or set out. And while this was amendable, it was insufficient as it stood, and without amendment was not in shape to be allowed. But instead of amending the claim the bankrupt abandoned it, after which it was the same as if it had never been made. The execution creditor could not prevent this. He had no right by virtue of his waiver to proceed against the goods of the bankrupt which he had seized, even though they amounted to less than the law allowed; but only against the specific property, within that amount, which the bankrupt selected and had set off to him; and this designation never having been made, and all that was done by the bankrupt in that connection having been recalled, the execution creditor was left without anything on which his writ could take effect. . . .

It may be that, by withdrawal of the claim, he was able to defeat the waiver. But however it may stand under the state law, there is no particular reason in bankruptcy why a waiver should be favored. The \$300 exemption is allowed to the unfortunate debtor

for the benefit of himself and his dependent family. And if he is authorized to waive the right to it in favor of one creditor over others, he certainly is authorized to make no claim to it after bankruptcy, so that all may fare alike."

105. *In re Hastings* (C. C. A., 6th Cir.), 24 Am. B. R. 360, 181 Fed. 33, which arose under a Michigan statute which authorizes the selection of exemptions to be made by the debtor "or his authorized agent," and in which it appeared that the bankrupt had mortgaged all his exempt property and authorized the mortgagee to "demand, receive and select such exemptions in my name or otherwise from any persons from whom I might have demanded them."

106. *In re Goodman* (C. C. A., 5th Cir.), 23 Am. B. R. 504, 174 Fed. 644.

107. The Ray bill of 1902, as amended on the floor of the House, would have settled the question in favor of any person claiming under a waiver, but the Senate struck out the provision.

108. *In re Brown* (D. C., Pa., Ref.), 1 Am. B. R. 256; *In re Moore* (D. C., Ala.), 7 Am. B. R. 285, 112 Fed. 289. See also *In re Tune* (D. C., Ala.), 8 Am. B. R. 285, 115 Fed. 906.

109. *In re Sisler* (D. C., Va.), 2 Am. B. R. 760, 96 Fed. 402. Compare *In re Hopkins* (D. C., Ala., Ref.), 1 Am. B. R. 209.

110. *Ingram v. Wilson* (C. C. A., 8th Cir.), 11 Am. B. R. 192, 125 Fed. 913; *In re Brumbaugh* (D. C., Pa.), 12 Am. B. R. 204, 128 Fed. 971; *Bell v. Dawson*, 120 Ga. 628, 12 Am. B. R. 159, 48 S. E. 150; *McKenney v. Cheney*, 118 Ga. 387, 395, 45 S. E. 433; *In re Allen* (D. C., Va.), 13 Am. B. R. 518, 526, 134 Fed. 620.

belong to the creditors, nor may the trustee recover the same for their benefit.¹¹¹ But it has been held that an opportunity should be given to creditors to enforce their debts or liens against the exempt property in a court of competent jurisdiction, and in the meantime the bankrupt's discharge may be withheld.¹¹² The creditor has an equity entitling him to a reasonable postponement of the discharge of the bankrupt to enable him to bring such proceedings in the State court as may be necessary to assert his rights.¹¹³ Where the exempt property consists of money in the hands of the trustee, the bankruptcy court will hold the fund, until it can be placed where it will be available to the benefit of parties in interest.¹¹⁴ If the discharge is not withheld it will operate as a release of the debt and bar a proceeding based thereon against the exempt property.¹¹⁵

d. Parties entitled to exemptions.—(1) **RIGHT IS PERSONAL.**—The right to an exemption is a matter personal to the bankrupt.¹¹⁶ It may not be claimed by an assignee.¹¹⁷ Nor may it be claimed by a mortgagee of exempt property,¹¹⁸ unless under the statutes of the State it is authorized to transfer the right to claim an exemption.¹¹⁹ But it has been held that a husband has the right to

111. *Vitzhum v. Large* (D. C., Iowa), 20 Am. B. R. 666, 162 Fed. 685; *In re Eash* (D. C., Iowa), 19 Am. B. R. 738, 157 Fed. 996.

112. *In re Castleberry* (D. C., Ga.), 16 Am. B. R. 159, 143 Fed. 1,018; *In re Allen* (D. C., Va.), 13 Am. B. R. 518, 134 Fed. 620; *Lockwood v. Exchange Bank*, 190 U. S. 294, 10 Am. B. R. 107, 47 L. Ed. 1061; *In re Maynard & Co.* (D. C., Ga.), 25 Am. B. R. 732, 183 Fed. 823; *Meinhard & Bro. v. Pincus* (C. C. A., 5th Cir.), 29 Am. B. R. 619, 200 Fed. 736.

113. *Lockwood v. Exchange Bank*, 190 U. S. 294, 10 Am. B. R. 107, 47 L. Ed. 1061; *In re Weaver* (D. C., Ga.), 16 Am. B. R. 265, 144 Fed. 229; *Roden Grocery Co. v. Bacon* (C. C. A., 5th Cir.), 13 Am. B. R. 251, 133 Fed. 515; *Bowen & Thomas v. Keller*, 130 Ga. 31, 22 Am. B. R. 727, 69 S. E. 174 (citing *Collier*, 6th Ed. 96).

114. *In re Castleberry* (D. C., Ga.), 16 Am. B. R. 159, 161, 143 Fed. 108.

115. **Effect of this charge on claim of creditor.**—In the case of *Bowen & Thomas v. Keller* (Sup. Ct., Ga.), 130 Ga. 31, 22 Am. B. R. 727, 69 S. E. 174, the court said: "Nor does the bankruptcy act prevent the creditor from enforcing a lien superior to the exemption under the state law, if such lien be fastened on the exempt property at any period of the bankruptcy proceedings prior to the final discharge of the debtor. But if the debtor succeeds in obtaining his discharge and pleads it prior to the fastening of a specific lien on such property, the effect is to release the debtor from the payment of the debt upon which the proceedings are based, and the creditor's right of action is destroyed." Citing *Jewett Bros. v. Huffman*, 14 N. D. 110, 13 Am. B. R. 738, 103 N. W. 408; *Claster v. Soble*, 22 Pa. Super. Ct. 631, 10 Am. B. R. 446; *Groves v. Osborn*, 46 Ore. 173, 79 Pac. 500.

116. **Bankrupt only entitled to exemption.**—The court has no right to order a

personal property exemption to any one except the bankrupt. *In re Blanchard & Howard* (D. C., No. Car.), 20 Am. B. R. 422, 161 Fed. 797. The right of exemption is personal, which he can exercise or waive, and unless otherwise provided by statute, it cannot be exercised by any other person. *In re Schuller* (D. C., Wis.), 6 Am. B. R. 278, 108 Fed. 591. Who entitled to exemptions, see Am. Bankr. Dig. §§ 947, 948.

117. *Mitchell v. Mitchell* (D. C., No. Car.), 17 Am. B. R. 382, 147 Fed. 280; *In re Sloan* (D. C., Pa.), 14 Am. B. R. 435, 135 Fed. 873; *Matter of French* (D. C., N. Y.), 37 Am. B. R. 289, 231 Fed. 255.

118. *Edmondson v. Hyde*, Fed. Cas. 4,285, 7 N. B. R. 1; *In re Blanchard & Howard* (D. C., No. Car.), 20 Am. B. R. 422, 161 Fed. 797; *Mitchell v. Mitchell* (D. C., No. Car.), 17 Am. B. R. 382, 147 Fed. 280; *Matter of French* (D. C., N. Y.), 37 Am. B. R. 289, 231 Fed. 255, holding that a bankrupt may not mortgage property which is not *per se* exempt, and thereby authorize the mortgagee to thereafter take and hold same on the theory that the bankrupt himself might have and, of right, could have, designated same as exempt; and that a mortgagee of property of a bankrupt unqualifiedly exempt under the State law, has the right to take and sell such property, although the mortgage was given within the four months' period and constitutes a preference.

Purchaser at mortgage foreclosure.—Exemptions in stock in trade, tools and fixtures are personal and cannot be claimed by a purchaser on the foreclosure of a chattel mortgage covering such property and constituting a voidable preference. *Feilbach Co. v. Russell* (C. C. A., 6th Cir.), 37 Am. B. R. 285, 233 Fed. 412.

119. **Assignment of exemptions as security.**—In the case of *In re Hastings* (C. C. A., 6th Cir.), 24 Am. B. R. 360, 181 Fed. 33, it appeared that the bankrupt had mortgaged all his exempt property, then

transfer exempt property prior to his bankruptcy, regardless of a present indebtedness, and his wife, not as the head of the family, but as vendee, is entitled to the protection which the exemption laws would have afforded the husband had he retained the property; and such property cannot be recovered by the trustee in bankruptcy of the husband.¹²⁰ Where by State statute a bankrupt's claim of exemption is not assignable, an attempted assignment operates as an abandonment of the right.¹²¹ In Pennsylvania a debtor may waive but not assign his right to exemptions and will not be permitted to withdraw a waiver thereof in favor of a creditor to whom he had assigned his claim.¹²² The bankrupt may claim his exemption through his attorney or agent, if within the statute under which it exists.¹²³ A voluntary bankrupt may not retain his exemption as against the actual and necessary costs of the bankruptcy proceeding, notwithstanding his affidavit of inability to pay.¹²⁴

(2) CLAIM BY OR FOR BENEFIT OF WIFE OR CHILDREN.—An exemption may be claimed by the bankrupt's wife and children, when the State law permits it,¹²⁵ the law being intended as much to protect them as the husband. Thus, the husband cannot deprive the family of the right to an exempt homestead merely by absconding, so long as he leaves his family in it.¹²⁶ The right to an exemption accrues when the proceedings are instituted against the bankrupt, and if he subsequently dies before the exempt property is set apart to him, his administrator will take such property, and if authorized by the State law, it may be administered for the benefit of his widow and children; it would seem to reasonably follow that in such a case the exemption may properly be claimed for their benefit.¹²⁷ If the exemption accrues by the State law to the benefit of husband and wife and the children, a failure to assert the claim by the husband in bankruptcy should not deprive the wife and children of the benefits of the law, and their right will be protected by the bankruptcy court;¹²⁸ but the wife in such case will be required to exercise the same degree of diligence in making her claims as the bankrupt.¹²⁹ Under the laws of Ohio, a divorced

owned or thereafter to be acquired by him, and had vested in the mortgagee the privilege of selecting the exempt property covered by the mortgage; it was held that it could not be said that the delegation of the right to select exempt property was against public policy and void, since, under the Michigan statute, the selection is permitted to be made by the debtor "or his authorized agent," and the authority to select, given upon a valuable consideration and coupled with an interest, could not be revoked by the failure of the bankrupt to claim the exemptions in his own name, or even by his express waiver thereof, the assignor being estopped so to do.

120. *Jackson v. Jetter* (Iowa, Sup. Ct.), 160 Ia. 571, 32 Am. B. R. 667, 142 N. W. 431.

121. *In re Sloan* (D. C., Pa.), 14 Am. B. R. 435, 135 Fed. 873.

122. *In re Pfeiffer* (D. C., Pa.), 19 Am. B. R. 230, 155 Fed. 892.

123. *Wilson v. McElroy*, 32 Pa. St. 82; *Regan v. Zeeb*, 28 Ohio St. 483.

124. *In re Hines* (D. C., W. Va.), 9 Am. B. R. 27, 117 Fed. 790; *In re Bean* (D. C., Vt.), 4 Am. B. R. 53, 100 Fed. 262.

125. *Smith v. Kehr*, Fed. Cas. 13,071, 2 Dill. 50, affd. 20 Wall, 31, 22 L. Ed. 313; *In re Pratt*, Fed. Cas. 11,370, 1 Flap. 353.

126. *In re Pratt*, 7 Pac. L. R. 202.

127. *In re Seabolt* (D. C., N. Car.), 8 Am. B. R. 57, 113 Fed. 766.

128. *In re Luby* (D. C., Ohio), 18 Am. B. R. 801, 155 Fed. 659; *In re Maxson* (D. C., Iowa), 22 Am. B. R. 424, 170 Fed. 356, which case arose under the Iowa statute, providing that the homestead of every family, whether owned by husband or wife, is exempt from judicial sale, and no conveyance thereof is valid unless they both join therein, and it was held that the adjudication of the wife as a bankrupt does not defeat the right of the husband to have the homestead occupied by the family set apart as exempt, although the bankrupt made no claim for any exemption from her schedules; *In re Youngstrom* (C. C. A., 8th Cir.), 18 Am. B. R. 572, 153 Fed. 98. See also *In re Griffith*, 1 N. B. N. 546; *In re Pope* (D. C., Iowa), 3 Am. B. R. 525, 98 Fed. 722.

129. *In re Burnham* (D. C., Wash.), 30 Am. B. R. 270, 202 Fed. 762.

Smalley v. Laugenour, 13 Am. B. R. 692, 196 U. S. 93.

Thomas, In re, 3 Am. B. R. 99, 96 Fed. 828.

Thompson, In re, 15 Am. B. R. 283, 140 Fed. 251.

Yungbluth, Matter of, 34 Am. B. R. 299, 220 Fed. 110.

WEST VIRGINIA:

Hines, In re, 9 Am. B. R. 27, 117 Fed. 790.

WISCONSIN:

Allen v. Central Wisconsin Trust Co., 25 Am. B. R. 126, 143 Wis. 381.

Churchill, In re, 29 Am. B. R. 153, 198 Fed. 711.

Ellenbecker, In re, 30 Am. B. R. 537, 205 Fed. 396.

Friedrich, In re, 95 Fed. 282, modified on appeal in 3 Am. B. R. 801, 100 Fed. 284.

Hoag, In re, 3 Am. B. R. 290, 97 Fed. 543.

Jones, In re, 3 Am. B. R. 259, 97 Fed. 773.

Kaufman, In re, 16 Am. B. P. 118, 142 Fed. 898.

Mayer, In re, 6 Am. B. R. 117, 108 Fed. 599.

Neimann, In re, 10 Am. B. R. 739, 124 Fed. 738.

Nelson, In re, 2 Am. B. R. 556, 98 Fed. 76.

Peterson, In re, 1 Am. B. R. 254.

Safady Brothers, Matter of, 36 Am. B. R. 6.

Schuller, In re, 6 Am. B. R. 278, 108 Fed. 591.

Wood, In re, 17 Am. B. R. 93, 147 Fed. 877.

Zimmerman, In re, 30 Am. B. R. 361, 202 Fed. 812.

SECTION SEVEN.

DUTIES OF BANKRUPTS.

§ 7. **Duties of bankrupts.**—*a.* The bankrupt shall (1) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; (2) comply with all lawful orders of the court; (3) examine the correctness of all proofs of claims filed against his estate; (4) execute and deliver such papers as shall be ordered by the court; (5) execute to his trustee transfers of all his property in foreign countries; (6) immediately inform his trustees of any attempt, by his creditors or other persons, to evade the provisions of this act, coming to his knowledge; (7) in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee; (8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and (9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

Provided, however, That he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town or village of his residence.

the difficulty mentioned in the preceding paragraph. Its constitutionality was questioned even in advance of its becoming the law.¹⁷⁷ But the proceeding for a discharge is not a criminal proceeding, and the protection of the witness extends to criminal proceedings only. The privilege of a discharge is not a natural right, or a right of property, but is a matter of favor to be accepted upon such terms as Congress sees fit to impose. Hence this provision does not violate the constitutional immunity.¹⁷⁸

i. **Effect of false swearing.**— This subject and the right to use the bankrupt's examination as a means to prevent his discharge is discussed in detail later.¹⁷⁹

j. **Examination of third persons.**— § 7-a (9), previously discussed, has to do only with the examination of the bankrupt. The procedure on and the subject-matter and effect of the examination of other witnesses, and the bankrupt, too, for that matter, under § 21-a, will be found in another place.¹⁸⁰

177. See editor's note *In re Feldstein* (D. C., N. Y.), 4 Am. B. R. 321, 103 Fed. 269. But see *contra*, *In re Nachman* (D. C., S. Car.), 8 Am. B. R. 180, 114 Fed. 995.

178. *In re Dresser* (C. C. A., 2d Cir.), 16 Am. B. B. 561, 145 Fed. 1021.

179. See discussion under Sections Fourteen and Twenty-nine of this work.

180. See discussion under Section Twenty-one.

SECTION EIGHT.

§ 8. **Death or Insanity of Bankrupts.**—*a.* The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: *Provided*, That in case of death the widow and children shall be entitled to all rights of dower and allowances fixed by the laws of the state of the bankrupt's residence.

Analogous provisions: In U. S.: Act of 1867, § 12, R. S., § 5090; Act of 1800, § 45.

In Eng.: Act of 1883, § 108.

Cross-references: To the law: §§ 4, 5-a.

To the General Orders: None.

To the Forms: None.

SYNOPSIS OF SECTION.

DEATH OR INSANITY OF BANKRUPTS.

I. Comparative Legislation, 273.

II. Effect of Bankrupt's Death or Insanity on the Proceeding, 274.

a. *In general*, 274.

b. *On right to discharge*, 274.

III. Effect on Statutory Rights of Widow and Children, 275.

a. *In general*, 275.

b. *Dower and statutory allowances*, 275.

I. COMPARATIVE LEGISLATION.

There is at present no substantial difference between the English and American statutes, save that the English section provides for the contingency of death only.¹ But in England the court may, in its discretion, refuse to proceed.² The English practice also permits the service of process on the personal representatives of the debtor, if he dies before such service.³ Our law, in providing that there shall be no abatement after a petition filed, seems to warrant this practice. The analogous section in our statute of 1800 provided

1. Eng. Bankr. Act. of 1883, § 108.

145, under the act of 1869, with *In re Walker*,

2. Compare *In re Obbard*, 24 L. T. N. S. 54 L. T. N. S. 682, under that of 1883.

3. *Ex parte Hill*, 4 Morrell, 281.

to a widow or children granted by the State statutes. The beneficiaries take them, as if there had been no bankruptcy. Where such allowances are authorized by State statutes the bankruptcy court may make them.²³ If the wife of a bankrupt consents to the sale of real estate free from her dower, she is entitled to the value of such dower as fixed by the laws of the State of the bankrupt's residence.²⁴

living his wife may assert her right of dower in his real property in accordance with the State law. *Thomas v. Woods* (C. C. A., 8th Cir.), 23 Am. B. R. 132, 173 Fed. 585.

^{23.} *In re Newton* (D. C., Ct.), 10 Am. B. R. 345, 122 Fed. 103; *In re Parschen* (D. C.,

Ohio), 9 Am. B. R. 389, 119 Fed. 976.

Contra: *In re Seabolt* (D. C., N. Car.), 8 Am. B. R. 57, 61, 113 Fed. 766.

^{24.} *In re Forbes* (Ref., Ohio), 7 Am. B. R. 42.

SECTION NINE.

PROTECTION AND DETENTION OF BANKRUPTS.

§ 9. **Protection and Detention of Bankrupts.**—*a* A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a State court having jurisdiction, and served within such State, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this act.

b The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

Analogous provisions: In U. S.: As to (a), Act of 1867, § 26, R. S., § 5107; Act of 1800, §§ 22, 38, 60; As to (b), Act of 1867, § 40, R. S., § 5024.

In Eng.: As to (a), Act of 1883, § 9 (1).

Cross-references: To the law: §§ 1(4), 2(13), (15), 10, 11-a, 17, 63. Compare, also, R. S., §§ 752, 753.

To the General Orders: XII, XXX.

To the Forms: None.

SYNOPSIS OF SECTION.

PROTECTION AND DETENTION OF BANKRUPTS.

I. Comparative Legislation; Scope of Section, 278.

- a. *Analogous provisions*, 278.
- b. *Scope of section*, 278.

II. Protection of Bankrupts, 279.

- a. *When right to protection begins and ends*, 279.
- b. *On what depends*, 279.
- c. *Kind of liability*, 280.
- d. *Practice*, 280.
- e. *General Order XXX*, 280.

III. Detention of Bankrupts, 281.

- a. *Purpose of subsection*, 281.
- b. *Practice*, 281.

I. COMPARATIVE LEGISLATION; SCOPE OF SECTION.

a. *Analogous provisions*.—The corresponding clause in the English act of 1883 applies both to protection from arrest and to the stay of suits. Under that act a bankrupt from the moment of the receiving order is immune from arrest on civil process.¹ Our first statute exempted the bankrupt from arrest for forty-two days—this, to give ample time for his examination—no matter what the character of the indebtedness, and from an arrest based on a debt owing before the bankruptcy during the pendency of the proceeding. The law of 1867 differed little from the present law, save in omitting entirely the two excepted classes stated in subheads (1) and (2). Minor differences will be discussed later.

b. *Scope of section*.—This section has undoubtedly a threefold purpose: (a) to preserve unimpaired the authority of the court of bankruptcy over the persons of the parties to the proceeding, (b) to protect the debtor from imprisonment on all civil suits in which the remedy will be barred by the subsequent discharge, and (c), as incidental to the first purpose and analogous to that expressed in § 10, to detain a bankrupt in the district when there seems a likelihood of his departing from it. There are two kinds of protection from arrest, (a) the absolute right, which existed at common law, *i. e.*, while in attendance on court or engaged in performing a duty imposed by the bankruptcy act, and (b) the qualified right, which may not exist as against a liability to which a discharge is not a release, or a warrant or order of commitment based upon a bankrupt's contempt or disobedience of the lawful orders of a court of bankruptcy. The section itself is somewhat narrower than its supplement, General Order XXX.² This same discrepancy existed under the former laws.³ Section 9-a which restricts the immunity of a bankrupt to debts which would be released by a discharge, and General Orders No. 12 and 30, which relate to practice only, and announce no rule as to the effect of a discharge, are in *pari*

1. Eng. Bankr. Act of 1883, § 9(1, 2).

2. In re Baker (D. C., Kan.), 3 Am. B. R. 101, 96 Fed. 954.

3. See § 26, Law of 1867, with General Order XXVII, under that law.

conferred by § 2 (15)³¹ grant such a writ, and this procedure will usually be resorted to. But a warrant cannot be issued under this subsection solely as a basis for extradition proceedings in another district to bring the bankrupt to the district in which the detention warrant has been issued.³² Where a bankrupt arrested under a writ of *ne exeat regno* is released upon giving a bond conditioned upon his remaining constantly within the jurisdiction of the court, his absence from the district from time to time without leave of the court, is a breach of the bond.³³

31. In *re Lipke* (D. C., N. Y.), 3 Am. B. R. 569, 98 Fed. 970; In *re Cohen* (D. C., Ill.), 14 Am. B. R. 355, 136 Fed. 999; *Matter of Berkowitz* (D. C., N. J.), 22 Am. B. R. 231, 173 Fed. 1012. As to sufficiency of affidavit to obtain a writ of *ne exeat*, see *Hoffschlaeger Co. v. Young Nap* (D. C., Hawaii), 2 U. S., D. C., Hawaii 103, 12 Am. B. R. 510.

Expiration of ten-day limit.—Where the bankrupt is arrested and examined under the provisions of this subsection and the ten-day limit is about to expire, the court may issue a writ in the nature of a writ *ne exeat* to restrain him from departing from the juris-

diction. In *re Cohen* (D. C., Ill.), 14 Am. B. R. 355, 136 Fed. 999.

Order authorizing issuance of writ.—The irregularity, if any, in failing to enter a formal order authorizing the issuance of a writ *ne exeat*, may be cured by the entry of an order *nunc pro tunc*. *Matter of Berkowitz* (D. C., N. J.), 22 Am. B. R. 231, 173 Fed. 1012.

32. In *re Ketchum* (C. C. A., 6th Cir.), 5 Am. B. R. 532, 108 Fed. 35.

33. In *re Appel* (C. C. A., 1st Cir.), 20 Am. B. R. 890, 163 Fed. 1002.

SECTION TEN.

EXTRADITION OF BANKRUPTS.

§ 10. **Extradition of Bankrupts.**—*a* Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another.

Analogous provisions: None.

Cross-references: To the law: §§ 2(13) (14) (15), 9, 29-b, 41-a.

To the General Orders: None.

To the Forms: None.

SYNOPSIS OF SECTION.

I. EXTRADITION OF BANKRUPTS.

I. Extradition of Bankrupts, 283.

- a. *When a bankrupt may be extradited*, 283.
 - b. *Practice*, 284.
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I. EXTRADITION OF BANKRUPTS.

a. **When a bankrupt may be extradited.**—This section is new to the present bankruptcy act. Extradition proceedings can be instituted under this section only when a warrant for the apprehension of a bankrupt has been issued, as when he has committed one of the offenses mentioned in § 29-b, or has been adjudged in contempt under § 2 (13) (15), or § 41-a. The court has no jurisdiction to issue a warrant of arrest as a basis for extradition proceedings to bring the bankrupt before the court for examination after he has departed from the district and settled in another jurisdiction.¹ He must also be found in the district whence extradition is sought. This implies positive identification. Further than this, however, the court need not go. The mere production of the warrant, authenticated either in writing or orally, appears to be sufficient. In this, extradition in bankruptcy seems to differ from extradition for crime.²

1. In *re Ketchum* (C. C. A., 6th Cir.), 5 Am. B. R. 532, 108 Fed. 35. In *re Wilson*, 127 U. S. 540, 32 L. Ed. 223; In *re Wolf*, 27 Fed. 606; In *re Hasenbusch*, 47 C. C. A. 177, 108 Fed. 35.

2. Compare In *re Dana*, 68 Fed. 886; Cal-

b. Practice.—By the terms of this section, the practice on extradition in bankruptcy is assimilated to that provided by § 1014 of the Revised Statutes.³ The bankrupt is brought in on a warrant issued by a commissioner on complaint under oath; he may deny identity, or that the warrant was issued, or, if issued, that it was for his apprehension. The commissioner must either discharge him or commit him to custody. If the latter, he may be admitted to bail. If no bail is offered, he must be taken before the judge, who, after inquiry into the facts, may either release him or grant an order or warrant for removal. And the marshal will then deliver him into the custody of the court which issued the original warrant of arrest.⁴

3. This section is as follows:

“§ 1014. For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance

of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.”

4. For practice and forms, see works on Federal Procedure.

SECTION ELEVEN.

SUITS BY AND AGAINST BANKRUPTS.

§ 11. **Suits By and Against Bankrupts.**—*a* A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.

b The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.

c A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

d Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.

Analogous provisions: In U. S.: As to right to maintain an action against a bankrupt, Act of 1867, § 21, R. S., § 5105; Act of 1841, § 5; As to stay of suits against a bankrupt, Act of 1867, § 21, R. S., § 5106; As to continuance of pending suits by trustee, Act of 1867, §§ 14, 16, R. S., § 5047; Act of 1841, §§ 3, 5; Act of 1800, § 13; As to limitations of actions against the trustee, Act of 1867, §§ 2, 14, R. S., §§ 5056, 5057.

In Eng.: As to stays, Act of 1883, § 10(2).

Cross-references: To the law: As to jurisdiction of bankruptcy court to issue such orders as may be necessary to enforce provisions of Act, § 2(7) (15).

Exemption from arrest except order issued from a court of bankruptcy, § 9-a(1).

Jurisdiction of district courts as to plenary suits by and against trustees, § 23; as to summary orders in respect to bankrupt's property, § 23.

Discharge as affecting suits against bankrupts, § 14.

Prosecution of suits by trustee, § 47-a(2).

To the General Orders: Application for injunctions to stay proceedings in other courts, to be decided by judge. XII (3).

SYNOPSIS OF SECTION.

SUITS BY AND AGAINST BANKRUPTS.

- I. Comparative Legislation, 286.**
 - a. *Stays under previous acts, 286.*
 - b. *Differences between previous acts and the present law, 287.*
- II. Stays of Suits Begun After Filing of Petition, 287.**
 - a. *Purpose of stays of suits, 287.*
 - b. *When stay of after-brought suits will be granted, 288.*
- III. Stays of Suits Against Bankrupt, 289.**
 - a. *Depending on dischargeability of debt, 289.*
 - b. *Power to grant stays discretionary, 291.*
 - c. *Power to stay should be exercised with caution, 292.*
 - d. *Effect of proof of debt on right of action, 292.*
- IV. Suits or Proceedings in Which Stays May be Granted, 293.**
 - a. *Suits or proceedings in rem, 293.*
 - (1) *IN GENERAL, 293.*
 - (2) *PROPERTY IN POSSESSION OF STATE COURT, 293.*
 - (3) *PROCEEDINGS OF LONG STANDING, 294.*
 - (4) *PROCEEDINGS TO ENFORCE A LIEN, 294.*
 - b. *Stay of proceedings under general assignments, 297.*
 - c. *Suits or proceedings in personam, 297.*
 - (1) *IN GENERAL, 297.*
 - (2) *WHEN SUCH STAYS WILL BE GRANTED, 298.*
- V. Practice and Pleadings, 298.**
 - a. *Application to State court, 298.*
 - b. *Application to bankruptcy court, 299.*
 - c. *Papers and procedure, 300.*
- VI. Duration, Modification and Vacation of Stay, 301**
- VII. Continuance of Suits by Trustee, 302.**
 - a. *Where bankrupt is defendant, 302.*
 - b. *Where bankrupt is plaintiff, 304.*
 - c. *Practice, 305.*
- VIII. Limitation on Suits by Trustees, 305.**
 - a. *Effect of limitation, 305.*
 - b. *When limitation begins to run; when estate is closed, 306.*

I. COMPARATIVE LEGISLATION.

a. *Stay under previous acts.*—The power to stay suits concerning the person or property of the bankrupt is essential to the orderly administration of a bankruptcy law. This principle has always been recognized in England; and, while it is not yet authoritatively settled, it seems that there even an inferior county court, sitting in bankruptcy, may stay a suit on a debt in a

superior; i. e., the high court.¹ The English statute also deprives a creditor whose debt is provable in bankruptcy of all remedies against the bankrupt, including the right to sue, during the pendency of the proceedings, save with the consent of the court.² In this country, for obvious reasons, stays of proceedings in State courts have been regarded with some alarm, and, as a rule, only those authorized by "any law relating to proceedings in bankruptcy" are permitted.³ The act of 1841 contained no clause like that now under discussion, but, under it, the assignee was empowered to prosecute or defend all pending suits, and the filing of a claim was deemed a waiver of all other remedies. Not so the law of 1867, which, by a specific grant of power to order stays, supplemented § 720 of the Revised Statutes and rendered the jurisdiction to enjoin both affirmative and virile. There is, however, a marked difference between the provisions of that and the present law.

b. Differences between previous acts and the present law.—These differences may be summarized thus: Stays under the former law were mandatory, if against a suit on a provable debt brought either before or during the pendency of the proceeding, and lasted until the time of discharge, unless there was unreasonable delay in obtaining it; provided, however, that the court might permit the suit to go as far as judgment, thus to measure up the amount of the debt. Stays of suits under the present law are, strictly speaking, confined to actions pending at the time of the bankruptcy. They are mandatory if before the adjudication, and discretionary after it. They cannot be granted against suits founded on provable debts that are not dischargeable, and if granted, they put an end to all further proceedings, and if granted after the adjudication, continue in force to the determination of the bankrupt's right to a discharge. The stay of suits against the bankrupt pending the bankruptcy proceedings, is absolutely necessary to give effect to the present bankruptcy act.⁴

II. STAYS OF SUITS BEGUN AFTER FILING OF PETITION.

a. Purpose of stays of suits.—If, as has been said, a chief purpose of such stays is to prevent the harassment of the bankrupt by suits, pending a discharge which will be a bar, it would seem that a court of bankruptcy could, in its discretion, restrain a suit begun after the filing of the petition.⁵ There was no doubt about this under the law of 1867, as the creditor who proved elected his remedy, and the creditor who did not could not prosecute his suit to judgment.⁶ The omission is perhaps significant. Yet, while a suit began on a provable debt after the bankruptcy would seem but a shot into the air and likely to amount to naught save a liquidation of the debt,⁷ the rule that a court of bankruptcy will stay an after-brought suit only when and because

1. Baldwin on Bankruptcy, 9th ed., p. 22.

2. Eng. Bankr. Act of 1883, § 9.

3. Judicial Code, § 265 (formerly R. S., § 720). The prohibition of this section against enjoining the proceedings of a State court does not apply when any law relating to bankruptcy authorizes an injunction, nor does it where the proceedings sought to be enjoined have been commenced after the jurisdiction of the Federal court has attached. In re Russell et al. (C. C. A., 2d Cir.), 3 Am. B. R. 658, 101 Fed. 248.

4. In re Basch (D. C., N. Y.), 3 Am. B. R. 235, 97 Fed. 761.

5. Baltimore Bargain House v. Busby (Ga. Sup. Ct.), 143 Ga. 734, 35 Am. B. R. 119, 85 S. E. 875.

6. See R. S., §§ 5105, 5106, and compare, however, to the effect that a suit might be prosecuted, provided it did not reach a judgment, In re Ghiradelli, Fed. Cas. 5,376. And see Eyster v. Gaff, 91 U. S. 521, 23 L. Ed. 403.

7. McDonald v. Davis, 105 N. Y. 508, 12 N. E. 40.

ing of temporary restraining orders only,¹⁰³ care should be taken to ask no more than the referee can grant. If the parties, upon an application for a stay, submit the question to a referee, they are bound; even if the right of a referee to award an injunction to stay suits and proceedings cannot be regarded as finally settled.¹⁰⁴

c. Papers and procedure.—Save in the interval between the filing of the petition and the adjudication, a stay is always discretionary. Suits, except those asserting remedies incident to valid liens, should, as a rule, be stayed. Unless there has been an abuse of discretion, the stay will not be interfered with on appeal.¹⁰⁵ Application is usually made by a petition setting out the jurisdictional facts, such as the name of the suit, in what court, for what it is brought, the names of the persons sought to be enjoined, of their attorneys of record, and the like, and, if on information and belief, accompanied by sustaining affidavits.¹⁰⁶ The petition for a stay should sufficiently show that the proceeding is pending in a district in which it is made.¹⁰⁷ It may be verified by the attorney where it is shown that the moving parties live at a distance and that the application is made by their attorney in their behalf and for their benefit, and states why it is so made.¹⁰⁸ The reasons why the stay should be granted must clearly appear. If there be a trustee, he should apply, though if he refuses or neglects so to do, or if a trustee be not yet appointed, any party in interest, including the bankrupt, may do so. Before adjudication, the petitioning creditors are the proper persons, but any party interested in the proceeding may also apply. The stay is granted *ex parte*, in the same manner as other Federal writs. If it be a stay proper, as distinguished from a mere temporary injunction coupled with an order to show cause, the granting of it may

103. Rules restricting powers of referees.—“When a motion for an injunction is pending or is about to be made the referee may, in order to prevent injury to the property of the bankrupt, or otherwise, grant a temporary restraining order staying proceedings until the hearing and decision of said motion. In case all parties in interest agree that said motion be heard by the referee in charge, they may file with the referee a written stipulation to that effect. The decision of the referee on such motion shall be filed with the clerk, and if the referee decides that an injunction shall issue, an order to that effect may be made by the judge.” (Rule XXI, Northern and Rule XXIII, Western District of New York.)

Under the rules of the district court of New Jersey a referee has no power to issue an injunction. Lanning, District Judge, in discussing this question said: “If, by consent of the parties in a case, he acquires jurisdiction to hear a motion for injunction, he may hear it, and advise the judge of his decision by filing it with the clerk of the court. The judge of the court, and he only, may then, if the decision of the referee be that an injunction should issue, make an order for injunction. The referee may also, without consent of the parties, in order to prevent injury to the property of the bankrupt, grant a temporary stay of judicial proceedings; but such stay should be but for a few days, and only until the applicant can

have an opportunity to move for an injunction before the judge. Such has been the general practice in the district of New Jersey.” In re Siebert (D. C., N. J.), 13 Am. B. R. 348, 133 Fed. 781.

104. In re Benjamin (D. C., Pa.), 15 Am. B. R. 351, 140 Fed. 320.

105. In re Lesser (C. C. A., 2d Cir.), 3 Am. B. R. 758, 99 Fed. 913; New River Coal Land Co. v. Ruffner Bros. (C. C. A., 4th Cir.), 21 Am. B. R. 474, 165 Fed. 881; Virginia Iron, Coal & Coke Co. v. Olcott (C. C. A., 4th Cir.), 28 Am. B. R. 321, 197 Fed. 730.

106. In re Keller, Fed. Cas. 7,647. For forms of petition of petitions and orders staying suits and proceedings, see Hagar & Alexander's Forms in Bankruptcy (2d ed.), Nos. 258-265.

107. In re Goldberg (D. C., N. Y.), 9 Am. B. R. 156, 117 Fed. 692, holding that a petition in a pending bankruptcy proceeding, described as: “In the District Court of the United States for the Northern District of New York. In Bankruptcy No. 1,141,” and which stated that the petition in bankruptcy was filed on a certain date and a writ of subpoena issued “herein,” was sufficient to show that a proceeding in bankruptcy was pending in the Northern District of New York.

108. In re Goldberg (D. C., N. Y.), 9 Am. B. R. 156, 117 Fed. 692.

be indorsed on the petition by the judge or the referee, and the clerk must then issue a writ of injunction, which, in turn, must be served by the marshal, in the same manner as other Federal writs. If a temporary restraining order, the practice of the State courts usually controls as to recitals, the signature of the judge or referee, and the method of service.¹⁰⁹ Omnibus stays are not frequent and the writ or order will, as a rule, be addressed to the party stayed *eo nomine*; however, stays directed generally "to all other persons" seem to bind all persons served.¹¹⁰ Whether, if the person to be stayed is not a party to the proceeding, he must be brought in by a subpoena served at the same time, is a question. There is high authority for the practice,¹¹¹ even under the present law; but the wording of the subsection under discussion does not seem to make it necessary. In actual practice, it is rarely essential and much less rarely done. How far courts will investigate the merits of contested applications depends largely on the conscience and industry of the judge or referee. The better authority seems to be that a court of bankruptcy will, if necessary, determine such merits, even swearing witnesses or ordering a referee to ascertain the facts. It will, indeed must, determine whether the debt is dischargeable or not.¹¹² To do this it must often declare the legal effect of pleadings in the State court, and sometimes of a judgment there granted.¹¹³ The petition, if presented to a referee, should be filed in the office of the clerk of the district court.¹¹⁴

VI. DURATION, MODIFICATION AND VACATION OF STAY.

Motions to modify or vacate an order staying proceedings in a State court are made in the usual way, on notice and affidavits, and are often subject to district rules or the practice of the local State courts. If the application for a stay is made prior to adjudication the stay is granted until after an adjudication or the dismissal of the petition. When granted before adjudication it is dissolved by the adjudication, although it may subsequently be renewed. If granted after the adjudication the stay may be continued until "twelve months after the date of such adjudication," but, if within that time such person applies for a discharge, then until the question of such discharge is determined.¹¹⁵ If the year goes by and the bankrupt obtains the extension permitted by § 14-a, it is questionable whether another stay could be granted under the terms of this section of the law; but it probably could under the general equity powers of the court, already discussed under § 2 (15). It is thought, however, that the words "the question of such discharge is determined" are sufficient to embrace the time consumed on an appeal, seasonably taken and diligently prosecuted. Once the discharge is granted or refused, the stay is dissolved. No order to that effect is required. Better practice, however, suggests the application for and entry of such an order, though it is the duty of the court

109. Useful forms will be found under "Supplementary Forms," *post*. See also Hagar and Alexander's Bankruptcy Forms (2d ed.), Nos. 258-265.

110. *In re Lady Byron Mining Co.*, Fed. Cas. 7,980.

111. *Bryan v. Bernheimer*, 181 U. S. 188, 5 Am. B. R. 623, 45 L. Ed. 814.

112. *In re Basch* (D. C., N. Y.), 3 Am. B. R. 235, 97 Fed. 761.

113. *Burnham v. Pidcock*, 58 N. Y. App. Div. 273, 5 Am. B. R. 590, 68 N. Y. Supp. 1007; *Knott v. Putnam* (D. C., Vt.), 6 Am. B. R. 80, 107 Fed. 907.

114. *In re Gerdes* (D. C., Ohio), 4 Am. B. R. 346, 102 Fed. 318.

115. Stay of proceedings pending discharge. — Pending the bankruptcy proceedings and before discharge, the bankrupt may plead to any suit pending at the time of his adjudication, or subsequently brought, a suggestion of the bankruptcy proceedings, and ask a stay in the State court until the question of his discharge has been finally determined in the bankruptcy court. *Baltimore Bargain House v. Busby* (Ga. Sup. Ct.), 143 Ga. 734, 35 Am. B. R. 119, 85 S. E. 875.

will pass to the trustee, is sufficient to authorize the trustee to bring a suit for damages to such property.¹⁴⁸ If the trustee intervenes, the suit will be continued in his name;¹⁴⁹ but the trustee is liable only for costs after he intervenes, and for costs personally only when guilty of mismanagement or bad faith.¹⁵⁰

c. **Practice.**—The order to intervene and the consent to defend should be granted upon application made by petition or motion. This application, as a rule, may be heard at a meeting of creditors. It may, however, be granted *ex parte*. In some districts the practice is to grant the consent in the form of an order authorizing the trustee to apply to the proper State court for substitution.¹⁵¹ How far an adverse party in the State court should be heard in opposition to the motion is an open question. He certainly should not, if he is not a creditor, and any effort on his part summarily to determine the controversy on the merits should be checked; the State court is the forum for such determination. Permission once granted, the scene shifts to the State court, and the application there will, of course, be in accordance with the rules and practice of that court.¹⁵² Throughout, the practice under these subsections is closely analogous to that where a trustee initiates a suit, discussed under the appropriate sections, *post*.¹⁵³

VIII. LIMITATION ON SUITS BY TRUSTEES

a. **Effect of limitation.**—Subsection *d* provides that "Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed." It has reference to suits initiated by the trustee, rather than those pending at the time of the bankruptcy.¹⁵⁴ It is similar to the corresponding clause under the act of 1867 in period only. It constitutes an arbitrary limitation on all suits; as to computation of time at least superseding all statutes whether State or Federal,¹⁵⁵ provided the action

148. *Johnson v. Collier*, 222 U. S. 538, 27 Am. B. R. 454, 56 L. Ed. 306.

149. *Ames v. Gilman*, 51 Mass. 239.

150. *Norton v. Switzer*, 93 U. S. 355, 23 L. Ed. 903; *Reade v. Waterhouse*, 52 N. Y. 587.

In *Murtaugh v. Sullivan*, 74 N. Y. Misc. 517, 27 Am. B. R. 431, 132 N. Y. Supp. 503, it was held that the trustee would not be substituted as plaintiff in an action to foreclose a mechanic's lien so far as his liability for costs was concerned, it appearing that the only purpose of such substitution was to avoid payment of a judgment properly obtained, the defendant no longer having opportunity to demand security for costs.

151. In *re Price* (D. C., N. Y.), 1 Am. B. R. 606, 92 Fed. 987; *Hahlo v. Cohn*, 112 N. Y. App. Div. 636, 15 Am. B. R. 591, 98 N. Y. Supp. 1049, citing *Collier on Bankruptcy* (5th ed.), p. 141.

152. *Drew v. Fort Payne Co.* (Sup. Ct., Ala.), 186 Ala. 285, 32 Am. B. R. 353, 65 So. 71, citing *Collier on Bankruptcy* (8th ed.), 223, 224; *Bank of Commerce v. Elliott* (Sup. Ct., Wis.), 6 Am. B. R. 409.

Action by trustee to recover stock subscriptions.—Before a trustee in bankruptcy, substituted as plaintiff in an action commenced by the receiver of an insolvent corporation prior to its bankruptcy to recover

unpaid stock subscriptions, can continue such action it is necessary that the defendant have notice and an opportunity to be heard upon the validity of the alleged debts of the corporation, and that an order be entered directing proceedings against the stockholders where subscriptions are unpaid for such amount as, together with the assets, will be sufficient to meet the liabilities of the corporation. Where the pleadings fail to allege such facts, they do not state a cause of action. *Chamberlain v. Piercy* (Sup. Ct., Wash.), 82 Wash. 157, 33 Am. B. R. 554, 143 Pac. 977.

153. See under Sections Sixty, Sixty-seven and Seventy of this work.

154. Compare *Maybin v. Raymond*, Fed. Cas. 9,338. See also Am. B. R. Dig., § 665.

155. **Effect of bankruptcy act on statute of limitations.**—In *Freeland v. Holloman*, Fed. Cas. 5,081, also reported in 9 N. B. R. 331, the question of the application of the statute of limitation was considered by the court. It is there said: "The Constitution of the United States conferred upon Congress the power to establish a uniform system of bankruptcy throughout the United States; and when Congress, in pursuance of this power, passed the Bankrupt Act, it at once superseded all laws in conflict with it. The bankrupt's estate and every thing and right connected with it, upon the bankruptcy, at

yet a cause of action may develop; while in many cases when a trustee is appointed he finds himself unable to find assets and, there being no funds with which to pay the expenses incident to a meeting for his discharge, files no report and is not discharged. There are as yet no decisions construing the meaning of this phrase. It is suggested that, where no trustee is appointed, the two years will begin to run from the day when the order dispensing with a trustee is granted, and that, when a trustee is appointed who does not report or seek a final discharge, it will not begin until such discharge is granted. It has been held that where an estate is declared closed, but is subsequently reopened, the two-year period begins to run from the subsequent closing of the estate.¹⁶⁵ Failure to commence the action within the required time because of inability to serve process is no excuse.¹⁶⁶

will be deemed "closed" within the meaning of § 11-d and § 2(8) of the bankruptcy act, and the trustee after the reopening of the estate and his reappointment cannot assert, in a suit brought to set aside as preferential a conveyance made by bankrupt within the four months' period, that the estate had not been "fully administered," because the property sued for had not been included in the

administration, as such property, although fraudulently conveyed, would form no part of the estate until the conveyance had been set aside. *Kinder v. Scharff* (Sup. Ct., La.), 129 La. 218, 26 Am. B. R. 765, 55 So. 769.

165. *Bilafsky v. Abraham*, 183 Mass. 401, 67 N. E. 318.

166. *Amey v. Watertown*, 130 U. S. 320, 32 L. Ed. 953.

SECTION TWELVE.

COMPOSITIONS, WHEN CONFIRMED.

§ 12. **Compositions, When Confirmed.**—*a* A bankrupt may offer, either before or after adjudication, terms of composition to his creditors, but not before, he has been examined in open court or at a meeting of his creditors, and has filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts. *In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation of conduct of estates, at which meeting the judge or referee shall preside; and action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed.**

b An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.

c A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation.

d The judge shall confirm a composition if satisfied that (1) 'it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden.

e Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.

* The amendment of 1910 is in italics.

Analogous provisions: In U. S.: R. S., § 5103-A (Act of June 22, 1874).

In Eng.: Act of 1890, § 3, which supersedes Act of 1883, § 18. See also Act of 1833,

§ 23. See also Deeds of Arrangement Acts of 1887 and 1900.

Cross-references: To the law: Power of court of bankruptcy to confirm or reject compositions, § 2(9).

Compositions, when set aside, § 13.

Effect of confirmation on discharge of debts, § 14-c.

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a. *The English system*.— Not until 1825, was a composition with creditors permitted in England, nor did this first statute discharge the debts of dissentient creditors. The act of 1849, which required the bankrupt to make a

cessio bonorum, provided for a discharge available against all creditors whether consenting or not. The act of 1869, § 126, is concededly the progenitor of our system of composition. Since then, two statutes have been passed in England, that of 1883 and that of 1890. The latter repeals the former's provisions concerning compositions, and is now the law. By it, in connection with § 23 of the act of 1883, a scheme of composition may be offered either between the entry of the receiving order (petition) and the adjudication, or after that date. When the offer is after that date, the practice seems not unlike our own; but a composition outside of, *i. e.*, before an actual bankruptcy, is not possible under our law.¹ The English statutes also provide for "deeds of arrangement" with creditors, a procedure something like those of our State insolvency laws that require the assent of creditors in advance.² In actual practice, these deeds of arrangement are more general than compositions proper.³ In England schemes of arrangement as distinguished from compositions are possible even after bankruptcy proceedings are commenced.

b. Continental systems.—The laws of the continental countries distinguish between compositions without the relinquishment of assets, and compositions with relinquishment. The first class differs from the English method in that it cannot take place until after a bankruptcy proceeding has been begun, and results in a part payment and the creation of a "debt of honor" for the balance, the bankrupt being restored to his business, but compelled to perform the terms of his composition agreement. In effect, this is merely an extension, but, when consented to by certain percentages of the creditors, is binding on all. It is, on the Continent, decidedly the more general and more popular method. The other kind of composition resembles that in vogue here, but seems to be possible only in France and Greece. Besides, some countries permit an arrangement with creditors before bankruptcy, to prevent or avoid bankruptcy, and, therefore, properly called "preventive compositions." These correspond to the English deeds of arrangement, either in or out of the proceeding proper, if made before the actual adjudication.⁴ The modern tendency is toward arrangements or compositions between the creditor and debtor, as distinguished from the harsher rules of the older bankruptcy laws. The section now under discussion will, therefore, become increasingly important as the years go on.

c. Compositions under act of 1867 as amended in 1874.⁵—Our first and second bankruptcy laws did not provide for compositions. Nor did the law of 1867, until amended by the act of June 22, 1874.⁶ The corresponding section of the present law is not only more terse, but, in effect, in several particulars unlike that of the law of 1874. The latter, and the adjudicated cases under it, are, therefore, not always in point. Its main features should, however, be understood and will be briefly outlined here, the foot-notes indicating the leading cases. The discussion of the present section, *post*, is confined, as far as possible,

1. Compare § 23, Eng. Act of Bankruptcy, 1883, with § 3, Act of 1890.

2. See N. Y. Debtor and Creditor Law, §§ 50-88.

3. See Eng. Deeds of Arrangement Acts of 1887 and 1890. The popularity of deeds of arrangement in England is, from our point of view, difficult to understand. Our insolvency laws, requiring in advance the assent of creditors, are practically dead letters.

4. The writer is greatly indebted in this connection to "Bankruptcy, a Study in Com-

parative Legislation," by S. Whitney Dunscomb, Jr., Esq., of the New York Bar; being No. 2, Vol. II, of the Columbia College Studies in History, Economics, and Public Law.

5. R. S., § 5103-a (Act of June 22, 1874, Ch. 390, § 17, 18 Stat. at Large, 182), *post*.

6. The parentage of this act is made clear in *In re Scott*, Fed. Cas. 12,519, where the English and American laws on compositions are set out in parallel columns.

to the meaning of the words of the statute, whether or not already interpreted by the courts. Under the act of 1874, a composition could be offered in a pending proceeding either before or after the adjudication.⁷ If offered, a meeting of creditors was called,⁸ at which the debtor was obliged to be present and answer all inquires made of him, and also to produce a statement of assets and liabilities with the names and addresses of his creditors.⁹ At such meeting, a resolution accepting the proposed composition became operative if passed by a majority in number and three-fourths in amount of creditors present or represented,¹⁰ and binding if confirmed by the signatures of the debtor and two-thirds in number and one-half in value of all his creditors.¹¹ Creditors on fifty dollars or less were counted as to amount but not as to number;¹² and secured creditors were not counted unless they relinquished their security.¹³ The resolution, if thus operative and confirmed, with a statement of assets and liabilities,¹⁴ was submitted to the judge, who thereupon calling a meeting of creditors,¹⁵ and, if (a) satisfied that the resolution was lawfully passed,¹⁶ and (b) that it was for the best interests¹⁷ of all concerned, caused it to be recorded. A composition once agreed to could be varied by a similar procedure.¹⁸ Compositions provided for the *pro rata* satisfaction in money of all debts not secured or entitled to priority.¹⁹ When accepted, they were binding on all creditors scheduled in the statement produced by the debtor at the meeting at which the resolution was passed,²⁰ and could be enforced by the court summarily or by contempt proceedings.²¹ If a composition was not ordered, or, when ordered, could not be carried out, the bankruptcy proceeding went on.²²

II. COMPOSITIONS UNDER THE PRESENT LAW.

a. In general.—The more important changes made by the present law are discussed later. A few of them are: (1) the composition, when offered after adjudication, cannot be offered until the bankrupt has filed his schedules and been examined, and the proposed terms have been accepted in writing by a

7. In re Reiman, Fed. Cas. 11,673; *affd.*, s. c., Fed. Cas. 11,674; In re Morris, Fed. Cas. 9,824; In re Odell, Fed. Cas. 10,427.

8. In re Spades, Fed. Cas. 13,196; In re Haskell, Fed. Cas. 6,192; In re Spencer, Fed. Cas. 13,229; *Lieke v. Thomas*, 116 U. S. 605, 29 L. Ed. 744.

9. In re Haskell, Fed. Cas. 6,192; In re Holmes, Fed. Cas. 6,632; In re Dobbins, Fed. Cas. 3,943; In re Proby, Fed. Cas. 11,439; In re Little, Fed. Cas. 8,392.

10. In re Holmes, Fed. Cas. 6,632; In re Spades, Fed. Cas. 13,196; In re Gilday, Fed. Cas. 5,422; *Ex parte Jewett*, Fed. Cas. 7,303; In re Keller, Fed. Cas. 7,654.

11. In re Gilday, Fed. Cas. 5,422; In re Spillman, Fed. Cas. 13,242; In re Scott, Fed. Cas. 12,519; *Home Nat. Bank v. Carpenter*, 129 Mass. 1.

12. In re Wald, Fed. Cas. 17,054.

13. In re Spades, Fed. Cas. 13,196; In re Van Auken, Fed. Cas. 16,828; In re O'Neil, Fed. Cas. 10,528; *Flower v. Greenbaum*, 50 Fed. 190.

14. In re Haskell, Fed. Cas. 6,192.

15. In re Scott, Fed. Cas. 12,519.

16. In re Sawyer, Fed. Cas. 12,395; In re Walshe, Fed. Cas. 17,118; In re Cavan, Fed. Cas. 2,528; In re Greenbaum, Fed. Cas. 5,769.

17. In re Haskell, Fed. Cas. 6,192; In re Weber Furniture Co., Fed. Cas. 17,330; In re Reiman, Fed. Cas. 11,673; In re Whipple, Fed. Cas. 17,513; In re Welles, Fed. Cas. 17,377.

18. In re McDowell, Fed. Cas. 8,776; In re Reiman, Fed. Cas. 11,673. See *Matter of Kinnane Co.* (D. C., Ohio), 33 Am. B. R. 243, 221 Fed. 762. Citing *Collier on Bankruptcy* (10th ed.) 287.

19. In re Reiman, Fed. Cas. 11,673; In re Langdon, Fed. Cas. 8,058; In re Louis, Fed. Cas. 8,528; In re Clapp, Fed. Cas. 2,785; In re McNab, Fed. Cas. 8,906; In re Hurst, Fed. Cas. 6,925; In re Wilson, Fed. Cas. 17,781.

20. In re Hurst, Fed. Cas. 6,925; In re Reiman, Fed. Cas. 11,673; In re Lytle, Fed. Cas. 8,650; In re Bechet, Fed. Cas. 1,210; In re Hamlin, Fed. Cas. 5,994.

21. In re McKeon, Fed. Cas. 8,858; In re Tooker, Fed. Cas. 14,096; In re Renisen, Fed. Cas. 11,698; In re Waetzfelder, Fed. Cas. 17,048.

22. In re Bayly, Fed. Cas. 1,144; *Bidwell v. Bidwell*, 92 Pa. St. 61; *Whittemore v. Stephens*, 48 Mich. 573, 12 N. W. 858; In re Kohlsaat, Fed. Cas. 7,918.

majority in number and amount of all claims allowed, and the consideration to be paid to creditors and the money necessary to pay debts entitled to priority and the expenses of administration shall have been deposited in court; (2) there are now three available objections to a composition, the first only being the same as that under the former law, and any available objection to the debtor's discharge being equally effective to prevent a composition. The court, and not the debtor, distributes the consideration. The practice, too, is necessarily different. Further, the section is silent as to some things specifically stated in the former law.

b. Constitutionality.—The objection was raised as to the constitutionality of the act of 1874. But, if the present section amounts, as it does, to a *cessio bonorum*, whence each creditor obtains substantially as great a *pro rata* as he would through distribution in bankruptcy, the sections on compositions are clearly within the power given Congress to establish a uniform system of bankruptcy.²³ Nor does the fact that the question whether the bankrupt shall be released from his debts depends upon a majority vote by his creditors, render the law unconstitutional. The discharge and the manner of awarding it are mere incidents.²⁴ The essential purpose of bankruptcy law is *pro rata* distribution of assets,²⁵ and this being brought about by composition under this section, it is constitutional.

c. Section, how construed.—Since it is in derogation of the common law, and compels any dissenting creditors to accept the percentage accepted by the majority and deprives them of their remedies on the balance thereafter, this section is strictly construed.²⁶ There must be the utmost good faith on the part of a bankrupt in offering a composition; and any attempt on his part to "trade" with the creditors or the court by offering a larger sum after he finds his first offer to be unsatisfactory, is quite contrary to the spirit of the statute.²⁷ Where the parties and the referee follow a course of procedure utterly at variance with the law, confirmation may be refused.

d. Who may offer composition.—Any "bankrupt," that is, any person, copartnership, or corporation against whom an involuntary petition has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt, can offer a composition.²⁸ This seems to have been so under the former law, though the word then was "person."²⁹ An offer of composition made by a third party is not authorized by the bankruptcy act.³⁰

23. In re Reiman, Fed. Cas. 11,673; In re Chamberlain, Fed. Cas. 2,580.

24. Hanover Nat. Bank v. Moyses, 186 U. S. 181, 8 Am. B. R. 1, 46 L. Ed. 1113.

25. See U. S. v. Fisher, 2 Cranch, 359, 396, 2 L. Ed. 304; McCulloch v. Maryland, 4 Wheat. 316, 321, 4 L. Ed. 579.

26. In re Shields, Fed. Cas. 12,784; In re Rider (D. C., N. Y.), 3 Am. B. R. 178, 96 Fed. 808; In re Frear (D. C., N. Y.), 10 Am. B. R. 199, 120 Fed. 978. Text cited with approval in Broadway Trust Co. v. Manheim, 47 N. Y. Misc. 415, 195 N. Y. Supp. 93, 14 Am. B. R. 122; Matter of Kinnane Co., (D. C., Ohio) 34 Am. B. R. 119, 221 Fed. 762; Matter of Goldstein (D. C., Conn.), 32 Am. B. R. 402, 213 Fed. 115, quoting above text with approval.

In re Rider (D. C., N. Y.), 3 Am. B. R. 178, 96 Fed. 808, the court said: "The effect of a composition is to supersede the

bankruptcy proceedings and reinvest the bankrupt with all his property free from the claims of creditors. As an abstract proposition considered for a moment apart from the provisions of the statute, it is entirely clear that a condition so plainly in derogation of common-law rights should not be permitted unless it is reasonably certain that the creditors approve and that they will fare at least as well as they would were the estate administered in the usual course."

See also Am. B. R. Dig. § 688.

27. Matter of Cockshaw (D. C., N. Y.), 34 Am. B. R. 278, 220 Fed. 239.

28. Compare Bankr. Act, § 1(4), with § 1(19). And see §§ 4 and 5.

29. In re Weber Furniture Co., Fed. Cas. 17,331; affd. on appeal s. c., Fed. Cas. 17,331; Pool v. McDonald, Fed. Cas. 11,268.

30. Offer by third party.—An order providing that upon deposit by a tenant in pos-

e. General purpose and effect.³¹—The act itself seems to recognize that composition is in some respects outside of bankruptcy; for it is provided in § 12 (e) that if composition is not confirmed “the estate shall be administered in bankruptcy as herein provided.”³² If the judge refuses to confirm the composition, the bankruptcy proceeding *per se* is revived and must be proceeded with as if no offer of composition had been made. If it is confirmed a formal order is entered to that effect.³³ This order and that dismissing the case are not the same. A certified copy of the order of confirmation constitutes evidence of the revesting of the title and, if recorded, imparts the same notice as a deed from a trustee to the bankrupt.³⁴ The effect of a composition is to supersede the bankruptcy proceedings and reinvest the bankrupt with all his property free from the claims of creditors.³⁵ Not only the title to the property, but also its accretion and proceeds reverts in the bankrupt. Thus where a trustee leases certain property of the bankrupt estate, upon a confirmation of a composition, the rights in the leases accrue to the bankrupt.³⁶ Provable claims are discharged though the holders thereof did not actually prove the same or participate with the other creditors in taking action upon the composition.³⁷ But it does not affect the debtor's obligation created as a part of the composition;³⁸ and, if notes given as the consideration are not paid, they are payable in their original amount.³⁹ The composition is only effective to release claims which are provable in bankruptcy, so that if a claim is not provable, as, for instance, where it is for rent accruing under a lease after the commencement of bankruptcy proceedings, attachment will lie against property of the bankrupt, the title of which has reverted in him because of the confirmation of composition.⁴⁰

session of and claiming the bankrupts' real estate of a sufficient amount to pay unsecured creditors, costs of administration, and attorney's fees, the petition in bankruptcy shall be dismissed and the property delivered to the tenant, is unauthorized and contrary to the bankruptcy act and the practice thereunder. *Luxury Fruit Co. v. Harris* (C. C. A., 5th Cir.), 33 Am. B. R. 228, 217 Fed. 740.

31. See also Am. B. R. Dig. § 714-716.

32. *In re Lane* (D. C., Mass.), 11 Am. B. R. 137, 125 Fed. 772; *Cumberland Glass Mfg. Co. v. DeWitt* (U. S. Sup. Ct.), 236 U. S. 288, 34 Am. B. R. 723, 59 L. Ed. 583, which cited with approval the opinion of Judge Lowell in the case of *In re Lane*, *supra*.

33. Form No. 62.

34. Bankr. Act, § 21-g. See *Mandell & Co. v. Levy* (N. Y. Sup. Ct.), 47 N. Y. Misc. 147, 14 Am. B. R. 549, 93 N. Y. Supp. 544.

35. Bankr. Act, § 70-f; *Cumberland Glass Mfg. Co. v. DeWitt*, 236 U. S. 288, 34 Am. B. R. 723, 59 L. Ed. 583; *In re August*, Fed. Cas. 645; *In re Shaw*, Fed. Cas. 12,716; *In re Rodgers*, Fed. Cas. 11,992; *In re Winship Co.* (C. C. A., 7th Cir.), 9 Am. B. R. 638, 120 Fed. 93, 56 C. C. A. 45; *In re Rider* (D. C., N. Y.), 3 Am. B. R. 178, 96 Fed. 808; *Stone v. Jenkins*, 176 Mass. 544, 4 Am. B. R. 568, 57 N. E. 1002; *Matter of Maytag-Mason Motor Co.* (D. C., Ia.), 35 Am. B. R. 160, 223 Fed. 684.

Action by trustee to recover for conversion of property.—Where a trustee in bankruptcy commences an action to recover for the con-

version of certain goods in which the bankrupt had an interest, and thereafter the bankrupt enters into a composition with his creditors and the trustee is discharged, the bankrupt becomes the real party in interest in such action, but the litigation may be carried on in the name of the trustee. *Stone v. Jenkins*, 176 Mass. 544, 4 Am. B. R. 568, 57 N. E. 1002.

Assets in possession of third parties.—When an offer of composition is confirmed by the court, moneys and accounts in the possession of bankers, which they obtained from the bankrupt prior to the bankruptcy, reverts in the bankrupt and becomes subject to attachment. *Matter of Frischnecht* (C. C. A., 2d Cir.), 34 Am. B. R. 530, 223 Fed. 417.

36. *Bracklee Co. v. O'Connor* (N. Y. Sup. Ct.), 67 N. Y. Misc. 599, 24 Am. B. R. 499, 122 N. Y. Supp. 710, holding that it is immaterial whether the trustee has been discharged.

37. *Glover Grocery Co. v. Dorne*, 116 Ga. 216, 8 Am. B. R. 702, 42 S. E. 347.

38. Bankr. Act, § 14-c. See also as to debts not affected discussion under Section Seventeen of this work.

39. *In re Reiman*, Fed. Cas. 11,673 and 11,675; *In re Hurst*, Fed. Cas. 6,925; *In re Negley*, 20 Fed. 449; *In re Carton & Co.*, 148 Fed. 63.

40. *Matter of Frischnecht* (C. C. A., 2d Cir.), 34 Am. B. R. 530, 223 Fed. 417.

It has been held in New York that creditors who enter into a composition with a debtor thereby release the debt and lose the right to retain securities held for the debt, unless there be an agreement to the contrary.⁴¹ Composition being outside of bankruptcy, a creditor who has received his composition dividend without protest, is not entitled to set off his claim against the bankrupt⁴² or to proceed to recover upon the unpaid balance of his claim,⁴³ and after confirmation of the composition he may not plead *res judicata* in an action against him on the debt due the bankrupt.⁴⁴ The order of confirmation becomes in effect a discharge and may be pleaded in bar with like effect.⁴⁵ But like a discharge, a composition, if not pleaded, is deemed waived.⁴⁶ The effect of a composition or discharge on the liability of a codebtor is discussed elsewhere.⁴⁷

f. Practice.— This is detailed in subsequent paragraphs. The law is not as instructive on this point as was the act of 1874. Nor are the general orders exactly illuminating,⁴⁸ or the forms prescribed by the Supreme Court reliable.⁴⁹ The amendment of 1910 has modified the practice where composition is offered prior to adjudication. It would seem to require the bankrupt to formally petition the court and file therewith the schedules of his property and creditors. In this respect the practice will be much the same

41. *McDonald v. Taylor & Co.*, 144 N. Y. App. Div. 329, 26 Am. B. R. 635, 637, 128 N. Y. Supp. 1048 (citing the text).

Liability of surety on injunction bond.— The fact that a creditor, the payment of whose claim had been enjoined, voted for and received dividends under a composition by the bankrupt debtor, does not release the surety on the injunction bond from liability. *Martin Furniture Co. v. Massey* (Tenn. Sup. Ct.), 37 Am. B. R. 380, 186 S. W. 451.

42. *Cumberland Glass Mfg. Co. v. DeWitt*, 236 U. S. 288, 34 Am. B. R. 723, 59 L. Ed. 583; *Hunt v. Holmes*, Fed. Cas. No. 6,890, in which Judge Lovell ruled that a creditor who took his composition dividend after the composition was finally passed over his objections, making no attempt to have mutual claims adjusted and set off, thereby waived his claim of set-off; there being no evidence that he received the amount under protest or by mistake, or under any other circumstance which would entitle him to a rehearing or adjustment.

43. *In re Ballance* (C. C. A., 2d Cir.), 33 Am. B. R. 642, 219 Fed. 537, where a creditor filed a petition to vacate a composition upon the ground of fraud, it was held that the petitioner, after a demurrer to his petition had been overruled, could not take the amount of the composition and also take the chance of proving the allegations of his petition to set aside the composition for fraud, but that he must make election as to which form of relief he would accept, and that he could not take his share of the composition as a partial payment, and proceed to recover upon the unpaid balance of his claim.

44. *Cumberland Glass Mfg. Co. v. DeWitt*, 236 U. S. 288, 34 Am. B. R. 723, 59 L. Ed. 583, holding that where a creditor in composition proceedings fails to invoke the power of the court to determine whether the

right of set-off exists, he may not plead *res judicata* in an action on a claim against him.

45. *Cumberland Glass Mfg. Co. v. DeWitt*, 236 U. S. 288, 34 Am. B. R. 723, 59 L. Ed. 583; *Glover Grocery Co. v. Dorne*, 116 Ga. 216, 8 Am. B. R. 702, 42 S. E. 347; *Ross v. Saunders* (C. C. A., 1st Cir.), 5 Am. B. R. 350, 105 Fed. 915; *Broadway Trust Co. v. Manheim*, 47 N. Y. Misc. 415, 14 Am. B. R. 122, 95 N. Y. Supp. 93 (citing the text with approval); *Mandell & Co. v. Levy* (N. Y. Sup. Ct.), 47 Misc. 147, 14 Am. B. R. 549, 93 N. Y. Supp. 544; *Herschman v. Bolster* 220 Mass. 137, 33 Am. B. R. 747, 107 N. E. 543. See also *In re Merriman*, Fed. Cas. 9,479; *In re Becket*, Fed. Cas. 1,210. For its effect on a claim for deficiency by a record creditor, see *In re Stowell*, 24 Fed. 468; *Paret v. Ticknor*, Fed. Cas. 10,711.

The confirmation of a composition shall discharge the bankrupt from his debts other than those agreed to be paid by the composition, and those not affected by the discharge. Bankr. Act, § 14-c. See *post*.

Unscheduled creditor.— Where an unscheduled creditor acquires no notice or actual knowledge of the bankruptcy proceedings until after the bankrupt's application for the confirmation of the composition, though he does before the final order of confirmation, he is not bound by the composition. *Broadway Trust Co. v. Manheim*, 47 N. Y. Misc. 415, 14 Am. B. R. 122, 95 N. Y. Supp. 93.

46. *In re Tooker*, Fed. Cas. 14,096; *Dimock v. Revere Copper Co.*, 117 U. S. 559, 29 L. Ed. 994; *Hirschman v. Bulster*, 220 Mass. 137, 33 Am. B. R. 747, 107 N. E. 543.

47. See discussion under Section Sixteen of this work.

48. General Orders XII (3), XXXII.

49. Forms Nos. 60, 61, 62, 63.

as that followed under the act of 1874.⁵⁰ Supplementary forms will, however, be found among the "Supplementary Forms," *post*.⁵¹

III. INFORMAL COMPOSITIONS.

A practice of compromising debts outside of the proceeding in bankruptcy which is sometimes attempted in an informal way should be condemned. A bankrupt's estate can be wound up under the statute in but two ways: (1) by distribution in bankruptcy, or (2) by distribution in composition. The effort is sometimes made to start a proceeding in bankruptcy and then settle with creditors outside the proceeding; either letting the latter die of inanition or else asking for a sale of the assets at a nominal figure to him who furnishes the consideration for the informal settlement. The difficulties attending such an effort are indicated in *In re Lockwood*.⁵² It can never be entirely successful until every creditor has accepted the settlement offered. As an attempt to evade the law, fruitful in possibilities of wrong to creditors who may not have notice, it will usually be checked when brought to the attention of the court. Nothing short of positive proof that every creditor has been ascertained and, without exception, paid the same *pro rata*, will warrant an order for the sale of the assets, even to him who comes into court claiming to be subrogated to the rights of the creditors; indeed, it may be doubted whether the court, thus informed of an attempted evasion of the law, will set the machinery of that law in motion for the benefit of him who admits such an attempt.

IV. OFFERING COMPOSITION.

a. *In general*.⁵³—It has been said that a composition arises from the acceptance of an offer to the creditors to purchase the estate.⁵⁴ The offer of terms should be made as directed by the statute. All the creditors must have notice of the proposal, whether they have proved their claims at the time of the offer or not; the composition must be offered and sufficiently explained to all alike and they must have reasonable opportunity to consider it. They must be fully and honestly advised of the true condition of the debtor's affairs, so they can act intelligently and understandingly in view of the facts and with a knowledge of their rights in the premises. Unless these conditions are met by the bankrupt the composition must fail, for the provisions of the bankruptcy act prescribing the requisites of a composition are to be strictly construed as against those who seek by such means to deprive non-assenting creditors of their right to have the debtor's property administered and distributed in the ordinary course of bankruptcy proceedings.⁵⁵

50. Under the former law the debtor was required to be present at the meeting and submit to an examination, and produce a statement of assets and liabilities with the names and addresses of his creditors. *In re Haskell*, Fed. Cas. 6,192; *In re Holmes*, Fed. Cas. 6,632; *In re Dobbins*, Fed. Cas. 3,943; *In re Proby*, Fed. Cas. 11,439; *In re Little*, Fed. Cas. 8,392.

51. See Supplementary Forms, *post*, and Hagar and Alexander's Bankruptcy Forms, (2d Ed.) Nos. 290-310.

52. (D. C., N. Y.), 4 Am. B. R. 731, 104 Fed. 794, wherein the court said: "The parties concerned in adopting this method of settlement took the risk of having its exe-

cution interfered with by any additional creditors who might appear within a year and before the provisions of the order were fully executed. Such creditors, proceeding regularly within the time limit of the act, are entitled to their day in court, and to their ratable share in any assets not already distributed."

53. See also Am. B. R. Dig. §§ 689-693.

54. *Matter of Atlantic Construction Co.* (D. C., N. Y.), 35 Am. B. R. 838, 228 Fed. 571; if made after adjudication it is in effect an offer by the bankrupt to purchase the estate from the trustee. *Matter of Spiller* (D. C., Mass.), 36 Am. B. R. 399, 230 Fed. 490.

55. *In re Rider* (D. C., N. Y.), 3 Am.

b. Amendment of offer.—The present law contains no provision relating to amended or substituted offers of composition, but amendments have been permitted, and in such a case, the amended or substituted offer supersedes the original offer and must be submitted to the several creditors in the manner prescribed by law for the original offer.⁵⁶ While the amendment of a composition offer should be allowed only in the rarest cases, it should be allowed when the only change in the offer is an increase in the cash offered, and the bankrupt has not trifled with the court, but has at all times acted in good faith.⁵⁷

c. When offer should be made.—(1) **IN GENERAL.**—Subsection *a* provides that the offer to his creditors may be made either before or after adjudication, and after, but not before, he has been examined in open court or at a meeting of his creditors, and has filed in court the required schedules.⁵⁸

(2) **AFTER DISCHARGE.**—It has been suggested that since a person ceases to be a bankrupt after he has obtained a formal discharge, the provisions of the law as to compositions are not effectual after such discharge. The statute does provide that the offer be made by the bankrupt, but so long as the estate is being administered in bankruptcy, he continues as the bankrupt so far as such estate and the incidents relating thereto are concerned, notwithstanding his discharge prior to the closing of the estate. There seems to be no reasonable grounds for refusing to a debtor the privileges accorded him by the act in respect to the settlement of the claims against him by composition proceedings, after his discharge, provided the estate is in such condition that it may be returned to him without detriment to the interests of his creditors.⁵⁹

(3) **EFFECT OF AMENDMENT OF 1910.**—Some doubt arose under the law as it existed prior to the amendatory act of 1910 as to whether the examination here referred to may be made after the proceedings are instituted and before the adjudication. Under the amendatory act of 1874 composition was permitted "whether an adjudication had been had or not." The act as amended by the amendatory act of 1910 contains a similar provision and it is now provided that an offer of composition may be made "either before or after adjudication," thus effectually nullifying the effect of decisions holding that composition may not be offered until the bankrupt has submitted to an examination under § 7 (9) at the first meeting of his creditors which under § 55-a may only be held after an adjudication.⁶⁰

B. R. 178, 96 Fed. 808; *Matter of Kinnane Co.* (D. C., Ohio), 33 Am. B. R. 243, 217 Fed. 488.

56. *Matter of Kinnane Co.* (D. C., Ohio), 33 Am. B. R. 243, 217 Fed. 488.

57. *Matter of Cockshaw* (D. C., N. Y.), 34 Am. B. R. 278, 220 Fed. 239.

58. See Bankr. Act, § 7(8). The schedules and lists of creditors are properly filed with the referee. In *re Bloodworth-Stembridge Co.* (D. C., Ga.), 24 Am. B. R. 156, 178 Fed. 372.

See also Am. B. R. Dig. § 692.

59. *Matter of Spiller* (D. C., Mass.), 36 Am. B. R. 399, 230 Fed. 490, in which the court says: "If the bankrupt, at the time of making the offer, has not received his discharge, the confirmation operates as one, and secures to him both his former property, and his discharge. In the present case the bankrupts received one of these before making the offer. It is difficult to see why that fact

should restrict their right to redeem their property. The creditors could have objected to the discharges, but did not, and the grant of them completed one of the two principal branches of the case. The creditors could still object to a disposal of the estate in accordance with the offer in composition upon any ground specified in the statute. The fact that the discharges were obtained in the usual course seems to me no sufficient reason for denying the right to settle the estate through proceedings in composition."

60. In *re Back Bay Automobile Co.* (D. C., Mass.), 19 Am. B. R. 835, 158 Fed. 679, revg. 19 Am. B. R. 33.

Effect of amendment of 1910.—The idea of Congress in amending section 12a of the bankruptcy act so that a bankrupt may offer a composition before adjudication, but after he has been examined in open court, and that upon filing schedules and suggesting a composition, the court shall call a meeting for

d. Meeting of creditors.—The statute does not require the offer to be made at a meeting of creditors. Form No. 60 indicates the practice, for it provides for a petition for a meeting of creditors to act upon a proposal for composition. If the offer is made before adjudication, the amendment of 1910 requires the bankrupt to file the required schedules, and thereupon the court is required to call a meeting of the creditors for the allowance of claims, examination of the bankrupt, and preservations or conduct of estates, at which meeting the judge or referee shall preside. If the offer is made after adjudication it may be made at the first meeting of creditors,⁶¹ and it may even be oral; provided there has been an examination of the bankrupt begun at such meeting. But where there has been a reference, the offer and its acceptance should, in the first instance, be filed with the referee. It would seem also that such acceptance by the required number of creditors can be tendered immediately after the offer. This was not so under the former law. A special meeting of creditors, on not less than ten days' notice, was required whenever the bankrupt proposed a composition.

e. Acceptance by creditors.⁶²—(1) **WHEN OFFER TO BE MADE.**—But though the offer may be made, application for its confirmation cannot be made until after the offer has been accepted in writing by a majority in number of all creditors whose claims have been allowed representing a majority in amount. Claims can be allowed only in the way prescribed by the law.⁶³ It results, therefore, that, before application can be made for confirmation, an adjudication must be had, else there can be no allowed claims. Thus is accomplished the first wide gap between the former and the present law. There is no statutory limitation as to time of acceptance, and it is thought the consents of creditors can be obtained at any time after the petition for bankruptcy is filed, and, within the usual limitations as to laches, even after the year for the proving of claims has expired.⁶⁴ They could even be obtained at the first meeting, provided a majority in number and amount were present.

(2) **HOW ACCEPTANCE OBTAINED.**—Any paper containing an unqualified acceptance of the bankrupt's offer and signed by the creditor or a proxy duly authorized to that end, will comply with the statute. The usual method is to send printed forms of acceptance to the creditors. But there must be no improper influences or false representations used to secure signatures, lest the composition be refused confirmation on that ground.⁶⁵ A creditor who has once accepted cannot, in the absence of fraud or misrepresentation, withdraw his acceptance.⁶⁶

such examination, shows that the words "after but not before he has been examined in open court" were made to mean that the bankrupt might advance the time of examination and thereafter might present at once the offer of composition. Thus the purpose was plainly to shorten the time necessary in cases of honest composition, and to do away with the necessity of waiting for adjudication, first meeting, and subsequent notice of the meeting to prove claims and of the offer of composition. Hence, an offer of composition and the approval of certain creditors, may be presented as soon as the first meeting and the examination of the bankrupt have been completed, where notice that the offer would be made and considered has been given to creditors. *Matter of Fox* (D. C., N. Y.), 34 Am. B. R. 812, 222 Fed. 135.

61. *In re Hilborn* (D. C., N. Y.), 4 Am. B. R. 741, 104 Fed. 866.

To whom offer is made.—Where an offer of composition is made before the year is up within which claims may be proved it can only be interpreted as made at that time to all those who are shown on the schedules. *Matter of Atlantic Construction Co.* (D. C., N. Y.), 35 Am. B. R. 838, 228 Fed. 571.

62. See also Am. B. R. Dig. §§ 695-700.

63. Compare Bankr. Act, § 55-b, with § 57-d.

64. Bankr. Act, § 57-n.

65. See "Because of Absence of Good Faith" under this section, *post*.

66. *In re Levy* (D. C., Pa.), 6 Am. B. R. 299, 110 Fed. 744.

(3) **WHO MAY ACCEPT.**—Only those creditors who have proved their claims before the application to conform is made are allowed to vote on the acceptance of a composition.⁶⁷ A creditor whose right to prove his claim is barred by the one-year limitation has no voice in a composition proceeding.⁶⁸ Priority claims are "allowed" like other claims, but, as the cash to pay them in full must be deposited as a condition precedent, the injustice of counting such claims is apparent. Secured claims will be counted only to the amount unsecured; they can be "allowed" only to such an amount.⁶⁹ Mortgagees whose debts are dependent solely upon the contingency of a deficiency arising upon foreclosure are neither necessary nor proper parties to a proposed composition.⁷⁰

(4) **HOW MANY MUST ACCEPT.**—Here the present statute is widely different from its predecessor. A majority only of claims allowed, constituting a majority in amount of such claims, is sufficient for the consent required by this subsection;⁷¹ and the assignee of a large number of creditors will be counted as one creditor only.⁷² An individual composition of a bankrupt partner of a bankrupt firm cannot be effected by the consent of the firm creditors and without the consent of a majority in number and amount of his individual creditors, even though the consenting majority of the firm creditors be more than a majority of number and amount of all creditors, firm and individual.⁷³ A bankrupt will not be permitted to select a time when but few creditors have proven their claims and then present his terms only to creditors friendly to his interests. Indeed, it has been thought that the phrasing of Form No. 60 implies that a court of bankruptcy should notify creditors of a meeting at which it is proposed to offer a composition; and such a practice in cases where but a small number of creditors or creditors apparently controlled by the bankrupt have proven, should usually be followed.⁷⁴

f. Deposit of consideration.—(1) **IN GENERAL.**—Not only must there be a requisite acceptance, but the consideration of the composition must have been deposited in such place as shall be designated by and subject to the order of the judge. That this has been done will, if the acceptance is filed in the first instance with the referee, usually be shown by a certificate from the clerk. Whatever the nature of the consideration, it should in value be substantially as much as the property can reasonably be expected to yield to the creditors.⁷⁵

67. In re Rider (D. C., N. Y.), 3 Am. B. R. 178, 96 Fed. 808; Matter of Atlantic Construction Co. (D. C., N. Y.), 35 Am. B. R. 574, 228 Fed. 571.

See also Am. B. R. Dig. § 698.

Attorney for receiver voting.—Where, after the bankrupt had been thoroughly examined, he proposed terms of composition which to a majority seemed best for the creditors, it was not improper for the attorney for the receiver to represent creditors and to vote in favor of said composition having secured powers of attorney to that end. In re McLellan (D. C., N. Y.), 30 Am. B. R. 325, 204 Fed. 482.

68. In re French (D. C., Mass.), 25 Am. B. R. 77, 181 Fed. 583.

69. In re Spades, Fed. Cas. 13,196; In re Scott, Fed. Cas. 12,519; In re O'Neil, Fed. Cas. 10,528; In re Van Auken, Fed. Cas. 16,828.

70. Matter of Kahn (D. C., N. Y.), 9 Am. B. R. 107, 121 Fed. 412.

71. Matter of Goldstein (D. C., Conn.), 32 Am. B. R. 402, 213 Fed. 115; In re Rider (D. C., N. Y.), 3 Am. B. R. 178, 96 Fed. 808; Matter of Silverstein (D. C., N. Y.), 34 Am. B. R. 479, 225 Fed. 665; See also Am. B. R. Dig. § 697.

72. In re Messengill (D. C., N. Car.), 7 Am. B. R. 669, 113 Fed. 366.

73. Matter of Uhlman (D. C., N. Y.), 24 Am. B. R. 755, 180 Fed. 944.

74. Compare In re Rider (D. C., N. Y.), 3 Am. B. R. 178, 96 Fed. 808, with In re Hilborn (D. C., N. Y.), 4 Am. B. R. 741, 104 Fed. 866.

75. It was, however, held under the former law that, since assets in the hands of the failing debtor were worth more than in the hands of assignees, the existence of a reasonable margin which could be saved by the debtor through composition proceedings was immaterial. In re Weber Furniture Co., Fed. Cas. 17,330 and 17,331; In re Whipple, Fed. Cas. 17,513.

(2) NATURE AND AMOUNT OF CONSIDERATION.—Under the former law, where money was required to be deposited, it was frequently held that notes or other evidences of indebtedness could be deposited in lieu of money.⁷⁶ Whether this can be done under the present law was doubted by a previous editor of this work.⁷⁷ However, the setting-off of the word "consideration," as applied to common creditors, against the word "money," as applied to priority creditors, is significant; and the word "paid" but little affects the result. It is not doubted, therefore, that any consideration which would have been sufficient under the former law will be under this.⁷⁸ It seems established that the creditors may waive the actual deposit of money required to meet the terms of the composition, where it appears for the best interests of the creditors;⁷⁹ and this being so it would follow that notes or other evidences of indebtedness, postponing the payment of the amounts required, may be deposited.⁸⁰ The considerations tendered by a bankrupt should be substantially equivalent to what his estate would pay, were it fully administered in bankruptcy,⁸¹ and must be sufficient to cover the stipulated percentage on all claims of creditors, both those already filed and also those scheduled by the bankrupt and not filed.⁸² Secured claims, not liquidated, should not be considered in determining the amount.⁸³ While the section makes no reference to taxes, by § 64 they are made preferred claims, and the bankrupt must deposit a sufficient sum for their payment.⁸⁴ The fact that a creditor has received a preferential

76. *In re Reiman*, Fed. Cas. 11,673 and 11,675; *In re McNab*, Fed. Cas. 8,906; *In re Hurst*, Fed. Cas. 6,925.

77. Compare, however, careful review of this and kindred branches of the law of compositions in the opinion of Mr. Referee Judson, in *In re Rider*, 1 N. B. N. 483.

78. See also Bankr. Act, § 14-c, which exempts from the effect of the discharge, following the confirmation of a composition, "those agreed to be paid by the terms of the composition."

79. *Kinlead v. Bacon & Sons* (C. C. A., 6th Cir.), 36 Am. B. R. 390, 230 Fed. 362.

Waiver of deposit.—Where attorneys for the bankrupt, for the trustees and petitioning creditors, and for the trustee himself, all waive in writing the deposit in a composition proceeding of a sum sufficient to pay their fees, in order to expedite and facilitate the proceeding, they may not thereafter insist on payment out of the estate. It seems that if the bankrupt be benefited by the waiver he himself should pay the attorneys. *Matter of Frischknecht* (C. C. A., 2d Cir.), 34 Am. B. R. 530, 223 Fed. 417.

80. **Notes on mortgages.**—In *Matter of Kinnane Co.* (D. C., Ohio), 34 Am. B. R. 119, 217 Fed. 488, it was held that a note or mortgage was a sufficient consideration for a composition; *Kinlead v. Bacon & Sons* (C. C. A., 6th Cir.), 36 Am. B. R. 390, 230 Fed. 362; *Matter of Batterman* (C. C. A., 2d Cir.), 36 Am. B. R. 695, 231 Fed. 699; Compare *In re Frear* (D. C., N. Y.), 10 Am. B. R. 199, 120 Fed. 978, wherein Judge Ray (N. D., N. Y.), refused to confirm a composition where promises to pay money or merchandise at a future day had been substituted for money.

81. *Matter of Kinnane Co.* (D. C., Ohio), 33 Am. B. R. 243, 217 Fed. 488.

82. *In re Fox* (Ref., Ohio), 6 Am. B. R. 525; *In re Harvey* (D. C., Pa.), 16 Am. B. R. 345, 144 Fed. 901; *Matter of Atlantic Construction Co.* (D. C., N. Y.), 35 Am. B. R. 838, 228 Fed. 571.

Unscheduled claims.—It may be that the bankrupt will be compelled to increase the deposit so as to cover unscheduled claims proved after the offer of composition. See *Matter of Ennis* (D. C., N. Y.), 25 Am. B. R. 383, 183 Fed. 859.

Expenses on failure of composition.—Money loaned to a bankrupt and deposited by him for the purpose of a composition, is liable, in case the composition fails, for expenses reasonably incurred, but not for expenses resulting from the opposition of a creditor to the composition. *Matter of Wiener* (D. C., N. Y.), 33 Am. B. R. 355, 217 Fed. 173.

Time within which changes may be proven.—When an estate is to be administered it is necessary to put a time limit to the proving of claims, because the rate of dividend depends upon what claims are proven, but this is not so in a composition because the dividend is necessarily fixed by the bankrupt upon the schedules alone. *Matter of Atlantic Construction Co.* (D. C., N. Y.), 35 Am. B. R. 838, 228 Fed. 571.

83. *In re Harvey* (D. C., Pa.), 16 Am. B. R. 345, 144 Fed. 901.

84. *In re Flynn* (D. C., Mass.), 13 Am. B. R. 720, 134 Fed. 145; *In re Fisher & Co.* (D. C., N. Y.), 14 Am. B. R. 366, 135 Fed. 223.

transfer within the four months' period does not deprive him of his rights as a creditor, and the amount due on his claim may be considered in determining the amount of the deposit.⁸⁵

(3) WHEN DEPOSIT IN CASH IS NECESSARY.—Clearly, sufficient cash "to pay all debts which have priority and the cost of the proceedings" must be deposited.⁸⁶ This was not so under the former law, if there were no appreciable assets.⁸⁷ There can be no doubt, however, that now in all cases this cash deposit must be made. How the "cost of the proceeding" is to be ascertained in advance is a bit puzzling. It includes the referee's, and, since the amendatory act of 1903, the trustee's commission, and the allowances to the attorneys for the bankrupt at least, and may include receivers' and appraisers' fees, and allowances to the attorneys for petitioning creditors. The only safe practice would seem to be to deposit such a sum as will certainly be larger than the total of all possible expenses, allowances, and fees.⁸⁸

85. *Matter of Ghinasin* (Ref., Mich.), 34 Am. B. R. 818, in which Referee Joslyn held that where preferential payments have been made, creditors have the right in determining whether or not they will accept a composition offer, to take into consideration to what extent the bankrupt's assets might be increased by the recovery through the trustee of such preferential payments, but when a composition has once been accepted, every creditor of the bankrupt has a right to prove, file and have allowed any valid claim against the bankrupt without reference to whether or not such creditor has received a preference within the meaning of the Bankruptcy Act.

86. *In re Fisher & Co.* (D. C., N. J.), 14 Am. B. R. 366, 135 Fed. 223; *In re Fox* (Ref., Ohio), 6 Am. B. R. 525; *In re Harvey* (D. C., Pa.), 16 Am. B. R. 345, 144 Fed. 901.

87. *In re Chamberlain*, Fed. Cas. 2,580.

88. Interest on money deposited by a bankrupt pursuant to an offer in composition, earned pending litigation by minority stockholders, should be returned to the bankrupt. *Matter of Kelley* (D. C., Mass.), 35 Am. B. R. 127, 223 Fed. 383.

Compensation of referee.—Where a bankrupt upon application for the confirmation of a composition has filed with the court certain obligations in lieu of a portion of the cash deposit required, and has agreed with the court to pay costs and expenses the same as if the money were actually in court, the referee is entitled to the commissions under section 40 of the Bankruptcy Act, based upon the amount paid. *Matter of White & Co.* (D. C., Ga.), 35 Am. B. R. 670, 225 Fed. 796.

In the case of *Kinkead v. Bacon & Sons* (C. C. A., 6th Cir.), 36 Am. B. R. 390, 230 Fed. 362, it was held that a referee is entitled to a commission of one-half of one per cent on the amount "to be paid by the bankrupt to creditors" regardless of the fact that payment was not made directly by the bankruptcy court. The amount to be paid "may include sums to which certain note-holders were entitled by virtue of the composition proceedings." And see *Matter of*

Batterman (C. C. A., 2d Cir.), 36 Am. B. R. 695, 231 Fed. 699, holding that where cash deposits for the whole amount agreed, to be paid are waived by the creditors, and a part is taken in notes to be paid by third parties, the referee is entitled to his commission on all claims actually paid. See also under § 40, *post*.

Expense chargeable against funds on failure of composition.—Upon an application for withdrawal of a fund deposited by a bankrupt for the purpose of composition, which he had procured, from a third person after adjudication, expenses incurred during the pendency of the composition offer, which would not have been incurred if the orders of the court previous to composition had been carried out, and if the property had been sold in the usual manner, should be paid out of such fund. *Matter of Wiener* (D. C., N. Y.), 32 Am. B. R. 777, 215 Fed. 278.

Cost of proceedings.—In the case of *In re Harris* (D. C., Tenn.), 9 Am. B. R. 20, 117 Fed. 575, the court said: "Composition is wholly a matter of arrangement by the bankrupt and his creditors, and the negotiations should always comprehend a disposition of all the costs, with a definite understanding of amounts and the method of their payment. If there be an attorney's fee not waived, the attorney should agree with the parties on the amount, or if disagreed, application should be made to the court to fix the fee, and so of the receiver or the trustee; and with every item not distinctly fixed by the statutes or rules of practice, this should be done, as a preliminary of the composition agreement and as a part of it. When the amounts are ascertained, the parties should agree whether the costs come out of the deposit for creditors, or whether the bankrupt provides an additional sum to meet costs."

Counsel and referee fees.—In a case where the bankrupt, by a mortgage of his wife's property, had raised a sufficient amount to offer a composition of 40 cents on the dollar, the attorney for the petitioning creditors was allowed \$50, the attorney for the bankrupt \$20, and the referee was refused an al-

(4) **DEPOSIT OF ASSETS OF ESTATE.**—Under the present law, title to the assets of the estate generally passes from the bankrupt before he offers the composition; it may even have vested in a trustee. Thus, where there has been a sale of perishable property by an assignee, which is ratified by the trustee and the avails turned over to him. The difficulty is, however, more theoretical than real, for the offer of composition could provide for notes payable on a day certain, and on that day, the composition having been meanwhile confirmed, the court could order the notes surrendered to the bankrupt in exchange for cash in the hands of the trustee, and that the latter be disbursed in place of notes. Section 12-e has been thought an insuperable obstacle to this practice; but, it is suggested that a court of bankruptcy will not dismiss the proceeding until its work is done, and that, therefore, the express provisions of the former law, requiring the enforcement of the composition by the court, by implication at least, still survive.⁸⁹ The opposite view would, in the nature of things, make compositions impossible, save through a loan on the security of property to which the bankrupt has not title. In effect, it would render a beneficent and wise system of arrangement between the debtor and his creditors but an exasperating illusion. It can safely be asserted, then, that, even under the present law, the assets of the bankrupt, after the same are vested in the trustee, can be used by him, if not by direct deposit, at least by indirection, to accomplish a composition.⁹⁰

g. Practice before confirmation.—(1) **IN GENERAL.**—Much that has gone before indicates the steps in composition proceedings up to the application for confirmation.

(2) **"EXAMINED."**—This does not necessarily mean that the examination of the bankrupt must be completed, but that there must have been a sufficient examination. If creditors so desire, the judge or referee will, in proper cases, adjourn the meeting to permit an extended examination, before allowing the offer to be made. If there is no meeting pending, and there has been no previous examination, one must be called for the purpose of examination, and the regular procedure to that end must be observed.⁹¹

(3) **ASCERTAINING WHETHER A MAJORITY HAS CONSENTED.**—This seems to be the duty of the referee, where the case has been referred. Only those creditors may accept a composition who could vote for trustee. This excludes,

lowance as special master in the composition proceedings where he was well paid in the bankruptcy proceedings, his fees amounting to \$40. *In re Talton* (D. C., N. Car.), 14 Am. B. R. 617, 137 Fed. 178.

Costs of attorney of bankrupt.—An application to confirm a composition made by an involuntary bankrupt is no part of the administration of the estate, so as to authorize the payment under section 64(3) of the bankruptcy act of a claim for the fees and disbursements of an attorney employed by bankrupt upon the contest of such an application. *In re Fogarty* (C. C. A., 8th Cir.), 26 Am. B. R. 568, 187 Fed. 773.

^{89.} See *In re Fox* (Ref., Ohio), 6 Am. B. R. 525.

^{90.} But see, as tending to disapprove of the statement in the text, *In re Frear* (D. C., N. Y.), 10 Am. B. R. 199, 120 Fed. 978.

Proceeds of bond by private banker to

people.—Under section 25 of the General Business Law of the State of New York providing that private bankers shall give a bond to the People and that "in the event of the insolvency or bankruptcy of the applicant, upon the payment of the full amount of such bond to the assignee, receiver or trustee of the applicant, as the case may require, for the benefit of the persons making such deposits and of such persons as shall deliver money to the applicant for transmission to another," moneys, paid under a bond upon the bankruptcy of an applicant, may be used by his trustee for the purpose of increasing the estate or saving assets for the benefit of the depositors, but cannot be used in carrying out a composition agreement. *Matter of Deutsche Brothers* (D. C., N. Y.), 33 Am. B. R. 858, 220 Fed. 532.

^{91.} For instance, notice must be given, see Bankr. Act, § 58-a.(1).

besides priority creditors and secured creditors to the amount of their securities,⁹² preferred creditors also, for the reason that their claims, if presented, will not be allowed unless accompanied by a surrender.⁹³

(4) **REPORTING TO THE JUDGE.**—Only the judge has power to confirm a composition.⁹⁴ If the offer and acceptance are made after reference, the referee will arrest the proceedings and report the proposed composition to the judge. This may be done by handing up a transcript of his record-book, showing (1) the filing of the debtor's schedules, (2) his examination, (3) his offer, (4) its acceptance by the required majority in number and amount of claims allowed, (5) the consideration to be deposited, and (6) a list of creditors and their addresses, the referee meanwhile, however, keeping the meeting of creditors alive by repeated continuances, so as to permit a prompt resumption of administration in case the proposed composition is not confirmed. If it is, the referee has no other duty, save subsequently, to report the case closed. The proper practice is detailed in the "Supplementary Forms," *post*.⁹⁵

V. CONFIRMING OR REJECTING COMPOSITION.⁹⁶

a. Who may oppose composition.—Creditors may oppose a composition irrespective of the number or amount of their claims.⁹⁷ The assignee of an original claim against a bankrupt is entitled to object to the confirmation of a composition.⁹⁸

b. Objections to confirmation.—(1) **IN GENERAL.**—The objection that the composition is not offered in accordance with the law (as where it is asserted that a majority in number and amount has not consented), which was a statutory objection under the former law, should probably now be taken specially; and, in that event, opportunity to correct the error will probably be given. It seems that only grounds which can be alleged in the formal written objections are those stated in subsection *d*.⁹⁹ The court is only concerned with the bankrupt estate; it has nothing to do with that part of the agreement which provides for raising funds which do not come out of the estate.¹⁰⁰

(2) **BECAUSE AGAINST THE BEST INTERESTS OF THE CREDITORS.**—This was an objection under the former law and useful precedents will be found in the reported cases. The English rule seems to be that, unless fraud is shown, the decision of the creditors will be final.¹⁰¹ That this is not the rule in this country is emphasized by the requirement of the present statute that the judge must be "satisfied." The court should confirm, "if satisfied" that the composition does not run counter to any of the three conditions named in § 12-d.¹⁰² If, however, the composition proceedings are not in accordance with the provisions of the bankruptcy act, if they are irregular, the court cannot confirm.¹⁰³ The

92. See p. 319, *ante*. And compare *In re Scott*, Fed. Cas. 12,519.

93. Bankr. Act, §§ 57-g and 60-b.

94. *Matter of Sonnabend* (Ref., Mass.), 18 Am. B. R. 117; *In re Bloodworth-Stembridge Co.* (D. C., Ga.), 24 Am. B. R. 156, 178 Fed. 372.

95. See *Supplementary Forms, post*, and *Hagar and Alexander's Bankruptcy Forms*, (2d Ed.), No. 290-310.

96. See also Am. B. R. Dig. §§ 702-712.

97. *Matter of Rivkin* (D. C., Conn.), 33 Am. B. R. 170, 216 Fed. 218. See also Am. B. R. Dig. § 704.

98. *In re Comstock* (D. C., R. I.), 19 Am. B. R. 65, 154 Fed. 747.

99. *In re Rudwick* (D. C., Mass.), 2 Am. B. R. 114, 93 Fed. 787.

100. *In re Linderman* (D. C., Pa.), 22 Am. B. R. 131, 166 Fed. 593.

101. *Adler v. Jones* (C. C. A., 6th Cir.), 6 Am. B. R. 245, 109 Fed. 967. See *Ex parte Jewett*, Fed. Cas. 7,303; *In re Morris*, Fed. Cas. 9,824.

102. *Matter of Kinnane Co.* (D. C., Ohio), 34 Am. B. R. 119, 221 Fed. 762.

103. *Matter of Kinnane Co.* (D. C., Ohio), 34 Am. B. R. 119, 221 Fed. 762.

point usually made is that the offer is less than would be realized on a sale of the assets in bankruptcy. It is the duty of the court to investigate the facts, independently of any agreement or composition the creditors may have made.¹⁰⁴ In deciding whether the composition should be approved or rejected the sum offered should be compared with what the creditors would receive through the trustee and not with what the debtor might be able to pay them. In the absence of fraud and concealment, the question for the court is not whether the debtor might have offered more, but whether his estate will pay more in bankruptcy.¹⁰⁵ The mere fact that an estate will, on full administration, pay more than the offer in composition, is not sufficient cause for refusing confirmation; if the amount offered is very considerably less than the amount which might be expected reasonably to be realized from administration, the composition is not for the best interests of the creditors and should not be approved.¹⁰⁶ The approval of the majority of the creditors is evidence, *prima facie*, that the composition is for the best interests of the creditors and the burden is upon those who attach it to show the contrary.¹⁰⁷ There must be a positive showing to rebut the presumption that the action of the majority is for the interest of all;¹⁰⁸ yet any gross discrepancy between the offer and the amount to be reasonably expected from the sale of the assets will justify a refusal to confirm;¹⁰⁹ but where the difference is but slight and necessarily problematical, the composition should be confirmed.¹¹⁰ A *bona fide* offer of a substantially larger sum for the assets than the bankrupt, through the composition, is willing to pay, would seem sufficient to warrant a rejection of the composition. That part of a composition agreement which provides for a

104. *In re Waynesboro Drug Co.* (D. C., Ga.), 19 Am. B. R. 487, 157 Fed. 101.

105. *Matter of Kinnane Co.* (D. C., Ohio), 33 Am. B. R. 243, 217 Fed. 488.

Determination of question.—In *Ex parte Jewett*, 2 Low. 393, Fed. Cas. 7,303, Judge Lowell said: "In the absence of fraud and concealment, the question for the court seems to be, not whether the debtor might have offered more, but whether his estate would pay more in bankruptcy." Cited in *In re Hoxie* (D. C., Me.), 25 Am. B. R. 32, 34, 180 Fed. 508. See also *Adler v. Jones* (C. C. A., 6th Cir.), 6 Am. B. R. 245, 109 Fed. 967, 48 C. C. A. 761; *United States ex rel. Adler v. Hammond* (C. C. A., 6th Cir.), 4 Am. B. R. 736, 104 Fed. 862, 44 C. C. A. 229; *In re Waynesboro Drug Co.* (D. C., Ga.), 19 Am. B. R. 487, 157 Fed. 101; *Matter of Dozier Grocery Co.* (D. C., Ala.), 37 Am. B. R. 633, 234 Fed. 169.

106. *Matter of Spiller* (D. C., Mass.), 36 Am. B. R. 399, 230 Fed. 490.

107. *City Nat. Bank v. Doolittle* (C. C. A., 5th Cir.), 5 Am. B. R. 736, 107 Fed. 236; *In re Hoxie* (D. C., Me.), 25 Am. B. R. 32, 180 Fed. 508; *In re Waynesboro Drug Co.* (D. C., Ga.), 19 Am. B. R. 487, 157 Fed. 101; *In re Barde & Levitt* (D. C., Ore.), 31 Am. B. R. 161, 207 Fed. 654; *Matter of Goldstein* (D. C., Conn.), 32 Am. B. R. 402, 213 Fed. 115; *Matter of Rivkin* (D. C., Conn.), 33 Am. B. R. 170, 216 Fed. 218; *Matter of Kinnane Co.* (D. C., Ohio), 33 Am. B. R. 243, 217 Fed. 488; *Matter of Spiller*

(D. C., Mass.), 36 Am. B. R. 399, 230 Fed. 490. See also Am. B. R. Dig. § 706.

Best interest of all.—"A composition must appear to be for the best interest of all creditors and not merely for the best interest of certain ones of a certain class." *Matter of Kinnane Co.* (D. C., Ohio), 34 Am. B. R. 119, 221 Fed. 762.

108. *In re Weber Furniture Co.*, Fed. Cas. 17,330 and 17,331; *In re Greenbaum*, Fed. Cas. 5,769.

Vague and general objections.—Where a bankruptcy proceeding has been delayed for more than five years without accomplishing anything, and specifications of objection to a composition are vague and general in character, and only one creditor out of a hundred objects to the composition, a confirmation should be ordered. *Matter of Soloway & Katz* (C. C. A., 2d Cir.), 37 Am. B. R. 257, 234 Fed. 67.

109. *In re Whipple*, Fed. Cas. 17,513; *Ex parte Williams*, 10 L. R. Eq. C. 55; *Adler v. Jones* (C. C. A., 6th Cir.), 6 Am. B. R. 245, 109 Fed. 967; *In re Waynesboro Drug Co.* (D. C., Ga.), 19 Am. B. R. 487, 157 Fed. 101; *In re Hoxie* (D. C., Me.), 25 Am. B. R. 32, 180 Fed. 508.

110. *In re Arrington Co.* (D. C., Va.), 8 Am. B. R. 64, 113 Fed. 498, and in *In re Criterion Watch, etc., Co.* (Ref., N. Y.), 8 Am. B. R. 206; *Bolles v. Kelley* (C. C. A., 1st Cir.), 34 Am. B. R. 704, 222 Fed. 63; *Matter of Spiller* (D. C., Mass.), 36 Am. B. R. 399, 230 Fed. 490.

provisional order of adjudication will not be approved.¹¹¹ In the nature of things, each case must turn on its own facts.

(3) **BECAUSE OF COMMISSION OF ACTS OR FAILURE TO PERFORM DUTIES WHICH WOULD BAR A DISCHARGE.**—This objection was not available under the former law. But since the confirmation of a composition discharges the bankrupt,¹¹² it is reasonable that the same grounds which prevent a discharge on a direct petition should also prevent a discharge on an application for confirmation of a composition.¹¹³ The intention clearly is to prevent one who cannot get a discharge from securing its equivalent through a composition.¹¹⁴ If a bankrupt has committed an offense available as an objection to his discharge the court will refuse to confirm the proposed composition without regard to the interests of the creditors, and the fact that but one creditor objects is of no importance,¹¹⁵ as where it appears that the bankrupt has failed to keep books from which his true financial condition might be ascertained,¹¹⁶ or where it appears that the bankrupt by a materially false financial statement in writing obtained property from the objecting creditor,¹¹⁷ or where partners take all the money available from the firm's assets immediately before the appointment of a receiver in a State court with the intent to hinder, delay and defraud creditors.¹¹⁸ But a preferential payment on an existing indebtedness does not necessarily constitute a fraudulent conveyance so as to bar the confirmation of

111. *In re Linderman* (D. C., Pa.), 22 Am. B. R. 131, 166 Fed. 593.

112. Bankr. Act, § 14-c.

113. *In re Comstock* (D. C., R. I.), 19 Am. B. R. 65, 154 Fed. 747; *Matter of Burman and Welling* (D. C., Mass.), 32 Am. B. R. 62, 210 Fed. 512.

114. This proposition was quoted with approval in *In re Comstock* (D. C., R. I.), 19 Am. B. R. 65, 154 Fed. 747; *Matter of Goldstein* (D. C., Conn.), 32 Am. B. R. 402, 213 Fed. 115.

115. *In re Godwin* (D. C., Pa.), 10 Am. B. R. 252, 122 Fed. 111.

116. *In re Olman* (D. C., Ohio), 13 Am. B. R. 395, 134 Fed. 681; *In re Godwin* (D. C., Pa.), 10 Am. B. R. 252, 122 Fed. 111; *In re Barde & Levitt* (D. C., Ore.), 31 Am. B. R. 161, 207 Fed. 654; *In re Wilson* (D. C., Pa.), 5 Am. B. R. 849, 107 Fed. 83.

Failure to keep books of account.—Where a bankrupt, whose sales were for cash, kept a merchandise ledger showing his purchases on credit, which were his most important transactions, but kept no other books, except his check-book and pass-book, the court should not refuse to confirm a composition, although no record was kept by the bankrupt of loans to friends and relatives. *Matter of Silberstein* (D. C., N. Y.), 34 Am. B. R. 479, 225 Fed. 665.

117. *In re Griffin* (D. C., Ga.), 25 Am. B. R. 206, 180 Fed. 792, wherein it appeared that the bankrupt had claimed to own a house which, in fact, was the property of his wife.

False statement to commercial agency for purpose of rating.—The confirmation of a composition should not be refused upon the ground that the bankrupt had made a false statement in writing of his financial condi-

tion, where it appears that the statement was made a long time previous for the purpose of securing a rating from a commercial agency and not for the specific purpose of obtaining credit on any particular sale, and sales were made under circumstances where inquiry of the bankrupt himself was possible. *Matter of Witman* (D. C., N. Y.), 32 Am. B. R. 780, 215 Fed. 286.

False statement to procure credit.—Where a debtor, who had credit with a trust company not exceeding \$1,000, rendered a financial statement to it in order to increase his credit, and stipulated that such statement should be considered as continuing in force until the company was notified to the contrary, and the officers of the company testified that they were not notified of any changes in the financial condition of the debtor, and relied upon his statement, which was false, in all subsequent transactions with him, and at the time of the debtor's bankruptcy he owed the company only \$500, an objection by the company to the bankrupt's offer of composition must be sustained. *Matter of Levenson* (D. C., Mass.), 35 Am. B. R. 260, 223 Fed. 874.

Where a statement of assets made by a bankrupt a year prior to his adjudication is not shown to have been materially false, and to have been made to obtain credit, a composition consented to by all the creditors, except the objecting creditor, who had once consented, will be approved, it not appearing that the interests of the creditors would be advanced by a refusal to confirm. *In re Seligman* (D. C., N. Y.), 20 Am. B. R. 774, 163 Fed. 549. See also *In re Griffin* (D. C., N. Y.), 20 Am. B. R. 774, 163 Fed. 549.

118. *Matter of Burman and Welling* (D. C., Mass.), 32 Am. B. R. 62, 210 Fed. 512.

a composition.¹¹⁹ The new objections to discharges¹²⁰ will make this subsection more valuable. It is thought that the provision that a petition for a discharge cannot be filed after a year subsequent to the adjudication does not apply to compositions. A composition has primarily to do with administration, and that may, from one cause or another, be delayed for years. For available objections to a discharge, see under sections fourteen and twenty-nine of this work.

(4) **BECAUSE OF ABSENCE OF GOOD FAITH.**—Where the entire course of conduct of a bankrupt is consistent only with an intent to keep his creditors and his trustee in ignorance, and to defraud them by a concealment of his assets, the court cannot confirm a composition.¹²¹ Fraud is sufficient to warrant a refusal to confirm,¹²² but it must be fraud connected with the offer or acceptance of the composition. Cases cited under the succeeding section will also be found in point. Fraud on the part of a single creditor is sufficient,¹²³ as where a creditor proves a false claim.¹²⁴ The giving of money to induce a creditor to sign vitiates the composition,¹²⁵ and, if it is extorted by the creditor, is a crime also.¹²⁶ Any secret advantage given one creditor over his fellows accomplishes the same result.¹²⁷ Where it clearly appears that preferential payments have been made, which, if recovered, would result in a greater percentage than that obtained by the composition, such composition should not be affirmed.¹²⁸ Purchasing claims for the purpose of using them to accomplish a composition is not necessarily fraudulent, but will be so held unless an honest motive appears.¹²⁹ Improperly inducing a creditor to withdraw has the same effect as improperly persuading him to join in the composition. The good faith of both debtor and creditors must be of the highest order.

c. Withdrawal of objections.—Where specifications of objections to the confirmation of a composition are withdrawn, the proposed composition will not be confirmed until after a hearing before the referee to inquire whether the creditors who withdrew their objections were related to the bankrupt, whether objections were well founded, and what grounds there are for believing that the composition will be for the best interests of the creditors.¹³⁰ Objections to an offer in composition cannot be withdrawn after they have been sustained, under an agreement by which the objecting creditor received, directly or indirectly, a larger amount on its claim than other creditors of the same class.¹³¹

119. *Matter of Rivkin* (D. C., Conn.), 33 Am. B. R. 170, 216 Fed. 218.

120. Bankr. Act, § 14-b (3) (4) (5) (6).

121. *In re Comstock* (D. C., R. I.), 19 Am. B. R. 65, 154 Fed. 747.

The assignee of an original claim against a bankrupt is entitled to object to the confirmation of a composition upon the ground of a fraudulent concealment and disposal of assets, and that the claim was bought for the purpose of forcing a settlement or discontinuance of a suit by the trustee against another person, by threats of opposition to the confirmation, is immaterial. *In re Comstock* (D. C., R. I.), 19 Am. B. R. 65, 154 Fed. 747.

122. Bankr. Act, § 13.

123. *In re Sawyer*, Fed. Cas. 12,395; *In re Whiting*, Fed. Cas. 17,580.

124. Compare Bankr. Act, § 29-b (3).

125. *In re Sawyer*, Fed. Cas. 12,395.

126. Bankr. Act, § 29-b (5).

127. *In re Jacobs*, Fed. Cas. 7,159; *Bean v. Amsinck*, Fed. Cas. 1,167, on appeal s. c. *Bean v. Amsinck*, 10 Blatchf. 361; *Bean v. Brookmire*, Fed. Cas. 1,170; *Citizens National Bank v. Kerney*, 59 Ind. App. 96, 35 Am. B. R. 574, 108 N. E. 139.

128. *In re McLellan* (D. C., N. Y.), 30 Am. B. R. 325, 204 Fed. 482.

129. *In re Sawyer*, Fed. Cas. 12,395.

130. *In re Levy* (D. C., Mass.), 22 Am. B. R. 769, 172 Fed. 780.

131. **Inducement to withdraw objections.**—The court will not permit objections to an offer in composition which have been heard and sustained to be withdrawn after the decision, under any agreement or transaction

d. Effect of fraud on a composition already confirmed.—Not only may the composition be objected to, but if obtained by fraud, it is void and unenforceable, and the consideration may be recovered.¹³² It would seem, however—a certified copy of the order confirming a composition being evidence of the jurisdiction of the court, the regularity of the proceedings and the fact that the order was made,¹³³ that a composition if attacked for fraud must be so attacked in a court of bankruptcy. It must appear that there was actual fraud, and not mere suspicion of it, to justify setting aside a composition which has been confirmed.¹³⁴

e. Practice.—The practice, from the time the referee's report reaches the judge, is identical with that on contested applications for discharge,¹³⁵ except perhaps, as modified by subsection *c* "parties in interest" is a broader term than "creditors." The same phrase is used in § 14-b. It is difficult to suppose a case when it will include others than those persons who have proved or may prove their claims. Ordinarily, after the time to enter appearances has expired, and there are none and no objections, there is a reference in any event to the referee in charge, as special master,¹³⁶ it being the duty of the court to satisfy itself as to the three facts set out in subsection *d*.¹³⁷ In this the practice differs from that on discharges. When objections are filed, there must be a hearing, and the same reference to a special master is customary. The date and place fixed for the hearing must be convenient, but the former is usually set after conference with the respective attorneys. Where the specifications of objections to the confirmation of a composition are meritorious they may be amended to conform to the proof.¹³⁸ The court may allow costs in its discretion. A bankrupt, after composition, including payment of all costs, has been confirmed, must pay his attorney in the matter.¹³⁹

by which the objecting creditor received, directly or indirectly, a larger amount on its claim than other creditors of the same class. *Matter of Levinson* (D. C., Mass.), 35 Am. B. R. 260, 223 Fed. 874.

^{132.} *Bean v. Amsinck*, Fed. Cas. 1,167. See also § 13 of this work.

^{133.} Bankr. Act, § 21-f.

^{134.} *Union Furniture Co. v. Walker-Coolley Furniture Co.* (D. C., Ga.), 31 Am. B. R. 73, 206 Fed. 217, holding that a composition duly confirmed by the court will not be set aside on the ground of fraudulent representations where it appears that the bankrupt disclosed fully the extent of his assets, and that the creditors with knowledge of the alleged fraud accepted the composition.

Agreement by trustee to guarantee dividend.—An agreement by a trustee in bankruptcy, whereby, without the knowledge of other creditors, he personally guarantees to one creditor the payment of a certain dividend, in order to induce such creditor to sign a composition agreement, constitutes a secret preference to such creditor, and, although it does not render void the composition, it is void, itself, as being against public policy. *Jacobs v. Siff*, 74 N. Y. Misc. 58, 27 Am. B. R. 189, 131 N. Y. Supp. 656.

^{135.} See discussion under Section Fourteen of this work. See also Am. B. R. Dig. § 707.

^{136.} Note General Orders XII(3) and XXXII and § 38-a(4).

^{137.} *In re Levy* (D. C., Mass.), 22 Am. B. R. 769, 172 Fed. 780.

^{138.} *Matter of Burman and Welling* (D. C., Mass.), 32 Am. B. R. 62, 210 Fed. 512.

^{139.} *In re Martin* (D. C., N. Y.), 18 Am. B. R. 250, 152 Fed. 582. See also Am. B. R. Dig. § 711.

Allowances to attorney of bankrupt.—In the case of *In re Fogarty* (C. C. A., 8th Cir.), 26 Am. B. R. 568, 187 Fed. 773, the court said: "If, because the professional services in this case were rendered in the bankruptcy court—in the administration of the bankruptcy law—the attorney's fees are therefore costs of administration within the meaning of section 64, nevertheless such fees are not payable from the estate unless the services were rendered to the bankrupt while he was in the performance of some duty prescribed by the act. No duty was laid upon him to try to settle the case and get back his property. That was a privilege, not a duty. If it be said that an application for a discharge is likewise merely a privilege, that the bankrupt's costs in connection with the hearing upon his application for a discharge are payable from the estate, that the confirmation of a composition is equivalent to a discharge, and that therefore his costs in connection with the prosecution of his composition offer should also be payable from the estate, we think the following considerations are a sufficient answer. Attendance in

VI. DISTRIBUTION IN COMPOSITION.

a. **In general.**—Subsection *e* provides that “upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed.” It will be noticed that the judge is to direct as to the manner of distribution, and the referee has no jurisdiction unless delegated to him by the judge.¹⁴⁰

b. **Practice.**—The law is silent as to the practice on distribution. The consideration has been deposited “in such place as shall be designated by the judge.”¹⁴¹ It can only be distributed “by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge.”¹⁴² But the distribution may be made “as the judge shall direct.” Form No. 63 seems to imply that it shall be made by the clerk, and this practice, amplified by district rules, has been generally adopted. At the same time, a convenient method is to make the referee in charge a distributing agent to the extent of performing the clerical work required;¹⁴³ the checks, however, to be signed by the clerk. Otherwise, the referee should furnish the clerk with a list of claims allowed, specifying the names, amounts, addresses, and the like.¹⁴⁴ As to the proof of claims the course of proceeding is the same whether there be composition, or the proceedings are carried through in ordinary course. Claims not proved within one year from the date of adjudication are not to share in the composition funds,¹⁴⁵ and the bankrupt may be heard to object to the allowance in composition of a claim offered for proof after the expiration of such year.¹⁴⁶ Where an unscheduled claim is not proved until after the deposit for a composition is made though proved within one year from the adjudication and before confirmation, the claimant is not entitled to share *pro rata* with the other creditors in the funds deposited but if there is any balance left after the other payments, it is

the one case is made by the letter of the statute the bankrupt's duty; in the other, not. Though a confirmed composition has the effect of a discharge, and though confirmation may be opposed on grounds that would prevent a discharge, the first question for the judge is whether the composition is for the best interests of the creditors, and this question has nothing to do with the right to a discharge. This question might be clearly determinable without the attendance of the bankrupt. Upon the judge is laid the duty of becoming “satisfied” that the composition offer is fair. If questions should arise which the judge thought might not be rightly solved without the attendance of the bankrupt and his attorney to aid in determining what was for the best interests of the creditors, it is possible that under section 7-a (2) he might make a “lawful order” requiring the attendance of the bankrupt and his attorney at the expense of the estate. But the issue here is whether the bankrupt can recover from the estate the fees and disbursements of his attorney in endeavoring to force a dismissal of the case and a restoration of the seized property, when neither the letter of the statute nor an order of the court

imposed upon the bankrupt the obligation to make such a contest. Our interpretation of the sections herein referred to, in connection with the spirit of the act as an entirety, is against the bankrupt's contention.”

140. *In re Fox* (Ref., Ohio), 6 Am. P. R. 526. See also *In re Lane* (D. C., Mass.), 11 Am. B. R. 136, 125 Fed. 772. See also Am. B. R. Dig. § 713.

141. Bankr. Act, § 12-b.

142. General Order XXIX.

143. Compare *In re Hamlin*, Fed. Cas. 5,994.

144. Perhaps this is his duty under General Order XXIV, though that rule being merely an inheritance from the rules in force under the former law, it is quite generally ignored.

145. *In re French* (D. C., Mass.), 25 Am. B. R. 77, 181 Fed. 583; *In re Brown* (D. C., Col.), 10 Am. B. R. 588, 123 Fed. 336. Compare *Matter of Atlantic Construction Co.* (D. C., N. Y.), 35 Am. B. R. 838, 228 Fed. 571. See Bankr. Act, § 57, cl. n. *post*.

146. *In re Lane* (D. C., Mass.), 11 Am. B. R. 136, 125 Fed. 772; *In re French* (D. C., Mass.), 25 Am. B. R. 77, 181 Fed. 583.

to be applied to the claim of such claimant to the extent of his dividend.¹⁴⁷ It seems that none of the officers named in the act can collect additional fees for making the distribution, their fees being limited by both it and the general orders. Now that the trustee may receive an allowance in composition cases,¹⁴⁸ such officer, if appointed, may properly be called upon to distribute the consideration.

c. Dismissal of the case.—Not until the distribution is completed, should the case be dismissed. If scheduled debts remain unproved or claimants cannot be found, the case proceeds to final distribution as in cases of unclaimed dividends.¹⁴⁹ Section 12-e does not mean that after confirming a composition the court has lost all further power over the case except to distribute the consideration. The case is to be dismissed, but "dismissed" in this connection can mean no more than that the court is not to proceed further with its administration of the estate under the bankruptcy act. It does not mean that there is to be no longer any case before the court. Immediate dismissal is neither directed nor intended. Dismissal is to be when everything remaining for the court to do has been done, and not before, and until that time has arrived the referee has power to act in the case for any proper purpose.¹⁵⁰

VII. NONPERFORMANCE OF COMPOSITION.

If the consideration for the composition has not for any reason been paid by it, the remedy of the creditor for the recovery thereof is against it as upon a new cause of action, which is not affected by the discharge.¹⁵¹ In New York a failure to carry out to the letter a composition agreement revives the original debts.¹⁵²

VIII. APPEALS.

Whether there may be an appeal from the order of a judge confirming or refusing to confirm a composition has already been somewhat debated. The word "satisfied" suggests a discretion from which no appeal will lie; the words of § 25-a emphasize this impression. That an appeal will not lie has been held,¹⁵³ though that ruling was reversed by the Circuit Court of Appeals of the sixth circuit.¹⁵⁴ The latter decision has already been departed from in the first circuit;¹⁵⁵ indeed, it may be suggested that it loses sight of the funda-

147. *Matter of Ennis* (D. C., N. Y.), 25 Am. B. R. 383, 183 Fed. 859.

148. See Bankr. Act, § 48-a, as amended by the Act of 1903.

149. See Bankr. Act, § 66. *United States v. Sondheim*, (D. C., Mass.), 33 Am. B. R. 217, 188 Fed. 378. Compare *In re Hinsdale*, Fed. Cas. 6,526.

150. *United States v. Sondheim* (D. C., Mass.), 33 Am. B. R. 217, 188 Fed. 378, citing text.

A formal order of dismissal should be entered, and the referee notified, that he may file the case as closed. It is not thought that the requirement of § 58-a (8) makes a notice to creditors of a proposed dismissal of this kind necessary.

151. *Matter of Maytag-Mason Motor Co.* (D. C., Iowa), 35 Am. B. R. 160, 223 Fed. 684; *Matter of Kinnane Co.* (D. C., Ohio), 34 Am. B. R. 119, 221 Fed. 762, wherein it was held that if a mortgage given as a part

of a proposed composition was not paid by the bankrupt at maturity the whole debt of the creditor would become due and payable.

The majority of the creditors are without power to bind the minority to look to the real estate only, or to deprive such minority from recourse to the bankrupt's personal assets for the satisfaction of their claims should the bankrupt default in the performance of the proposed agreement. *Matter of Kinnane Co.* (D. C., Ohio), 34 Am. B. R. 119, 221 Fed. 762.

152. *In re A. B. Carton & Co.* (D. C., N. Y.), 17 Am. B. R. 343, 148 Fed. 63.

153. *In re Adler* (D. C., Tenn.), 4 Am. B. R. 583, 103 Fed. 444.

154. *U. S. v. Adler* (D. C., Tenn.), 4 Am. B. R. 736, 104 Fed. 862. See also *Adler v. Jones* (C. C. A., 6th Cir.), 6 Am. B. R. 245, 109 Fed. 967.

155. *Ross v. Saunders* (C. C. A., 1st Cir.), 5 Am. B. R. 350, 105 Fed. 915.

mental difference between a discharge¹⁵⁶ and a composition, which, strictly, is a branch of administration, and, for convenience only, has the effect of a discharge. Even if confirmation is refused, the bankrupt is not aggrieved, for his rights were exercised when he made the offer, and he may still apply for a discharge in the bankruptcy proceeding. He, at least, should not be heard on the appeal. If he cannot, creditors surely cannot, as not within the words or intendment of § 25-a. The question is, however, still an open one.¹⁵⁷ It has been held that the creditors assenting to a composition, and who have received the amount due them thereunder, are necessary parties to an appeal from the order of confirmation.¹⁵⁸

156. A discharge proper may be appealed from. See Bankr. Act, § 25-a(2).

157. When appeal entertained.—An objecting creditor who has filed restrictions against discharge and not withdrawn them is entitled to be heard before the Circuit Court of Appeals on their merits; his rights cannot be prejudiced by the vote of a majority of the

other creditors expressing satisfaction with a proposed compromise of conflicting claims. *Matter of Doyle* (C. C. A., 2d Cir.), 34 Am. B. R. 28, 220 Fed. 434.

158. *Field & Co. v. Wolf & Bros., Dry Goods Co.* (C. C. A., 8th Cir.), 9 Am. B. R. 693, 120 Fed. 815, 57 C. C. A. 326.

SECTION THIRTEEN.

COMPOSITIONS, WHEN SET ASIDE.

§ 13. **Compositions, When Set Aside.**—*a* The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has to come to the petitioners since the confirmation of such composition.

Analogous provisions: In U. S.: R. S., § 5103-A (Act of June 22, 1874).

In Eng.: Act of 1890, § 3(15).

Cross-references: To the law: Jurisdiction of court to set aside compositions, § 2(9).

Compositions, when allowed, § 12.

Certified copy of order setting aside composition as evidence, § 21-f.

Appointment of trustee after composition has been set aside, § 44.

Application of property to payment of debts after composition is set aside, § 64-c.

Title to property to vest in trustee upon setting aside composition, § 70-d.

SYNOPSIS OF SECTION.

COMPOSITIONS, WHEN SET ASIDE.

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I. WHEN COMPOSITION WILL BE SET ASIDE.

a. *In general.*—The striking similarity between this section and § 15, relative to the revocation of a discharge, should be noted at the outset.¹ The marked difference between it and the corresponding clauses of the former law will also

1. For what degree and kind of fraud will sustain a proceeding to set aside a discharge, see under § 15.

be observed.² Then, a composition could be set aside, if it appeared that, in consequence of legal difficulties, or for any sufficient cause, it could not proceed without injustice or undue delay. This, with the added objection that "the approval of the court was obtained by fraud," is the law in England to-day.³ This added objection stands alone in our present law. Those available under the law of 1867 have been discarded. Most of the cases under that law are thus of little value.⁴

b. What constitutes fraud.—Fraud as a reason for refusing to confirm a composition has been discussed under section twelve, *ante*.⁵ Such fraud as would warrant the refusal of confirmation to a composition will warrant its setting aside, with this difference: the fraud must have been discovered since the confirmation of the composition.⁶ It must, of course, have been practiced in the procuring of the composition. In this respect § 13 is clearly a limitation on § 2 (9).⁷ Only when a fraud, as thus restricted, appears and is proven, can the jurisdiction to set aside a composition and reinstate the case be exercised.⁸ The court may annul the composition where it appears that the fraud was that of the trustee and the bankrupt in inducing creditors to accept it by misrepresentation and concealment.⁹ The making of a false schedule, and a false oath to a schedule, and the concealment of property by the bankrupt constitute fraud "practiced in the procuring of such composition."¹⁰ It is fraud sufficient to justify the setting aside of a composition, to assure a creditor that his claim will be included, while it was the purpose of the bankrupt to secure a confirmation of the composition without the consideration of such claim.¹¹ In considering an application to set aside a composition the court may determine whether the fraud shown is such that, had the circumstances been known at the time of the confirmation, the composition would have been rejected.¹² The utmost good faith must be observed by all the parties to the composition, and a secret promise by the debtor to pay one creditor more than others is

2. Act of 1867, as amended by Act of June 22, 1874; U. S. R. S., § 5,103-a, *post*.

3. Eng. Act of Bankruptcy of 1890, § 3 (15).

4. For instance, *In re Dupee*, Fed. Cas. 4,183, has already been declared inapplicable in *In re Rudwick* (D. C., Mass.), 2 Am. B. R. 114, 93 Fed. 787, though this ruling may be doubted. Compare *In re Dietz* (D. C., N. Y.), 3 Am. B. R. 316, 97 Fed. 563.

5. See p. 326, *ante*. See also *Elfelt v. Snow*, Fed. Cas. 4,342; *In re Sturgess*, Fed. Cas. 13,565. For reasons for setting aside compositions. See Am. Bankr. Dig. § 720.

6. *In re Roukous* (D. C., R. I.), 12 Am. B. R. 128, 128 Fed. 645.

7. *In re Rudwick* (D. C., Mass.), 2 Am. B. R. 114, 93 Fed. 787, holding that a composition will not be set aside on the ground that a creditor has failed to receive notice of the proceedings because his address was by mistake misstated in the bankrupt's schedule.

8. *Matter of Cooper Bros.* (D. C., N. Y.), 20 Am. B. R. 634, 159 Fed. 956; *Matter of Abrams & Rubins* (D. C., N. Y.), 23 Am. B. R. 25, 173 Fed. 430.

9. *In re Wrisley Co.* (C. C. A., 7th Cir.), 13 Am. B. R. 193, 133 Fed. 388.

10. *In re Roukous* (D. C., R. I.), 12 Am. B. R. 128; 128 Fed. 645; *In re Kaplan* (D. C., Pa., Ref.), 29 Am. B. R. 54, holding that a bankrupt knowingly and fraudulently concealing from his trustee assets to a large amount and making a false oath in having sworn that his schedules were correct and that they contained a true statement of all his assets, constitute fraud "practiced in the procuring of such composition" within the meaning of section 13, and warrant the setting aside of the composition upon a petition, filed within six months after its confirmation, by creditors who had no knowledge of such fraud at the time of the confirmation, or at any time prior thereto.

11. *Matter of Abrams & Rubins* (D. C., N. Y.), 23 Am. B. R. 25, 173 Fed. 430.

12. *Matter of Sacharoff & Kleiner* (D. C., N. Y.), 20 Am. B. R. 814, 163 Fed. 664, in which case it appeared that on a composition certain creditors received promissory notes in excess of their *pro rata* share, and because of inability to pay any of the composition notes a second petition in bankruptcy had been filed against the bankrupt, and the motion of a creditor who had himself received a preference was denied, and the notes declared void.

unenforceable and may affect the validity of the composition.¹³ A failure to fulfill the terms of the composition agreement will not of itself be sufficient basis for setting aside the composition. A bankrupt may by his acts deprive himself of the benefit of a composition; he may so behave that the composition order ceases to be a shield, but that furnishes no reason why the order should be vacated in any other manner or for any other reason than that specified in the act.¹⁴

II. PRACTICE ON APPLICATION TO SET ASIDE COMPOSITION.

a. Who may make application.—The application to set aside a composition must be made by the parties in interest. This will generally be deemed equivalent to the "creditors" of the bankrupt, although often meaning more.¹⁵ A creditor who has assigned his claim, although induced to do so by the bankrupt's misrepresentations, is not a "party in interest."¹⁶ But the assignee of an original claim against a bankrupt is entitled to object to the confirmation of a commission on the ground of fraudulent concealment and disposal of assets.¹⁷

b. To whom and when made.—The application should be made to the judge, and should be filed within six months after the composition has been confirmed.¹⁸ The judge only has power to hear the application, not, however, because of the limitation on analogous proceedings found in § 38-a (4), but because only "the judge . . . may set . . . aside a composition." A referee to whom a petition to set aside a composition has been referred may grant an order reopening the estate.¹⁹

c. Petition; practice as on discharge.—The petition should show (1) that the petitioner is a party in interest, (2) that the composition was confirmed not more than six month before, (3) that fraud was practiced in procuring it and the nature and perpetrators of such fraud, and (4) that such fraud was not discovered by the petitioner until after the confirmation of the composition.²⁰ It is not necessary to allege that the petitioner restored, or offered to restore, the consideration on the discovery of the fraud, nor need he tender the same into court.²¹ Leave to file the petition should be granted unless from the facts

13. *Citizens Nat. Bank v. Kerny* (Ind. App. Ct.), 59 Ind. App. 96, 35 Am. B. R. 574, 108 N. E. 139.

14. *Matter of Eisenberg* (D. C., N. Y.), 16 Am. B. R. 776, 148 Fed. 325, wherein the court said: "This bankrupt has a right to maintain the existence of his composition, but the effect thereof may well depend upon proof of its fulfillment."

15. But compare *In re Scott*, Fed. Cas. 12,519. As to practice on setting aside compositions, see Am. Bankr. Dig. § 721.

16. *In re Wrisley & Co.* (C. C. A., 7th Cir.), 13 Am. B. R. 193, 133 Fed. 388. As to meaning of phrase "parties in interest," see under § 14, "*Who may file specifications*," *post*.

17. *In re Comstock* (D. C., R. I.), 19 Am. B. R. 65, 154 Fed. 747.

18. *Matter of Ennis* (D. C., N. Y.), 25 Am. B. R. 383, 183 Fed. 859; *Matter of Eisenberg* (D. C., N. Y.), 16 Am. B. R. 776, 148 Fed. 325; *In re Jersey Island Packing Co.* (D. C., Cal.), 18 Am. B. R. 417, 154 Fed. 839.

19. *Matter of Sonnabend* (Ref., Mass.), 18 Am. B. R. 117, wherein the court said: "The pendency of a petition to set aside a composition does not operate to prohibit the referee from exercising his right independently of, or in conjunction with, such application, to reopen an estate, and such reopening is not an interference with the administration of said estate."

20. See *In re Roukous* (D. C., R. I.), 12 Am. B. R. 128, 128 Fed. 645; *Matter of Ennis* (D. C., N. Y.), 25 Am. B. R. 383, 183 Fed. 859; *In re Wilkens* (D. C., N. Y.), 27 Am. B. R. 235, 191 Fed. 94. For form of petition to set aside composition, see *Hagar & Alexander's Bankr. Forms* (2d Ed.), No. 309.

21. *In re Roukous* (D. C., R. I.), 12 Am. B. R. 128, 128 Fed. 645. Compare *Marshall Field & Co. v. Wolfe Dry Goods Co.* (C. C. A., 8th Cir.), 9 Am. B. R. 693, 120 Fed. 816.

Explanation of rule.—In *In re Roukous* (D. C., R. I.), 12 Am. B. R. 128, 128 Fed. 645, the court, in so holding, said: "The object of the petition is to secure additional

therein alleged it is clear that the petitioner cannot be afforded the relief asked for.²² Where a petition by a creditor to vacate a composition upon the ground of fraud has been sustained after a demurrer was interposed thereto, the petitioner must elect whether to accept his share of the composition or to take his chance of proving the allegations of his petition.²³ In the absence of rules of practice, the procedure followed when application is made to revoke a discharge, perhaps, even the practice on application for a discharge, may be adopted.²⁴

d. Notice to creditors.—Notice should be given to all creditors,²⁵ they, and not the bankrupt, being the real parties in interest; but not necessarily the notice required by § 58-a. The former law prescribes the practice on notice. It is thought that an order to show cause, similar to that used on an application for discharge, will be sufficient. But the judge can change the form or method of service, and make it returnable when or where he wishes; but, from the analogy of other sections, both time and place should, however, be convenient for the parties in interest.

e. Trial.—It has been thought that the word "trial" makes a jury necessary. Not only is the proceeding a purely equitable remedy, but, elsewhere in the statute, the same word is used in such ways as to negative, in connection with the clear meaning of § 566 of the Revised Statutes as limited by § 19 of the law, such a view. The hearing required in §§ 12 and 14 is, therefore, no different from the trial made mandatory by §§ 13 and 15. In actual practice, these trials will usually be before the referee sitting as a special master.

f. Impeaching the order setting aside.—This cannot be done collaterally. A certified copy is evidence of jurisdiction, regularity, and that the order was made.²⁶

III. EFFECT OF SETTING ASIDE.

Setting aside the composition revests the title in the trustee; but, it does more. It takes from the debtor all property acquired since the adjudication and applies it in payment of debts contracted while the composition was in force.²⁷ This is the only approximation in our statute to the English doctrine that results in drawing in all property acquired after the receiving order and before the discharge. The rule, too, is eminently just. As to payments made under the composition, it seems that they are not affected.²⁸ The order setting aside also reinstates the case, and provision is made elsewhere in the statute for the election of a trustee in such cases.²⁹ A trustee once elected, the case proceeds as though there had been no composition, and every one is restored, so far as possible, to the rights and remedies existent at the time the composition was confirmed.

payments. There is no apparent reason why a petitioner who has received less than his due should surrender this as a condition precedent to getting the full amount to which he is entitled. The setting aside of a composition will not ordinarily have the effect of invalidating *pro rata* payments made in pursuance of the composition."

²² In re Wrisley Co. (C. C. A., 7th Cir.), 13 Am. B. R. 193, 133 Fed. 388.

²³ Matter of Ballance (C. C. A., 2d Cir.), 33 Am. B. R. 642, 219 Fed. 537.

²⁴ See under §§ 14 and 15, *post*.

²⁵ Ex parte Hamlin, Fed. Cas. 5,994; In re Diggles, Fed. Cas. 3,905; In re Dunn et al., 53 Fed. 341.

²⁶ Bankr. Act, § 21-f.

²⁷ See Bankr. Act, § 64-c.

²⁸ Ex parte Hamlin, Fed. Cas. 5,994; In re Roukous (D. C., R. I.), 12 Am. B. R. 128, 128 Fed. 645, citing text. Compare Marshall Field & Co. v. Wolf & Bro. Dry Goods Co. (C. C. A., 8th Cir.), 9 Am. B. R. 693, 120 Fed. 816.

²⁹ See Bankr. Act, § 44.

SECTION FOURTEEN.

DISCHARGES, WHEN GRANTED.

§ 14. Discharges, when Granted.—*a* Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

b The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by *the trustees or other** parties in interest at such time as will give *the trustee or†* parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with¹ intent to conceal his² financial condition,³ destroyed, concealed, or failed to keep books of account or records from which *such⁴* condition might be ascertained; or (3) obtained *money or** property on credit upon a materially false statement in writing made *by him* to any person or his representative†* for the purpose of obtaining *credit from such person*; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property, with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of, or to answer any material question approved by the court:† *Provided, That a trustees shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do at a meeting of creditors called for that purpose.**

1. Here the word "fraudulent" was stricken out by the amendatory act of 1903.

2. Here the word "true" was stricken out by the same.

3. Here the words "and in contemplation

of bankruptcy" were stricken out by the same.

4. Here the word "such" takes the place of the words "his true" in the original act.

* Amendments of 1910 in italics.

† Amendment of 1903 added clauses 3 to 6, inclusive.

c The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.

W 13 1107, 1120, 1121

Analogous provisions: In U. S.: As to the application and hearing, Act of 1867, § 29, R. S., §§ 5108 (as amended by Act of July 26, 1876), 5109; Act of 1841, § 4; As to objections to discharge, Act of 1867, §§ 29, 30, 33, R. S., §§ 5110, 5112, 5112-A (added by the Act of June 22, 1874), 5116; Act of 1841, § 4; Act of 1800, §§ 36, 37; As to proofs and pleadings, Act of 1867, § 21, R. S., § 5111; Act of 1841, § 4; As to oaths and verification, Act of 1867, § 29, R. S., § 5113; As to proceedings, certificate of discharge and second applications, Act of 1867, §§ 30, 32, R. S., §§ 5114, 5115, 5116; Act of 1841, § 12; Act of 1800, § 57.

In Eng.: As to application, hearing, objections, and procedure, Act of 1890, § 8(1)-(8).

Cross-references: To the law: Jurisdiction of the court to discharge or refuse to discharge bankrupt, § 2(12).

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I. HISTORY AND COMPARATIVE LEGISLATION.

a. Discharges under Roman and continental systems.—Republican Rome punished the bankrupt with slavery, and, it is said, in some cases, even permitted the creditors to prorate the debtor's body, as well as his estate; Rome under the emperors, however, granted a discharge to the honest insolvent. The savagery of the early Latins, though much softened, still survives in the

continental bankruptcy systems of to-day. Thus, in France, not only must a bankrupt in effect pay his debts in full, but there are three classes of bankrupts: (1) those whose condition is due to misfortune, and who are, therefore, not liable to imprisonment; (2) those who have been guilty of misconduct not tantamount to an actual fraud, who may be imprisoned from one month to two years; and (3) those whose bankruptcy is fraudulent, who may be sentenced to penal servitude for not less than five nor more than twenty years. These restraints on the liberty of the dishonest trader are characteristic of all European laws. They are a survival of the time when inability to pay a debt was a crime.

b. Discharges under English system.—England stands about midway between the above referred to systems and our own. Fraudulent bankruptcy is a crime,⁵ but, except as against certain well-defined statutory objections, a discharge may generally be obtained whatever be the rate per cent. paid.⁶

c. Origin and nature of the discharge.—We have grown to look upon the discharge feature as the primal element of bankruptcy jurisprudence. Being too easily obtained, it has resulted in abuse, and, therefore, reprobation. The fact is, however, that the discharge feature was not grafted on our Anglo-Saxon bankruptcy system until the fourth year of Anne, two hundred and fifty years after England's first bankruptcy law, and that, in its inception, it was a device to keep bankrupts in England.⁷ Strictly speaking, it is no more a part of a bankruptcy law—which concerns itself with the equitable division of a debtor's assets—than are those sections which define bankruptcy crimes. It is unfortunate, that our legislators and jurists have so long overlooked its origin. Else we would not to-day, from this point of view, seem a people given to financial jubilees.⁸ The fundamental and original element of every system of bankruptcy has been to provide for and regulate the distribution of the bankrupt's property equally among his creditors; latterly a second element was added in the provisions for discharge upon such terms and conditions as the act may provide.⁹

5. See English Debtors Act of 1869, Part II.

6. **English law as to discharge.**—Since the bankruptcy act of 1890 in England, the court has, on proof of certain facts like our objections to a discharge, four options, (1) to refuse the discharge absolutely, (2) to suspend it for not less than two years, (3) to suspend it until a dividend of not less than 50 per cent. has been paid, or (4) to require the bankrupt to permit entry of judgment for the balance unpaid, execution, however, not to issue thereon without leave of court. Act of 1890, § 8 (2).

The facts, or objections to discharge as we would call them, are (1) that, save in cases of misfortune not amounting to misconduct, the assets do not amount to ten shillings in the pound, or (2) the bankrupt's omission to keep proper books of account within three years, or (3) continuance in trade after knowing himself to be insolvent, or (4) the contracting of a debt without at the time having reasonable ground or expectation of ability to pay it, or (5) the failure to account satisfactorily for deficiency in assets, or (6) that the bankruptcy was brought on by rash speculation, extravagance in living,

gambling or culpable neglect of business, or (7) his interposing any frivolous or vexatious defense to any action properly brought, or (8) within three months incurred unjustifiable expense in so doing, or (9) while insolvent and within three months gives an undue preference, or (10) within three months incurred liabilities for the purpose of making his assets equal to ten shillings in the pound, or (11) had a previous bankruptcy, composition or arrangement with creditors, or (12) been guilty of fraud or fraudulent breach of trust. Act of 1890, §§ 8 (3) (a) (b) (c) (d) (e) (f) (g) (h) (i) (j) (k) (l).

7. See 4 Anne, chap. 17.

8. Compare the Hebrew Jubilee in Leviticus, Chap. XXV.

9. In re Neeley (Ref., N. Y.), 12 Am. B. R. 407; In re Gutwillig (D. C., N. Y.), 1 Am. B. R. 78, 90 Fed. 475; In re Salmon (D. C., Mo.), 16 Am. B. R. 122, 134, 143 Fed. 395; In re Hall Co. (D. C., Conn.), 10 Am. B. R. 88, 95, 121 Fed. 992; In re Curtis (D. C., Ill.), 1 Am. B. R. 440, 91 Fed. 737; In re Marshall Paper Co. (C. C. A., 1st Cir.), 4 Am. B. R. 468, 102 Fed. 872.

d. **Discharges in the United States.**—Each of our laws, save that of 1800, was the result of agitation in the interest of the hopeless insolvents of well-known periods of financial depression. Our first law required the consent of two-thirds in number and value of the creditors, and a discharge might be withheld for concealment of assets, fraud, losses in gambling, and the like.¹⁰ Available objections under the law of 1841, among others of less importance, were fraud, concealment of assets, preference of creditors, wilful omission or refusal to obey orders of the court, misappropriation of trust funds, or, if a merchant, failure to keep books of account; nor could a discharge be granted—subject, however, to a judicial inquiry as to its justness—where a majority in number and value of creditors filed a written dissent.¹¹ The law of 1867, modeled in this feature after the then English law, went further and denied a discharge to him who had wilfully sworn falsely in the proceeding, or concealed assets, or been guilty of fraud or negligence as to his property, or destroyed or falsified his books, or secreted his assets with intent to defraud, or given a fraudulent preference, or made a fraudulent transfer, or lost property in gaming, or admitted or failed to disclose a fictitious debt, or if a merchant, had not kept proper books, or procured the assent of a creditor by a pecuniary consideration, or in contemplation of bankruptcy made a preference, or been convicted of a crime under the act, or been guilty of any fraud contrary to the true intent of the law.¹² After the first year, and until 1874, the debtor was obliged to pay fifty cents on the dollar, unless he had the consent of a majority in number and value of creditors to take a less sum;¹³ a restriction which, after 1874, was abolished in involuntary cases, and modified in voluntary cases to a required dividend of thirty per cent., save with the assent of one-fourth of the creditors in number and one-third in amount.¹⁴ Nor, save by consent of creditors, was a bankrupt granted a second discharge, short of paying seventy cents on the dollar to all creditors.¹⁵ There were undoubtedly frauds on creditors, followed by discharges, under that law, but, if so, it was not the fault of the law-making power.

II. DISCHARGES UNDER PRESENT LAW.

a. **Definition; nature and purpose.**—(1) **DEFINITION.**—Under our present act a discharge is defined as “the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this act.”¹⁶

(2) **NATURE OF RIGHT.**—The discharge of a debtor from his debts was grafted upon bankruptcy proceedings as an incident wrought by an advanced civilization. It is not an absolute right existing at the time of filing the petition in bankruptcy. The right or privilege arises subsequently and is granted upon the conditions of the statute, and is dependent in part upon the conduct of the bankrupt after the filing of his petition in bankruptcy. Those conditions cannot be applied until application has been made for a discharge.¹⁷

(3) **PURPOSE OF DISCHARGE.**—A discharge is granted to an honest bankrupt in order that he may reinstate himself in the business world; it is refused to a dishonest bankrupt as a punishment for his fraud and to prevent its con-

10. Act of 1800, §§ 36, 37.

11. Act of 1841, § 4.

12. Act of 1867, § 29, R. S., § 5,110.

13. Act of 1867, § 29, R. S., § 5,112.

14. Act of June 22, 1874, R. S., § 5,112-a.

15. Act of 1867, § 30, R. S., § 5,116.

16. Bankr. Act., § 1(12). U. S. ex rel.

Adler v. Hammond (C. C. A., 6th Cir.), 4 Am. B. R. 736, 739, 104 Fed. 862. The debts not dischargeable are specified in Bankr. Act, § 17-b, *post*.

17. In re Little (C. C. A., 7th Cir.), 13 Am. B. R. 640, 137 Fed. 521.

tinuance in the future.¹⁸ Where a bankrupt has been brought into court at the instance of his creditors, and all his property is being applied to the payment of his debts, he has paid the price of a discharge, and must be accorded the relief which he seeks, unless he has been guilty of conduct which, under the act, deprives him of such relief.¹⁹

b. Discharges under original and amended act.—It is conceded that the act of 1898 was woefully weak in its discharge features. The bill as introduced was not,²⁰ but, in the compromises that accompanied its passage, nearly all the objections to discharges, not amounting to bankruptcy crimes, disappeared. As the law was passed, a discharge could be refused only on a showing of (1) concealment of assets, (2) false swearing in the progress of the proceeding, and (3) destruction of, concealment of, or failure to keep, books of account, accompanied by fraudulent intent to conceal financial condition and a purpose of going into bankruptcy. Even these meager bars on dishonesty have been necessarily cut through by judicial constructions; and the country has witnessed the spectacle of a commercial jail delivery. This condition was subsequently met by the amendatory act of 1903, which added four new objections to a discharge, discussed in detail later. The amendment of 1910 further strengthened the act by withholding a discharge where money as well as property was obtained by a false financial statement by the debtor to the representative of the creditor, as well as when made to the creditor himself. The amendment also provides for objections to be made by the trustee, in behalf of the creditors, when authorized by them at a creditors' meeting.

c. Constitutionality of restrictions.—Congress may prescribe any regulations concerning discharges in bankruptcy that are not so unreasonable as to be incompatible with fundamental laws, and there is nothing in the act relative to discharges which renders it unconstitutional.²¹

d. Jurisdiction.—(1) **IN GENERAL.** The jurisdiction of courts of bankruptcy in respect to discharges is expressly conferred by § 2 (12) and is sub-

18. *In re Hammerstein* (C. C. A., 2d Cir.), 26 Am. B. R. 757, 189 Fed. 37.

The purpose of releasing an honest debtor from the burden of debts which he is unable to longer carry is to give freer play to his energies and enterprises, that he may thereafter be better able to support himself and those dependent upon his earnings, and thereby be in a position to render a better service to the State and to society. *Barton Bros. v. Produce Co.* (C. C. A., 8th Cir.), 14 Am. B. R. 502, 136 Fed. 355. The release of the unfortunate and insolvent debtor from the burden of his debts and his restoration to business activity in the interest of his family and the general public, are the main, if not the most important objects of the bankruptcy act. *Hardie v. Swafford Bros. Dry Goods Co.* (C. C. A., 5th Cir.), 21 Am. B. R. 457, 165 Fed. 588.

Relief of bankrupt.—In the case of *In re Hammerstein* (C. C. A., 2d Cir.), 26 Am. B. R. 757, 189 Fed. 37, the court said: "A discharge is granted to an honest bankrupt in order that he may reinstate himself in the business world; it is refused to a dishonest bankrupt as a punishment for his fraud and to prevent its continuance in the future. In

a sense the question has passed beyond the creditors and is one of public policy, but when the charge is that the bankrupt has defrauded his creditors the fact that they have ceased to assert their charge cannot be wholly ignored by the court." In the case of *Williams et al. v. U. S. Fidelity Co.*, 236 U. S. 549, 34 Am. B. R. 181, 59 L. ed. 713, revg. 28 Am. B. R. 802, the court said: "It is the purpose of the Bankruptcy Act to convert the assets of the bankrupt into cash for distribution among creditors, and then to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes."

19. *Matter of Johnson*, (D. C., Pa.), 32 Am. B. R. 448, 215 Fed. 748.

20. See *Torrey bill*, S. 1,035, 55th Congress, 1st Session, introduced by Senator Lindsay, March 22, 1897, § 51; also the *Henderson bill*, § 13, p. 2,039, Vol. 31, Cong. Record, 55th Congress, 2d Session.

21. *Hanover Nat. Bank v. Moyes*, 186 U. S. 181, 8 Am. B. R. 1. See also *In re Billing* (D. C., Ala.), 17 Am. B. R. 80, 145 Fed. 395.

ject to the same restrictions, territorially and otherwise, as in other matters pertaining to bankruptcy. By subsection *a* of this section the application is to be filed in the court in which the proceeding is pending. Jurisdiction is conferred where it appears that the applicant resided within the district for practically all of the six months preceding the filing of the petition in bankruptcy.²² It has been held that a creditor who has participated in all the proceedings without objection cannot raise the question of lack of jurisdiction on the bankrupt's application for a discharge.²³ Unless the application for a discharge is filed within the required time the court is without jurisdiction.²⁴

(2) COURT BUT NOT REFEREE.—The section contemplates that the application shall be made to the judge and by § 38-a (4) questions arising out of applications for discharges are expressly excepted from the jurisdiction conferred upon referees. All such questions are original questions for the court,²⁵ although after application reference may be made to the referee as a special master to hear and report on the facts.²⁶ In such a case the reference is not by consent and the report of the referee is advisory merely.²⁷

e. Law governing proceedings.—The proceedings are to be governed by the law as it existed when the bankrupt filed his petition for adjudication.²⁸

22. *Matter of Harris* (Ref., N. J.), 11 Am. B. R. 649.

Jurisdiction.—Where a court did not have jurisdiction to adjudicate as to the bankruptcy because of lack of residence, it cannot grant a discharge, the question being first raised on the application therefor. In *re Clisdell* (Ref., N. Y.), 2 Am. B. R. 424.

23. **Objections going to the jurisdiction** must be raised at the first, or, at least, an early opportunity. A creditor who received notice of the first meeting of creditors, who appeared thereat, nominated the trustee, and exhaustively examined the bankrupt, cannot, on the bankrupt's application for a discharge thereafter, urge, for the first time, that the court is without jurisdiction to entertain the bankrupt's application for a discharge, on the ground that the adjudication was made by the referee, and not by the judge. In *re Polakoff* (Ref., N. Y.), 1 Am. B. R. 359.

24. In *re Fahey* (D. C., Ia.), 8 Am. B. R. 354, 116 Fed. 239. In this case the judge said: "The power and right to grant a discharge effectual to bar the enforcement of debts is conferred by the statute, and is governed by the limitations found in the statute; and therefore, unless it is petitioned for within the time limit fixed by section 14 of the act, the court of bankruptcy is without the power and jurisdiction to grant a discharge. If the court, yielding to the equitable considerations pressed upon it, should grant a discharge in form to the bankrupt, it would be a mistaken kindness, for the validity of the discharge could be impeached before any court wherein it might be pleaded as a bar to a claim on the ground of want of jurisdiction in this court to entertain the petition for discharge; the record showing on its face that the petition was not filed within 18 months of the date of the adjudication."

25. In *re Johnson* (D. C., Ark.), 19 Am. B. R. 814, 158 Fed. 342; In *re Elby* (D. C.,

Iowa), 19 Am. B. R. 734, 157 Fed. 935; In *re Hockman* (D. C., Pa.), 30 Am. B. R. 921, 209 Fed. 330.

Referee has no jurisdiction.—Applications for discharge are in the nature of proceedings separate from the original cause which is closed upon the final distribution of the assets of the estate, and over them the reference to the referee of the original cause confers no jurisdiction. In *re Taylor* (D. C., Ala.), 26 Am. B. R. 143, 188 Fed. 479.

An application for a discharge is in the nature of a separate proceeding from the original case which is closed with the final distribution of assets. The reference to the referee of the original case confers no jurisdiction whatever on him as to the discharge, as the bankruptcy act, in section 14 (a), requires the application to be "filed in the court of bankruptcy," and, in section 1(5), "Clerk" is defined to mean "clerk of the court of bankruptcy." *Matter of Kendrick & Co.* (D. C., Vt.), 35 Am. B. R. 630, 226 Fed. 980.

26. See discussion under Section Thirty-eight of this work, *post*. In *re Randall* (D. C., Pa.), 20 Am. B. R. 305, 159 Fed. 298.

Reference to special master.—Such application or any specified issue arising thereon may be sent to the referee to ascertain and report the facts and no one is prejudiced thereby. In *re McDuff* (C. C. A., 5th Cir.), 4 Am. B. R. 110, 101 Fed. 241. The judge may, in his discretion, appoint a person other than the referee. In *re Gillardon* (D. C., Pa.), 26 Am. B. R. 103, 187 Fed. 289.

27. *International Harvester Co. v. Carlson*, (C. C. A., 8th Cir.), 33 Am. B. R. 178, 217 Fed. 736.

28. *Matter of Petersen* (Ref., Minn.), 10 Am. B. R. 355; In *re Chamberlain* (D. C., N. Y.), 11 Am. B. R. 95, 125 Fed. 639; In *re Hammerstein* (C. C. A., 2d Cir.), 26 Am. B. R. 757, 189 Fed. 37; In *re Simon* (D. C., N. Y.), 29 Am. B. R. 808, 201 Fed. 1004.

Statutory provisions regulating the conditions on which bankrupts may be discharged are remedial in their nature with respect to the bankrupts or their creditors, and the strict rules of construction or interpretation appropriate to retroactive or retrospective laws are inapplicable to them. The amendment of this section by the acts of 1903 and 1910 deals solely with a condition precedent to the discharge of a bankrupt in future cases.²⁹

III. APPLICATION FOR DISCHARGE.

a. Who may apply.—(1) **IN GENERAL.**—Subsection *a* provides that that any person who has been adjudged a bankrupt may file an application for a discharge; unless he is within the restrictions of § 14-b and § 29-b he will be entitled to it.³⁰ A bankrupt's right to a discharge is not affected by his insanity, which prevented his examination by creditors,³¹ and the same is probably true in case of death;³² in either event the personal representative should be permitted to institute the proceedings for a discharge.

(2) **CORPORATION; INDIVIDUAL PARTNER.**—Application may be filed by a corporation when it has been adjudicated a bankrupt.³³ If a member of a firm is adjudged a bankrupt, he is entitled to an individual discharge from partnership debts as well as individual debts.³⁴ But if the adjudication is that of the individual partner, and the administration has no concern with the partnership estate, he is not entitled to a discharge from partnership debts.³⁵

(3) **DENIAL IN FORMER PROCEEDING.**—The application may be filed even by one refused a discharge in a former proceeding,³⁶ but a second petition cannot be filed where a first petition in the same bankruptcy was denied on the merits.³⁷ Where the prior proceeding determined all the issues, and the subsequent proceeding was instituted for the purpose of obtaining a discharge denied in the prior proceeding,³⁸ or where the same debts were scheduled in

29. *In re Scott* (D. C., Del.), 11 Am. B. R. 327, 126 Fed. 981, citing many authorities under former acts; *Matter of Petersen* (Ref., Minn.), 10 Am. B. R. 355.

30. *In re Crist* (D. C., Ala.), 9 Am. B. R. 1, 116 Fed. 1,007; *Smith v. Keegan*, (C. C. A., 1st Cir.), 7 Am. B. R. 4, 111 Fed. 157; *In re Eades* (C. C. A., 7th Cir.), 16 Am. B. R. 30, 143 Fed. 293; *In re Marshall Paper Co.* (C. C. A., 1st Cir.), 4 Am. B. R. 468, 102 Fed. 872.

A voluntary bankrupt may be granted a discharge, although he has not filed a schedule of his assets with his petition and schedule of debts. A voluntary bankrupt need not satisfy the court that he has performed everything which the law requires of him to do and is guilty of none of the things which the law condemns; but he is entitled to his discharge as a legal right unless the objecting creditors establish his guilt. *Matter of Johnson* (D. C., Pa.), 32 Am. B. R. 448, 32 Fed. 448.

31. *In re Miller* (D. C., Pa.), 13 Am. B. R. 345, 133 Fed. 1,017.

32. *In re Miller* (D. C., Pa.), 13 Am. B. R. 345, 133 Fed. 1,017; *In re Hicks* (D. C., Vt.), 6 Am. B. R. 181, 107 Fed. 910.

Application by administratrix of bankrupt.—The administratrix of a deceased bankrupt may file an application for discharge, and

the judge may, on cause shown, extend the time, but not exceeding 18 months from the adjudication. *Matter of Agnew and Sherman* (D. C., N. Y.), 35 Am. B. R. 709, 225 Fed. 650.

33. *In re Marshall Paper Co.* (D. C., Mass.), 2 Am. B. R. 653, 95 Fed. 419; *affd.* on appeal, s. c., 4 Am. B. R. 468, 102 Fed. 872.

34. *In re Myers* (D. C., N. Y.), 3 Am. B. R. 260, 97 Fed. 753; *In re Laughlin* (D. C., Ia.), 3 Am. B. R. 1, 96 Fed. 589; *Matter of Neyland v. McKeithen* (D. C., Miss.), 24 Am. B. R. 879, 184 Fed. 144.

35. *Matter of Freund* (D. C., Ia., Ref.), 1 Am. B. R. 25; *In re Meyers* (D. C., N. Y.), 2 Am. B. R. 707, 96 Fed. 408; *In re Morrison* (D. C., Tex.), 11 Am. B. R. 498, 127 Fed. 186; *In re Hale* (D. C., N. Car.), 6 Am. B. R. 35, 107 Fed. 432.

36. *In re Herrman* (D. C., N. Y.), 4 Am. B. R. 139, 102 Fed. 753; *In re Claff* (D. C., Mass.), 7 Am. B. R. 128, 111 Fed. 506.

37. *In re Royal* (D. C., No. Car.), 7 Am. B. R. 636, 113 Fed. 146; *Matter of Feigenbaum* (C. C. A., 2d Cir.), 9 Am. B. R. 595, 121 Fed. 69, *revd.* 7 Am. B. R. 339, 151 Fed. 508; *In re Cohen* (D. C., N. Y.), 29 Am. B. R. 698, 201 Fed. 188.

38. *Kuntz v. Young* (C. C. A., 8th Cir.), 12 Am. B. R. 505, 131 Fed. 719.

both proceedings,³⁹ the bankrupt may not be discharged. The denial of a discharge in the prior proceeding renders the issue of the bankrupt's discharge *res adjudicata* in a subsequent proceeding as to debts provable in the prior proceeding.⁴⁰

b. Time of making application.—(1) **IN GENERAL.**—The application should be filed after one month, and within twelve months,⁴¹ subsequent to the adjudication. This means any time within a period of twelve months after the end of the first month succeeding the adjudication.⁴²

(2) **EXTENSION OF TIME.**—His time, on cause shown, may be and usually is extended six months, but such extension can be granted only by the judge.⁴³ An extension should not be granted unless it clearly appear that the bankrupt was unavoidably prevented from filing his application within the twelve months; laches will be fatal.⁴⁴ The words "unavoidably prevented" should

39. *Pollet v. Cosel* (C. C. A., 1st Cir.), 24 Am. B. R. 678, 179 Fed. 488; *Matter of Kuffler* (C. C. A., 2d Cir.), 22 Am. B. R. 289, 168 Fed. 1021, affg. 19 Am. B. R. 181, 155 Fed. 1018.

40. *In re Kuffler* (D. C., N. Y.), 19 Am. B. R. 181, 155 Fed. 1018, affd. 22 Am. B. R. 289, 168 Fed. 1021.

Failure of objecting creditor.—Where, upon the objection of a creditor having a provable debt, the bankrupt is denied his discharge, but in a subsequent bankruptcy the same creditor intentionally remained away from court and the bankrupt was granted his discharge without objection, an action upon said debt, if it is a dischargeable one, is barred, where the ground upon which the first discharge was refused does not appear. *Bluthenthal v. Jones*, 208 U. S. 64, 19 Am. B. R. 288, 52 L. Ed. 390, affg. 51 Fla. 396, 41 So. 533.

41. **Computation of time.**—Under the provisions of section 14-a, that "within the next twelve months subsequent to being adjudged a bankrupt," when read in connection with the provisions of section 31, relating to the computation of time, a bankrupt has a year and a day from adjudication in which to apply for his discharge, unless for unavoidable delay clearly shown, the court extends the time. *In re Holmes* (D. C., Vt.), 21 Am. B. R. 339, 165 Fed. 225.

Limitation as to time.—The section creates three limitations of time, all subsequent to adjudication, the first one month thereafter, the second the next twelve months after the first, and the third the next six months after the second. The bankrupt has twelve months within which to file his application for discharge as of right and course, commencing after the expiration of one month subsequent to adjudication. *Matter of Walters* (D. C., Mont.), 31 Am. B. R. 565, 209 Fed. 133.

42. *Matter of Daly* (D. C., N. Y.), 35 Am. B. R. 219, 224 Fed. 263.

43. For petition, certificate of the referee in charge, and order, see "Supplementary Forms;" Hagar and Alexander's Bankruptcy Forms, 2d Ed., Forms No. 283-285.

Jurisdiction to grant order extending time.

—Where a duly verified petition of the bankrupt, setting forth that sickness had prevented him from having sufficient means with which to pay an attorney for preparing his application for a discharge within twelve months after adjudication, was presented to the district judge before whom the bankruptcy proceedings were had, and who alone had jurisdiction of the discharge proceedings, he had jurisdiction to grant an order extending the time within which bankrupt might file his application for discharge, and the mere fact that the order was erroneous, because based on insufficient evidence, is no reason for vacating it on the ground of want of jurisdiction. *In re Casey* (D. C., N. Y.), 28 Am. B. R. 359, 195 Fed. 322.

44. *In re Fahy* (D. C., Iowa), 8 Am. B. R. 354, 116 Fed. 239. In this case the court said: "In express terms the discretion of the judge is limited to the six months following the expiration of the year beginning with the date of the adjudication, and, as I construe the statute, this is a limitation on the jurisdiction of the judge over the matter of discharge. The power and right to grant a discharge effectual to bar the enforcement of debts is conferred by the statute, and is governed by the limitations found in the statute; and therefore, unless it is petitioned for within the time limit fixed by section 14 of the act, the court of bankruptcy is without the power and jurisdiction to grant a discharge." This language was quoted and approved in *In re Wagner* (D. C., Nev.), 15 Am. B. R. 100, 139 Fed. 87; *In re Daly* (D. C., Wash.), 30 Am. B. R. 475, 205 Fed. 1002.

Notice to bankrupt.—It is not the duty of the referee to notify the bankrupt when the year will expire. *In re Knauer* (D. C., Iowa), 13 Am. B. R. 503, 133 Fed. 805.

Objections by creditors, where an extension is granted, are confined to statutory objections. *In re Haynes & Son* (D. C., Pa.), 10 Am. B. R. 13, 122 Fed. 560.

Proof may be required showing why the application for a discharge was not made within the specified time. *In re Glickman* (D. C., Pa.), 21 Am. B. R. 171, 164 Fed. 209.

be construed with some liberality, so as to permit an extension in a case of excusable or ignorant neglect or mistake.⁴⁵ It must be shown that the petitioner was unavoidably prevented from filing his application during the entire period of one year.⁴⁶ An adjudication of bankruptcy will not be opened for the sole purpose of extending the time of making an application for a discharge.⁴⁷ The affidavit, upon which the extension is asked for, should contain a valid excuse; a statement that the counsel for the bankrupt was busy with other matters and had overlooked it is insufficient;⁴⁸ and mere illness in the family of the bankrupt will not suffice.⁴⁹ The granting of the extension is discretionary and no notice to creditors is required.⁵⁰ Creditors who had notice of an application to extend the time within which an application for a discharge may be made and who do not move promptly to vacate the order extending such time, but

A motion made more than eighteen months after adjudication for an order granting leave to file an application *nunc pro tunc* as of a date sixteen months after adjudication when an authorized application had been made, should be denied in the absence of sufficient reason therefor. *In re Wolff* (D. C., Cal.), 4 Am. B. R. 74, 100 Fed. 430.

Excuse of default.—Where more than thirteen months have expired from the adjudication in bankruptcy at the time a petition for a discharge is presented, it is impossible for the clerk to file same, or for the court to permit it to be filed, without a showing that the bankrupt was unavoidably prevented from filing it within the thirteen months succeeding the adjudication. If delay in filing an application for a discharge is occasioned by the fault of a postmaster or his employees, where the application is forwarded by mail, or is occasioned by the fault of some clerk or employee in the office of the attorney making the application, or by the absence of the court or judge from his office or place of holding court, or by any act of omission or commission on the part of an officer of the court, justice demands that a *nunc pro tunc* order be made. *Matter of Daly* (D. C., N. Y.), 35 Am. B. R. 219, 224 Fed. 263.

45. The words "unavoidably prevented," should be liberally construed, so as to permit an application for a discharge to be filed where bankrupt has been prevented from filing it during the first twelve months through excusable neglect, reasonable grounds for delay, mistake, inadvertence, etc. Where a bankrupt represents to the court his reliance upon counsel who it appears have misunderstood his instructions, his default in not filing an application for a discharge is explained, and the discretion of the court in granting an extension of time, upon such explanation, will not be disturbed. *In re Churchill* (D. C., Wis.), 28 Am. B. R. 607, 197 Fed. 114.

46. In re Harris (D. C., Pa.), 15 Am. B. R. 705; *In re Lewin* (D. C., Tex.), 14 Am. B. R. 358, 135 Fed. 252.

47. In re Morse (D. C., N. Y.), 21 Am. B. R. 709, 168 Fed. 157.

48. Failure of application in time.—

Where a bankrupt has failed to file a petition for discharge within one year from the time of his adjudication and within the next six months thereafter failed to obtain from the judge an extension of time, as provided by section 14-a of the bankruptcy act, his right to such discharge is lost to him forever, especially where bankrupt had been apprised of his error in time to make application to the judge for such extension of time. *In re Levenstein* (D. C., Conn.), 24 Am. B. R. 822, 180 Fed. 957, citing *Kuntz v. Young* (C. C. A., 8th Cir.), 12 Am. B. R. 505, 131 Fed. 719, 65 C. C. A. 477; *In re Kuffler* (C. C. A., 2d Cir.), 18 Am. B. R. 16, 151 Fed. 12, 80 C. C. A. 508; *In re Bramlett* (D. C., Ga.), 20 Am. B. R. 402, 161 Fed. 588; *In re Anderson* (D. C., Mont.), 14 Am. B. R. 221, 134 Fed. 319; *In re Richter* (D. C., Conn.), 27 Am. B. R. 215, 190 Fed. 905, holding that the failure to apply in time may not be excused because of the bankrupt's poverty.

49. In re Lewin (D. C., Tex.), 14 Am. B. R. 358, 135 Fed. 252.

Grounds for extension of time; sickness.—If a bankrupt or his family were sick and it was necessary for him to provide for their support, wherefore he did not have sufficient means to pay an attorney, it may be said that he was unavoidably prevented from filing his application for a discharge within one year after adjudication, so as to be permitted to file the application within six months thereafter. *In re Casey* (D. C., N. Y.), 28 Am. B. R. 359, 195 Fed. 322.

50. In re Fritz (D. C., N. Y.), 23 Am. B. R. 84, 173 Fed. 560; *In re Chase* (D. C., Mass.), 26 Am. B. R. 456, 186 Fed. 408.

Extension may be granted by the district judge, not only *ex parte*, but in such summary or informal manner as may be proper or convenient at the time; and a contention that an order extending the time in which a bankrupt may file his application is erroneous, because made without notice and upon an unverified petition, is without merit. *In re Churchill* (D. C., Wis.), 28 Am. B. R. 607, 197 Fed. 114.

appear for the purpose of filing objections will be deemed to have waived objections to the extension.⁵¹

(3) **FILING AFTER TIME LIMITED.**—It is doubtful whether the court may allow a *nunc pro tunc* order granting leave to file an application for a discharge after the period of eighteen months has expired,⁵² it has been held that the court has no jurisdiction after the expiration of the time limit.⁵³ If the court has permitted a petition to be filed more than a year after the adjudication, upon an insufficient showing, the remedy is by motion to vacate.⁵⁴ The application for a discharge will be dismissed if not diligently prosecuted.⁵⁵

c. Effect of failure to apply within time.—(1) **IN GENERAL.**—If the bankrupt fails to apply for his discharge within the limit prescribed by statute, *i. e.*, within twelve months after adjudication, or the succeeding six months if an extension of time has been granted, the court is without jurisdiction to grant such discharge.⁵⁶ His right to a discharge from the debts scheduled by him is lost, and may not be restored by any act or proceeding in the court.⁵⁷

(2) **RIGHT NOT RESTORED BY SUBSEQUENT PROCEEDINGS.**—The failure to apply for a discharge within the time limited has the same effect as a denial of a discharge from the debts involved in the proceedings, and the bankrupt may not thereafter institute voluntary proceedings for the purpose of securing a discharge from debts scheduled in the former proceedings.⁵⁸ The failure

51. *In re Casey* (D. C., N. Y.), 28 Am. B. R. 359, 195 Fed. 322.

Collateral attack.—An order granting an extension of time for the administratrix of a bankrupt to file an application for a discharge, and the validity and regularity of the latter, cannot be attacked upon a hearing of objections to the discharge. *Matter of Agnew and Sherman* (D. C., N. Y.), 35 Am. B. R. 709, 225 Fed. 650.

52. *In re Wolff* (D. C., Cal.), 4 Am. B. R. 74, 100 Fed. 430, holding that such a *nunc pro tunc* order may not be granted except where the delay was caused by some act of the court or its officers. But see *Matter of Daly* (D. C., N. Y.), 35 Am. B. R. 219, 224 Fed. 263.

53. *In re Fahy* (D. C., Ia.), 8 Am. B. R. 354, 116 Fed. 239; *Matter of Taunton* (D. C., N. Y.), 33 Am. B. R. 308, 216 Fed. 987; *Matter of Loughran* (C. C. A., 3d Cir.), 33 Am. B. R. 350, 215 Fed. 271.

54. *In re Haynes & Sons* (D. C., Pa.), 10 Am. B. R. 13, 122 Fed. 560.

55. *In re Lederer* (D. C., N. Y.), 10 Am. B. R. 492, 125 Fed. 96.

Delay in prosecution.—The debtor was adjudged a bankrupt on January 4, 1906. In June, 1906, she signed an application for her discharge and left it with her attorney. He did not file it until April 26, 1907, when he procured a permissive order of the bankruptcy court on an affidavit which failed to show that he or the bankrupt had been unavoidably prevented from filing it within the year. Between April 26, 1907, and September 12, 1911, neither the bankrupt nor her attorney took any action to bring the application to a hearing. On the latter day they procured an order for a hearing on October 16, 1911, which was met by cred-

itors by a motion to dismiss the application for the discharge for want of prosecution. *Held*, the motion should have been granted. The bankrupt failed to exercise that reasonable diligence requisite to call a court of equity into action on her behalf. *Lindeka v. Converse* (C. C. A., 8th Cir.), 28 Am. B. R. 596, 198 Fed. 618. But see *In re Glasberg* (C. C. A., 2d Cir.), 28 Am. B. R. 826, 197 Fed. 896, holding that delay in bringing on the hearing is not a ground for refusing a discharge.

56. *Siebert v. Dahlberg* (C. C. A., 8th Cir.), 33 Am. B. R. 272, 218 Fed. 793; *In re Fahy* (D. C., Ia.), 8 Am. B. R. 354, 116 Fed. 239; *In re Knauer* (D. C., Ia.), 13 Am. B. R. 503, 133 Fed. 805; *In re Wagner* (D. C., Nev.), 15 Am. B. R. 100, 139 Fed. 87; *In re Levenstein* (D. C., Conn.), 24 Am. B. R. 822, 180 Fed. 957.

57. *In re Levenstein* (D. C., Conn.), 24 Am. B. R. 822, 180 Fed. 957; *Matter of Daly* (D. C., N. Y.), 35 Am. B. R. 219, 224 Fed. 263, holding that section 14a of the Bankruptcy Act expressly forbids the court or judge to make an order after the expiration of 18 months from the date of the adjudication extending the time within which the application for a discharge may be filed.

58. *In re Stone* (D. C., Ore.), 23 Am. B. R. 24, 172 Fed. 947; *In re Schnabel* (D. C., N. Y.), 23 Am. B. R. 22, 166 Fed. 383; *In re Pullian* (D. C., Tenn.), 22 Am. B. R. 513, 171 Fed. 595; *In re Kuffer* (C. C. A., 2d Cir.), 18 Am. B. R. 16, 151 Fed. 12; *In re Silverman* (C. C. A.), 19 Am. B. R. 460, 157 Fed. 675; text cited with approval in *In re Springer* (D. C., N. Car.), 29 Am. B. R. 96, 199 Fed. 294.

Where, in prior proceedings, a bankrupt's discharge was not in form refused, but on

of an involuntary bankrupt to apply for a discharge within twelve months of his adjudication will prevent him from obtaining a discharge in a subsequent voluntary proceeding from debts which were scheduled in the prior proceeding.⁵⁹ The failure of the bankrupt to apply for a discharge in the first bankruptcy proceedings, and the approval of the record of such proceedings by the court without granting a discharge, are in effect a judgment by default in favor of his then existing creditors that the bankrupt was not entitled to a discharge from their claims, and that judgment is conclusive in favor of such creditors.⁶⁰ This rule is also applicable to a case where a partner failed in the first proceedings against the partnership to apply for a discharge within the time required; he may not have a discharge in a subsequent proceeding from debts existing and provable against him in the first proceeding.⁶¹

d. Petition for discharge.—(1) **IN GENERAL.**—The application for a discharge is made by a petition, which should "state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt."⁶² If the application is by a member of a firm, the petition should indicate that the intention is to bar his partnership liability.⁶³

(2) **VERIFICATION OF PETITION.**—Neither the statute, the general orders nor the official form indicates that the petition must be verified. In conformity with the practice in other similar proceedings it would seem more suitable to verify the petition.⁶⁴ Being in the nature of a pleading, it should,

the ground that the bankrupt had failed to prosecute and to appear for examination, he is not entitled in a second proceeding to a discharge from debts in the first. *Pollet v. Cosel* (C. C. A., 1st Cir.), 24 Am. B. R. 678, 179 Fed. 488, 103 C. C. A. 68.

59. *In re Bramlett* (D. C., Ga.), 20 Am. B. R. 402, 161 Fed. 588; *In re Van Borries* (D. C., Wis.), 21 Am. B. R. 849, 168 Fed. 718, holding that in subsequent bankruptcy proceedings the bankrupt will only be granted a discharge as to such debts as were incurred since the institution of the first bankruptcy proceedings; *Matter of Loughran* (D. C., Penn.), 32 Am. B. R. 330, 215 Fed. 271.

60. *Kuntz v. Young* (C. C. A., 8th Cir.), 12 Am. B. R. 505, 131 Fed. 719, 65 C. C. A., 477; *In re Elby* (D. C., Iowa), 19 Am. B. R. 734, 157 Fed. 935; *Siebert v. Dahlberg* (C. C. A., 8th Cir.), 33 Am. B. R. 272, 218 Fed. 793.

Failure of bankrupt to apply in former proceedings.—Where it appeared that the bankrupt had filed a prior petition, been adjudicated thereunder, but had failed within the statutory time to apply for a discharge, a creditor scheduled under the first petition may object to a discharge, as to him, on the second application, on the ground of failure to apply under the first petition within the time allowed, and, while a discharge on the second petition will be granted as to other creditors, the debt of the objecting creditor will be excluded from its opera-

tion. *In re Westbrook* (D. C., Ala.), 26 Am. B. R. 181, 186 Fed. 414. See also *Bacon v. Buffalo Cold Storage Co.* (C. C. A., 5th Cir.), 27 Am. B. R. 736, 193 Fed. 34.

The failure of a voluntary bankrupt to apply for a discharge, within the time limited by section 14 of the Bankruptcy Act, bars him from making such an application, and a new petition subsequently filed, scheduling the same creditors and the same indebtedness, should be dismissed. *Matter of Loughran* (C. C. A., 3d Cir.), 33 Am. B. R. 350, 215 Fed. 271.

61. *In re Springer* (D. C., N. Car.), 29 Am. B. R. 96, 199 Fed. 294.

62. See General Order XXXI and Official Form No. 57; *Hagar & Alexander's Bankr. Forms* (2d ed.), Nos. 266-268.

63. *In re Laughlin* (D. C., Iowa), 3 Am. B. R. 1, 96 Fed. 589. See also *In re Hale* (D. C., No. Car.), 6 Am. B. R. 35, 107 Fed. 432; *In re Carmichael* (D. C., Iowa), 2 Am. B. R. 815, 96 Fed. 594; *In re Russell* (D. C., Iowa), 3 Am. B. R. 91, 97 Fed. 32; *In re McFaun* (D. C., Iowa), 3 Am. B. R. 66, 96 Fed. 592. See for individual petition after refusal of discharge to partnership, *In re Feigenbaum* (C. C. A., 2d Cir.), 9 Am. B. R. 595, 121 Fed. 69. Compare for rule under law of 1867, *In re Pierson*, Fed. Cas. 11,153.

64. *In re Glass* (D. C., Tenn.), 9 Am. B. R. 394, 119 Fed. 509; *In re Brown* (C. C. A., 5th Cir.), 7 Am. B. R. 252, 112 Fed. 49.

in view of the requirements of § 182, be verified.⁶⁵ A failure to object that the application is unverified until after the evidence on the application has been heard amounts to a waiver.⁶⁶ The elaborate oath prescribed by the law of 1867 is no longer necessary.⁶⁷

(3) **WHERE FILED.**—All petitions should be filed with the clerk, and not with the judge or referee.⁶⁸ A filing with the clerk is deemed a filing with the court, within the meaning of subsection *a*, but a filing with the referee is not sufficient, unless specially authorized by court rule.⁶⁹

(4) **AMENDMENTS.**—The same liberality in respect to amendments to petitions for discharge should be permitted as in the case of other petitions in bankruptcy proceedings. If errors are contained in the petition, the court may direct their correction by amendment.⁷⁰ But such forbearance should not be extended in favor of a bankrupt whose business career is tainted, and whose conduct toward his creditors has not been fair.⁷¹ And where the time to file objections has expired an amendment to the petition in matter of substance is only allowable where there is already a record sufficient to justify it.⁷²

e. Notice to creditors and trustee.—Creditors are entitled to at least ten days' notice by mail of all hearings upon applications for discharge.⁷³ When the petition for a discharge is duly filed the clerk may either himself send out the notices, or the referee may do it, upon the certificate of the clerk that the petition has been filed. It is usual for the clerk to issue an order to show cause to creditors, returnable before the judge. This order must be served by mail. In some districts, local rules result in the referee giving the required notice by mailing and publishing the order to show cause, or a notice of its pendency, and then returning the proofs, with a certificate of conformity, to the clerk in time for the return day.⁷⁴ Personal service of the notice is not required; the official form (Form No. 57) indicates that the notice be pub-

The petition is a pleading of fact and should be verified. In *re Taylor* (D. C., Ala.), 26 Am. B. R. 143, 147, 188 Fed. 479, where the court says: "Inasmuch as the official form of application for discharge contains the averment that the bankrupt has duly surrendered all his property and rights of property and has fully complied with all the requirements of the act and the orders of the court touching his bankruptcy, and inasmuch as this averment, without further proof, in the absence of objections filed, entitles the bankrupt to his discharge, it seems to me it should be considered a pleading of fact requiring verification."

65. In *re Taylor* (D. C., Ala.), 26 Am. B. R. 143, 188 Fed. 479.

66. In *re Taylor* (D. C., Ala.), 26 Am. B. R. 143, 147, 188 Fed. 479.

67. Act of 1867, § 29, R. S., § 5,108 (as amended by Act of July 26, 1876), *post*.

68. See Bankr. Act, § 38-a(4) and General Order XII(3); In *re Sykes* (D. C., Tenn.), 6 Am. B. R. 264, 106 Fed. 669.

69. In *re Hockman* (D. C., Pa.), 30 Am. B. R. 921, 209 Fed. 330.

In the Southern District of New York the office of the referee is, by force of District Court Rule II, the office of the court, and filing a petition for discharge with the referee confers jurisdiction. In *re Pincus* (D. C., N. Y.), 17 Am. B. R. 331, 147 Fed. 621. No such rule exists in the Northern

District of Alabama and it has been held that a filing with the referee is not a filing with the court. In *re Taylor* (D. C., Ala.), 26 Am. B. R. 143, 188 Fed. 479.

70. *Mahoney v. Ward* (D. C., N. Car.), 3 Am. B. R. 770, 100 Fed. 278; In *re Meyers* (D. C., N. Y.), 3 Am. B. R. 260, 97 Fed. 753.

71. In *re Gross* (Ref., N. Y.), 5 Am. B. R. 271, affirmed by Judge Brown of the Southern District of New York without opinion.

72. See In *re Gift* (D. C., Pa.), 12 Am. B. R. 244, 130 Fed. 230.

73. Bankr. Act, § 58-a(2) and discussion thereunder.

Failure to give notice.—The mere fact that the receiver of a creditor, whose name and address appeared in the proofs, did not receive notice, because the creditor's name did not appear in the schedules, is not sufficient to set aside the order granting the discharge. In *re Fritz* (D. C., N. Y.), 23 Am. B. R. 84, 173 Fed. 560.

74. This practice is recommended. For sample rules and forms, see Rules X and XI, No. Dist. of N. Y., 1 N. B. 109; and forms S. & T. Erie County (N. Y.) Dist., 1 N. B. N. 123; In *re Sykes* (D. C., Tenn.), 6 Am. B. R. 264, 106 Fed. 669.

Forms of order to show cause and certificate of conformity, see Supplementary Forms Nos. 108, 109; Hagar & Alexander's Bankr. Forms (2d ed.), Forms Nos. 267, 268.

lished in a designated newspaper, and "that the clerk shall send by mail to all known creditors copies of said petition and this order, addressed to them at their places of residence as stated;" this practice should be observed, and if it is the validity of the discharge is not affected by lack of personal notice to creditors.⁷⁵ The practice is not uniform throughout the country; local rules or customs should always be ascertained. Everywhere, however, all creditors and persons in interest must have at least ten days' notice of the hearing. Not only should creditors be notified of the application for discharge, but they are entitled to notice of the bankruptcy so that they may file their claims and be prepared to oppose the discharge; if no meeting of creditors is called, it is sometimes required by court rule that the bankrupt see that the creditors are notified of the bankruptcy.⁷⁶ The mailing of the notice in the manner prescribed by statute will be sufficient even if not received and read by creditors.⁷⁷

IV. HEARING ON APPLICATION FOR DISCHARGE.

a. Appearances.— Upon the filing of the application and the giving of notice a creditor opposing the application must enter his appearance in opposition thereto on the day when the creditors are required to show cause.⁷⁸ This requirement should be strictly followed.⁷⁹ The filing of objections by a creditor is equivalent to the appearance which the rule requires.⁸⁰ The appearance must be entered on the day of the return,⁸¹ and if objections are filed on such day it will be sufficient. The appearance may be entered at any time during such day, and it is error to deny the right to enter an appearance, because a creditor failed to appear at the hour appointed.⁸² The court may, in its discretion, extend the time within which the creditor may enter his appearance in opposition to a bankrupt's discharge even after the expiration of the time limit provided in the general order.⁸³ The appearance may be made by the

75. *Hanover National Bank v. Moyses*, 186 U. S. 181, 8 Am. B. R. 1, 46 L. ed. 1113, in which the court said: "Creditors are bound by the proceedings in distribution, on notice by publication and mail, and when jurisdiction has attached and been exercised to that extent, the court has jurisdiction to decree discharge, if sufficient opportunity to show cause to the contrary is afforded, or notice given in the same way. The determination of the status of the honest and unfortunate debtor by his liberation from encumbrance or future exertion is a matter of public concern, and Congress has power to accomplish it throughout the United States by proceedings at the debtor's domicile. If such notice to those who may be interested in opposing discharge, is provided to be given, that is sufficient. Service of process or personal notice is not essential to the binding force of the decree."

76. *In re Wollowitz* (C. C. A., 2d Cir.), 27 Am. B. R. 558, 192 Fed. 105, in which case it was held that Bankruptcy Rule 20 (So. Dist., N. Y.), providing that: "If the first meeting of creditors is not called and the examination of bankrupt at such meeting begun, carried on and completed before the discharge is filed, the referee is directed to certify such facts to the court, and thereupon, upon notice to the bankrupt, an application to dismiss the petition for discharge may

be made," is not obnoxious to the bankruptcy act and void, as adding a new ground for the refusal of a discharge, since it merely provides for the details of the form, manner and time of giving notice of the application for a discharge.

77. *In re Downing* (D. C., N. Y.), 28 Am. B. R. 778, 199 Fed. 329.

78. General Order XXXII, and cases cited thereunder. See Am. B. R. Dig., § 1,035.

79. Appearances must be entered as required in General Order XXXII; *In re Grant* (D. C., Pa.), 14 Am. B. R. 398, 135 Fed. 889; *In re Clothier* (D. C., Pa.), 6 Am. B. R. 203, 108 Fed. 199.

Failure to enter an appearance on the return day precludes the creditor from thereafter appearing and filing specifications. *In re Ginsberg* (D. C., Pa.), 12 Am. B. R. 459, 130 Fed. 627.

80. *In re Magen Bros.* (C. C. A., 3d Cir.), 27 Am. B. R. 729, 192 Fed. 883.

81. *In re Young* (D. C., Pa.), 20 Am. B. R. 697, 162 Fed. 912; *In re Grant* (D. C., Pa.), 14 Am. B. R. 398, 135 Fed. 889; *In re Gingsburg* (D. C., Pa.), 12 Am. B. R. 459, 130 Fed. 627.

82. *In re Barrager* (D. C., Iowa), 27 Am. B. R. 366, 191 Fed. 247.

83. *In re Levin* (C. C. A., 1st Cir.), 23 Am. B. R. 845, 176 Fed. 177.

creditor in person or by an attorney "who shall be an attorney or counsellor authorized to practice in the circuit or district court."⁸⁴ On the call of the case on the return day, if no appearance is entered or filed, and the statutory facts as to time, publication and mailing, etc., appear, a discharge follows.⁸⁵ The judge does not, as a rule, investigate further.⁸⁶ The bankrupt should be ordered to attend upon the hearing if the creditors so request.⁸⁷ The failure to appear on the return day will ordinarily preclude a creditor from subsequently filing specifications of objections.⁸⁸ An objection going to the jurisdiction cannot, it seems, be made for the first time on the application for a discharge.⁸⁹ Thus, the objection that a bankrupt is a non-resident will not be considered.⁹⁰

b. Specifications of objections.—(1) **IN GENERAL.**—If an appearance is made in opposition to the discharge by any party in interest, such party must file a specification in writing of the grounds of his opposition within ten days thereafter.⁹¹ The purpose of such specifications is to give the bankrupt notice of the particular conduct of his which is challenged as an objection to his discharge.⁹²

(2) **TIME AND PLACE OF FILING.**—The ten days' requirement should be followed, and may only be excused upon reasons satisfactory to the court.⁹³ Under the general order the time may be enlarged by the judge, or, in given circumstances, a late specification may be filed *nunc pro tunc*.⁹⁴ The hearing must then go on "at such time as will give parties in interest a reasonable opportunity to be fully heard." It must be before the judge or before a special master appointed for that purpose; a jury cannot be demanded.⁹⁵

(3) **WHO MAY FILE SPECIFICATIONS.**—Subsection *b* as amended by the amendatory act of 1910 limits the right to oppose to parties in interest, or

84. General Order IV, Bankr. Act, § 1(9). In re Gasser (C. C. A., 8th Cir.), 5 Am. B. R. 32, 104 Fed. 537, in which the court held that an attorney at law admitted to practice in the district court, who enters his appearance and files objections to the discharge of a bankrupt must be presumed to have authority so to do without any special written power of attorney to take such action. See *Creditors v. Williams*, Fed. Cas. 3,379; In re Palmer, Fed. Cas. 10,682; In re McVey, Fed. Cas. 8,932.

85. See In re Marshall Paper Co. (C. C. A., 1st Cir.), 4 Am. B. R. 468, 102 Fed. 872; *Talcott v. Friend et al.* (C. C. A., 7th Cir.), 24 Am. B. R. 708, 713, 179 Fed. 676.

86. In re Royal (D. C., No. Car.), 7 Am. B. R. 636, 113 Fed. 140.

87. See discussion under Section Seven of this work, *ante*. In re Shanker (D. C., Pa.), 15 Am. B. R. 109, 138 Fed. 862.

88. In re Ginsburg (D. C., Pa.), 12 Am. B. R. 459, 130 Fed. 627; In re Chase (D. C., Mass), 26 Am. B. R. 456, 186 Fed. 408; In re Eidom, Fed. Cas. 4,314.

The appearance of the parties before the referee and the acquiescence of the objecting creditor in the proceeding thereunder cure any infirmities that may exist in the application. In re Taylor (D. C., Ala.), 26 Am. B. R. 143, 188 Fed. 479.

89. *Allen & Co. v. Thompson*, 10 Fed. 116; In re Ives, Fed. Cas. 7,115; In re Polakoff (Ref., N. Y.), 1 Am. B. R. 358.

90. In re Goodale (D. C., N. Y.), 6 Am. B. R. 493, 109 Fed. 783.

91. General Order XXXII; In re Albrecht (D. C., Pa.), 5 Am. B. R. 223, 104 Fed. 974.

92. In re Hirsch (D. C., Tenn.), 2 Am. B. R. 715, 96 Fed. 468.

93. In re Clothier (D. C., Pa.), 6 Am. B. R. 203, 108 Fed. 199.

Time of filing.—Objections to a bankrupt's discharge must be filed with the clerk, within 10 days after the "show cause" hearing, and a motion to dismiss will be granted where they have not been so filed, unless the time is enlarged in accordance with General Order XXXII. *Matter of Kendrick & Co.* (D. C., Vt.), 35 Am. B. R. 630, 226 Fed. 980.

94. In re Grefe, Fed. Cas. 5,794; In re Frice (D. C., Iowa), 2 Am. B. R. 674, 96 Fed. 611.

Time of filing extended.—The district judge may, in his discretion, extend the time within which a creditor may enter his appearance and file specifications in opposition to a bankrupt's discharge. In re Levin (C. C. A., 1st Cir.), 23 Am. B. R. 845, 176 Fed. 177.

Failure to file specifications within the time limited by General Order 32 can only be excused upon reasons satisfactory to the court. In re Clothier (D. C., Pa.), 6 Am. B. R. 203, 108 Fed. 199.

95. Compare Bankr. Act, § 19. A jury trial was possible under the former law.

the trustee when duly authorized by a meeting of the creditors called for that purpose. The meeting which authorizes the trustee to oppose the discharge may be called by the referee; it is not necessary that the district judge should specially authorize the meeting.⁹⁶ A party in interest is meant to include only a party who has some pecuniary interest in the discharge.⁹⁷ Specifications may be filed by any person having a pecuniary interest in resisting the discharge of the bankrupt, as one owning an "unliquidated claim,"⁹⁸ or where the party holds an equitable claim only against the estate,⁹⁹ or is the assignee of a judgment, scheduled in the name of the original creditor,¹⁰⁰ or where his claim is being contested,¹⁰¹ even though such person has not proven a debt,¹⁰² or his debt is no longer provable.¹⁰³ If the bankrupt's schedule contains the name of a creditor, it is *prima facie* evidence that such creditor is entitled to oppose the bankrupt's discharge.¹⁰⁴ If the claim is barred by the statute of limitations between the filing of objections, and the hearing thereon, the objecting creditor does not lose his right to oppose the discharge because the right to plead the statute is a personal right which may be waived by the debtor.¹⁰⁵ If the limitation had not expired at the time of bankruptcy the debt

96. In re Reiff (D. C., Pa.), 29 Am. B. R. 753, 205 Fed. 399.

97. **Pecuniary interest.**—In re Frice (D. C., Iowa), 2 Am. B. R. 674, 96 Fed. 611. In the case of In re Levey (D. C., N. Y.), 13 Am. B. R. 312, 133 Fed. 572, the court said: "The court is of the opinion that it was the purpose of Congress to enable any person having a personal pecuniary interest or a representative pecuniary interest in preventing a discharge, to oppose the discharge of the bankrupt."

The term "parties in interest" includes all creditors who have had their claims allowed and who have participated in the distribution of the insufficient assets. Talcott v. Friend et al. (C. C. A., 7th Cir.), 24 Am. B. R. 708, 713, 179 Fed. 676.

The executor or administrator of a deceased creditor of the bankrupt, who had proved his claim, it seems, may file specifications of objection. In re Levey (D. C., N. Y.), 13 Am. B. R. 312, 133 Fed. 572.

98. Ex parte Traphagen, Fed. Cas. 14,140; In re Shepard, Fed. Cas. 12,753; In re Smith, Fed. Cas. 12,977; In re Boutelle, Fed. Cas. 1,705; Books Case, Fed. Cas. 1,637; In re Levey (D. C., N. Y.), 13 Am. B. R. 312, 133 Fed. 572, quoting Collier on Bankruptcy 5th Ed.), p. 172. The plaintiff in an action on a promissory note, in which the bankrupt denies liability is a party interested to such an extent as to enable him to object to a discharge. In re Conroy (D. C., Pa.), 14 Am. B. R. 249, 134 Fed. 764.

An allegation that the objector, "being interested as a creditor in the estate of Jacob Nathanson, a bankrupt, does hereby oppose," etc., is sufficient to show that the objecting creditor is one of the parties in interest. Matter of Nathanson (D. C., N. Y.), 19 Am. B. R. 56, 155 Fed. 645.

99. In re Tebbetts, Fed. Cas. No. 13,817; In re Conroy (D. C., Pa.), 14 Am. B. R. 249, 252, 134 Fed. 764.

100. Haley v. Pope (C. C. A., 9th Cir.), 30 Am. B. R. 644, 206 Fed. 266.

101. In re Belden, Fed. Cas. No. 1,238; In re Conroy (D. C., Pa.), 14 Am. B. R. 249, 252, 134 Fed. 764.

102. In re Frice (D. C., Iowa), 2 Am. B. R. 674, 96 Fed. 611; Matter of Nathanson (D. C., N. Y.), 19 Am. B. R. 56, 155 Fed. 645; Haley v. Pope (C. C. A., 9th Cir.), 30 Am. B. R. 644, 206 Fed. 266. This was not so under the former law. Compare In re Murdock, Fed. Cas. 9,939. See also In re Beldon, Fed. Cas. 1,238, and In re Bush, Fed. Cas. 2,222.

103. Matter of Bimberg (D. C., N. Y.), 9 Am. B. R. 601, 121 Fed. 942; In re Conroy (D. C., Pa.), 14 Am. B. R. 249, 134 Fed. 764. A creditor who has been paid in full cannot oppose discharge. In re Harr (D. C., Mo.), 16 Am. B. R. 213, 143 Fed. 421. Nor can a creditor whose debt is barred by the statute of limitations. In re Burk, Fed. Cas. 2,156.

Creditor who refuses to submit claim.—A creditor may prove his claim for goods obtained by a false financial statement and oppose the discharge; but, if he will not liquidate his claim, and persists in proceeding in another jurisdiction on the theory that the debt is not provable and not dischargeable, he is not entitled to oppose the discharge. Matter of Menzin (D. C., N. Y.), 37 Am. B. R. 468, 233 Fed. 333.

104. In re Barrager (D. C., Ia.), 27 Am. B. R. 366, 191 Fed. 247.

105. **Statute of limitations.**—In the case of In re Westbrook (D. C., Ala.), 26 Am. B. R. 191, 182, 186 Fed. 414, the court said: "This matter comes on to be heard upon the objection of a creditor to the application of the bankrupt for his discharge. The bankrupt denies the right of the objecting creditor to appear and object as a party in interest, because his claim has become barred by the statute of limitations, after the filing of the specifications of objections, but before

is provable.¹⁰⁶ A creditor having a claim which is not dischargeable may not be heard in opposition.¹⁰⁷ Where petitioners simply allege that they are creditors of the bankrupt, it is insufficient to show that they are "parties in interest."¹⁰⁸ If a member of a firm files objections he must show that he is acting with the consent of the other members.¹⁰⁹ It was held under the law prior to the amendment of 1910 that a trustee is a "party in interest" and may file objections, when it appears that he is seeking to recover from the bankrupt property alleged to belong to the estate.¹¹⁰ Under the law as amended he is not a party to the proceedings until he has been authorized to appear by a creditors' meeting.¹¹¹ And when so authorized he is entitled to exercise the same rights as other parties in interest.¹¹² In Pennsylvania a creditor may prosecute his objections to the discharge of a bankrupt, in *forma pauperis*.¹¹³

(4) FORM AND CONTENTS OF SPECIFICATIONS.—(I) *In general*.—Official Form No. 58 should be followed in preparing the specifications. It will require modification to meet the circumstances of the particular case. They should be in writing, and should contain allegations sufficient to show that all essential facts exist bringing the opposition within the grounds specified by the statute.¹¹⁴ Specifications must be clear and unequivocal, and contain

the hearing of the application. The statute of limitations does not destroy the cause of action, but merely affects the remedy. If not specially pleaded by the debtor, when the claim is sued on, judgment would go against him. The defense is personal and waived by a failure to plead. In view of the nature of the defense there is left in the creditor a subsisting cause of action in spite of the running of the statute. He is therefore a party in interest, ever thereafter, in resisting the discharge. Again, when the specification of objection was filed by the creditor, the statute had not run. He was then a party in interest, and it seems to me the time as of which this interest is to be determined is the time of the beginning of the opposition to a discharge."

106. See discussion under Section Sixty-three, sub-heading "Debts outlawed by statute of limitations."

107. *In re Servis* (D. C., Iowa), 15 Am. B. R. 271, 140 Fed. 222; *In re Maples* (D. C., Mont.), 5 Am. B. R. 426, 105 Fed. 919; *In re Main* (D. C., Iowa), 30 Am. B. R. 547, 205 Fed. 421.

Creditor who has proved claim.—Although a bankrupt is not entitled to be discharged from debts fraudulently contracted, a creditor who has proved a claim and from whom goods have been obtained by bankrupt under a false property statement in writing, may validly contest bankrupt's application for a discharge. *Matter of Reed* (D. C., Okl.), 26 Am. B. R. 286, 191 Fed. 920.

108. *In re Chandler* (C. C. A., 7th Cir.), 14 Am. B. R. 512, 138 Fed. 637, holding that the petition should show that the petitioners have at the time provable debts against the bankrupt which will be affected by his discharge; *In re Barrager* (D. C., Iowa), 27 Am. B. R. 366, 191 Fed. 247, holding creditors named in the bankrupt's sched-

ules are *prima facie* creditors entitled to oppose discharge.

109. *In re Hendrick* (D. C., Ky.), 16 Am. B. R. 218, 143 Fed. 647.

110. *In re Levey* (D. C., N. Y.), 13 Am. B. R. 312, 133 Fed. 572; *In re Hockman* (D. C., Pa.), 30 Am. B. R. 921, 209 Fed. 330.

111. *In re Hockman* (D. C., Pa.), 30 Am. B. R. 921, 209 Fed. 330.

112. **Effect of authorization of trustee to oppose discharge.**—Under section 14-b of the bankruptcy act, where a majority of the creditors both in number and amount have authorized the trustee to oppose a bankrupt's discharge, he is entitled to exercise the same rights which "parties in interest" may exercise as a matter of course, including "a reasonable opportunity to be fully heard;" and the right to exercise such authority having been granted or perfected as contemplated by the statute, the court or referee cannot withhold it or annex conditions which are repugnant to its free, or at least reasonable, exercise, such as denying him reimbursement for his costs and reasonable expenses and imposing the condition that the final settlement of the estate shall not be delayed for more than sixty days. *In re Churchill* (D. C., Wis.), 28 Am. B. R. 603, 197 Fed. 111.

113. *In re Guilbert* (D. C., Pa.), 18 Am. B. R. 830, 154 Fed. 676.

114. See also Supplementary Forms, No. 111; Hagar & Alexander's Bankr. Forms (2d Ed.), No. 274.

Form and contents of specifications.—*In re Peacock* (D. C., No. Car.), 4 Am. B. R. 136, 101 Fed. 560; *In re Quackenbush* (D. C., N. Y.), 4 Am. B. R. 274, 102 Fed. 282; *In re Kaiser* (D. C., Minn.), 3 Am. B. R. 767, 99 Fed. 689; *Matter of Brincat* (D. C., Ala.), 37 Am. B. R. 587, 233 Fed. 811.

specific averments of facts; they should be pleaded with greater particularity than complaints in civil actions; indeed, they more nearly resemble indictments, especially if the commission of one of the offenses against the law is relied on,¹¹⁵ although the strict rules applicable to indictments may not apply.¹¹⁶ Allegations must be specific and of such a character that their sufficiency may be met by demurrer, or by exceptions analogous to those

A specification of objection to a bankrupt's discharge alleging that, within the four months' period, the bankrupts transferred, removed, destroyed or concealed their property, with intent to hinder, delay and defraud their creditors, in that, about a week prior to the filing of the petition, and at other times, they removed and concealed large quantities of merchandise in a certain house, with intent to hinder, delay, and defraud their creditors, is sufficient. *Milgraum v. Ost* (D. C., Pa.), 12 Am. B. R. 306, 129 Fed. 827.

Where the written specifications are that the bankrupt has "concealed part of his effects from the court," and has, "in contemplation of becoming a bankrupt, made payments, transfers, and assignments of his property for the purpose of preferring a creditor having a claim against him, and to prevent the same from coming into the hands of the trustee, such specifications are not sufficiently definite and are too vague and general to prevent the discharge of the bankrupt. *In re Hixon* (D. C., Iowa), 1 Am. B. R. 610, 93 Fed. 440.

An allegation that said bankrupts, with intent to conceal their financial condition, did destroy, through the agency of their regularly authorized bookkeeper, canceled checks drawn by them, and also the check stubs, from which such condition might be ascertained, is sufficiently specific. *Godschalk Co. v. Sterling* (C. C. A., 3d Cir.), 12 Am. B. R. 302, 129 Fed. 580. But it has been held that a specification of objection to a bankrupt's discharge that said bankrupts, with intent to conceal their financial condition, have destroyed, concealed, or failed to keep books of account or record, from which such condition might be ascertained, is insufficient, because it follows the words of the statute. *Milgraum v. Ost* (D. C., Pa.), 12 Am. B. R. 306, 129 Fed. 827.

Criminal concealment. — Specifications must aver scienter and all essential facts necessary to establish the commission of the offense. *In re Kaiser* (D. C., Minn.), 3 Am. B. R. 767, 99 Fed. 689; *Matter of Wetmore* (Ref., N. Y.), 6 Am. B. R. 703.

115. Clear, positive and direct. — Specifications in opposition to a bankrupt's application for a discharge, and the proofs in support thereof, should be clear, positive, and direct. The opposing creditor or creditors must distinctly allege and prove one or more of the statutory grounds for refusing a dis-

charge. *In re McGurn* (D. C., Nev.), 4 Am. B. R. 459, 102 Fed. 743. See also *In re Thomas* (D. C., Iowa), 1 Am. B. R. 515, 92 Fed. 912; *In re Holman* (D. C., Iowa), 1 Am. B. R. 600, 92 Fed. 512; *In re Hixon* (D. C., Iowa), 1 Am. B. R. 610, 93 Fed. 440; *In re Hirsch* (D. C., Tenn.), 2 Am. B. R. 715, 96 Fed. 468; *In re Kaiser* (D. C., Minn.), 3 Am. B. R. 767, 99 Fed. 689; *In re Peacock* (D. C., No. Car.), 4 Am. B. R. 136, 101 Fed. 560; *In re McGurn* (D. C., Nev.), 4 Am. B. R. 459, 102 Fed. 743; *In re Quackenbush* (D. C., N. Y.), 4 Am. B. R. 274, 102 Fed. 282; *In re Gross* (Ref., N. Y.), 5 Am. B. R. 271; *In re Wolfensohn* (Ref., N. Y.), 5 Am. B. R. 60; *Matter of Wetmore* (Ref., N. Y.), 6 Am. B. R. 703; *In re Idzall* (D. C., Iowa), 2 Am. B. R. 741, 96 Fed. 314; *In re Griffin Bros.* (D. C., Ala.), 19 Am. B. R. 78, 164 Fed. 537; *In re Main* (D. C., Iowa), 30 Am. B. R. 547, 205 Fed. 421, citing text.

116. *In re Blalock* (D. C., So. Car.), 9 Am. B. R. 266, 118 Fed. 679.

Criminal indictment. — Where the offense is one prohibited by § 29 of the act the allegations should be set forth with substantially the exactness of a criminal indictment. *Matter of Wetmore* (Ref., N. Y.), 6 Am. B. R. 703; *In re Hirsch* (D. C., Tenn.), 2 Am. B. R. 715, 96 Fed. 468; *In re Quackenbush* (D. C., N. Y.), 4 Am. B. R. 274, 102 Fed. 282. So far as the specifications charge or attempt to charge the commission of a crime, they must state facts showing the commission of the crime with substantially the same particularity and exactness required in an indictment. *In re Levey* (D. C., N. Y.), 13 Am. B. R. 312, 133 Fed. 572. Even if not required to be as specific as indictments, they should, where based upon acts made criminal by the bankruptcy act, be so specific and of such a character that their sufficiency may be met by demurrer or by exceptions. *Matter of White* (D. C., Ore.), 34 Am. B. R. 803, 222 Fed. 688.

Perjury; sufficiency of specifications. — Where perjury is relied upon as an objection to the confirmation of a composition, it should be charged with substantially the same particularity and exactness as would be required in an indictment. The specifications should set forth the testimony alleged to be false, together with the facts relied on to prove its falsity. *Matter of Reivkin* (D. C., Conn.), 33 Am. B. R. 170, 216 Fed. 218.

allowed in equity;¹¹⁷ mere general averments are not sufficient.¹¹⁸ If they fail to allege any fact which by any construction would be deemed ground for denying a discharge, they will be disregarded although not excepted to.¹¹⁹ The specifications should allege that the objecting creditor will be affected by the discharge, and is therefore interested in defeating it.¹²⁰ It is also necessary for the petitioners to aver in their application the facts showing their freedom from laches.¹²¹ The exact language of the statute should not be used except, possibly, in the case of failure to keep books of accounts.¹²² If vague or general, or merely asserting acts which would render certain debts not dischargeable, but not affect the right to a discharge proper, the specifications will be dismissed.¹²³ Two grounds of objection should not be included in one specification.¹²⁴ Mere conclusions of law and alternative general averments are not sufficient.¹²⁵ Nor are facts alleged upon mere information and belief.¹²⁶ The rule has been stated to be that facts relied on to prevent a discharge must be pleaded with sufficient certainty of detail to appraise the bankrupt of the charge he has to meet and to enable the court to understand the issue to be examined and determined.¹²⁷

117. *In re Troeder* (C. C. A., 1st Cir.), 17 Am. B. R. 723, 150 Fed. 710; *Matter of White* (D. C. Ore.), 34 Am. B. R. 803, 222 Fed. 688, citing text.

118. *In re Steed* (D. C., No. Car.), 6 Am. B. R. 73, 107 Fed. 682; *In re Peek* (D. C., Conn.), 9 Am. B. R. 747, 120 Fed. 972; *In re Parish* (D. C., Iowa), 10 Am. B. R. 548, 122 Fed. 553; *In re Chandler* (C. C. A., 7th Cir.), 14 Am. B. R. 512, 138 Fed. 637; *In re Servis* (D. C., Iowa), 15 Am. B. R. 271, 140 Fed. 222.

General averments.—Specifications of objections to a bankrupt's discharge, in general terms following the language of the statute, should be ordered amended or made more specific, provided an objection thereto is taken before trial; but where a motion to amend is not made until after witnesses have been called and it is apparent that the bankrupt will not be affected by surprise or prejudice by proceeding upon the specifications as they stand, it is not error to deny the motion until the testimony is heard which might supply the deficiency. *In re Mintzer* (D. C., N. Y.), 28 Am. B. R. 743, 197 Fed. 648.

119. *In re McCarthy* (D. C., N. Y.), 22 Am. B. R. 499, 170 Fed. 859.

120. *In re Servis* (D. C., Iowa), 15 Am. B. R. 271, 140 Fed. 222; *In re Brown* (C. C. A., 5th Cir.), 7 Am. B. R. 252, 112 Fed. 49.

121. *In re Griffin Bros.* (D. C., Ala.), 19 Am. B. R. 78, 154 Fed. 537.

122. *In re McNamara* (Ref., N. Y.), 2 Am. B. R. 566; *In re Hirsch* (D. C., Tenn.), 2 Am. B. R. 715, 96 Fed. 468; *In re Levey* (D. C., N. Y.), 13 Am. B. R. 317, 133 Fed. 572; *In re Wetmore* (D. C., N. Y.), 6 Am. B. R. 704, 99 Fed. 703; *In re Condict*, Fed. Cas. 3,094; *Matter of Remmers* (C. C. A., 8th Cir.), 23 Am. B. R. 78, 173 Fed. 484; *Milgram v. Ost* (D. C., Pa.), 12 Am. B. R. 306, 129 Fed. 827.

123. *In re Hixon* (D. C., Iowa), 1 Am. B. R. 610, 93 Fed. 440; *In re Holman* (D. C., Iowa), 1 Am. B. R. 600, 92 Fed. 512; *In re Shepherd*, 2 N. B. N. Rep. 1,020; *In re Hi*" Fed. Cas. 6,482; *In re Bellis*, Fed. Cas. 1,275. Compare *Bragassa v. St. Louis Cycle* (C. C. A., 5th Cir.), 5 Am. B. R. 700, 107 Fed. 77; *In re Blalock* (D. C., So. Car.), 9 Am. B. R. 266, 118 Fed. 679; *In re Parish* (D. C., Iowa), 10 Am. B. R. 548, 122 Fed. 553; *In re Servis* (D. C., Iowa), 15 Am. B. R. 271, 140 Fed. 222.

124. *Matter of Wetmore* (Ref., N. Y.), 6 Am. B. R. 703, holding a charge that the bankrupt made a false oath in the proceeding, and that he concealed assets from the trustee, objectionable.

125. *In re Quackenbush* (D. C., N. Y.), 4 Am. B. R. 274, 102 Fed. 282; *In re Main* (D. C. Ia.), 30 Am. B. R. 547, 205 Fed. 421.

126. *Matter of White* (D. C., Ore.), 34 Am. B. R. 803, 222 Fed. 688.

127. *Matter of Remmers* (C. C. A., 8th Cir.), 23 Am. B. R. 78, 81, 173 Fed. 484, citing *In re McNamara* (Ref., N. Y.), 2 Am. B. R. 566; *In re Milgram* (D. C.), 12 Am. B. R. 306, 129 Fed. 827; *In re Thomas* (D. C.), 1 Am. B. R. 515, 92 Fed. 912; *In re Holman* (D. C.), 1 Am. B. R. 600, 92 Fed. 512.

Information to bankruptcy and court.—Specifications should distinctly allege the particular grounds relied upon to defeat the discharge, so as to advise (1) the bankrupt of the grounds relied upon, in order that he may prepare to meet the same, and (2) the court of the issue to be tried, and should also allege facts showing that the party filing the specifications will be affected by the discharge and is therefore interested in defeating the same. *In re Servis* (D. C., Iowa), 15 Am. B. R. 271, 140 Fed. 222; *In re Wolfensohn* (Ref., N. Y.), 5 Am. B. R. 60.

(II) "*Knowingly and fraudulently*" committed act.—Where it is charged that the bankrupt has committed an act punishable by imprisonment under the bankrupt act it must be alleged to have been done "knowingly and fraudulently,"¹²⁸ but specifications may be amended so as to allege that the acts complained of were knowingly and fraudulently committed.¹²⁹ This requirement applies where the act alleged consists of the concealment of property¹³⁰ or of making a false oath in the proceedings.¹³¹

(III) *Concealment or transfer of property*.—The allegations of the acts alleged as constituting should be specific as to the circumstances of the concealment or transfer.¹³² Where property has been fraudulently transferred or concealed the specifications should disclose a description of the property, together with the names of the persons holding the title, the time of the transfer and any other facts necessary to identify the transaction.¹³³

128. In re Blalock (D. C., So. Car.), 9 Am. B. R. 266, 118 Fed. 679; In re Peck (D. C., Ct.), 9 Am. B. R. 747, 120 Fed. 972; In re Patterson (D. C., N. Y.), 10 Am. B. R. 371, 121 Fed. 921; In re Levey (D. C., N. Y.), 13 Am. B. R. 312, 133 Fed. 572; In re Taplin (D. C., Ia.), 14 Am. B. R. 360, 135 Fed. 861.

Where concealment of true financial condition is alleged, and there is no allegation as to knowledge of fraudulent intent, the specification is insufficient. In re Wetmore (Ref., N. Y.), 6 Am. B. R. 703. Where the allegation is that the bankrupt has concealed assets, it must be alleged that such concealment was "knowingly and fraudulently" done. Property should be described in such a manner that it may be clearly identified; specifications should not be used as a dragnet or as a cover for a fishing excursion." In re Mudd (D. C., Mo.), 5 Am. B. R. 242, 105 Fed. 348. See also In re Peck (D. C., Conn.), 9 Am. B. R. 747, 120 Fed. 972; In re Hirsch (D. C., Tenn.), 2 Am. B. R. 715, 96 Fed. 468; In re Adams (D. C., N. Y.), 22 Am. B. R. 613, 171 Fed. 599.

129. In re Knaszak (D. C., N. Y.), 18 Am. B. R. 187, 151 Fed. 503.

130. In re Taplin (D. C., Ia.), 14 Am. B. R. 360, 135 Fed. 861; In re Pierce (D. C., N. Y.), 4 Am. B. R. 554, 103 Fed. 64; In re Adams (D. C., N. Y.), 22 Am. B. R. 613, 171 Fed. 599; In re Griffin Bros. (D. C., Ala.), 19 Am. B. R. 79, 154 Fed. 537.

131. In re Patterson (D. C., N. Y.), 10 Am. B. R. 371, 121 Fed. 921; Matter of Agnew & Sherman (D. C., N. Y.), 35 Am. B. R. 709, 225 Fed. 650.

132. Matter of Agnew & Sherman (D. C., N. Y.), 35 Am. B. R. 709, 225 Fed. 650; In re Griffin Bros. (D. C., Ala.), 19 Am. B. R. 79, 154 Fed. 537; In re Parish (D. C., Ia.), 10 Am. B. R. 548, 122 Fed. 553; In re Hixon (D. C., Ia.), 1 Am. B. R. 610, 93 Fed. 440, holding that where the written specifications are that the bankrupt has "concealed part of his effects from the court," and has, "in contemplation of becoming a bankrupt, made payments, transfers, and assignments of his property for the purpose of preferring a creditor having a claim against him, and

to prevent the same from coming into the hands of the trustee," they are too vague and general to prevent the discharge of the bankrupt.

Specifications as to time and place.—A specification of objection to bankrupt's discharge alleging that, within the four months' period, the bankrupts transferred, removed, destroyed, or concealed their property, with intent to hinder, delay, and defraud their creditors, in that, about a week prior to the filing of the petition, and at other times, they removed and concealed large quantities of merchandise in a certain house, with intent to hinder, delay and defraud their creditors, and thereafter, on a certain day, removed and concealed other large quantities of merchandise from their place of business with like intent, is sufficiently specific. In re Milgraum v. Ost (D. C., Pa.), 12 Am. B. R. 307, 129 Fed. 827.

133. In re Parish (D. C., Iowa), 10 Am. B. R. 548, 122 Fed. 553.

Description of property.—Specifications of objections to a bankrupt's discharge, alleging the concealment of assets, should specify what property was concealed, and when, with some reasonable degree of certainty. Matter of Agnew and Sherman (D. C., N. Y.), 35 Am. B. R. 709, 225 Fed. 650.

A specification in opposition to a bankrupt's discharge, which alleges that the bankrupt has concealed a large amount of merchandise and groceries, does not sufficiently describe the property. Matter of White (D. C., Ore.), 34 Am. B. R. 803, 222 Fed. 688.

Placing property in hands of strangers.—If a person, before a petition in bankruptcy is filed by him or against him, in contemplation thereof, puts property out of his hands, intending to put it beyond the reach of his creditors and retain title, so that at some future time he may reclaim it, and he commences such concealment prior to the filing of a petition, and continues it thereafter and during the pendency of such bankruptcy proceedings, failing to disclose the truth to his trustee, and then aids in its concealment by transfer to or through others, specifications of objections to a discharge so

(IV) *False statement to secure credit.*—Where it is alleged as a ground of opposition that the bankrupt has made a materially false statement upon which he obtained credit, the substance or part of the statement alleged to be false must be set forth clearly and specifically.¹³⁴ Not only must the false representation be set out but the name of the person alleged to have been defrauded must be given.¹³⁵

(V) *Failure to keep, or destruction or concealment of books.*—Ordinarily the bankrupt knows whether he has kept, destroyed or concealed books of accounts. The creditor may not be expected to know more than that proper books of accounts have not been delivered to the bankrupt's trustee, hence it is not required to allege this offense with the same particularity as the other offenses.¹³⁶ The language of the statute is sufficient to serve the purpose of giving notice to the offender of the particular conduct which is charged against him as an offense.¹³⁷

(5) AMENDMENT OF SPECIFICATIONS.—Amendments to correct error due to mistake or accident are usually allowed, if asked at any time prior to the

alleging, will be deemed sufficient. *Matter of Agnew and Sherman* (D. C., N. Y.), 35 Am. B. R. 709, 225 Fed. 650.

134. *Godshalk Co. v. Sterling* (C. C. A., 3d Cir.), 12 Am. B. R. 302, 129 Fed. 580; *In re Main* (D. C., Ia.), 30 Am. B. R. 547, 205 Fed. 421.

135. *Matter of Napier* (D. C., Ky., Ref.), 23 Am. B. R. 560; *In re Levey* (D. C., N. Y.), 13 Am. B. R. 312, 133 Fed. 572.

136. General allegation as to failure to keep books or to conceal or destroy them, held sufficient. *Godshalk v. Sterling* (C. C. A., 3d Cir.), 12 Am. B. R. 302, 129 Fed. 580; *In re Brod* (D. C., Ga.), 21 Am. B. R. 426, 166 Fed. 1011; *In re Ginsburg* (D. C., Pa.), 12 Am. B. R. 459, 130 Fed. 627.

Concealment of or failure to keep books; sufficient allegations.—Objections to a bankrupt's discharge upon the ground that he "concealed or failed to have kept books of account or the records from which his financial condition might be ascertained," and that "while under examination under oath before the referee he failed to show what he did or had done with money which he alleged to have borrowed from his sister-in-law," naming her, are sufficiently specific. *In re Randall* (D. C., Pa.), 20 Am. B. R. 305, 159 Fed. 298.

Where a bankrupt testifies that he kept no books of account, an objection to the granting of his discharge, following the words of the statute, that he failed to keep books of account or records from which his financial condition might be ascertained "with intent to conceal his true financial condition and in contemplation of bankruptcy" is sufficient. But this form of objection, following the language of the statute, may be criticised, in that it is impossible to tell whether an utter failure to keep books is intended to be charged, or whether the books that were kept are insufficient

to show the true condition of the bankrupt's property. *In re Lewis* (D. C., N. Y.), 20 Am. B. R. 711, 163 Fed. 137.

In the case of *In re Magen Bros. Co.* (C. C. A., 3d Cir.), 27 Am. B. R. 729, 192 Fed. 883, the court said: "Whether a bankrupt has kept such accounts, and, if so, whether he retains, conceals, or destroys them, is a matter peculiarly within his own knowledge and which, in the nature of things, a creditor ordinarily does not know. All he does know is that the bankrupt has not surrendered such books to the trustee. Now the purpose of a specification is to fairly apprise the bankrupt of such matters in bar of his discharge as will be insisted upon, in order that he may be able to meet them. Such matters are not to be specified with the exactness and formality required in indictments, but only in such substantial form as will fairly inform one of the charges made against him. But where, as in the case of books of account, the bankrupt in the very nature of things, and he alone already knows what books he did or did not keep, and the creditor does not know, except as he infers their non-existence, concealment, or destruction from the fact of their non-delivery to the trustee, it would seem that a specification following the language of the statute and covering non-keeping, concealment, or destruction sufficiently and fairly apprises the bankrupt of the matter insisted upon in that respect." Citing *Godshalk v. Sterling* (C. C. A., 3d Cir.), 12 Am. B. R. 302, 129 Fed. 580, 64 C. C. A. 148.

137. *In re Hirsch* (D. C., Tenn.), 2 Am. B. R. 715, 96 Fed. 468; *In re Ginsburg* (D. C., Pa.), 12 Am. B. R. 459, 130 Fed. 627; *In re Patterson* (D. C., N. Y.), 10 Am. B. R. 371, 121 Fed. 921; *Milgraum v. Ost* (D. C., Pa.), 17 Am. B. R. 306, 129 Fed. 827; *In re Brod* (D. C., Ga.), 21 Am. B. R. 426, 166 Fed. 1,011.

submission of the case.¹³⁸ It has even been held that under certain circumstances they may be denied to conform to the proofs.¹³⁹ Application should be made to the judge; a referee having no power to grant such amendments.¹⁴⁰ Leave to amend vague and indefinite specifications of objections may be granted.¹⁴¹ Where the original specifications allege fraudulent false representations as grounds of opposition, an amendment is permissible to set up another instance of such representations, where there is nothing to suggest laches or oversight.¹⁴² Specifications of objections to a bankrupt's discharge may be amended, in the discretion of the court, after the expiration of the ten days allowed by General Order XXXIII, for the filing thereof,¹⁴³ provided the proposed amendment does not present a new issue or set up new matter constituting an additional or separate objections to the discharge.¹⁴⁴ The specifications as amended must merely amount to an enlargement of the original, and if they exceed this they are not entitled to come in.¹⁴⁵ Amendments

138. In re Quackenbush (D. C., N. Y.), 4 Am. B. R. 274, 102 Fed. 282; In re Carley (C. C. A., 3d Cir.), 8 Am. B. R. 720, 117 Fed. 130; In re Hixon (D. C., Iowa), 1 Am. B. R. 610, 93 Fed. 440; In re Morgan (D. C., Ark.), 4 Am. B. R. 402, 101 Fed. 982; In re Osborne (C. C. A., 1st Cir.), 8 Am. B. R. 165, 115 Fed. 1; In re Glass (D. C., Tenn.), 9 Am. B. R. 391, 119 Fed. 509; Matter of Soloway & Katz (C. C. A., 2d Cir.), 32 Am. B. R. 234, 211 Fed. 333. See Am. Bankr. Dig., § 1044.

Knowingly and fraudulently committed.—An amendment to specifications may be allowed so as to allege that the acts complained of were knowingly and fraudulently committed. In re Knaskaz (D. C., N. Y.), 18 Am. B. R. 187, 151 Fed. 503. Such an amendment may be made *nunc pro tunc*. In re Pierce (D. C., N. Y.), 4 Am. B. R. 554, 103 Fed. 64; In re Bemis (D. C., N. Y.), 5 Am. B. R. 36, 104 Fed. 672.

In cases of mistake or accident the courts are extremely liberal in permitting amendments. In re Gross (Ref., N. Y.), 5 Am. B. R. 271.

Laches.—Where a creditor, nineteen months after filing its objections to the bankrupt's discharge and fifteen months after closing its case, presents a petition alleging more in detail but in substance the same transactions embodied in the objections of another creditor with whom it united in a single joint motion, whereby the specifications of both were referred to a special master, a refusal of the district judge to allow such additional specifications to be filed is a proper exercise of judicial discretion. Kentucky National Bank v. Carley (C. C. A., 3d Cir.), 10 Am. B. R. 375, 121 Fed. 822.

When creditors delay the hearing upon an application for a discharge by reason of their insufficient objections thereto, it rests largely in the sound discretion of the court as to whether or not amendments to such specifications shall be permitted. In re Mudd (D. C., Mo.), 5 Am. B. R. 242, 105 Fed. 348.

139. In re Lesser (D. C., N. Y.), 5 Am. B. R. 330, 108 Fed. 205; In re Knaszak

(D. C., N. Y.), 18 Am. B. R. 187, 151 Fed. 503.

Amendments to conform to proof.—Where specifications of objections to bankrupt's discharge charged concealment of and failure to account for assets and the withholding of property from their schedules in certain amounts, the failure of the trustee to prove the whole amount alleged is immaterial in passing upon the bankrupt's right to be discharged, but the specifications may be amended to conform to the proof. Matter of Magen (D. C., Pa.), 33 Am. B. R. 346, 218 Fed. 692.

140. In re Wolfensohn (Ref., N. Y.), 5 Am. B. R. 60; In re Kaiser (D. C., Minn.), 3 Am. B. R. 767, 99 Fed. 689; In re Peck (D. C., Conn.), 9 Am. B. R. 747, 120 Fed. 972. For form of petition for amendment of specifications, see Hagar & Alexander's Bankr. Forms, (2d ed.), Form No. 276.

141. In re Wittenberg (D. C., Pa.), 20 Am. B. R. 398, 160 Fed. 991.

142. Matter of Pechin (D. C., Pa.), 34 Am. B. R. 721, 225 Fed. 798.

143. In re Osborne (C. C. A., 1st Cir.), 8 Am. B. R. 165, 115 Fed. 1; In re Nathanson (D. C., N. Y.), 18 Am. B. R. 252, 152 Fed. 585.

144. In re Johnson (D. C., S. Dak.), 27 Am. B. R. 644, 192 Fed. 356; In re Weston (C. C. A., 2d Cir.), 30 Am. B. R. 647, 206 Fed. 281.

145. Defects in the form of specifications, filed with a referee, may be cured by amendments, if the nature of the objections remains unchanged. In re Hendrick (D. C., Conn.), 14 Am. B. R. 795, 138 Fed. 473.

Lack of verification, being matter of form only, may be supplied by amendment. In re Gift (D. C., Pa.), 12 Am. B. R. 244, 130 Fed. 230; In re Hanna (C. C. A., 2d Cir.), 21 Am. B. R. 843, 108 Fed. 238.

Amendments in matter of substance, after the time within which objections are required to be filed, are only allowable where there is already a record sufficient to justify it. In re Gift (D. C., Pa.), 12 Am. B. R. 244, 130 Fed. 230.

are discretionary with the district courts, and are reviewable in the circuit court of appeals, under section 24-b of the Bankruptcy Act.¹⁴⁶ Leave to amend should not be granted where only the words of the statute are used.¹⁴⁷

(6) **WAIVER OF DEFECTS.**—All objections to the sufficiency of specifications are waived unless made before trial;¹⁴⁸ unless the specifications are fatally defective because failing to show some jurisdictional requirement, as, for instance, that the party filing them is a party in interest.¹⁴⁹ Lack of verification may be waived,¹⁵⁰ and so may a defect consisting of a failure to allege that the offense was committed knowingly and fraudulently.¹⁵¹

(7) **EXCEPTIONS TO SPECIFICATIONS.**—Objections to the form of specifications not taken in the lower court cannot be raised on review.¹⁵² The bankrupt need not answer;¹⁵³ the issue is made by the petition and the specifications. He may file exceptions to the latter, on the ground of insufficiency, or he may answer or demur if he chooses.¹⁵⁴ The creditors may not object to the referee's report because he failed to consider the bankrupt's exceptions.¹⁵⁵

146. Amendments discretionary.—An amendment of specifications in opposition to a discharge is a matter of sound discretion and should only be exercised to meet the ends of justice. In re Morgan (D. C., Ark.), 4 Am. B. R. 402, 101 Fed. 982.

Where no laches or unfairness on the part of a creditor appears, and no injustice to the bankrupt or unreasonable delay will result, amendments to specifications in opposition to the bankrupt's discharge should be allowed as of course. In re Carley (C. C. A., 3d Cir.), 8 Am. B. R. 720, 117 Fed. 130.

While the court may permit the objecting creditor to amend his specifications so as to specifically state his objections, it should not do so unless it is apparent that the party can specify facts, and that his failure to be specific is excusable. In re Hixon (D. C., Iowa), 1 Am. B. R. 610, 93 Fed. 440.

147. In re Bromley (D. C., Pa.), 18 Am. B. R. 227, 152 Fed. 493; In re Pack (D. C., Conn.), 9 Am. B. R. 747, 120 Fed. 972.

148. In re Baldwin (D. C., N. Y.), 9 Am. B. R. 591, 119 Fed. 796.

Where specifications of objection are insufficiently drawn, objections to the form of the specifications are waived where the bankrupt goes into the hearing without making a motion to dismiss until the taking of the testimony is completed. Matter of Huber (D. C., N. D., Ref.), 34 Am. B. R. 100.

149. In re Servis (D. C., Iowa), 15 Am. B. R. 271, 140 Fed. 222.

150. Lack of verification.—An objection that specifications lack verification comes too late if made after the submission of the case. In re Baerncoepf (D. C., Pa.), 9 Am. B. R. 133, 117 Fed. 975; In re Robinson (D. C., R. I.), 10 Am. B. R. 477, 123 Fed. 844.

Objection to the jurat to specifications of objections to a discharge may not be raised for the first time on petition for review. Godschalk Co. v. Sterling (C. C. A., 3d Cir.), 12 Am. B. R. 302, 129 Fed. 580.

151. In re Osborne (C. C. A., 1st Cir.), 8 Am. B. R. 165, 115 Fed. 1.

Failure to demur or object.—Where a rule of the court provides that when specifications of objections are filed, and no demurrer or motion as to their sufficiency is interposed, prior to the hearing, they shall be deemed sufficient to present every question fairly suggested thereby, it was held that a specification alleging a fraudulent transfer and that the bankrupt retained possession of the property and made no reference thereto in his schedules, is sufficient to raise the question of a secret ownership or concealment. In re Wakefield (D. C., N. Y.), 31 Am. B. R. 42, 207 Fed. 180.

152. In re Headley, 2 N. B. N. Rep. 684; In re Servis (D. C., Iowa), 15 Am. B. R. 271, 140 Fed. 222. Form of exceptions to specifications, see Hagar & Alexander's Bankr. Forms (2d ed.), Form No. 275.

153. In re Logan (D. C., Ky.), 4 Am. B. R. 525, 102 Fed. 876, holding that a failure to answer does not justify a denial of the bankrupt's discharge, but that the specifications in opposition must be established by proof. In re Crist (D. C., Ala.), 9 Am. B. R. 1, 116 Fed. 1007, holding that the bankrupt need not demur.

154. In re Rosenfield, Fed. Cas. 12,059.

In the Western District of Kentucky where specifications of objections to a bankrupt's discharge have been filed, the practice is to refer the application for discharge to a referee to ascertain and report the facts under the third clause of General Order in Bankruptcy No. 12; the filing of objections does not start a new case; no system of pleading is in existence in such case, and a demurrer taken to the specifications of objections pending the reference and eleven days thereafter is not in harmony with the practice in such district, although valid grounds of objection, even though taken by demurrer, will not be disregarded by the court. Matter of Daugherty (D. C., Ky.), 26 Am. B. R. 550, 189 Fed. 239.

155. Matter of Brockman (D. C., Ky.), 21 Am. B. R. 251, 168 Fed. 1015.

c. Creditor proceeding under specifications of another creditor.—Creditors may be allowed, in the discretion of the court, to enforce objections filed and abandoned by other creditors.¹⁵⁶ And a claim by a creditor, whose objections to a discharge are held to be insufficient, of the right to proceed under objections filed on behalf of another creditor who did not appear on the hearing should be passed upon by the district judge, and not by the referee.¹⁵⁷

d. Verification of specifications.—Specifications of objection to a bankrupt's discharge are in the nature of pleadings within the meaning of section 18-c of the bankruptcy act and should be verified¹⁵⁸ in order to prevent frivolous objections and waste of time;¹⁵⁹ although it has been held that lack of verification is not fatal,¹⁶⁰ and the omission may be supplied by amendment,¹⁶¹ at any time before the testimony is all in and the argument commenced.¹⁶² An objection that there was a failure or omission of verification cannot be raised for the first time on petition for review.¹⁶³ Several creditors may verify the same specifications.¹⁶⁴ A verification, made by the attorney or agent for the objecting creditor, should explain why the oath was not made by the creditor himself.¹⁶⁵ The verification should be in the form prescribed for the creditor's petition. If there be two or more objecting creditors all should verify the specifications.¹⁶⁶

156. *In re Houghton*, Fed. Cas. 6,730, 10 N. B. R. 337.

157. *Matter of Wetmore* (Ref., N. Y.), 6 Am. B. R. 703.

158. *Verification of specifications.*—*In re Brown* (C. C. A., 5th Cir.), 7 Am. B. R. 252, 112 Fed. 49; *In re Baernkopf* (D. C., Pa.), 9 Am. B. R. 133, 117 Fed. 975; *In re Gift* (D. C., Pa.), 12 Am. B. R. 244, 130 Fed. 230.

159. *In re Brown* (C. C. A., 5th Cir.), 7 Am. B. R. 252, 112 Fed. 49.

160. *In re Jamieson* (D. C., Ill.), 9 Am. B. R. 681, 120 Fed. 697; *In re Brown* (C. C. A., 5th Cir.), 7 Am. B. R. 252, 112 Fed. 49, holding that a ruling of the district judge requiring a positive verification to the specifications of objections is not reviewable.

161. *In re Meurer* (D. C., Pa.), 15 Am. B. R. 823, 144 Fed. 445; *In re Miller* (D. C., Iowa), 27 Am. B. R. 606, 192 Fed. 730, holding that the verification may be supplied after the specifications were filed; *In re Gift* (D. C., Pa.), 12 Am. B. R. 244, 130 Fed. 230; *In re Hanna* (C. C. A., 2d Cir.), 21 Am. B. R. 843, 168 Fed. 238, holding that specifications filed for a number of creditors but signed and verified only by an agent of one of them, may be amended so as to permit another creditor to sign and verify them.

162. *In re Baernkopf* (D. C., Pa.), 9 Am. B. R. 133, 117 Fed. 975; *In re Miller* (D. C., Iowa), 27 Am. B. R. 606, 192 Fed. 730.

After submission of the case to the court upon evidence which fully supports and verifies certain of the specifications, the objection to the specifications for lack of verification is too late, and cannot be considered as a sufficient ground for dismissing the specifications and granting the discharge. *In re Robinson* (D. C., R. I.), 10 Am. B. R. 477, 123 Fed. 844.

163. *Godschalk v. Sterling* (C. C. A., 3d Cir.), 12 Am. B. R. 302, 129 Fed. 580.

164. *Milgraum v. Ost* (D. C., Pa.), 12 Am. B. R. 306, 129 Fed. 827.

165. *Verification by attorney or agent.*—*In re Randall* (D. C., Pa.), 20 Am. B. R. 305, 159 Fed. 298. If counsel sign and swear to specifications the reason for this unusual practice should be stated so that the court may be enabled to decide whether the reason is sufficient. *In re Baernkopf* (D. C., Pa.), 9 Am. B. R. 133, 117 Fed. 975. The practice which forbids attorneys in fact or at law from signing and swearing to specifications of objections to a bankrupt's discharge will be departed from only in exceptional circumstances. *Milgraum v. Ost* (D. C., Pa.), 12 Am. B. R. 306, 129 Fed. 827.

Order of court required.—The attorneys or solicitors or other agents of creditors opposing the bankrupt's discharge will not be allowed to make the verification to the specifications in opposition unless by order of the court allowing the oath to be so taken, the reasons therefor appearing in the order and on the face of the oath itself. *In re Glass* (D. C., Tenn.), 9 Am. B. R. 391, 119 Fed. 509.

166. *Form of verification.*—See form No. 3, *post*. *In re Glass* (D. C., Tenn.), 9 Am. B. R. 391, 119 Fed. 509.

On information and belief.—An affidavit to specifications of objection that the facts therein stated are true to the best of affiant's knowledge, information and belief is sufficient. *Melgraum v. Ost* (D. C., Pa.), 12 Am. B. R. 306, 129 Fed. 827.

Verification by partnership.—When the opposing creditor is a partnership, the signature of the firm by one of the partners authorized to sign the firm name will be sufficient, and may be verified by him alone or another partner, if the facts be known to him and not the partner signing the plead-

e. Reference to special master.—The referee being denied jurisdiction to determine discharges,¹⁶⁷ references to him, not as referee, but as special master in chancery to hear and report on the facts, are quite universal.¹⁶⁸ The report of the referee is advisory only and the court is not bound thereby.¹⁶⁹ A reference may be made to a person other than the referee, as in other cases in equity.¹⁷⁰ If such a reference is ordered, the special master sets a time and place for the hearing, which goes on before him as if before the judge. Special masters may pass on the relevancy or materiality of evidence,¹⁷¹ and determine the sufficiency of specifications so far, at least, as to decide whether to permit testimony thereon. But a referee, acting as special master,

ing, the oath stating the fact as it may be. In re Glass (D. C., Tenn.), 9 Am. B. R. 391, 119 Fed. 509.

Verification by corporation should be by the same oath as other creditors. In re Glass (D. C., Tenn.), 9 Am. B. R. 391, 119 Fed. 509.

167. Bankr. Act, § 38-a (4); General Order XII (3).

A referee has no power to decide any question relating to the bankrupt's discharge until that subject has been referred to him by the judge. In re Randall (D. C., Pa.), 20 Am. B. R. 305, 159 Fed. 298; International Harvester Co. v. Carlson (C. C. A., 8th Cir.), 33 Am. B. R. 178, 217 Fed. 736.

A referee in bankruptcy having no jurisdiction to act upon an application for discharge, it is within the power of the court, under General Order XII, to specially refer it to a referee. Matter of Amer (D. C., Pa.), 35 Am. B. R. 627, 228 Fed. 576.

168. International Harvester Co. v. Carlson (C. C. A., 8th Cir.), 33 Am. B. R. 178, 217 Fed. 736.

Jurisdiction or referee.—*Fellows v. Freudenthal* (C. C. A., 7th Cir.), 4 Am. B. R. 490, 102 Fed. 731; *In re Taylor* (D. C., Ala.), 26 Am. B. R. 143, 188 Fed. 479. The referee has no jurisdiction to determine the question as to discharge, but the court may refer the case to him generally for a report. He aids the court like a master in chancery. He cannot finally determine the question of discharge or non-discharge, but he may be ordered to report the facts and his recommendations or conclusions as to the matter. *In re Rauchenplat* (D. C., Porto Rico), 9 Am. B. R. 763. Where an application for a discharge must be heard and decided by the judge, such application or any specified issue arising thereon may be sent to the referee to ascertain and report the facts, and no one is prejudiced thereby. *In re McDuff* (C. C. A., 5th Cir.), 4 Am. B. R. 110, 101 Fed. 241.

As to rules governing a special master upon a hearing, see *In re Walder* (D. C., Ct.), 18 Am. B. R. 419, 152 Fed. 489.

169. The practice on reference of discharge cases and the effect of a referee's report thereon is commented upon in *International Harvester Co. v. Carlson* (C. C. A., 8th Cir.), 33 Am. B. R. 178, 217 Fed. 736, in which the court says: "The duty of the court to pass

upon the issue cannot be shifted by such a reference, nor can the duty of the court be dependent upon the filing of exceptions. Orderly practice would require that such exceptions be filed, but the omission to do so is not jurisdictional. When the question of the discharge is brought before the District Court the issue is made up of the specifications of objection to the discharge, and the bankrupt's answer thereto, and not by the report of the referee and exceptions thereto. We are of the opinion, therefore, that it was the duty of the district judge to hear the cause and exercise an independent judgment thereon. When the referee's report was brought to his notice, he was then, for the first time, called upon to perform his duty of deciding whether the petition for discharge should be granted or denied. If the filing of exceptions to the master's report would aid him in the performance of this duty, he had ample authority to require such exceptions to be filed, or to consider such exceptions though they were filed late. Counsel for the objecting creditor insists that General Order 37 makes the general equity rules prescribed by the Supreme Court applicable to proceedings in bankruptcy, and that by Equity Rule 66, the time for filing exceptions to the report of masters is fixed at twenty days. We do not think that the general equity rules can be applied as rules of court in the performance of the administrative work of courts of bankruptcy. They may be looked to for analogies but not as rules. The Supreme Court itself has fixed the rules to govern courts of bankruptcy. To hold that the District Court was bound by the report of the referee because exceptions were not filed within twenty days, would deprive that court of its duty both under the bankruptcy law and the rules of the Supreme Court to pass upon the question of the bankrupt's right to his discharge.

170. *In re Gillardon* (D. C., Pa.), 26 Am. B. R. 103, 187 Fed. 289.

171. *In re Kaiser* (D. C., Minn.), 3 Am. B. R. 767, 99 Fed. 689.

In the Southern District of New York the matters are referred as of course to the referee who has acted in the proceeding, as special master, and it is then the duty of the bankrupt to bring the matter on before the referee. *In re Eldred* (D. C., N. Y.), 18 Am. B. R. 243, 152 Fed. 491.

should not base a finding upon the original examination of the bankrupt before him as referee.¹⁷² A special master should not report upon questions presented by the specifications of objections to a discharge without having examined the witnesses and heard their testimony for the presence of witnesses in a contested controversy is vital to its proper determination.¹⁷³ All testimony objected to, with the objections noted therein and the decisions thereon, should be preserved and reported to the court.¹⁷⁴

f. Proceedings on hearing.—(1) **IN GENERAL.**—The hearing is, in effect, a trial in equity. Objections to a bankrupt's discharge are the beginning of a distinct and separate dispute and easily fall within any accepted definition of a suit or an action.¹⁷⁵ The opposition to the discharge is always in the nature of a new suit. It requires proofs of the grounds set out in the specifications in opposition to the discharge.¹⁷⁶ All the grounds of objection urged against granting a discharge should be passed upon, so as to prevent the necessity of sending the case back, if the referee's conclusions on particular charges are not concurred in by the court.¹⁷⁷ The bankrupt may file such papers as he may desire, but he is not required to file any.¹⁷⁸

(2) **DEATH OF CREDITOR AFTER OBJECTIONS.**—The death of a creditor who has filed objections prior to the termination of the discharge proceedings, the hearing upon the application should be continued on notice to the decedent's attorney and also to the widow and children or next of kin; but it is not necessary for the bankrupt to proceed in the proper jurisdiction to obtain the appointment of a legal representative of the decedent's estate.¹⁷⁹ The testimony already given by the deceased creditor in the proceedings under oath, although not signed or read to him, as required by General Order 22, may be written out and included in the report.¹⁸⁰

(3) **RULES OF EVIDENCE; PROOF REQUIRED.**—The ordinary rules of evidence control. Proof must be strict and convincing, but not necessarily to the limit required in proving a crime.¹⁸¹ Evidence will be confined to the

172. In re Murray (D. C., Conn.), 20 Am. B. R. 700, 162 Fed. 983.

May not pass upon objections.—A special master appointed to hear the "specifications in opposition to the discharge" of a bankrupt member of a copartnership has no jurisdiction to pass upon an objection raised before him that the bankrupt cannot be discharged from his own debts when he has filed no individual schedules and has taken no steps to bring in the absent partner. In re Cantor (Ref., N. Y.), 26 Am. B. R. 359 (report of special master confirmed by Judge Holt).

173. Matter of Rubin & Lipman (D. C., N. Y.), 32 Am. B. R. 295, 215 Fed. 669.

174. In re Isaacson (D. C., N. Y.), 23 Am. B. R. 665, 174 Fed. 406; First National Bank of Philadelphia v. Abbott (C. C. A., 8th Cir.), 21 Am. B. R. 436, 165 Fed. 852.

175. In re Guilbert (D. C., Pa.), 18 Am. B. R. 830, 154 Fed. 676, quoting Collier on Bankruptcy (6th ed.), p. 182; objections to a bankrupt's discharge are the beginning of a distinct and separate dispute, and the hearing thereon is in effect a trial in equity. Matter of Amer (D. C., Pa.), 35 Am. B. R. 627, 228 Fed. 576.

176. In re Prager & Son (D. C., W. Va.),

13 Am. B. R. 527, 134 Fed. 1,006.

177. Matter of Haskell (D. C., N. Y.), 20 Am. B. R. 914, 164 Fed. 301.

178. In re Logan (D. C., Ky.), 4 Am. B. R. 525, 102 Fed. 876; In re Hendrick (D. C., Conn.), 14 Am. B. R. 795, 138 Fed. 473.

Demurrer.—The bankrupt need not file a demurrer to specifications in opposition to his discharge. In re Crist (D. C., Ala.), 9 Am. B. R. 1, 116 Fed. 1,007.

179. Matter of Blaesser (D. C., N. Y.), 36 Am. B. R. 795, 230 Fed. 528.

180. Matter of Blaesser (D. C., N. Y.), 36 Am. B. R. 795, 230 Fed. 528.

181. **Proof.**—In the case of Garry v. Jefferson Bank (C. C. A., 5th Cir.), 26 Am. B. R. 511, 514, 186 Fed. 461, the court said: "We are of the opinion that as stated in Collier (8th Ed.), p. 268, while the ordinary rules of evidence control; the proof must be strict and convincing, but not necessarily to the limit required in proving a crime." In re Polakoff (Ref., N. Y.), 1 Am. B. R. 358; In re Gross (Ref., N. Y.), 5 Am. B. R. 271; In re Berner (Ref., Ohio), 4 Am. B. R. 383; In re Greenberg (D. C., Conn.), 8 Am. B. R. 94, 114 Fed. 773; In re Dauchy (D. C., N. Y.), 10 Am. B. R. 527, 122 Fed. 688; In re Troeder (C. C. A., 1st Cir.), 17

specifications.¹⁸² The burden of proof is upon the opposing creditor,¹⁸³ unless the question presented is the construction of a statute.¹⁸⁴ It is not necessary that the alleged ground for refusing a discharge be proved beyond a reasonable doubt, as in the case of the trial of a criminal offense,¹⁸⁵ although the conscience of the court should be satisfied by clear and convincing testimony that the bankrupt is not entitled to his discharge.¹⁸⁶ If the ground depended

Am. B. R. 723, 150 Fed. 710, quoting Collier on Bankruptcy (5th ed.), p. 174; Matter of Rivkin (D. C., Conn.), 33 Am. B. R. 170, 216 Fed. 218; Matter of White (D. C., Ore.), 34 Am. B. R. 803, 222 Fed. 688. As to evidence in proceedings to obtain discharge, see Am. Bankr. Dig., §§ 1064-1068.

182. In re Rosenfeld, Fed. Cas. 12,059; In re Hendrick (D. C., Ct.), 14 Am. B. R. 795, 138 Fed. 473.

The bankrupt has the opportunity, upon the hearing of an application for discharge, to argue before the judge that the question put to him was not material. In re Weinreb (C. C. A., 2d Cir.), 18 Am. B. R. 387, 153 Fed. 363.

183. Burden of proof.—In re Idzall (D. C., Iowa), 2 Am. B. R. 741, 96 Fed. 314; In re Brice (D. C., Iowa), 4 Am. B. R. 355, 102 Fed. 114; In re Phillips (D. C., N. Y.), 3 Am. B. R. 542, 98 Fed. 844; In re Fitchard (D. C., N. Y.), 4 Am. B. R. 609, 103 Fed. 742; In re Wetmore (D. C., Mo.), 2 Am. B. R. 755; In re Finkelstein (D. C., N. Y.), 3 Am. B. R. 800, 101 Fed. 418; In re Cashman (D. C., N. Y.), 4 Am. B. R. 326, 103 Fed. 67; In re Ferris (D. C., Iowa), 5 Am. B. R. 246, 105 Fed. 356; In re Wolfensohn (Ref., N. Y.), 5 Am. B. R. 60; In re Howden (D. C., N. Y.), 7 Am. B. R. 191, 111 Fed. 723; In re Gaylord (C. C. A., 2d Cir.), 7 Am. B. R. 1, 112 Fed. 668; In re Chamberlain (D. C., N. Y.), 11 Am. B. R. 95, 125 Fed. 629; In re Hamilton (D. C., N. Y.), 13 Am. B. R. 333, 133 Fed. 823; In re Jacobs (D. C., N. J.), 16 Am. B. R. 482, 144 Fed. 868; In re Keefer (D. C., N. Y.), 14 Am. B. R. 290, 135 Fed. 885; In re Eades (C. C. A., 7th Cir.), 16 Am. B. R. 30, 143 Fed. 293; In re Brockman (D. C., Ky.), 21 Am. B. R. 251, 164 Fed. 301; Hardie v. Swafford Bros. Dry Goods Co. (C. C. A., 5th Cir.), 21 Am. B. R. 457, 165 Fed. 588; Shaffer v. Koblegard Co. (C. C. A., 4th Cir.), 24 Am. B. R. 898, 183 Fed. 71; In re Main (D. C., Iowa), 30 Am. B. R. 547, 205 Fed. 421; Matter of Haimowich (D. C., Pa.), 36 Am. B. R. 648, 232 Fed. 378. See Am. Bankr. Dig., § 1068.

Failure to keep books.—Where the specification is based upon the ground that the bankrupt has, with intent to conceal his financial condition, failed to keep books of account, the burden of proof is upon the opposing creditor to show by convincing proof both that he failed to keep books of account and that his omission to do so was with intent to conceal his financial condition. In re Garrison (C. C. A., 2d Cir.), 17 Am. B. R. 832, 149 Fed. 178.

184. In re Gilpin (D. C., Pa.), 20 Am. B. R. 374, 160 Fed. 171.

185. In re Greenberg (D. C., Conn.), 8 Am. B. R. 94, 114 Fed. 773; In re Gross (Ref., N. Y.), 5 Am. B. R. 271; In re Berner (Ref., Ohio), 4 Am. B. R. 383; In re Polakoff (Ref., N. Y.), 1 Am. B. R. 360; In re Salisbury (D. C., N. Y.), 7 Am. B. R. 771, 113 Fed. 833; In re Howden (D. C., N. Y.), 7 Am. B. R. 191, 111 Fed. 723; In re Leslie (D. C., N. Y.), 9 Am. B. R. 561, 119 Fed. 406; In re Dauchy (D. C., N. Y.), 10 Am. B. R. 527, 122 Fed. 688. Except possibly where the ground of opposition consists of the concealment of property or the making of a false oath within the meaning of section 29-b of the bankruptcy act. In re Hennebray (D. C., Ia.), 31 Am. B. R. 231, 207 Fed. 882.

Evidence of false oath.—An objection to a bankrupt being granted a discharge, on the ground that he had knowingly and with fraudulent intent made a false oath to his schedules, need only be sustained by proof such as will overcome the presumption as to his honesty of purpose. Matter of Remmers (C. C. A., 8th Cir.), 23 Am. B. R. 78, 173 Fed. 484; see In re Marcus & Sherr (D. C., N. Y.), 27 Am. B. R. 164, 192 Fed. 743.

Concealment of assets.—The fact, that a bankrupt has been indicted and put upon trial for the criminal offense of concealing assets on the eve of bankruptcy, may be sufficient ground for a denial of his discharge. The facts need not be proved beyond a reasonable doubt. A preponderance is enough, although not sufficient to convict. Matter of Atlas (D. C., Ill.), 34 Am. B. R. 44, 219 Fed. 783; In re Delmour (D. C., N. Y.), 20 Am. B. R. 405, 161 Fed. 589; In re Doyle (D. C., N. Y.), 29 Am. B. R. 102, 199 Fed. 247; In re Bacon (D. C., N. Y.), 30 Am. B. R. 584, 205 Fed. 545. The bankrupt is entitled to the benefit of the doubt, In re Cotton & Preston (D. C., Ga.), 25 Am. B. R. 522, 183 Fed. 190; In re Wakefield (D. C., N. Y.), 31 Am. B. R. 42, 207 Fed. 180.

186. In re Howden (D. C., N. Y.), 7 Am. B. R. 194, 111 Fed. 723, 725; In re Troeder (C. C. A., 1st Cir.), 17 Am. B. R. 723, 732, 150 Fed. 710, 80 C. C. A. 376; In re Taylor (D. C., Ala.), 26 Am. B. R. 144, 188 Fed. 479; In re Chamberlain (D. C., N. Y.), 25 Am. B. R. 37, 40, 180 Fed. 304; In re Cotton & Preston (D. C., Ga.), 25 Am. B. R. 517, 526, 183 Fed. 181; In re Berner (Ref., Ohio), 4 Am. B. R. 383, holding that proof should be "clear" or satisfying, where the commission of an offense punishable by imprisonment is charged; In re Gross (Ref., N. Y.),

upon is an offense for which the bankrupt may be punished it is probable that a greater degree of proof should be required.¹⁸⁷ Mere suspicious circumstances tending toward the establishment of a ground of objection, shown by the bankrupt's testimony, alone, would be insufficient.¹⁸⁸ How far testimony brought out on the bankruptcy proceeding *per se* may be used as evidence on the discharge is a question; some authorities holding that it is material only for impeaching purposes.¹⁸⁹ The accepted rule seems to be that the bankrupt's evidence, but not that of other witnesses, so far as it is material to the issues, may be so used.¹⁹⁰ The whole record of the bankruptcy case proper is fre-

5 Am. B. R. 271, holding that it is sufficient ground for refusing a discharge if the conscience of the court is satisfied by proper and sufficient evidence that the bankrupt is not entitled to receive it.

187. In re Gaylord (C. C. A., 2d Cir.), 7 Am. B. R. 1, 112 Fed. 668, holding that where a false oath is charged it is incumbent upon the opposing creditor to establish satisfactorily that the particular statements of which perjury is predicated were false.

Presumption of innocence.—In the case of In re Troeder (C. C. A., 1st Cir.), 17 Am. B. R. 723, 150 Fed. 710, the court says that where a crime is charged, although only on a civil issue, "it shocks the judicial mind to refuse to give him the benefit of the usual presumption of innocence, unless the adverse proofs are so far satisfactory as to be convincing." This case was sustained in Garry v. Jefferson Bank (C. C. A., 5th Cir.), 26 Am. B. R. 511, 514, 186 Fed. 461.

188. In re Kolster (D. C., Nev.), 17 Am. B. R. 52, 146 Fed. 138; In re Howard (C. C. A., 2d Cir.), 24 Am. B. R. 84, 180 Fed. 399.

Suspicious circumstances.—Under the rule that mere suspicion, conjecture, or surmise is not a basis for a conclusion that a bankrupt has concealed assets, evidence which merely shows that on the night prior to bankruptcy, bankrupt was seen to leave his business clandestinely and late at night, bearing away with him what seemed to the witness to be books and records, is insufficient to support a charge that bankrupt concealed or destroyed inventory books especially where his bookkeeper testifies that no inventory books were kept and that all the books were delivered to bankrupt's trustees when they entered into possession. In re Simon (D. C., N. Y.), 29 Am. B. R. 808, 201 Fed. 1004.

189. In re Penny, 2 N. B. N. Rep. 1001. See "Use of Former Examination under § 7(9)" in this section, *post*.

190. In re Bard (D. C., N. Y.), 5 Am. B. R. 810, 108 Fed. 208; In re Wilcox (C. C. A., 2d Cir.), 6 Am. B. R. 362, 109 Fed. 628 (superseding In re Cooke (D. C., N. Y.), 5 Am. B. R. 434, 109 Fed. 631); In re Leslie (D. C., N. Y.), 9 Am. B. R. 561, 119 Fed. 406; In re Goodhile (D. C., Iowa), 12 Am. B. R. 380, 130 Fed. 782; In re Gaylord (D. C., N. Y.), 5 Am. B. R. 410, 106 Fed. 833; *affd.*, s. c., 7 Am. B. R. 1, 112 Fed. 668;

In re Eaton (D. C., N. Y.), 6 Am. B. R. 531, 110 Fed. 731.

Use of bankrupt's former testimony.—In the case of Shaffer v. Koblebard Co. (C. C. A., 4th Cir.), 24 Am. B. R. 898, 900, 183 Fed. 71, the court said: "It has generally been held that statements made by the bankrupt, under oath in his examination before the referee, may and should be considered in a proceeding touching his right to a discharge so far as the same may be material to the issues involved." (Citing cases in this note and the text.)

An application for a discharge is not a criminal proceeding, and section 7, providing that no testimony given by a bankrupt at any meeting of creditors "shall be offered in evidence against him in any criminal proceeding" has no apparent application to such a proceeding. In re Gaylord (C. C. A., 2d Cir.), 7 Am. B. R. 1, 112 Fed. 668.

Evidence by partners on former examination.—Evidence given by the members of a bankrupt partnership on a general examination before the referee as to the property of the firm is admissible, on an application for a discharge, against each of the members respectively; but the evidence of each member is not admissible against each of the other members. Matter of Malschick & Levin (D. C., Pa.), 33 Am. B. R. 214, 217 Fed. 492.

Waiver of objection.—Upon a hearing before the referee upon objections to the discharge of members of a bankrupt firm, objection was made to the admission in evidence, in support of the specifications, of the bankrupts' testimony taken upon their general examination, upon the grounds that such examination was never adjourned *sine die*, that the testimony had not been signed; that bankrupts had no opportunity to amend or correct it and that no opportunity had been given to cross-examine them for the purpose of elucidating points in their favor, but not upon the ground that the testimony of one bankrupt so taken was inadmissible against the other, and after opportunity was afforded to examine bankrupts and after their examination in the discharge proceedings, no further objection was taken. Held, that the objection had been waived. Matter of Magen (D. C., Pa.), 33 Am. B. R. 346, 218 Fed. 692.

quently stipulated in. This practice is loose and should not be followed. The better method, where a stipulation is possible, is to cull out those portions that are pertinent, and read them in.

(4) **MINUTES AND REPORT.**—The testimony may be taken down in narrative form, or by question and answer, and, if the latter, a stenographer may be employed, this perhaps by analogy to the procedure on the examination of the bankrupt.¹⁹¹ The referee should preserve all testimony objected to, noting the objections and taking answers subject thereto, and report the same to the court, or if necessary, certify to the court on proper application any particular ruling.¹⁹² Equity Rules LXXII to LXXXII should be consulted for details of procedure on such hearings. At the conclusion of the reference, the special master makes up a report, and files it, with his record, and all papers and pleadings with the clerk.¹⁹³ Such report should embody a summary of his findings and state his opinion thereon. He should pass his own judgment on the facts, and not that of a jury which in another proceeding had rendered a verdict as to the bankrupt's guilt.¹⁹⁴ He should pass upon all the grounds of objections urged on the hearing before him.¹⁹⁵ This report is brought up on notice either on motion for confirmation or by exception, and the case then proceeds before the judge.¹⁹⁶ Exceptions to the report of the referee must be filed within twenty days after the filing of the report.¹⁹⁷ A referee's findings upon conflicting evidence are entitled to the same consideration as those of a district judge,¹⁹⁸ and cannot be disregarded where there is sufficient testimony to support them.¹⁹⁹

191. See General Order XXII.

The referee in taking testimony must have it taken down preferably in narrative form, but upon objection raised, it is his duty to require the matter to be presented by question, to which the objection and reason thereof is to be clearly but briefly noted, then to enter his ruling thereon as to whether proper or not, and although he may rule it to be improper, yet allow it to be answered. *In re Romine* (D. C., W. Va.), 14 Am. B. R. 785, 788, 138 Fed. 837.

192. *In re Isaacson* (D. C., N. Y.), 23 Am. B. R. 665, 174 Fed. 406; *In re Knaszak* (D. C., N. Y.), 18 Am. B. R. 188, 151 Fed. 503.

193. Report of special master.—See "Supplementary Form No. 115;" Hagar & Alexander's *Bankr. Forms* (2d Ed.), Form No. 280, *post*. Compare *In re Steed* (D. C., N. Car.), 6 Am. B. R. 73, 107 Fed. 682; *Mahoney v. Ward* (D. C., N. Car.), 3 Am. B. R. 770, 100 Fed. 278.

It is the duty of the special master to take and report evidence, and to return the same together with the ruling as to its admissibility. It is not error for the special master to reserve decision as to the admissibility of testimony under insufficient specifications. *In re Knaszak* (D. C., N. Y.), 18 Am. B. R. 187, 151 Fed. 503.

Synopsis of specifications.—Where the specifications of objections to bankrupts' discharge filed by creditors were before the referee, but in referring to them in his report he set out a synopsis of them instead of setting them out in full, an exception that he erred in setting forth specifications of objections not actually filed, is frivolous.

Matter of Magen (D. C., Pa.), 33 Am. B. R. 346, 218 Fed. 692.

194. *In re Cohan* (D. C., N. J.), 26 Am. B. R. 544, 192 Fed. 751.

195. *Matter of Haskell* (D. C., N. Y.) 20 Am. B. R. 914, 164 Fed. 301; *In re Hendrick* (D. C., Conn.), 14 Am. B. R. 795, 138 Fed. 473.

196. Compare Equity Rules and the various district rules for the practice. See, for effect of findings of referee, *In re Covington* (D. C., N. Car.), 6 Am. B. R. 373, 110 Fed. 143; also, that findings of fact are conclusive on a petition for rehearing, *In re Royal* (D. C., N. Car.), 7 Am. B. R. 636, 113 Fed. 140.

Exceptions to report of referee.—The District Court is not bound by a report of a referee denying a bankrupt's discharge, because exceptions were not filed within twenty days as required by Equity Rule 66. *International Harvester Co. v. Carlson* (C. C. A., 8th Cir.), 33 Am. B. R. 178, 217 Fed. 736.

197. *Matter of Pierce, Jr.* (D. C., Wash.), 32 Am. B. R. 96, 210 Fed. 389.

198. *In re Simon v. Sternberg* (D. C., Ga.), 18 Am. B. R. 204, 151 Fed. 507; *In re Wheeler* (C. C. A., 7th Cir.), 21 Am. B. R. 262, 164 Fed. 301.

199. *In re Forth* (D. C., N. Y.), 18 Am. B. R. 186, 151 Fed. 951. Thus a finding that the bankrupt made a false oath and concealed his assets will not be disturbed. *In re Knaszak* (D. C., N. Y.), 18 Am. B. R. 187, 151 Fed. 503.

Conflicting evidence.—In the case of *Baker v. Bishop-Babcock-Becker Co.* (C. C. A., 4th Cir.), 34 Am. B. R. 396, 220 Fed. 657, the court said: "Just what weight should be

(5) **COMPENSATION AND DISBURSEMENTS.**—The right of referees sitting as special masters to compensation in addition to their fees as referees has already been well settled,²⁰⁰ and rests on the ground that the duties required of them are outside their functions as defined and paid for under the law. Section 72, added by the amendatory act of 1903, has not, it is thought, affected this rule. This compensation is often fixed by district rules.²⁰¹ If not, it is adjusted under Equity Rule LXXXII. The disbursements of the special master, as for a stenographer, are, of course, allowed.²⁰²

V. GROUNDS OF OPPOSITION TO DISCHARGE.

a. In general.—Subsection *b* of this section specifies the cases in which a bankrupt may be refused a discharge. As previously suggested, the specifications of objection must exhibit, and the evidence in support of them must prove, one of the objections specified in the law,²⁰³ and the only grounds of

given to the finding of a referee or special master upon an application for a discharge, has been the subject of some difference of opinion among the courts; but we think it may fairly be stated that the consensus is that where a referee and special master's action is based upon conflicting testimony, and he heard and saw the witnesses, that his findings ought to be accepted, and not disturbed, unless it appears that he has made a plain mistake; and this is particularly true in cases involving the concealment of assets, where the motive and intent of the bankrupt becomes material. In this class of cases much weight is necessarily due to the conclusions of the tribunal which had the opportunity of seeing and observing the matter and deportment of the witnesses whose acts were called in question, or of those who may have been cognizant of the transaction. In *re Lafefche* (D. C., Vt.), 6 Am. B. R. 483, 109 Fed. 307; *Ohio Valley Bank v. Mack* (C. C. A., 6th Cir.), 20 Am. B. R. 40, 163 Fed. 155, and cases cited, 89 C. C. A. 605, 24 L. R. A. (N. S.) 184; In *re Wheeler* (C. C. A., 7th Cir.), 21 Am. B. R. 262, 165 Fed. 188, 91 C. C. A. 222; *Epstein v. Steinfeld* (O. C. A., 3d Cir.), 32 Am. B. R. 6, 210 Fed. 236, 127 C. C. A. 24. In this case we have the findings of fact by the referee and special master, and have carefully and critically examined the testimony; and our conclusion is that he was correct in his finding, and that the evidence is entirely insufficient to justify a refusal of the discharge."

200. Compensation.—*Fellows v. Freudenthal* (C. C. A., 7th Cir.), 4 Am. B. R. 490, 102 Fed. 731; In *re Grossman* (D. C., Mich.), 6 Am. B. R. 510, 111 Fed. 507. In *Bragassa v. St. Louis Cycle* (C. C. A., 5th Cir.), 5 Am. B. R. 700, 107 Fed. 77, the referee seems to have been allowed extra compensation as referee and not as special master.

201. See, for rule in force in the Northern and Western Districts of New York, In *re Gaylord* (D. C., N. Y.), 5 Am. B. R. 805, 106 Fed. 833.

202. In *re Grossman* (D. C., Mich.), 6 Am. B. R. 510, 111 Fed. 507.

Findings where jury has found as to same facts.—Where a referee, who has been appointed to take proofs respecting specifications of objection to a bankrupt's discharge and to report such proofs to the court together with his findings thereon, is convinced after duly considering all the evidence, that bankrupt had wilfully sworn falsely to material facts, and so certifies, he should report a finding to that effect, and it is error for him to subordinate his own judgment in the matter to that of a jury which, by their verdict in another proceeding, had found bankrupt not guilty of the offense with which he is charged. In *re Cohan* (D. C., N. J.), 26 Am. B. R. 544, 192 Fed. 791.

Supreme Court Equity Rule 67, as to costs, applies to a hearing of objections to a bankrupt's discharge, and the fact that the same objecting creditor filed similar exceptions in five separate cases does not relieve it from payment of costs to each of the bankrupts. *Matter of Amer.* (D. C., Pa.), 35 Am. B. R. 627, 228 Fed. 576.

203. In *re Frank* (Ref., N. Y.), 6 Am. B. R. 156; *Smith v. Keegan* (C. C. A., 1st Cir.), 7 Am. B. R. 4, 111 Fed. 157; In *re Wetmore* (Ref., N. Y.), 6 Am. B. R. 703; In *re Steed* (D. C., N. Oar.), 6 Am. B. R. 73, 107 Fed. 682; *Bauman v. Feist* (C. C. A., 8th Cir.), 5 Am. B. R. 703, 107 Fed. 83; In *re Pierce* (D. C., N. Y.), 4 Am. B. R. 554, 103 Fed. 64; In *re Black* (D. C., Pa.), 4 Am. B. R. 776, 104 Fed. 289; In *re Peacock* (D. C., N. Car.), 4 Am. B. R. 136, 101 Fed. 560; In *re Marshall Paper Co.* (C. C. A., 1st Cir.), 4 Am. B. R. 468, 102 Fed. 872; In *re Logan* (D. C., Ky.), 4 Am. B. R. 525, 102 Fed. 874; In *re Crist* (D. C., Ala.), 9 Am. B. R. 1, 116 Fed. 1007; In *re Griffin Bros.* (D. C., Ala.), 19 Am. B. R. 78, 154 Fed. 537; In *re Blalock* (D. C., S. Car.), 9 Am. B. R. 266, 118 Fed. 679; In *re Howden* (D. C., N. Y.), 7 Am. B. R. 191, 111 Fed. 723; In *re Schenck* (D. C., Wash.), 8 Am. B. R. 727, 116 Fed. 554.

objection specified are those enumerated in sections fourteen and twenty-nine.²⁰⁴ Matters of jurisdiction and the validity of prior proceedings are not included.²⁰⁵ Even if the proof shows that the only debt is one which is not dischargeable, if the specifications are not sustained, a discharge should be granted.²⁰⁶ But it has been held that if the court knows of facts rendering the discharge revokable if they had first become known after it was granted, the statute does not compel the court to grant the discharge.²⁰⁷ And if one of several objections is well pleaded and sustained by the evidence, a discharge may be denied.²⁰⁸

b. Offense of larceny.—The offense of larceny, or larceny as bailee, committed by a bankrupt against an objecting creditor more than a year before the petition was filed, is not within the statutory grounds.²⁰⁹

c. Under the original law, and under the law as amended.—The additional objections provided for by the act of 1903, and as amended by the act of 1910, are important and far-reaching, but they are not available as grounds for denying a discharge in proceedings instituted prior to the taking effect of said amendments.²¹⁰ Neither the original act nor its amendments are retrospective; if the act complained of was not prohibited when it was committed a discharge may not be refused because under a subsequent enactment such act was prohibited.²¹¹

VI. COMMISSION OF OFFENSE PUNISHABLE BY IMPRISONMENT.

a. In general.—Subdivision 1 of subsection *b* provides as the first ground of refusing a discharge the commission of "an offense punishable by imprisonment as herein provided." This, in effect, means the commission of either of the offenses specified in the first and second subdivisions of § 29-b.²¹² Those defined in the third, fourth or fifth subdivision cannot well be committed by a bankrupt.²¹³ It has been thought also to include the commission of a contempt,

²⁰⁴ *In re Walrath* (D. C., N. Y.), 24 Am. B. R. 541, 175 Fed. 243; *In re Griffin Bros.* (D. C., Ala.), 19 Am. B. R. 78, 154 Fed. 537; *Matter of Wetmore* (Ref., N. Y.), 6 Am. B. R. 703; *In re Thomas* (D. C., Iowa), 1 Am. B. R. 515, 92 Fed. 912.

General dishonesty, or unfair and sharp dealing with creditors or oral misrepresentations made in obtaining property on credit are not grounds for refusing a discharge. *In re Chamberlain* (D. C., N. Y.), 25 Am. B. R. 37, 180 Fed. 304.

Charging the creation of a debt by reason of bankrupt's misconduct while acting in a fiduciary capacity is not sufficient ground for a discharge. *In re Gara* (D. C., Pa.), 26 Am. B. R. 573, 190 Fed. 112.

The violation by a bankrupt of a criminal law of a State is no ground for denying his discharge in bankruptcy. *In re McLellan* (D. C., N. Y.), 30 Am. B. R. 325, 204 Fed. 482.

²⁰⁵ *In re Walrath* (D. C., N. Y.), 24 Am. B. R. 541, 175 Fed. 243, holding that the question of the infancy of the bankrupt cannot be interposed collaterally as an objection to his discharge.

Domicile or residence of bankrupt cannot be interposed as an objection on an application for a discharge. *In re Mason* (D. C.,

N. Car.), 3 Am. B. R. 599, 99 Fed. 256; *In re Olisdell* (D. C., N. Y.), 4 Am. B. R. 95, 101 Fed. 246.

²⁰⁶ *In re Rhutassel* (D. C., Iowa), 2 Am. B. R. 697, 96 Fed. 597; *In re Tinker* (D. C., N. Y.), 3 Am. B. R. 580, 99 Fed. 79; *In re McCarty* (D. C., Ill.), 7 Am. B. R. 40, 111 Fed. 151. But in *In re Maples* (D. C., Mont.), 5 Am. B. R. 426, 105 Fed. 919, it was held that where the only debt scheduled is a judgment for seduction, the court will not grant a discharge.

²⁰⁷ *Matter of Luftig* (D. C., Mass.), 15 Am. B. R. 773, 162 Fed. 322.

²⁰⁸ *Hudson v. Mercantile Nat. Bank* (C. C. A., 8th Cir.), 9 Am. B. R. 432, 56 C. C. A. 250, 119 Fed. 346.

²⁰⁹ *In re Wolf* (D. C., Pa.), 20 Am. B. R. 304, 159 Fed. 299.

²¹⁰ *In re Dauchy* (D. C., N. Y.), 10 Am. B. R. 527, 122 Fed. 688.

²¹¹ *In re Webb* (D. C., N. Y.), 3 Am. B. R. 386, 96 Fed. 404; *In re Quackenbush* (D. C., N. Y.), 4 Am. B. R. 274, 102 Fed. 282; *In re Hammerstein* (C. C. A., 2d Cir.), 26 Am. B. R. 757, 189 Fed. 37.

²¹² See § 29 of Bankr. Act, *post*, and discussion thereunder.

²¹³ See Bankr. Act, § 29-b(3) (4) (5).

though the use of the word "offense" necessarily negatives such a view.²¹⁴ If any of the offenses enumerated by § 29 of the act are committed by the bankrupt, either in his own or some other bankruptcy proceedings, his discharge must be denied.²¹⁵

b. Concealment of property.—(1) **WHAT CONSTITUTES.**—(I) *In general.*—To entitle the bankrupt to the privilege of a discharge there must be entire good faith on his part; he must surrender his property fully; he may not retain or conceal any part thereof which should go to his creditors.²¹⁶ The bankrupt cannot decide for himself whether a specific piece of property may be retained by him, and conceal the existence thereof by omitting it from his

214. A contempt, even though punished by imprisonment, is not a crime. The offense must be one under the bankruptcy law. Section 29 indicates what constitutes such "offenses."

215. Commission of offenses in bankrupts bankruptcy.—In the case of *Matter of Lesser* (C. C. A., 2d Cir.), 36 Am. B. R. 833, 234 Fed. 65, the court said: "As herein provided means as provided under the head of 'Offenses' in the bankruptcy act (section 29a). If a bankrupt applying for a discharge has committed an offense covered by section 29a his discharge must be refused. It would be an absolute impossibility for him to commit some of these offenses in his own bankruptcy. One of the offenses punished by section 29a is the embezzlement by a trustee in bankruptcy of property belonging to the estate of the bankrupt. If the trustee is convicted of such embezzlement and subsequently becomes a bankrupt himself he can, if the ruling of the district judge is correct, obtain his discharge, notwithstanding his conviction under section 29a of an offense which section 14 declares is an absolute bar to a discharge. As before stated, there is nothing in the act which confines the perjury which bars a discharge to that committed in the bankrupt's own proceeding. On the contrary, many of the offenses, conviction of which bars a discharge, cannot, as before stated, be committed in the bankruptcy proceedings of the applicant for a discharge. We cannot think that the lawmakers intended a result so illogical as to permit a trustee who has embezzled the estate of the bankrupt placed in his care by the court to file a petition of his own and procure a discharge, notwithstanding his crime, because it was committed in a bankruptcy proceeding other than his own. There is nothing compelling such a construction of the law. * * * It seems clear that the intention of the lawmakers was to refuse a discharge to a bankrupt who has taken a false oath in any bankruptcy proceeding. If he can commit perjury once and succeed he will be quite likely to attempt it again. The contention that the perjury must be committed in his own bankruptcy is contrary to the letter of the law, and if sustained may lead to deplorable results."

216. *In re Breitling* (C. C. A., 7th Cir.), 13 Am. B. R. 126, 133 Fed. 146; *Matter of Brincat* (D. C., Ala.), 37 Am. B. R. 587, 233 Fed. 811.

Complete appropriation of assets.—In the case of *In re Baudouine* (D. C., N. Y.), 3 Am. B. R. 55, 61, 96 Fed. 536, 539, Judge Brown said: "A discharge in bankruptcy upon any other condition than the complete appropriation of every known asset legally available to creditors would not only be a glaring wrong to creditors, but contrary to every conception of a just system of bankruptcy."

In the case of *Barton Bros. v. Produce Co.* (C. C. A., 8th Cir.), 14 Am. B. R. 502, 505, 136 Fed. 355, the court said: "The bankrupt must make a full and complete surrender of all his unexempt property for the benefit of his creditors. He must be honest in this respect. He must neither conceal nor withhold knowingly anything from his creditors which they are entitled, under the law, to know or receive. Whenever the court is impressed with the belief, after due inquiry and examination, that in the main the bankrupt has intended and tried to comply with the law, he should be dealt with liberally on his petition for manumission from his debts. On the other hand, in order to obstruct gross abuses of the spirit of the bankrupt act, that it may not aid the dishonest debtor in being acquitted of his honest debts, while withholding ought that he should surrender for the benefit of his creditors, it is the duty of the court to look into the heart of his transactions."

Bad faith of bankrupt.—Where creditors objecting to a bankrupt's discharge sustain their accusation that he has so conducted his business as not to indicate good faith, and has caused his assets to disappear, the burden is upon the bankrupt to show that he is entitled to a discharge; and where bankrupt conducted a business which he got rid of when trouble was in sight because of a promissory note, and thereafter conducted business for the benefit and in the name of his sister, who apparently had no capital, without accounting for the proceeds derived from the sale of his business, a discharge will be denied. *In re Miller* (D. C., N. Y.), 30 Am. B. R. 113, 203 Fed. 170.

schedules; it is his duty to disclose the property and permit the court to determine whether it could go to his creditors.²¹⁷

(II) *Essential elements*.—To constitute concealment an objection to a discharge, it must be (1) by the bankrupt,²¹⁸ while a bankrupt or after his discharge—in other words, after the filing of the petition²¹⁹—and (2) from his trustee, (3) of property belonging to the estate in bankruptcy, and (4) such concealment must be “knowingly and fraudulently” done.²²⁰

(III) *Knowingly and fraudulently*.—The most important of the essentials of a concealment is that it be done “knowingly and fraudulently,” and without clear proof sustaining it, the specifications must be dismissed.²²¹ The question of intent becomes, therefore, of first importance in determining whether the offense has been committed. Without a purpose to profit by the concealment, or to deprive the creditors of their legal right to an apportionment of all the property of the bankrupt the act complained of will not constitute a bar to a discharge.²²² Thus, an omission to include property in the schedules under

217. *In re Gailey* (C. C. A., 7th Cir.), 11 Am. B. R. 539, 127 Fed. 538; *Barton v. Texas Produce Co.* (C. C. A., 8th Cir.), 14 Am. B. R. 502, 136 Fed. 355; *Vehon v. Ullman* (C. C. A., 7th Cir.), 17 Am. B. R. 435, 147 Fed. 694, holding that the failure of the president of a mail order corporation to schedule a duplicate mailing list was not a bar to his discharge.

Intent.—While intent is a pertinent inquiry, it is not the sole inquiry. The substance of the offense is the withholding of assets, so that the true inquiry is whether with fraudulent intent, the bankrupt withheld from his schedule property belonging to his creditors. Apart from the withholding of assets, the intent constitutes no cause for denying a discharge. *Vehon v. Ullman* (C. C. A., 7th Cir.), 17 Am. B. R. 435, 147 Fed. 694.

Where it appears that a bankrupt intentionally took his property and kept it from his creditors, with intent to hinder, delay or defraud them, he will be denied a discharge, even though he thought his action justified. *Matter of Nelson* (D. C., N. Y.), 23 Am. B. R. 37, 179 Fed. 320.

218. *In re Myers* (D. C., N. Y.), 5 Am. B. R. 4, 105 Fed. 353, holding that a discharge may be granted to a wife, notwithstanding a concealment of assets by her husband in managing her business. So, the fraud of a husband in failing to keep true books of account will not prevent the wife from securing her discharge. *In re Hyman* (D. C., N. Y.), 3 Am. B. R. 169, 97 Fed. 195.

219. *In re Webb* (D. C., N. Y.), 3 Am. B. R. 386, 98 Fed. 404.

220. Concealment; essential elements.—To constitute a concealment of property having discharge, it must have been by the bankrupt after the filing of a petition against him, while a bankrupt, or after his discharge, and the property must have been concealed from the trustee, and such property must have belonged to the estate in bankruptcy. The concealment must be knowingly and

fraudulently made. *Matter of Agnew and Sherman* (D. C., N. Y.), 35 Am. B. R. 709, 225 Fed. 650.

221. *In re Conn* (D. C., Or.), 6 Am. B. R. 217, 108 Fed. 525; *In re Pierce* (D. C., N. Y.), 4 Am. B. R. 554, 103 Fed. 64; *In re Freund* (D. C., N. Y.), 3 Am. B. R. 418, 98 Fed. 81; *In re Bryant* (D. C., Tenn.), 5 Am. B. R. 114, 104 Fed. 789; *In re Todd* (D. C., Vt.), 7 Am. B. R. 770, 112 Fed. 315; *In re Patterson* (D. C., N. Y.), 10 Am. B. R. 371, 121 Fed. 921; *In re Blacklock* (D. C., S. Car.), 9 Am. B. R. 266, 118 Fed. 679; *In re Beebe* (D. C., Pa.), 8 Am. B. R. 597, 116 Fed. 48; *Woods v. Little* (C. C. A., 3d Cir.), 13 Am. B. R. 742, 134 Fed. 229; *In re Talpin* (D. C., Iowa), 14 Am. B. R. 360, 135 Fed. 861; *In re Griffin Bros.* (D. C., Ala.), 19 Am. B. R. 78, 154 Fed. 537; *In re Bacon* (D. C., N. Y.), 30 Am. B. R. 584, 205 Fed. 545.

The words “knowingly” and “fraudulently,” in section 29b, relating to concealment of assets by a bankrupt, must be given their natural significance in the consideration of a charge of concealment of assets made in opposition to granting him a discharge, and it must be shown by a clear preponderance of evidence that such concealment was practiced knowingly and fraudulently. *Klein v. Powell* (C. C. A., 3d Cir.), 23 Am. B. R. 494, 174 Fed. 640.

222. *Matter of Nelson* (D. C., N. Y.), 23 Am. B. R. 37, 179 Fed. 320; *Klein v. Powell* (C. C. A., 3d Cir.), 23 Am. B. R. 494, 174 Fed. 640; *In re Julius Bros.* (D. C., N. Y.), 31 Am. B. R. 132, 209 Fed. 371, holding that creditors, claiming that a bankrupt transferred property in fraud of their rights, must show that the bankrupt knew the result of his act would deprive them of their rights—that is the element of intent—but it is quite irrelevant whether the bankrupt in his own mind had an honest justification; *In re Kyte* (D. C., Pa.), 23 Am. B. R. 414, 174 Fed. 867.

an honest mistake of law or fact will not bar a discharge.²²³ But, if such omission is not satisfactorily explained, it will usually amount to a concealment.²²⁴

(IV) *Property belonging to estate*.—The concealment must pertain to property belonging to the bankrupt, which would pass upon his bankruptcy to his trustee. It must be shown by competent and sufficient evidence that the property concealed belonged to the bankrupt, and in the absence of a finding to this effect the offense is not established.²²⁵ The amount or value of the property concealed does not bear particularly upon the existence of the offense, if the knowledge, intent or wilfulness of the concealment is established.²²⁶

(V) *Failure to schedule property*.—Failure to schedule or surrender property to the trustee is not *per se* or *ipso facto* knowingly and fraudulently concealing it.²²⁷ If the bankrupt has money in his possession when he files his petition, which he did not schedule or turn over to his trustee, he is, in the absence of a satisfactory explanation, guilty of a concealment of assets which bars his discharge.²²⁸ An omission to schedule property fraudulently conveyed usually amounts to a concealment, where the bankrupt retains an interest therein.²²⁹ But where the transfer was made more than four months prior

223. In re Morrow (D. C., Cal.), 3 Am. B. R. 263, 97 Fed. 574; In re Wetmore (D. C., Pa.), 3 Am. B. R. 700, 99 Fed. 703; In re Blalock (D. C., N. Car.), 9 Am. B. R. 266, 118 Fed. 679; In re Eaton (D. C., N. Y.), 6 Am. B. R. 531, 110 Fed. 731.

224. In re Royal (D. C., N. Car.), 7 Am. B. R. 106, 112 Fed. 135; In re Finkelstein (D. C., N. Y.), 3 Am. B. R. 800, 101 Fed. 418; In re O'Gara (D. C., Or.), 3 Am. B. R. 349, 97 Fed. 932. For such an explanation, see In re Miner (D. C., Or.), 8 Am. B. R. 248, 114 Fed. 988.

Presumption of concealment arises from failure to account for property in possession of bankrupt shortly before adjudication, and and not included in schedules. The sufficiency of the explanation is in the discretion of the district judge. Siegel v. Cartel (C. C. A., 8th Cir.), 21 Am. B. R. 140, 164 Fed. 691.

225. *Property belonging to estate*.—Under section 29b of the bankruptcy act, to justify the refusal of a discharge, it must appear that the bankrupt knowingly and fraudulently "concealed while a bankrupt, or after his discharge, from his trustee, any of the property belonging to his estate in bankruptcy." Hence, a report by a special master the certain moneys have been retained by the bankrupt and not paid over, which does not state whether or not such moneys were concealed from the trustee, is insufficient. Matter of Lenweaver (D. C., N. Y.), 36 Am. B. R. 73, 226 Fed. 987.

226. *Value of property concealed*.—The bankruptcy act is not aimed particularly at large concealments of property, but at all concealments of property. If the amount is small, and inadvertently retained or forgotten, the failure to disclose will not prevent a discharge; but when knowingly and willfully concealed from the trustee, and drawn out and used by the bankrupt for his own personal use, whether the sum be large or small, there is a concealment of property

with intent to defraud creditors. Matter of Smith (D. C., N. Y.), 37 Am. B. R. 230, 232 Fed. 248. See Matter of Levy (D. C., N. Y.), 36 Am. B. R. 181, 227 Fed. 1011.

The mere fact that a bankrupt omitted bedroom furniture of small value from his schedules is not in itself sufficient to justify the denial of a discharge, especially where it was partly owned by his clerk and the key to the room had been given to the trustee. Baker v. Bishop-Babcock-Becker Co. (C. C. A., 4th Cir.), 34 Am. B. R. 396, 220 Fed. 657.

227. In re Hirsch (D. C., Tenn.), 2 Am. B. R. 715, 96 Fed. 468; In re Freund (D. C., N. Y.), 3 Am. B. R. 418, 98 Fed. 81; In re Blalock (D. C., S. Car.), 9 Am. B. R. 266, 118 Fed. 679; Gretsche v. United States (C. C. A., 3d Cir.), 36 Am. B. R. 571, 231 Fed. 57.

Failure to schedule property transferred.—The failure to schedule or surrender property to the trustee is not *per se*, or *ipso facto*, knowingly and fraudulently concealing it, though an omission to schedule property fraudulently conveyed usually amounts to a concealment where the bankrupt retains any interest therein. Where, however, the evidence shows an entire absence of fraudulent intent, no such offense has been committed as will warrant the denial of a discharge on the ground of concealment. Matter of Stafford (D. C., Conn.), 35 Am. B. R. 747, 221 Fed. 127.

228. In re Friedrich (D. C., Minn.), 28 Am. B. R. 656, 199 Fed. 193, holding that proceeds derived from the sale of crops raised upon homestead property are not exempt under the law of Minnesota, so as to excuse a bankrupt for failure to schedule such proceeds or turn them over to his trustee.

229. Bragassa v. St. Louis Cycle (C. C. A., 5th Cir.), 5 Am. B. R. 700, 107 Fed. 77; In re Berner (D. C., Ohio, Ref.), 4 Am. B. R. 383; In re Skinner (D. C., Iowa), 3 Am. B. R. 163, 97 Fed. 190; In re Welch (D. C.,

to filing the petition in bankruptcy, it will not constitute a bar to discharge.²³⁰ This question often arises where property has been given or transferred by a bankrupt to his wife and omitted from the schedules or otherwise concealed.²³¹ Where a bankrupt has property in his wife's name, for the purpose of keeping such property from his creditors, a discharge will not be granted.²³² It seems, however, that an omission of assets from the schedule, on the advice of counsel, honestly given, is at least a presumptive excuse;²³³ as where the bankrupt was advised that his interest in his grandfather's estate was contingent and not vested.²³⁴ If there be no fraudulent or criminal intent in failing to schedule the property, and it was omitted upon a fair and reasonable cause to believe that it should not be included, based upon the advice of counsel, the omission is not an offense barring discharge.²³⁵ The advice of counsel is no excuse unless it was based upon a full and truthful disclosure of all the facts pertaining to the

Ohio), 3 Am. B. R. 93, 100 Fed. 65; In re McNamara (Ref., N. Y.), 2 Am. B. R. 566, 95 Fed. 429; In re Quackenbush (D. C., N. Y.), 4 Am. B. R. 274, 102 Fed. 282; Matter of Stafford (D. C., Conn.), 35 Am. B. R. 747, 221 Fed. 127.

Failure to schedule property transferred by a bankrupt to his wife prior to the enactment of the bankruptcy law is not a ground for opposing a discharge. In re Goodale (D. C., N. Y.), 6 Am. B. R. 493, 109 Fed. 783; In re House (D. C., N. Y.), 4 Am. B. R. 603, 103 Fed. 616. So also a transfer made more than two years prior to bankruptcy, Matter of Kaufman (C. C. A., 2d Cir.), 38 Am. B. R. 648.

230. In re Henneby (D. C., Iowa), 31 Am. B. R. 231, 207 Fed. 882; In re Kolster (D. C., Nev.) 17 Am. B. R. 52, 146 Fed. 138; In re Countryman (D. C., Ia.), 9 Am. B. R. 572, 119 Fed. 637; Fields v. Karter (C. C. A., 5th Cir.), 8 Am. B. R. 351, 115 Fed. 950. Otherwise if within the four months' period. Pirvitz v. Pithian (C. C. A., 8th Cir.), 27 Am. B. R. 621, 194 Fed. 403, 114 C. C. A. 365.

231. In re McCrea (C. C. A., 2d Cir.), 20 Am. B. R. 412, 161 Fed. 246; In re Brown (D. C., Vt.), 15 Am. B. R. 350, 140 Fed. 383, in which case it was held that since a Vermont statute prohibits a contract between husband and wife, an attempted transfer to her did not constitute a concealment; In re Hirshowitz (D. C., Pa.), 27 Am. B. R. 701, 194 Fed. 562.

232. In re Steindler & Hahn (Ref., N. Y.), 5 Am. B. R. 63; In re Gilbert (D. C., Pa.), 22 Am. B. R. 221, 169 Fed. 149. Failure to schedule assets held in trust for a bankrupt by his wife is ground for refusal of his discharge. Matter of Borg (D. C., Minn.), 25 Am. B. R. 189, 184 Fed. 649; In re De Mauriac (D. C., N. Y.), 30 Am. B. R. 677, 206 Fed. 358.

Failure to schedule property held by wife. — In the case of In re Graves (D. C., Pa.), 26 Am. B. R. 633, 189 Fed. 847, the court said: "To entitle the bankrupt to a discharge, there must be entire good faith on his part. He must surrender his property fully. He cannot retain or conceal any part

thereof which should go to his creditors. If the property, or a portion of it, belonging to the bankrupt has been vested directly or indirectly in his wife, no matter when that was done, if the court believes from the evidence that it was done and continued fraudulently, and the property really was held for the bankrupt's benefit and subject to his control, the failure to mention such property, of whatever it may consist, in the schedule and to inform the trustee in regard thereto, is concealment of property and will prevent a discharge. This is a well settled principle, requiring no reference to cases decided." See also In re Diamond (D. C., Wis.), 30 Am. B. R. 363, 204 Fed. 137. But this rule would not apply where the property so transferred was purchased by the bankrupt with his wife's money. Matter of Kean (D. C., N. Y.), 38 Am. B. R. 628, 237 Fed. 682.

233. Omission under advice of counsel. — In re Schreck (Ref., N. Y.), 1 Am. B. R. 366; In re Berner (Ref., Ohio), 4 Am. B. R. 383; In re Headley, 2 N. B. N. Rep. 684; U. S. v. Connor, 3 McLean, 573; In re Kyte (D. C., Pa.), 23 Am. B. R. 417, 174 Fed. 867; Matter of Meikelham (D. C., Ga.), 38 Am. B. R. 324, 236 Fed. 401. But In re Stoddard (D. C., Wash.), 7 Am. B. R. 762, 114 Fed. 486, it was held that where certain real estate conveyed by the bankrupt shortly before filing his petition in bankruptcy, in trust to pay another the profits thereof for life and then to hold for his benefit, is intentionally omitted from his schedules, he is not entitled to his discharge, although he acted under advice of counsel, that all his interest in the property was divested by the deed.

Doubtful ownership. — In the case of In re Alleman (D. C., Pa.), 20 Am. B. R. 745, 162 Fed. 693, it was held that a bankrupt will not be denied a discharge upon the ground of a fraudulent concealment of property, where his ownership is doubtful and, under the advice of counsel, the property in question is omitted from the schedules.

234. Woods v. Little (C. C. A., 3d Cir.), 13 Am. B. R. 742, 134 Fed. 229.

235. In re Jacobson & Son Co. (C. C. A., 3d Cir.), 28 Am. B. R. 492, 196 Fed. 949.

omitted assets.²³⁶ Where a person prior to filing a petition in bankruptcy conveys property to a third person, to be held, in whole or in part, in secret trust for himself, and fails to schedule such interest, such failure constitutes a knowing and fraudulent concealment from his trustee, while a bankrupt, of property belonging to his estate in bankruptcy, and will preclude his discharge.²³⁷ The listing of property after an attempt to conceal the same and after the false oath has been discovered will not relieve the bankrupt from the consequences of such acts.²³⁸ Real property set apart to a divorced wife as alimony is not within the jurisdiction of a court in bankruptcy,²³⁹ and a failure to schedule such property does not constitute a concealment so as to defeat the wife's right to a discharge.²⁴⁰ Salary of a public officer does not pass to a trustee, and a failure to schedule the amount earned when the petition was filed is not a concealment of assets barring discharge.²⁴¹ A bankrupt should not be refused a discharge because he failed to set forth in his schedules the income derived from certain trust funds, and did not turn over to the trustee on demand his interest in said income, especially where it has not been decided whether or not such income passes to the trustee.²⁴²

(VI) *Undervaluation*.—The value of the property concealed is not material if it be shown that it was knowingly and fraudulently done.²⁴³ If property is undervalued the fact may be considered in determining whether a concealment has been committed although it is not itself a concealment.²⁴⁴

(VII) *Other instances of fraudulent concealment*.—It is not fraud for a bankrupt to collect insurance commissions and apply them to his own use, where a referee has decided that such commissions do not pass to the trustee, although the referee is subsequently reversed.²⁴⁵ The participation of bankrupt partners in the foreclosure of a chattel mortgage, given anterior to the four

236. *Matter of Remmers* (C. C. A., 8th Cir.), 23 Am. B. R. 78, 173 Fed. 484.

237. *Matter of Borg* (D. C., Minn.), 25 Am. B. R. 189, 184 Fed. 640; *In re Breiner* (D. C., Iowa), 11 Am. B. R. 684, 129 Fed. 155; *In re Dauchy* (D. C., N. Y.), 10 Am. B. R. 527, 122 Fed. 688; *Hudson v. Mercantile Nat. Bank* (C. C. A., 8th Cir.), 9 Am. B. R. 432, 56 C. C. A. 250, 119 Fed. 346; *In re Bemis* (D. C., N. Y.), 5 Am. B. R. 36, 104 Fed. 672; *In re Welch* (D. C., Ohio), 3 Am. B. R. 93, 100 Fed. 65.

Omission of a vested remainder of doubtful value which the bankrupt held in his father's estate, coupled with the bankrupt's testimony that he took nothing under his father's will, constitutes a fraudulent concealment. *In re Becker* (D. C., N. Y.), 5 Am. B. R. 438, 106 Fed. 54.

Failure to surrender life income in a trust fund, although scheduled, will prevent the granting of a discharge. *In re Fleischman* (D. C., Ill.), 9 Am. B. R. 557, 120 Fed. 960.

Surrender of an option to purchase real estate and a failure to mention the same in his schedules will not constitute a concealment of assets in the absence of evidence of a secret trust or agreement that the one to whom the option was surrendered was to hold the property for the benefit of the bankrupt. *In re Kloster* (D. C., Nev.), 17 Am. B. R. 52, 146 Fed. 138.

Assignment of securities to attorney.—

Where bankrupt on the day before filing his petition made an assignment to his attorney of certain pledged securities which he omitted to schedule, and delivered such assignment to the bank holding the securities in pledge after his adjudication, an intention to conceal said securities is made out; and a conditional assignment of said securities subsequently tendered to bankrupt's trustee by the attorney, which would necessitate the bringing of an action against bankrupt to recover his equities therein, will not relieve the bankrupt from the consequences of his act. *In re Doyle* (D. C., N. Y.), 29 Am. B. R. 102, 199 Fed. 247.

238. *In re Breiner* (D. C., Iowa), 11 Am. B. R. 684, 129 Fed. 155; *In re Sussman* (D. C., Pa.), 26 Am. B. R. 18, 190 Fed. 111.

239. *Audubon v. Shufeldt*, 181 U. S. 575, 5 Am. B. R. 829, 45 L. Ed. 1009.

240. *In re Le Claire* (D. C., Iowa), 10 Am. B. R. 733, 124 Fed. 654.

241. *In re Doherty* (D. C., Ct.), 13 Am. B. R. 549, 135 Fed. 432.

242. *Matter of Buchanan* (C. C. A., 2d Cir.), 33 Am. B. R. 638, 219 Fed. 492.

243. *In re Lowenstein* (D. C., N. Y.), 2 Am. B. R. 193, 106 Fed. 51; *In re Becker* (D. C., N. Y.), 5 Am. B. R. 438, 106 Fed. 54.

244. *In re Semmel* (D. C., Pa.), 9 Am. B. R. 351, 118 Fed. 487.

245. *In re Wright* (D. C., N. Y.), 24 Am. B. R. 437, 177 Fed. 578.

months' period, being charged as a fraudulent concealment of assets from the trustee, will prevent the granting of a discharge until the validity of the mortgage and the sufficiency of the foreclosure has been passed upon by a court of competent jurisdiction.²⁴⁶ If a voluntary transfer be made in contemplation of future indebtedness it may amount to a concealment,²⁴⁷ and so also where it appears that property was conveyed in fraud of creditors and is held in secret trust;²⁴⁸ and where a deed executed and recorded more than four months prior to bankruptcy, was in fact a mortgage which was not disclosed until immediately prior to the filing of the petition, there was a concealment of property within the meaning of the act.²⁴⁹ Where the bankrupt remains in possession of the transferred property, and the transfer is merely a device to obtain credit from the use of the transferee's note, the property is fraudulently concealed, and discharge may be denied.²⁵⁰

(2) EVIDENCE OF CONCEALMENT OF ASSETS.—A wilful and fraudulent concealment of assets by a bankrupt need only be shown by a fair preponderance of credible evidence.²⁵¹ The burden of proof rests upon the opposing creditors; they must show by satisfactory evidence the essential elements of a concealment.²⁵² If the testimony is that of the bankrupt alone, and the most that can be said is that the circumstances are suspicious, the objection to a discharge should be overruled.²⁵³ Where objecting creditors have made a *prima facie*

246. In re Olanesky (D. C., N. Y.), 20 Am. B. R. 780, 163 Fed. 428.

247. In re McNamara (Ref., N. Y.), 2 Am. B. R. 579.

248. In re Berner (Ref., Ohio), 4 Am. B. R. 383.

Secret trust.—It has been held on several occasions that where a person, prior to filing a petition in bankruptcy, conveys the whole or a part of his property to a third party to be held in secret trust for himself, and fails to schedule it as a part of his assets, such an act amounts to a fraudulent concealment of assets which will defeat his right to a discharge. Hudson v. Mercantile Nat'l Bank (C. C. A., 8th Cir.), 9 Am. B. R. 432, 436, 119 Fed. 346; In re Bemis (D. C., N. Y.), 5 Am. B. R. 36, 104 Fed. 672; In re Welch (D. C., Ohio), 3 Am. B. R. 93, 100 Fed. 65; In re Becker (D. C., N. Y.), 5 Am. B. R. 438, 106 Fed. 54; Matter of Borg (D. C., Minn.), 25 Am. B. R. 189, 184 Fed. 640.

249. Matter of White (D. C., Ore.), 34 Am. B. R. 803, 222 Fed. 688.

250. Matter of Hagy (C. C. A., 6th Cir.), 34 Am. B. R. 319, 220 Fed. 665.

251. Evidence of concealment.—In re Greenberg (D. C., Ct.), 8 Am. B. R. 94, 114 Fed. 773; In re Howden (D. C., N. Y.), 7 Am. B. R. 191, 111 Fed. 723; In re Gaylord (C. C. A., 2d Cir.), 7 Am. B. R. 1, 112 Fed. 668; In re Tillyer (D. C., Pa.), 17 Am. B. R. 125, 147 Fed. 860. It is not necessary to establish the concealment of assets beyond a reasonable doubt. A fair preponderance of testimony is sufficient. In re Delmour (D. C., N. Y.), 20 Am. B. R. 405, 161 Fed. 589; Klein v. Powell (C. C. A., 3d Cir.), 23 Am. B. R. 494, 174 Fed. 640; In re Mar-

golis (D. C., Mass.), 24 Am. B. R. 934, 181 Fed. 591; In re Cohen (C. C. A., 2d Cir.), 30 Am. B. R. 653, 206 Fed. 457, revg. 29 Am. B. R. 698, 201 Fed. 188; In re Doyle (D. C., N. Y.), 29 Am. B. R. 102, 199 Fed. 247; evidence that a bankrupt knowingly and fraudulently concealed property from his trustee must be clear. Matter of Agnew and Sherman (D. C., N. Y.), 35 Am. B. R. 709, 225 Fed. 650; a willful and fraudulent concealment of assets by a bankrupt need only be shown by a clear preponderance of credible evidence. Matter of Brincat (D. C., Ala.), 37 Am. B. R. 587, 233 Fed. 811.

Sufficiency of evidence.—Although the facts of concealment if proved would render the bankrupt liable to criminal prosecution, yet in an application for a discharge, merely a civil case, the facts proved need not be sufficient to convict of the crime. Matter of Atlas (D. C., Ill.), 34 Am. B. R. 44, 219 Fed. 783.

252. Poff v. Adams, (C. C. A. 4th Cir.), 35 Am. B. R. 307, 226 Fed. 187.

253. In re Kolster (D. C., Nev.), 17 Am. B. R. 52, 146 Fed. 138; Matter of Nadel (D. C., N. Y.) 34 Am. B. R. 727, 211 Fed. 767; Matter of Miller (C. C. A., 2d Cir.), 32 Am. B. R. 397, 212 Fed. 920.

Mere suspicion insufficient.—In the case of In re Taylor (D. C., Ala.), 26 Am. B. R. 143, 149, 188 Fed. 479, 484, the court said: "The denial of the discharge because of fraudulent concealment of assets or of a false oath by the bankrupt must be made out by clear and convincing proof, and is not the subject of mere suspicion or inference."

That fraud may not be presumed does not imply that it may not be proved by circumstances. Matter of Brincat (D. C., Ala.), 37 Am. B. R. 587, 233 Fed. 811.

case the burden is on the bankrupt to so weaken it by credible evidence as to present a question of fact.²⁵⁴ If it appear that the bankrupt did not act in good faith in withholding a part of his property from his creditors, the court will not countenance it by permitting his discharge.²⁵⁵ While fraudulent intent is essential it does not of itself justify a refusal of a discharge where it is not shown that the assets alleged to have been concealed belonged to the bankrupt's estate.²⁵⁶ If it be decided in a prior controversy in the proceedings that the bankrupt was guilty of a concealment of assets, the question of concealment is *res adjudicata* in the proceedings for a discharge, and raises a presumption against the bankrupt.²⁵⁷ The failure of the trustee to prove the whole amount alleged to have been concealed is immaterial in passing on the bankrupt's right to be discharged, as the specifications may be amended to conform to the proof.²⁵⁸

(3) CONTINUING CONCEALMENT.—Concealment being possible only if the person is "a bankrupt," strictly, a concealment accomplished before the bankruptcy is not within the penalty of the statute. This limitation has, however, led to the doctrine of "continuing concealment," which is now generally recognized.²⁵⁹ Although the concealment must have been done while a bank-

254. *In re Leslie* (D. C., N. Y.), 9 Am. B. R. 561, 119 Fed. 406. In this case it was held that an unexplained shrinkage in the bankrupt's assets of about \$12,000 within a year of his bankruptcy is insufficient proof that he had that amount of money at the time of filing his petition and concealed it from his creditors and the trustee. See also *In re Blalock* (D. C., S. Car.), 9 Am. B. R. 266, 118 Fed. 679; *In re Baernkopf* (D. C., Pa.), 9 Am. B. R. 133, 117 Fed. 975; *In re Coppleman* (D. C., Mich.), 30 Am. B. R. 414, 207 Fed. 815.

Undervaluation.—In the case of *In re Sammel* (D. C., Pa.), 9 Am. B. R. 356, 118 Fed. 457, it was held that the bankrupt could not be charged with concealing shares of stock because he had undervalued them, but that fact, as well as the fact that he did not name the stock, was a circumstance of more or less weight on the question of concealment, if there was further evidence to bear it out; *In re Jacobs* (D. C., N. J.), 16 Am. B. R. 482, 144 Fed. 868.

Presumption of concealment arises from failure to account for property in possession of the bankrupt shortly before adjudication, and not included in his schedules. The reasonableness of a bankrupt's explanation of the omission of property from his schedules is in the judicial discretion of the judge. *Matter of Brincat* (D. C., Ala.), 37 Am. B. R. 587, 233 Fed. 811.

255. *In re Breitling* (C. C. A., 7th Cir.), 13 Am. B. R. 126, 133 Fed. 146; *In re Graves* (D. C., Pa.), 26 Am. B. R. 633, 189 Fed. 847.

256. *Vehon v. Ullman* (C. C. A., 7th Cir.), 17 Am. B. R. 435, 147 Fed. 694.

257. *In re Krall* (D. C., Conn.), 28 Am. B. R. 452, 196 Fed. 402.

258. *Matter of Magen* (D. C., Pa.), 33 Am. B. R. 346, 218 Fed. 692.

259. *In re Quackenbush* (D. C., N. Y.), 4

Am. B. R. 274, 102 Fed. 282; *In re Bemis* (D. C., N. Y.), 5 Am. B. R. 36, 104 Fed. 672.

Placing title in wife's name as continuing concealment.—Where a bankrupt, several years previously, had transferred certain real estate, subject to a mortgage, to his wife, without consideration, but without any attempt at concealment, and there was no proof that there was any agreement between them that the bankrupt should retain any interest in such property, the fact that after such transfer the bankrupt continued to live with his wife on this property and other real estate which she purchased, and that he worked for her thereon, without proof, however, that he did more for his wife than his board was worth, was not sufficient to disclose such a secret interest in the property as to sustain the burden imposed upon a creditor objecting to the bankrupt's discharge on the ground of concealment of property. *In re Wermuth* (D. C., N. Y.), 24 Am. B. R. 785, 175 Fed. 1009.

Where the record shows that the bankrupt, having an interest in certain properties, placed the title thereto in his wife's name for the purpose of keeping them out of the reach of the creditors, and she held the title when he filed his schedules, in which he did not include his interest in the properties, he will be refused a discharge, both upon the ground of a fraudulent concealment of assets and of making a false oath. *In re Guilbert* (D. C., Pa.), 22 Am. B. R. 221, 169 Fed. 149.

Concealment of assets of a bankrupt before the appointment of the trustee, and continuing after such appointment, is a concealment from the trustee in violation of the bankruptcy act. *Matter of Brincat* (D. C., Ala.), 37 Am. B. R. 587, 233 Fed. 811.

Conveyances prior to four months' period.—In New York a conveyance of real estate made by a bankrupt long anterior to the

rupt or after discharge, yet where a bankrupt has disposed of property prior to bankruptcy but has possession or control of the proceeds subsequent to adjudication which he fails to disclose, there is a continuing concealment for which he is amenable to the law.²⁶⁰ The word "concealed" is sufficiently elastic to include "continuing concealments."²⁶¹ Such a concealment once begun necessarily continues after the bankruptcy and is, therefore, "from his trustee." Whether it is also of "property belonging to his estate in bankruptcy" is sometimes a difficult question, and usually turns on the *bona fides* of the transaction through which possession and title passed from the bankrupt. No hard and fast rule can be phrased; the cases rest each on its own facts.²⁶²

four months' period, with intent to hinder, delay and defraud creditors, may be alleged as a ground of objection to his discharge, where the conveyance is not recorded until within the four months' period. *Matter of McKane* (D. C., N. Y.), 19 Am. B. R. 103, 155 Fed. 674. But it is no ground for denying a bankrupt's discharge that more than four months prior to the filing of his petition he conveyed to his wife, for full value, certain shares of corporate stock for the purpose of raising money to pay the expenses of an impending suit for breach of promise to marry. *In re Brambaugh* (D. C., Pa.), 12 Am. B. R. 204, 128 Fed. 971.

Proof that the bankrupt, three years prior to bankruptcy, having no other property, conveyed certain real estate, heavily mortgaged, but in which he had an equity of redemption worth from \$10,000 to \$12,000; to his sons for a cash consideration of \$500, and upon the understanding that they would pay his creditors, including themselves, is insufficient, in the absence of evidence that the property was held by the grantees in trust for the bankrupt or his benefit or that he thereafter in any way dealt with the property as his own or directly or indirectly derived any benefit therefrom, to sustain an objection to his discharge upon the ground of a concealment of assets from his trustee. *In re Jacobs* (D. C., N. J.), 16 Am. B. R. 482, 144 Fed. 868.

Where a bankrupt, while insolvent, conveys property to a near relative without consideration and afterward fails to disclose the existence of such property in his schedules, he is *prima facie* guilty of concealing assets from his trustee, although the conveyance may have been made more than four months before the petition was filed; but if, upon the bankrupt's application for discharge, the innocence of the transaction be made to appear, the conveyance and the subsequent omission of the property from the schedules will interpose no obstacle to the discharge. *In re McCann* (D. C., Pa.), 24 Am. B. R. 789, 179 Fed. 575.

Continued after filing petition.—A concealment of property, in order to bar a discharge, must be by the bankrupt, or by his procurement, after the filing of his petition, and from his trustee, or before such filing, and continued after such filing and the ap-

pointment of the trustee, and such concealment must be knowingly and fraudulently done. *Matter of Brincat* (D. C., Ala.), 37 Am. B. R. 587, 233 Fed. 811.

260. *U. S. v. Cohen* (D. C., N. Y.), 15 Am. B. R. 359, 142 Fed. 983, holding that if a bankrupt before the bankruptcy has concealed his property, and after his trustee is appointed continues to conceal it, he is criminally liable under § 29-b; *In re Jacobs & Verstandig* (D. C., Or.), 17 Am. B. R. 470, 147 Fed. 797; *In re James* (D. C., N. Car.), 23 Am. B. R. 703, 175 Fed. 894, *affd. sub nom. James v. Stone*, 24 Am. B. R. 288, 181 Fed. 476.

Evidence of concealment before bankruptcy.—Upon the prosecution of a defendant for "the offence of having knowingly and fraudulently concealed while a bankrupt * * * from his trustees * * * property belonging to his estate in bankruptcy," in violation of section 29b of the Bankruptcy Act, testimony of facts indicating concealment of property before bankruptcy is admissible in proof of its concealment continued and completed after bankruptcy. As evidence of acts committed before bankruptcy is admissible in proof of concealment then begun and thereafter completed, no evidence of acts before bankruptcy is admissible in proof of fraudulent intent with which concealment is completed after bankruptcy. *Glass v. United States* (C. C. A., 3d Cir.), 36 Am. B. R. 550, 231 Fed. 65.

261. *In re Jacobs & Verstandig* (D. C., Or.), 17 Am. B. R. 470, 147 Fed. 797; *James v. Stone* (C. C. A., 4th Cir.), 24 Am. B. R. 288, 181 Fed. 476.

262. *In re March* (D. C., Vt.), 6 Am. B. R. 537, 109 Fed. 602; *In re Adams* (D. C., N. Y.), 4 Am. B. R. 696, 104 Fed. 72; *In re Fitchard* (D. C., N. Y.), 4 Am. B. R. 609, 103 Fed. 742; *In re Jacobs* (D. C., Or.), 17 Am. B. R. 470, 147 Fed. 797. If upon a bankrupt's application for a discharge, the innocence of the transaction be made to appear, the conveyance of property to a near relative and the subsequent omission of such property from the schedules will interpose no obstacle to the discharge. *In re McCann* (D. C., Pa.), 24 Am. B. R. 789, 179 Fed. 575; *In re Doyle* (D. C., N. Y.), 29 Am. B. R. 102, 199 Fed. 247.

(4) MISCELLANEOUS CASES.—In the foot-notes will be found a number of cases, not previously cited, in all of which the commission of the offense of concealment has been alleged.²⁶³

c. A false oath in the proceeding.—(1) IN GENERAL.—Much that has been said in the previous paragraphs applies with equal force here. The oath, if available as an objection to a discharge, must be (1) “in or in relation to any proceeding in bankruptcy.”²⁶⁴ The analogy of this objection to a crime usually compels strict pleading and even stricter proof.²⁶⁵

(2) KNOWINGLY AND FRAUDULENTLY.—The false oath must have been knowingly and fraudulently made.²⁶⁶ That is the statement must contain matter which the bankrupt knew to be false and he must have included them wilfully with intent to defraud.²⁶⁷

(3) WHAT CONSTITUTES FALSE OATH.—The verification of an answer of a bankrupt, containing a false statement and filed after the time allowed by the Bankruptcy Act, does not constitute a false oath.²⁶⁸ The oath may have been

263. Discharge granted.—In re Locks (D. C., N. Y.), 5 Am. B. R. 136, 104 Fed. 783; In re Hirsch (D. C., N. Y.), 3 Am. B. R. 344, 97 Fed. 571; In re Cornell (D. C., N. Y.), 3 Am. B. R. 172, 97 Fed. 29; In re Polakoff (Ref., N. Y.), 1 Am. B. R. 358; In re Lesser (C. C. A., 2d Cir.), 8 Am. B. R. 15, 114 Fed. 83, revg. s. c., 5 Am. B. R. 330, 108 Fed. 205; In re Countryman (D. C., Iowa), 9 Am. B. R. 572, 119 Fed. 637; In re Semmel (D. C., Pa.), 9 Am. B. R. 351, 118 Fed. 487.

Discharge refused.—In re Scheneck (D. C., Wash.), 8 Am. B. R. 727, 116 Fed. 554; In re Bullwinkle (D. C., N. Y.), 6 Am. B. R. 756, 111 Fed. 364; In re Cabus (D. C., N. Y., Ref.), 6 Am. B. R. 156; Ablowich v. Stursburg (C. C. A., 2d Cir.), 5 Am. B. R. 403, 99 Fed. 81, affg. In re Ablowich (D. C., N. Y.), 3 Am. B. R. 586, 99 Fed. 81; Fields v. Karter (C. C. A., 5th Cir.), 8 Am. B. R. 351, 115 Fed. 950; In re Gross (Ref., N. Y.), 5 Am. B. R. 271; In re Heyman (D. C., N. Y.), 4 Am. B. R. 735, 104 Fed. 677; In re Hoffmann (D. C., N. Y.), 4 Am. B. R. 331, 102 Fed. 970; In re Dews (D. C., R. I.), 3 Am. B. R. 691, 96 Fed. 181; In re Holstein (D. C., Ct.), 8 Am. B. R. 147, 114 Fed. 794; In re Greenberg (D. C., Ct.), 8 Am. B. R. 94, 114 Fed. 773; In re Young (D. C., N. Car.), 15 Am. B. R. 477, 140 Fed. 728.

On appeal.—In re Otto (D. C., N. J.), 8 Am. B. R. 305, 115 Fed. 860; Osborne v. Perkins (C. C. A., 1st Cir.), 7 Am. B. R. 250, 112 Fed. 127; In re Covington (D. C., N. Car.), 6 Am. B. R. 373, 110 Fed. 143.

264. Compare, for practice, In re Goodale (D. C., N. Y.), 6 Am. B. R. 493, 109 Fed. 783. The statement in the above case that “the facts relied upon to prove falsity” should be stated does not mean that evidence must be set forth. Matter of Jacob Nathanson (D. C., N. Y.), 19 Am. B. R. 56, 155 Fed. 645 (false oath as to keeping of books). See In re Kretsch (D. C., N. Y.), 22 Am. B. R. 284, 172 Fed. 523, holding that a false oath in the proceedings for discharge is not available to prevent a discharge.

265. In re Howden (D. C., N. Y.), 7 Am. B. R. 191, 111 Fed. 723; In re Gaylord (D. C., N. Y.), 5 Am. B. R. 410, 106 Fed. 833. See also this case on appeal, 7 Am. B. R. 195, 111 Fed. 717. Compare Matter of Remmers (C. C. A., 8th Cir.), 23 Am. B. R. 78, 173 Fed. 484, holding that the objection need only be sustained by such proof as will overcome the presumption of the honest of purpose of the bankrupt; Matter of Agnew and Sherman (D. C., N. Y.), 35 Am. B. R. 709, 715, 225 Fed. 650.

266. In re Bryant (D. C., Tenn.), 5 Am. B. R. 114, 104 Fed. 789; In re Salisbury (D. C., N. Y.), 7 Am. B. R. 771, 113 Fed. 833; In re Beebe (D. C., Pa.), 8 Am. B. R. 597, 116 Fed. 48; In re Cohen (D. C., N. Y.), 18 Am. B. R. 84, 149 Fed. 908; Matter of Luftig (D. C., Mass.), 15 Am. B. R. 773, 162 Fed. 322; Kentucky Nat. Bank v. Carley (C. C. A., 3d Cir.), 12 Am. B. R. 119, 127 Fed. 686. Compare also cases in foot-note, *ante*.

Knowingly and fraudulently.—A specification of objection to a bankrupt's discharge which fails to state, either in the words of the statute or in equivalent phraseology, that bankrupt knowingly “and fraudulently” made a false oath in or in relation to any proceeding in bankruptcy does not set forth the offense defined by section 29 of the Bankruptcy Act, and is insufficient to bar a discharge. In re Mayer (D. C., N. Y.), 28 Am. B. R. 342, 195 Fed. 571.

267. In re Hale (D. C., N. Mex.), 31 Am. B. R. 88, 206 Fed. 856.

Purpose of deceiving trustee.—A specification in opposition to a bankrupt's discharge, that he knowingly and fraudulently made a false oath, is shown to be material, where it appears that the oath was made for the purpose of deceiving the trustee, concealing the assets of the bankrupt, and preventing a discovery thereof. Matter of White (D. C., Ore.), 34 Am. B. R. 803, 222 Fed. 688.

268. In re Young (D. C., N. Car.), 15 Am. B. R. 477, 140 Fed. 728.

made by the bankrupt in a bankruptcy proceeding other than his own.²⁶⁹ A discharge in bankruptcy cannot be denied on the ground that the testimony of the bankrupt was evasive, and may have been false.²⁷⁰

(4) OATH TO SCHEDULES OMITTING PROPERTY.—A common instance is where a bankrupt swears that his schedule of property is a statement of "all his estate, both real and personal," and he has knowingly or fraudulently omitted assets therefrom.²⁷¹ If the items were omitted because of mistake or the honest advice of counsel, to whom the bankrupt had disclosed all the facts relative to such items, the oath will not be deemed wilfully false, and the discharge should not be denied because of it.²⁷² The evidence must be definite and certain to the effect that the property omitted should have been scheduled as part of the bankrupt's assets.²⁷³ A bankrupt, who omits from his sworn schedule

269. *Matter of Lesser* (C. C. A., 2d Cir.), 36 Am. B. R. 833, 234 Fed. 65.

270. *In re Cohen* (D. C., N. Y.), 18 Am. B. R. 84, 149 Fed. 908.

Where a bankrupt, at the first meeting of creditors, made evasive answers to inquiries concerning his insolvency at a certain time, and even made some statements which were not true, but admitted as soon as the question was squarely put to him, that he was insolvent at that time, sufficient cause does not exist for the denial of his discharge on the ground of making false oath. *In re Marcus & Scherr* (D. C., N. Y.), 27 Am. B. R. 164, 192 Fed. 743, *affd.* 30 Am. B. R. 176, 203 Fed. 29.

Former determination as to false oath; effect.—A prior adjudication that the bankrupt had made a false oath, and his summary punishment for contempt, are to be considered as *prima facie* establishing a specification of objection to his discharge, interposed on the ground that he had made such false oath, but opportunity should not be denied him of showing in the discharge proceedings that the offense of making a false oath was not knowingly and fraudulently committed, nor should he be prevented from making further explanation of his testimony, or from showing that he did not make a willful misstatement. *In re Shear* (D. C., N. Y.), 29 Am. B. R. 688; 201 Fed. 460.

271. *In re Breiner* (D. C., Iowa), 11 Am. B. R. 684, 129 Fed. 155; *In re Gailey* (C. C. A., 7th Cir.), 11 Am. B. R. 539, 127 Fed. 538; *In re Rauchenplat* (D. C., Porto Rico), 9 Am. B. R. 763; *In re Semmel* (D. C., Pa.), 9 Am. B. R. 351, 118 Fed. 487; *Barton v. Texas Produce Co.* (C. C. A., 8th Cir.), 14 Am. B. R. 502, 136 Fed. 355; *In re Herman* (C. C. A., 2d Cir.), 13 Am. B. R. 778, 69 C. C. A. 413, 134 Fed. 566; *In re Schofield* (D. C., Pa.), 17 Am. B. R. 916, 147 Fed. 862; *In re Gilbert* (D. C., Pa.), 22 Am. B. R. 221, 169 Fed. 149; *Matter of Cooper* (C. C. A., 2d Cir.), 38 Am. B. R. 589, 230 Fed. 991.

False oath to schedules.—Where a bankrupt, in his schedules, states that he had no money or property except \$10 in cash, when in fact he was the owner of nine head of cattle and had in his possession \$861 in

cash, which he failed to schedule, but afterward surrendered to his trustee by order of the referee, he will be denied a discharge upon the ground of having made a false oath to his schedules. *Matter of Napier* (Ref., Ky.), 23 Am. B. R. 560.

Where it appears that a bankrupt has concealed assets, which have not been listed in his schedules, he will be deemed to have taken a false oath when he swore to the truth of the schedules. *In re Cantor* (Ref., D. C., N. Y.), 26 Am. B. R. 859.

False oath as to interest in real property.—Where it appears that by statute a bankrupt has a life estate in one-third of his wife's real estate, that such property was purchased by his wife with his own savings; that, although he claims to hold the property merely as trustee for his children, he has in many instances held it out as his own, his oath to the effect that he has no such interest will be held to have been made knowingly and will prevent his discharge. *In re Hale* (D. C., New Mex.), 31 Am. B. R. 88, 206 Fed. 856.

Property fraudulently transferred.—Bankrupts by omitting to list property fraudulently transferred in their schedules are guilty of making a false oath for which their discharge should be denied. *Matter of Aymo and Barathia* (Ref., D. C., N. Y.), 35 Am. B. R. 13.

272. *Matter of Stafford* (D. C., Conn.), 35 Am. B. R. 747, 221 Fed. 127.

273. Evidence.—*In re Hamilton* (D. C., N. Y.), 13 Am. B. R. 333, 133 Fed. 823; *In re Ferris* (D. C., Iowa), 5 Am. B. R. 246, 105 Fed. 356; *In re Fitchard* (D. C., N. Y.), 4 Am. B. R. 609, 103 Fed. 742; *In re Boyden* (D. C., Pa.), 13 Am. B. R. 269, 132 Fed. 991, holding that discrepancy between statement of his financial condition made prior to bankruptcy and his schedules is not necessarily evidence of a false oath.

An objection to a bankrupt being granted a discharge, on the ground that he had knowingly and with fraudulent intent made a false oath to his schedules, need only be sustained by proof such as will overcome the presumption as to his honesty of purpose. *Matter of Remmers* (C. C. A., 8th Cir.), 23 Am. B. R. 78, 173 Fed. 484.

securities which are absolutely worthless, is not guilty of making a false oath.²⁷⁴ If the securities omitted are deemed valuable by the bankrupt, evidenced by an effort made to recover them by suit against a pledgee, brought subsequent to the bankrupt's adjudication, his discharge should be denied.²⁷⁵ It thus appears that the omission of property from verified schedules may be both a false oath and a concealment.²⁷⁶ What has already been said in respect to wilful and fraudulent omission of items from schedules constituting concealment, applies here with equal force.

(5) FALSE OATH ON FORMER EXAMINATION UNDER § 7 (9).— This same analogy has led to much confusion concerning the right to predicate such an objection on a false oath during the bankrupt's examination. It seems not to be doubted that this objection may rest on any oath voluntarily taken,²⁷⁷ but it has been vigorously denied that a false oath under compulsion can be made the basis of an objection to a discharge. The earlier cases were quite uniform that it could not; this on the ground that, by § 7 (9), the evidence then adduced could not be used against a bankrupt in a criminal proceeding.²⁷⁸ This view has, however, now been exploded.²⁷⁹ It is a torturing of words to call a proceeding on discharge a criminal proceeding, merely because the same facts if proven in support of an indictment might result in conviction for crime. The contention that to permit the use of such testimony "would set a trap for the debtor" has been well answered by a distinguished judge to the effect that the opposite rule "would set a trap for the creditors, or else so set the trap that the debtor could get all the bait (the discharge) and yet not spring the trap."²⁸⁰

(6) OTHER INSTANCES OF FALSE OATH.— The false oath must be on a matter material to the inquiry,²⁸¹ and it has been held that it must have been made in the proceedings in which the bankruptcy of the petitioner was to be adjudicated and his estate administered.²⁸² But, if a false oath was due to a mistake in fact or the result of honest advice of counsel, a discharge will not usually

274. In re McOrea (C. C. A., 2d Cir.), 20 Am. B. R. 412, 161 Fed. 246.

Value of property not scheduled.— Where a bankrupt, after turning over to his wife a plumbing business, had its full management and control, and had drawn but from \$2 to \$4 a week for his services, which were reasonably worth \$10 to \$20 a week, it cannot be charged that he made a false oath in omitting from his schedules a claim against his wife for services where the specifications of objection to his discharge, alleging the above facts, fail to set forth the existence of a valid claim against the wife. In re Adams (D. C., N. Y.), 22 Am. B. R. 613, 171 Fed. 599.

275. Matter of Remmers (C. C. A., 8th Cir.), 23 Am. B. R. 78, 173 Fed. 484; In re Sussman (D. C., Pa.), 26 Am. B. R. 18, 190 Fed. 111.

276. In re Becker (D. C., N. Y.), 5 Am. B. R. 438, 106 Fed. 54.

277. See reasoning in cases immediately post.

278. In re Goldsmith (D. C., Pa.), 4 Am. B. R. 234, 101 Fed. 570; In re Marx (D. C., Ky.), 4 Am. B. R. 521, 102 Fed. 676; In re Logan (D. C., Ky.), 4 Am. B. R. 525, 102 Fed. 876.

279. In re Dow (D. C., Iowa), 5 Am. B. R. 400, 105 Fed. 889; In re Gaylord (D. C.,

Mo.), 7 Am. B. R. 195, 111 Fed. 117, affg. s. c., 5 Am. B. R. 410, 106 Fed. 833.

280. In re Dow (D. C., Iowa), 5 Am. B. R. 400, 105 Fed. 889.

281. Compare, for testimony in State court, In re Eaton (D. C., N. Y.), 6 Am. B. R. 531, 110 Fed. 731; and, to effect that testimony other than by the bankrupt is inadmissible, In re Wilcox (C. C. A., 2d Cir.), 6 Am. B. R. 362, 109 Fed. 628; In re Strouse, 2 N. B. N. Rep. 64; In re Huber, 1 N. B. N. 431; In re Chamberlain (D. C., N. Y.), 25 Am. B. R. 37, 180 Fed. 304. See cases cited Am. Bankr. Dig., § 1011.

282. False oaths should relate to matters material to the bankruptcy proceedings in order to be interposed as objections to a discharge. In re Chamberlain (D. C., N. Y.), 25 Am. B. R. 37, 180 Fed. 301; In re Marcus & Scherr (D. C., N. Y.), 27 Am. B. R. 164, 192 Fed. 743, affd. 30 Am. B. R. 176, 203 Fed. 29. Thus, a false oath made by the bankrupt, prior to his adjudication in a bankruptcy proceeding, against a corporation of which he was an officer and stockholder, is not ground for refusing his discharge. In re Blalock (D. C., S. Car.), 9 Am. B. R. 266, 118 Fed. 679; In re Marcus (C. C. A., 2d Cir.), 30 Am. B. R. 176, 203 Fed. 29.

Perjury of a bankrupt in a proceeding for his discharge is not ground for depriving

be refused.²⁸³ Statements by bankrupt on examination before the referee that he had no property not scheduled, when it appeared that he had transferred valuable property within the four months' period with intent to defraud his creditors, constitute a false oath, barring his discharge.²⁸⁴ A bankrupt, who at the first meeting of creditors swears positively that he had never made a statement of financial condition to any one, when in fact he had made such a statement a very short time before, is guilty of knowingly and fraudulently making a false oath, which constitutes a bar to his discharge.²⁸⁵ Cases where the bankrupt swears falsely to an account in the proceeding are rare. Usually such an oath would also amount to a false oath proper, and might often be a concealment. There are as yet no authorities in point. Additional cases where this ground of objection has been considered will be found in the foot-note.²⁸⁶

VII. FAILURE TO KEEP, DESTRUCTION OR CONCEALMENT OF BOOKS.

a. In general.—A bankrupt who, "with intent to conceal his financial condition, destroyed, concealed or failed to keep books of accounts or records from which such condition might be ascertained" is not entitled to a discharge.²⁸⁷ The amendatory act of 1903 materially modified the original law, and greatly altered the essential elements of pleading and proof. We have indicated these changes in the notes to the text of section 14.²⁸⁸ The subdivision in its original form was highly objectionable, in particular, in that it required proof that the act complained of was "in contemplation of bankruptcy,"²⁸⁹ which was held to mean in contemplation of a bankruptcy proceeding. This requirement has been dropped out.²⁹⁰ So have the adjectives "fraudulent," as perhaps nar-

him of the discharge itself, but he is guilty of a contempt of court and may be punished therefor. *In re Kretsch* (D. C., N. Y.), 22 Am. B. R. 284, 172 Fed. 523.

Materiality of false oath.—A false oath is not a bar to a discharge unless it constitutes an offense punishable by imprisonment. Testimony as to property, which can have no interest to the estate and no bearing on the estate's condition, is not material in a bankruptcy case. *Matter of Huber* (Ref., D. C., N. D.), 34 Am. B. R. 100.

283. *In re Eaton* (D. C., N. Y.), 6 Am. B. R. 531, 110 Fed. 731; or if it appears that an erroneous statement was subsequently corrected by the bankrupt. *In re Doyle* (D. C., N. Y.), 29 Am. B. R. 102, 199 Fed. 247; *Matter of Stafford* (D. C., Conn.), 35 Am. B. R. 747, 221 Fed. 127; *Matter of Levy* (D. C., N. Y.), 36 Am. B. R. 181, 227 Fed. 1011.

284. *Poff v. Adams* (C. C. A., 4th Cir.), 35 Am. B. R. 307, 226 Fed. 187.

285. *Matter of Zoffer* (C. C. A., 2d Cir.), 33 Am. B. R. 652, 211 Fed. 936.

False statement to mercantile agency; false oath.—False testimony, given by a bankrupt as to a false statement made by him to a mercantile agency, is "in relation to" a "proceeding in bankruptcy," within the meaning of section 29b(2) of the Bankruptcy Act, and is a bar to a discharge, although it does not appear that any creditor relied upon the false statement to the mercantile agency. *Matter of Sheinberg* (D. C., N. Y.), 35 Am. B. R. 132, 223 Fed. 218.

286. Discharges granted.—*Bauman v. Feist* (C. C. A., 8th Cir.), 5 Am. B. R. 703, 107 Fed. 83; *In re Crenshaw* (D. C., Ala.), 2 Am. B. R. 623, 95 Fed. 632; *In re Bates* (D. C., Conn.), 5 Am. B. R. 848, 125 Fed. 1007; *In re Troeder* (C. C. A., 1st Cir.), 17 Am. B. R. 723, 150 Fed. 710. But compare *In re Roy* (D. C., Vt.), 3 Am. B. R. 37, 96 Fed. 400; and *Sellers v. Bell* (C. C. A., 5th Cir.), 2 Am. B. R. 529, 94 Fed. 801.

Discharges refused.—*In re Grossman* (D. C., Mich.), 6 Am. B. R. 510, 111 Fed. 507; *In re Gamman* (D. C., Iowa), 6 Am. B. R. 482, 109 Fed. 312; *In re Lesser Bros.* (D. C., N. Y.), 5 Am. B. R. 330, 108 Fed. 205 (revd. on appeal, 8 Am. B. R. 15, 114 Fed. 83); *In re Lewin* (D. C., Vt.), 4 Am. B. R. 636, 103 Fed. 852; *In re Lowenstein* (D. C., N. Y.), 2 Am. B. R. 193, 106 Fed. 51; *In re Williams*, 2 N. B. N. Rep. 206; *In re Goodman* (D. C., Pa.), 22 Am. B. R. 570, 171 Fed. 287; *Broomfield v. Lehman* (C. C. A., 1st Cir.), 32 Am. B. R. 456, 215 Fed. 97.

287 Bankr. Act, § 14-b(2), *ante*.

288. See *ante*, p. 335.

289. *In re Spear* (D. C., Vt.), 4 Am. B. R. 617, 103 Fed. 779; *In re Marx* (D. C., Ky.), 4 Am. B. R. 521, 102 Fed. 676; *In re Morgan* (D. C., Ark.), 4 Am. B. R. 402, 101 Fed. 982; *In re Berkowitz* (Ref., N. Y.), 4 Am. B. R. 37; *Van Ingen v. Schophofen* (C. C. A., 8th Cir.), 12 Am. B. R. 24, 129 Fed. 352. But see *In re Feldstein* (C. C. A., 2d Cir.), 8 Am. B. R. 160, 115 Fed. 259.

290. The reasons for these changes are indicated in a Report of the Executive Com-

rowing the meaning of "intent," and "true," as redundant when limiting the words "financial condition." These changes, however, by no means bring the law in this regard up to the level of its predecessor. It is still necessary to show that the failure to keep books was "with the intent to conceal his true financial condition."²⁹¹ The former law, like the English law, made mere failure by a merchant or tradesman to keep proper books of account an objection to his discharge; proof of intent was essential only when falsifying books was charged.²⁹² To sustain this objection, the proof must now show that (1) the act complained of was done after the passage of the bankruptcy law, (2) by the bankrupt or by some one acting under his direction, (3) with intent to conceal his financial condition; and (4) the act must consist of either destruction, concealment — which, as has been seen, includes secreting, falsifying, and mutilating²⁹³ — or failure to keep books of account or records from which the bankrupt's condition might be ascertained.²⁹⁴

b. Act committed after passage of law.— The first of these elements flows by implication from the words of the law.²⁹⁵ For instance a loss or disappearance of books prior to the enactment of the bankruptcy act will not justify a finding that there has been a failure to keep books with the intent to conceal the financial condition of the bankrupt.²⁹⁶ The bankrupt's failure to enter loans in the books or records of his business is not excused by the fact that the loans were made before the bankruptcy act was passed.²⁹⁷

c. Act by bankrupt.— It is also clear that the act complained of must have been committed by the bankrupt or by some one acting under his direction.²⁹⁸ If the bankrupt leaves the keeping of books of account to his wife or an agent he is responsible for a failure to keep proper books, if such failure was the natural result of the bankrupt's own acts.²⁹⁹ Where it appears that the bank-

mittee of the National Association of Referees in Bankruptcy published in March, 1900, as follows: "The necessity of proving intent to conceal condition, coupled with the still more difficult element of 'contemplation of bankruptcy,' which means bankruptcy *per se*, and not mere insolvency, has rendered this objection all but useless." See *In re Alvord* (D. C., Conn.), 14 Am. B. R. 264, 135 Fed. 236.

^{291.} *In re Burstein* (D. C., Conn.), 20 Am. B. R. 399, 160 Fed. 765; *In re Griffin Bros.* (D. C., Ala.), 19 Am. B. R. 78, 154 Fed. 537; *Matter of Acomb* (Ref., D. C., Ohio), 33 Am. B. R. 854.

"It would seem as if the purpose of the amendment was merely to relieve those objecting to the granting of a discharge from being required to prove that the intent with which a bankrupt was concealing his true financial condition was a fraudulent one, that is, accompanied by, or in pursuance of, a design actually to defraud; now, it is sufficient if he has the intent to conceal his financial condition from his creditors, because it would be presumed that the existence of such intent was with the design of perpetrating a fraud." *Matter of Hindin* (D. C., Cal.), 34 Am. B. R. 114, 219 Fed. 605.

^{292.} Law of 1867, § 29, R. S., § 5,110.

^{293.} See *Bankr. Act*, § 1 (22).

^{294.} *Baylor v. Rawlings* (C. C. A., 8th Cir.), 28 Am. B. R. 773, 200 Fed. 731.

^{295.} *In re Shertzger* (D. C., Pa.), 3 Am. B. R. 699, 99 Fed. 706; *In re Lieber* (Ref., Pa.), 3 Am. B. R. 217; *In re Carmichael* (D. C., Iowa), 2 Am. B. R. 815, 96 Fed. 594; *In re Shorer* (D. C., Conn.), 2 Am. B. R. 165, 96 Fed. 90; *In re Stark* (Ref., N. Y.), 1 Am. B. R. 180; *In re Polakoff* (Ref., N. Y.), 1 Am. B. R. 358.

^{296.} *In re Prager* (D. C., W. Va.), 13 Am. B. R. 527, 134 Fed. 1006.

^{297.} *In re Feldstein* (C. C. A., 2d Cir.), 8 Am. B. R. 160, 115 Fed. 259.

^{298.} *In re Hyman* (D. C., N. Y.), 3 Am. B. R. 169, 97 Fed. 195, in which case it appeared that the business of a bankrupt was conducted entirely by her husband; he intentionally and fraudulently failed to keep true books of account from which her financial condition could be ascertained, and it was held that his fraud could not under these circumstances be imputed to her and her discharge should be granted.

^{299.} *Matter of Jambautz* (C. C. A., 3d Cir.), 34 Am. B. R. 105, 219 Fed. 876, affg. 32 Am. B. R. 501; *Matter of Landersmaro* (D. C., N. J.), 38 Am. B. R. 685.

Inability of bankrupt.— A bankrupt, who was unable to read or write, and who knew nothing about modern methods of bookkeeping and entrusted it to his daughter who had

rupt's books were left by him in his office subject to the control of the trustee, he should not be charged with their concealment, in the absence of proof connecting him with the transaction.³⁰⁰ Books left in the bankrupt's safe, of which no one knew the combination but himself, and which remained intact until it came into the hands of the receiver, will be presumed to have been taken out by the bankrupt, and his discharge will be denied.³⁰¹ It has been held that a falsifying of books by the bankrupt's partner is not an objection to his discharge.³⁰² Although if he destroys or mutilates books of a partnership of which he is a member, his discharge should be refused.³⁰³

d. Intent to conceal financial condition.—The act complained of must have been done by the bankrupt with intent to conceal his financial condition.³⁰⁴ This means that the act must have been committed "knowingly."³⁰⁵ The omission of the word "fraudulent" by the amendment of 1903 relieves objecting creditors of the necessity of proving specific acts disclosing "fraudulent intent."³⁰⁶ Mere *scienter* and a purpose to conceal financial condition without the additional purpose of intent to defraud by such concealment are enough. Mere failure to keep books and records is not enough.³⁰⁷ But if the failure to keep such books is with an intent to conceal the bankrupt's financial condition, the offense is established,³⁰⁸ and an allegation in the specifications of objections to the effect that the bankrupt did with intent to conceal his financial condition fail to keep books of account or records from which such condition might be ascertained, is sufficient, although it did not specify what

been in the habit of opening a new set of books each year and destroying the old set, without any guilty intent, should not be denied a discharge under section 14b (2) of the Bankruptcy Act. *Matter of Rosenthal* (C. C. A., 2d Cir.), 36 Am. B. R. 693, 231 Fed. 449.

300. *In re Eades* (C. C. A., 7th Cir.), 16 Am. B. R. 30, 143 Fed. 293.

301. *Matter of Lewin* (D. C., N. Y.), 18 Am. B. R. 72, 155 Fed. 501.

302. *In re Schultz, Jr.* (D. C., N. Y.), 6 Am. B. R. 91, 109 Fed. 264; *In re Garrison* (C. C. A., 2d Cir.), 17 Am. B. R. 831, 149 Fed. 178, holding that a bankrupt will not be refused a discharge upon the ground that he failed to keep proper books of account, showing the condition of a firm whose business was conducted by one of his partners in a distant State, and whose books were never under his control during the year the partnership was in existence.

303. *In re Conley* (D. C., Ga.), 9 Am. B. R. 496, 120 Fed. 42.

304. *In re Burstein* (D. C., Conn.), 20 Am. B. R. 399, 160 Fed. 765; *In re Griffin Bros.* (D. C., Ala.), 19 Am. B. R. 78, 154 Fed. 537; *Godschalk v. Sterling* (C. C. A., 3d Cir.), 12 Am. B. R. 302, 129 Fed. 580; *In re Allendorf* (D. C., Iowa), 12 Am. B. R. 320, 129 Fed. 981; *In re Rauchenplat* (D. C., Porto Rico), 9 Am. B. R. 764; *In re Feldstein* (C. C. A., 2d Cir.), 8 Am. B. R. 160, 115 Fed. 259; *Matter of Napier* (Ref., Ky.), 23 Am. B. R. 560; *In re Bradin* (D. C., Pa.), 24 Am. B. R. 793, 179 Fed. 768; *In re Tanner* (D. C., Wash.), 27 Am. B. R. 615, 192 Fed. 572; *Matter of Barthier* (D.

C., Mass.), 33 Am. B. R. 900, 188 Fed. 394; *Matter of Silverstein* (D. C., N. Y.), 34 Am. B. R. 479, 225 Fed. 665.

305. *In re Allendorf* (D. C., Iowa), 12 Am. B. R. 320, 129 Fed. 981; *In re Mackenzie* (D. C., Conn.), 12 Am. B. R. 605, 132 Fed. 114.

306. *Matter of Chass* (D. C., Pa.), 37 Am. B. R. 734.

307. *In re Blalock* (D. C., So. Car.), 9 Am. B. R. 266, 118 Fed. 679; *In re Keefer* (D. C., N. Y.), 14 Am. B. R. 290, 135 Fed. 885; especially where it appears that the bankrupt had not been engaged in business for more than three years prior to the enactment of the bankruptcy act. *In re Prager* (D. C., W. Va.), 13 Am. B. R. 527, 134 Fed. 1,006.

Intent not to be presumed from either bad bookkeeping or mere failure to keep books. *In re Brockman* (D. C., Ky.), 21 Am. B. R. 251, 168 Fed. 1015.

The mere failure to keep books is not enough to justify the refusal of a discharge, but the omission must have been accompanied by a specific intent on the part of the debtor to conceal his financial condition, the burden being upon the objecting creditors to prove this intent. *In re Brown* (D. C., N. Y.), 29 Am. B. R. 73, 199 Fed. 356; *Sherwood Shoe Co. v. Wix* (C. C. A., 4th Cir.), 38 Am. B. R. 670.

308. *In re Goldich* (D. C., Pa.), 21 Am. B. R. 249, 164 Fed. 882; *In re Hanna* (C. C. A., 2d Cir.), 21 Am. B. R. 843, 168 Fed. 238; *In re Schachter* (D. C., N. Y.), 22 Am. B. R. 389, 170 Fed. 683, holding that where within the four months' period, a

books of account the bankrupt should have kept.³⁰⁹ The act proclaims the presumption and intent of the law that honest merchants will keep account books which will disclose their true financial condition. If the evidence shows that a business was conducted without books of account so that nothing could be ascertained as to the bankrupt's purchases and sales, or the disposition of the proceeds of such sales, the intent to conceal the financial condition of the bankrupt will be presumed.³¹⁰ But no particular system of bookkeeping is required. The books kept may be as faulty and deficient as to in fact *deceive* creditors, but if they have not been so kept with the *purpose* to deceive the

bankrupt firm purchased certain goods not of a kind in which he dealt, and no reasonable excuse for its failure to make any entry of such purchase in its books of account is assigned, the presumption is that it intended to conceal its financial condition, and the individual partners are not entitled to a discharge; *In re Sabsevitz* (D. C., N. Y.), 28 Am. B. R. 623, 197 Fed. 109.

Intent to conceal; what constitutes.—In the case of *In re Marcus & Scherr* (D. C., N. Y.), 27 Am. B. R. 164, affd. 30 Am. B. R. 176, the court said: "The intent to conceal one's financial condition is a separate fact from the keeping of the books. The reasonable consequences of keeping imperfect books may be a concealment of one's financial condition, if the occasion ever arises when they are scrutinized, and that fact would be enough to charge one with responsibility for that result, if the law forbade keeping imperfect books. The general intent of the criminal law is of this kind, it only means that the actor must be aware of his acts and then charges him with much consequences as would naturally follow them, regardless of whether he had these in mind or not. When, however, as is sometimes the case, the law attaches no responsibility to an act unless the actor does have in mind the specific consequences, it is necessary as an additional element to prove that state of mind. This is such a case. Moreover, since the intent to conceal is different from the intent to keep imperfect books, the objectors must go further than to show merely that the bankrupts intended to keep the kind of books they kept; for they must show also that they intended these books to conceal from somebody—which must be their creditors—their financial condition. That involves not only knowledge of how the books were kept, but some anticipation that at a future time they might be examined by creditors and would then fail to enlighten them upon all the facts." *In re Weston* (C. C. A., 2d Cir.), 30 Am. B. R. 647, 206 Fed. 281, holding that failure of broker to record sales, etc., in books shows intent to conceal financial condition.

Where there was no evidence to show that bankrupts intended to conceal their financial condition by failing to keep sufficient books of account, and it appeared that they employed a thoroughly competent bookkeeper and left the books in his charge without

themselves interfering with the manner in which he performed his duties, they should not be refused a discharge, even if their financial condition could not be accurately determined from the books. *In re Marcus* (C. C. A., 2d Cir.), 30 Am. B. R. 176, 203 Fed. 29, affg. 27 Am. B. R. 164, 192 Fed. 743.

Presumption against intent to conceal financial condition.—Where from certain acts and omissions, two inferences may be drawn, the one pointing to a guilty or bad intent and the other perfectly consistent with honesty and absence of a bad purpose, it is the duty of the court to find in favor of honesty and absence of intent; and where the evidence upon objections to a bankrupt's discharge, on the ground that he failed to keep books of account with intent to conceal his financial condition, will justify a finding either way, the appellate court will not interfere with a finding in favor of the bankrupt made by the referee who had the bankrupt before him, heard him testify and noted his manner. *In re Brown* (D. C., N. Y.), 29 Am. B. R. 73, 199 Fed. 356.

309. *Godshalk Co. v. Sterling*, (C. C. A., 3d Cir.), 12 Am. B. R. 302, 129 Fed. 580; *In re Ginsburg* (D. C., Pa.), 12 Am. B. R. 459, 130 Fed. 627; *In re Patterson* (D. C., N. Y.), 10 Am. B. R. 371, 121 Fed. 921. But see *Milgraum v. Ost* (D. C., Pa.), 12 Am. B. R. 306, 129 Fed. 827.

310. *McKibbin v. Haskell* (C. C. A., 8th Cir.), 28 Am. B. R. 588, 198 Fed. 639; *In re Koelle* (D. C., Pa.), 22 Am. B. R. 515, 171 Fed. 257; *In re Hanna* (C. C. A., 2d Cir.), 21 Am. B. R. 843, 168 Fed. 238; *Matter of Newbury & Durham* (C. C. A., 2d Cir.), 31 Am. B. R. 365, 209 Fed. 195; *Matter of Landersman* (D. C., N. J.), 38 Am. B. R. 685.

Failure to keep books.—A proprietor of a large department store who for two months after a competent bookkeeper had left his employ, failed to have the books kept so that his financial condition could be ascertained, is chargeable with intending the natural and probable consequences of his acts and omissions so as to bar a discharge. *Matter of Janavitz* (C. C. A., 3d Cir.), 34 Am. B. R. 105, 210 Fed. 876, affg. 32 Am. B. R. 501.

If, in the absence of evidence, to overcome the presumption that a bankrupt intended the natural and probable consequences of his acts and omissions, the court, from all the facts and circumstances, is of the opinion

inhibition of the statute does not apply.^{310a} The failure of an illiterate bankrupt, who was engaged in a small business, to keep books of account will not raise the presumption that he intended to conceal his financial condition.³¹¹ The failure of the superintendent of a mine to keep books of account, which are not required by his personal business, does not indicate a fraudulent intent for which he may be denied his discharge.³¹² And so too the destruction of important books kept by a bankrupt in a business which would ordinarily require such books to be kept, the necessary result of which was to conceal his true financial condition, will be presumed to have been intentional.³¹³ In either a failure to keep or a destruction of books of accounts, the bankrupt's intent to conceal his financial condition will be presumed if such was the natural and provable consequences of his conduct.³¹⁴ But it has been suggested that a rule which raises a presumption of intent to conceal from a mere failure to keep books or to keep them properly, is too strict against the bankrupt, and that in every case the intent to conceal should affirmatively appear.³¹⁵

that the bankrupt's failure to keep books and records was not with intent to conceal his financial condition, a discharge should not be refused. *Matter of Arnold* (D. C., N. J.), 35 Am. B. R. 740, 228 Fed. 75. Compare *Sheinberg & Weisberg v. Hoffman* (C. C. A., 3d Cir.), 38 Am. B. R. 24.

310a. *Sherwood Shoe Co. v. Wix* (C. C. A., 4th Cir.), 38 Am. B. R. 670.

311. *Matter of Pinsker* (Ref., N. Y.), 25 Am. B. R. 494.

Small business transaction.—Transactions of a building contractor, conducting a small business for a few months, examined and held that his failure to keep books or records was not with intent to conceal his financial condition, and that a discharge should not be denied him. *Matter of Arnold* (D. C., N. J.), 35 Am. B. R. 740, 228 Fed. 75.

312. **Business not requiring accounts.**—Where the bankrupt was engaged in the business of promoting mines, which did not require any elaborate accounts, it appearing that he had no office or fixed place of residence where books might be kept, that he had no employees, and that each one of his mining deals was separate and complete in itself, his practice to rely entirely upon pocket memoranda, noting upon these memoranda the deposits and withdrawals from his bank account, and having his bank book balanced each month, was sufficient to disclose substantially the state of his financial affairs and would not warrant a finding that the failure to keep more complete records arose from any intention upon his part to conceal his financial condition. *In re Howard* (C. C. A., 2d Cir.), 24 Am. B. R. 841, 180 Fed. 399; *In re McCrea* (C. C. A., 2d Cir.), 20 Am. B. R. 412, 161 Fed. 246.

313. *Matter of Acornb* (Ref., D. C., N. Y.), 33 Am. B. R. 854; *In re Hodge* (D. C., N. Y.), 30 Am. B. R. 522, 205 Fed. 824, in which the court says: "It is quite true that a mere failure to keep books or records or the mere destruction of those kept is not sufficient to justify the court in refusing a discharge. There must be circumstances and

conditions from which the inference ought to be drawn and necessarily should be drawn that such failure or destruction was 'with intent to conceal his financial condition.' Here no other inference can reasonably be drawn from the destruction of this stub book and these paid checks. It is evident that the now bankrupt, then bankrupt in fact, destroyed these records, stub books, and checks for the purpose of concealing from his creditors the disposition he had made of this money. There was no other reason for the act. If he paid it out to creditors, workmen, or for material, he knew where the most of it went and he should have shown where it went and for what purpose.

"Under such circumstances, a mere general statement of the bankrupt is not sufficient to show absence of intent to do that which the act itself, under the circumstances shown, necessarily results in. A sane intelligent man is presumed to intend the natural, probable and well-known consequences of his own willful acts."

Inference of intent.—Where it is established that a bankrupt failed to keep proper books of account, the court may infer an "intent to conceal his financial condition," within the meaning of section 14b (2) of the bankruptcy act. It is not necessary to prove that the bankrupt's intent was fraudulent or that his acts were done in contemplation of bankruptcy. *Matter of Linker* (D. C., N. Y.), 33 Am. B. R. 709, 222 Fed. 173.

314. **Presumption against bankrupt.**—It is not necessary for a creditor to prove the failure of the bankrupt to keep books of account where such books were necessary and proper. When satisfactory evidence of such fact is produced, the law determines the intent to have existed because the bankrupt must be presumed to have intended to conceal his financial condition if such were the natural and probable consequences of his failure to keep books. *Matter of Chass* (D. C., Pa.), 37 Am. B. R. 734.

315. *Matter of Hindin* (D. C., Cal.), 34 Am. B. R. 114, 219 Fed. 605. Citing *In re*

e. **What constitutes failure, destruction or concealment.**—The statute itself indicates what will constitute the offense. "Conceal" includes "secrete, falsify and mutilate."³¹⁶ The phrasing here is even broader than was that of the law of 1867. Any act or series of acts with relation to business records which may reasonably be held to be within the meaning of "destruction," "concealment," "secreting," "falsifying," "mutilation," or "failure to keep" will be within the interdiction of the law. Where a man of business experience and intelligence conducting a business ordinarily requiring books to be kept, fails to keep them, it will be presumed that he intended to conceal his financial condition.³¹⁷ No particular form or method of keeping books is required; it will be sufficient if the accounts are kept in such a way as to show the bankrupt's financial condition.³¹⁸ The test is this: If a competent accountant can from an examination of the books produced and in the possession of the trustee determine the true condition of the debtor they are sufficient to justify granting him a discharge.³¹⁹ But where a bankrupt, engaged in mercantile business, and carrying a large stock, fails to keep books of account from which a creditor or expert accountant might discover his financial condition and the amount of money which it is conceded he had borrowed, a discharge should be denied.³²⁰ An omission to make entries of payments to or loans from relatives should be explained.³²¹ A claim of mere negligence in bookkeeping will be rejected.³²² A failure to satisfactorily explain what has become of books of accounts kept by the bankrupt during all the time that he was engaged in

Marcus & Scherr (D. C., N. Y.), 27 Am. B. R. 164, 192 Fed. 743; In re Brockman (D. C., Ky.), 21 Am. B. R. 251, 168 Fed. 1015; In re Brown (D. C., N. Y.), 29 Am. B. R. 73, 199 Fed. 356; Sherwood Shoe Co. v. Wix (C. C. A., 4th Cir.), 38 Am. B. R. 670. See cases cited in note 240, *supra*.

316. Bankr. Act, § 1 (22).

317. In re Alvord (D. C., Ct.), 14 Am. B. R. 264, 135 Fed. 236; Matter of Sims (D. C., Ga.), 32 Am. B. R. 564, 213 Fed. 992. But see cases cited in note 315.

Failure to keep books.—Where a bankrupt has for some years intermingled his property with that of his wife, having transferred property to her in a manner calculated to stamp the transaction with fraud, and fails, even when he knew or should have known that he was a bankrupt, to keep books of account or any records from which the state of his business relations with his wife might be determined or his financial condition ascertained, sufficient cause exists for the denial of a discharge in bankruptcy. In re Graves (D. C., Pa.), 26 Am. B. R. 633, 189 Fed. 847.

318. In re Simon (D. C., N. Y.), 29 Am. B. R. 808, 201 Fed. 1004; Sherwood Shoe Co. v. Wix (C. C. A., 4th Cir.), 38 Am. B. R. 670.

319. Matter of Acomb (D. C., Ohio, Ref.), 33 Am. B. R. 854.

320. Matter of Linker (D. C., N. Y.), 33 Am. B. R. 709, 222 Fed. 173.

Insufficient books for mercantile business.—Where it appears that a bankrupt began business in a large commercial center three years prior to his adjudication; that he owes

about \$7,500; that his trustee found on hand goods inventoried at \$4,000, and that the bankrupt made deposits and drew checks but only presented to the trustee on demand a check book and pass book from which it was impossible to determine the actual condition of the estate, and the only explanation of his failure is the loss of several hundred dollars in gambling, his discharge should be refused upon the ground that he failed to keep books "with intent to conceal his financial condition." Matter of Shrimmer (D. C., N. Car.), 36 Am. B. R. 404, 228 Fed. 794.

Absence of books.—Where it appears that a partnership kept no books at all, that the only record they had for reference was the register record of cash receipts, and the invoices showing the purchases were simply filed for reference, but during the course of the business no record was made of these bills, so that there were absolutely no books by which the condition of the firm could be ascertained or kept, the members should be denied a discharge. Matter of Josephson (D. C., Ore.), 36 Am. B. R. 505, 229 Fed. 272.

321. Pomerkrantz v. Hopkins (D. C., Pa.), 21 Am. B. R. 857, 168 Fed. 444; In re Koelle (D. C., Pa.), 22 Am. B. R. 515, 171 Fed. 257.

322. Matter of Haskell (D. C., N. Y.), 20 Am. B. R. 914, 164 Fed. 301, holding that where the granting of a discharge is opposed upon the ground that no entries were made in the bankrupt's books of account as to seven payments to near relatives or friends and it appears that the bankrupt never made entries in or examined his books, and that the omission was the fault of the book-

business will warrant a denial of his discharge.³²³ A failure to show by the books a large shrinkage of assets during a short period of time may prevent a discharge.³²⁴ Where a person keeps books in such a condition as to be suspicious on their face, a discharge should be refused,³²⁵ as where a partnership purchases goods not of a kind in which it dealt, and failed to make entries of such purchases in its books, there is a presumption of an intent to conceal its financial condition.³²⁶ If the method used is appropriate to the business conducted and indicates the character of the accounts and the identity of persons to whom they refer it will suffice.³²⁷ And where a business of sufficient magnitude to require books to be kept, and the only books found were check books, showing deposits and payments from a bank, some of them fictitious, there is evidence of a fraudulent intent to conceal the bankrupt's financial condition, justifying a denial of a discharge.³²⁸ The destruction of vouchers or other business papers is as fatal as would be the destruction of books.³²⁹ All books and records which are material to a proper understanding of the bankrupt's financial condition are within the protection of the act.³³⁰ The placing of certain books in the cellar as a mere incident of the work of closing out his business has been held

keeper, to whom the payments were reported, there should be some explanation of how and when and under what circumstances the bankrupt notified the bookkeeper of such payments, and the latter, if he had notice of the payments, should explain why he did not make the entries.

323. Failure to explain non-production of books of account.—Where bankrupt, who had kept books of account during all the time that he was engaged in business, is requested upon his examination before the referee to produce such books and promises to do so at a subsequent hearing, but, after several adjournments at his request, at a hearing six months later testifies that his wife had kept the books and that they cannot be found, he will be deemed to have concealed or destroyed his books of account with intent to conceal his true financial condition, so as to warrant a denial of his discharge in bankruptcy. *In re Wiedman* (D. C., N. Y.), 26 Am. B. R. 697, 188 Fed. 684.

324. *In re Brod* (D. C., Ga.), 21 Am. B. R. 426, 166 Fed. 1011.

325. *In re Leopold* (Ref., N. Y.), 5 Am. B. R. 278.

Books improperly kept.—If the discharge is opposed on the ground of books improperly kept, and the evidence does not sustain the objection, the discharge will not be denied on the ground that he kept no books. *In re Halsell* (D. C., Tex.), 13 Am. B. R. 107, 132 Fed. 562.

Where a sale of lumber was entered in the books of a bankrupt firm and the bookkeeper credits the transferees of the lumber with having paid a greater sum than was in fact received, for the sole purpose of deceiving the general creditors into the belief that an ordinary sale of lumber had been made to an unsecured creditor, such entries are not sufficient ground for denying a discharge to the partner responsible for the transaction.

In re Hamilton (D. C., N. Y.), 13 Am. B. R. 333, 133 Fed. 823.

326. *In re Schachter* (D. C., N. Y.), 22 Am. B. R. 389, 170 Fed. 683.

327. *In re Brown & Co.* (C. C. A., 2d Cir.), 30 Am. B. R. 305, 204 Fed. 64.

Failure to take inventory.—Where the books of a bankrupt partnership were kept so as to show what goods they had on hand, stated at their cost value, and so that a person familiar with the particular trade could estimate with reasonable accuracy what discount there should be made from cost, in order to ascertain the firm's financial condition, the failure to take an inventory each year, stating not the cost of merchandise on hand, but its value at the time of the inventory, did not make bankrupts chargeable with keeping books from which their financial condition could not be ascertained. *In re Marcus* (C. C. A., 2d Cir.), 30 Am. B. R. 176, 203 Fed. 29.

328. *Matter of Newbury & Durham* (C. C. A., 2d Cir.), 31 Am. B. R. 365, 209 Fed. 195.

329. Destruction of bank books and checks.—*Godshalk Co. v. Sterling* (C. C. A., 3d Cir.), 12 Am. B. R. 302, 129 Fed. 580; *Matter of Studebaker* (C. C. A., 2d Cir.), 11 Am. B. R. 384, 127 Fed. 951, revg. 10 Am. B. R. 205, 124 Fed. 945; *In re Hirshowitz* (D. C., Pa.), 27 Am. B. R. 701, 194 Fed. 562; *In re Hodge* (D. C., N. Y.), 30 Am. B. R. 522, 205 Fed. 824.

330. *In re Conley* (D. C., Ga.), 9 Am. B. R. 496, 120 Fed. 42, holding that where, at a time when the bankrupt was contemplating the filing of his petition in bankruptcy, he wilfully and intentionally destroyed the books of account of a firm of which he had been a member, and which were material to a proper understanding of his financial condition, his discharge should be denied.

not to prevent the bankrupt's discharge.³³¹ Where the business of a bankrupt is transacted through a corporation, as his agent, the failure of the corporation to keep books showing the transactions committed to such corporation, and of the bankrupt to record such transactions, warrants a denial of the bankrupt's discharge.³³² Where a wife acted as her husband's agent and was in complete control of his business with his consent, he is liable for her failure to keep satisfactory books, the failure to keep proper books being not a crime but merely civil misconduct.³³³ Other cases where this objection has been urged against a discharge will be found in the foot-note.³³⁴ The practitioner is, however, warned against those cases which turn on the existence of a "contemplation of bankruptcy" or a "fraudulent" intent to conceal financial condition. These elements, as has been seen, are no longer the law.

f. Burden of proof.—In this as in other grounds of objection to a discharge the burden is on the objecting creditor, and the act must be shown by a clear preponderance of evidence;³³⁵ but not, it is thought, with the same degree of certainty as in the objections already discussed. It will not be presumed that proper books of account were not kept because books are not found.³³⁶

VIII. FALSE STATEMENT OF CREDIT.

a. In general.—It is provided in subdivision 3 of subsection *a* of this section as amended by the amendatory act of 1910 that a bankrupt's discharge may be refused if he has "obtained money or property on credit upon a materially false statement in writing made by him to any person or his representative for the purpose of obtaining credit from such person." This new objection to a discharge was added by the amendment of 1903, and will prove the most valuable only to careful traders.³³⁷ The amendment of 1910 inserted the words "money or," "by him," "or his representative" and "credit from such person."

b. Elements of proof; pleading.—The creditor alleging this objection must prove that the bankrupt (1) obtained money or property on credit, that he did so on (2) a statement of his financial condition relied on by the creditor, that such statement was (3) in writing, that it was (4) materially false, and (5) that it was so made to the creditor or his representative (6) for the purpose of obtaining credit from such creditor. To these should be added the usual elements, that the obtaining of property must have been (7) by the bankrupt or

³³¹ *In re Murray* (D. C., Ct.), 20 Am. B. R. 700, 162 Fed. 983.

³³² *In re Berger* (D. C., N. Y.), 29 Am. B. R. 712, 200 Fed. 325.

³³³ *Matter of Janavitz* (C. C. A., 3d Cir.), 34 Am. B. R. 105, 219 Fed. 876.

³³⁴ *Discharges granted.*—*Bauman v. Feist* (C. C. A., 8th Cir.), 5 Am. B. R. 703, 107 Fed. 83; *In re Corn* (D. C., Ga.), 5 Am. B. R. 478, 106 Fed. 143; *Sellers v. Bell* (C. C. A., 5th Cir.), 2 Am. B. R. 529, 94 Fed. 801; *In re Dews* (D. C., R. I.), 3 Am. B. R. 691, 96 Fed. 181; *In re Lafleche* (D. C., Vt.), 6 Am. B. R. 483, 109 Fed. 307; *In re Rauchenplat* (D. C., Porto Rico), 9 Am. B. R. 763; *In re Garrison* (C. C. A., 2d Cir.), 17 Am. B. R. 831, 149 Fed. 178.

Discharges refused.—*In re Morgan* (D. C., Ark.), 4 Am. B. R. 402, 101 Fed. 982; *In re Idzall* (D. C., Iowa), 2 Am. B. R. 741, 96

Fed. 314; *In re Kenyon* (D. C., Iowa), 7 Am. B. R. 527, 112 Fed. 658; *In re Mebachron* (D. C., Wis.), 8 Am. B. R. 732, 116 Fed. 783; *Matter of Sims* (D. C., Ga.), 32 Am. B. R. 564, 213 Fed. 992.

On appeal.—*In re Feldstein* (D. C., N. Y.), 6 Am. B. R. 458, 108 Fed. 794; *affd.*, s. c., 8 Am. B. R. 160, 115 Fed. 259.

³³⁵ *In re Boasberg* (Ref., N. Y.), 1 Am. B. R. 353; *In re Phillips* (D. C., N. Y.), 3 Am. B. R. 542, 98 Fed. 844; *In re Garrison* (C. C. A., 2d Cir.), 17 Am. B. R. 831, 149 Fed. 178; *Garry v. Jefferson Bank* (C. C. A., 5th Cir.), 26 Am. B. R. 511, 186 Fed. 461.

³³⁶ *In re Cantor* (Ref., D. C., N. Y.), 26 Am. B. R. 859.

³³⁷ See Report of Ex. Com. of Nat. Ass'n of Referees in Bankruptcy, published in March, 1900, p. 17.

by some one duly authorized by him.³³⁸ The effect of this new objection will be that every tradesman, whose credit is not unquestioned, will be asked to give a mercantile statement as a condition precedent to dealing. The specifications of objections should set out the false representation, and the name of the person alleged to have been defrauded.³³⁹ It has been held that this objection to a discharge may be pleaded by any creditor.³⁴⁰

c. Meaning and effect of the clause.—(1) **IN GENERAL.**—Nothing like this clause appears in any previous bankruptcy law.³⁴¹ Even the English law has no equivalent, though there, one who at the time of contracting a debt had not a reasonable expectation of paying it, is denied a discharge.³⁴² This ground for denying a discharge was evidently leveled particularly at the practice of making false statements of one's financial condition by a borrower or buyer for the purpose of obtaining from the person to whom such false statement is made, the articles or money derived "on credit."³⁴³ This provision as amended in 1910 would seem to apply to any false statement which has to do with the extension of credit affecting the bankruptcy proceeding. It is the falsity of the statement which controls. If false when made the creditor may interpose it as a bar to the debtor's discharge, and it is immaterial that the indebtedness not included was released prior to bankruptcy, or was omitted in the belief that the persons to whom he was indebted would not press him for payment.³⁴⁴ In effect,

338. The amendment of 1903 applies to a false statement to obtain credit made before such amendment became effective. In re Scott (D. C., Del.), 11 Am. B. R. 327, 126 Fed. 981; In re Petersen (Ref., Minn.), 10 Am. B. R. 355.

Burden of proof.—While the burden of proof is upon the objecting creditor to establish the cause which he claims bars a discharge, yet, when such creditor shows that a materially false statement was known to be untrue when it was made, the burden of proof shifts to the bankrupt to show that it was not made with intent to deceive. In re Arenson (D. C., N. J.), 28 Am. B. R. 113, 195 Fed. 609.

339. In re Levey (D. C., N. Y.), 13 Am. B. R. 312, 133 Fed. 572.

340. In re Harr (D. C., Mo.), 16 Am. B. R. 213, 143 Fed. 421.

The right to object on this ground is not confined to the person defrauded but belongs to any party in interest. In re Carton & Co. (D. C., N. Y.), 17 Am. B. R. 343, 148 Fed. 63. In the Matter of Pincker (Ref., N. Y.), 25 Am. B. R. 494, the referee said: "It does not appear that the objecting creditor herein was a subscriber to the mercantile agency to which the bankrupt made his statement, nor sold goods upon the strength thereof, yet under section 14-b (3) as it existed prior to the last amendment, such objection to discharge may be urged by any creditor and is not confined to the person defrauded." Matter of Kretz (D. C., Wash.), 32 Am. B. R. 365, 212 Fed. 784. Citing Collier on Bankruptcy (9th Ed.), 350 B.

341. Compare In re Steed (D. C., N. Car.), 6 Am. B. R. 73, 107 Fed. 682.

342. English Bankruptcy Act of 1890, § 8 (3) (d).

343. Purpose of statement.—The false statement in writing which is enough to deny a discharge implies a statement knowingly false, or made recklessly, without an honest belief in its truth, and with a purpose to mislead or deceive, and thereby obtain from the person to whom it is made property upon a credit. Firestone v. Harvey (C. C. A., 6th Cir.), 23 Am. B. R. 468, 174 Fed. 574.

344. Josephs v. Powell & Campbell (C. C. A., 2d Cir.), 32 Am. B. R. 222, 213 Fed. 627, revg. In re Josephs (D. C., N. Y.), 30 Am. B. R. 586, 205 Fed. 548, holding that where bankrupt at the time of making a statement in writing for the purpose of obtaining credit owed certain relatives for money loaned, and their debts were not scheduled nor proven in the bankruptcy proceedings, but bankrupt asserted that such loans were made with the understanding that they were not to be paid back if he was unable to do so and were not to interfere with the claims of his other creditors, his discharge will not be refused, provided he obtain releases from such loans or consents that they be scheduled *nunc pro tunc*.

It is the act of issuing the false statement, with fraudulent intent, for the purpose of inducing credit, which constitutes the objection to a discharge. In re Carton & Co. (D. C., N. Y.), 17 Am. B. R. 343, 148 Fed. 63.

Omission of loans to friends.—A bankrupt will be denied a discharge where, in a statement of his financial condition, sent out over his signature, there was no mention of loans made by relatives and friends, although the aggregate amount of said loans would not have materially curtailed the bankrupt's line

the objection means that, where a creditor has been defrauded in a given sale on credit by the purchaser's material misstatements as to his financial condition given for the purpose of obtaining credit for the goods purchased, the creditor has the option of interposing a bar to a discharge affecting all debts, or of permitting the discharge to be granted, and then asserting his claim on after-acquired property, on the ground that his claim is not affected by the discharge.

(2) **OBTAINING MONEY OR PROPERTY ON CREDIT.**—The phrase "obtaining property on credit," as used in the act prior to the amendment of 1910, included a borrowing of money on time. Thus, a bankrupt, who obtained a loan of money from a bank on the faith of a materially false statement in writing, will be denied a discharge,³⁴⁵ even though made prior to the four months' period, if the property was obtained within that time.³⁴⁶ The amendment of 1910 inserted the word "money," and removed any doubt which may have theretofore existed. If the bankrupt obtained pecuniary profit or benefit as a result of the credit which he received by making the false statement, it will constitute a bar to a discharge, although made by him in respect to the property of another debtor.³⁴⁷ Credit is obtained within the meaning of the act although the bankrupt gave his promissory note, secured by collateral, as part of the purchase price.³⁴⁸ It has been held that a statement made in an application for an indemnity bond does not fall within the clause, as such a bond is not property;³⁴⁹ but this conclusion may well be doubted because of the evident fact that the statements contained in the application lead to the extension of credit by the surety company to the principal, and if such statements are false, the principal should not be released from his liability by a discharge.³⁵⁰ It

of credit. *Matter of Brener* (D. C., N. Y.), 20 Am. B. R. 644, 166 Fed. 930.

Omission of partnership indebtedness from financial statement.—Where upon the death of one member of a partnership it was agreed among the survivors that on the books of the firm the capital of the deceased should be credited to his estate as a liability due to it, and this indebtedness, so carried on the books, was omitted by the partnership from successive annual statements of its financial condition furnished to banks as a basis for accommodations, the omission of such indebtedness is a bar to the discharge of the partner using the same, although the bankrupts believed that the debt would not be enforced so as to embarrass them. *Matter of Waite* (D. C., Md.), 35 Am. B. R. 189, 223 Fed. 853.

^{345.} *In re Pfaffinger* (C. C. A., 6th Cir.), 19 Am. B. R. 309, 154 Fed. 528, revg. 19 Am. B. R. 41; *In re Darevski* (D. C., Pa.), 22 Am. B. R. 571, 171 Fed. 238.

Property has been held to include anything of value, hence money is property within the meaning of the phrase obtaining property on credit. *Carson, Pirie, Scott & Co. v. Chicago Title & Trust Co.*, 182 U. S. 438, 5 Am. B. R. 814, 45 L. Ed. 1171.

False statement inducing credit at bank.—A bank which had received a false financial statement from a partnership as a basis for accommodations, whenever a note of the firm fell due, discounted a new note for less than the face of the old, so that when a

voluntary petition in bankruptcy was filed by the firm the sum due the bank was considerably less than when the false statement was received. The discount of the new notes was passed to the credit of the bankrupts and they thereafter drew a check for the payment of the old note, so that, in form, there was the payment of an old loan, and the contracting of a new. *Held*, that the false statement is within the condemnation of section 14b(3) of the bankruptcy act, and the form of the transaction is within its letter and constitutes a bar to a discharge. *Matter of Waite* (D. C., Md.), 35 Am. B. R. 189, 223 Fed. 853.

^{346.} *In re Terens* (D. C., Wis.), 22 Am. B. R. 895, 175 Fed. 495.

^{347.} *Matter of Bleyer* (C. C. A., 2d Cir.), 33 Am. B. R. 76, 215 Fed. 896 (affg. 32 Am. B. R. 98, 210 Fed. 391), holding that where a bankrupt by false representations as to the solvency of a corporation of which he was president procured money from a bank on notes of the corporation indorsed by him, and devoted a large part of such money to his individual use, he should be refused a discharge under section 14b(3) of the bankruptcy act.

^{348.} *Matter of Wylly, Jr.* (D. C., N. Y.), 32 Am. B. R. 145, 210 Fed. 954.

^{349.} *In re Tanner* (D. C., Wash.), 27 Am. B. R. 615, 192 Fed. 572.

^{350.} *In re Dunfee* (D. C., N. Y.), 30 Am. B. R. 721, 206 Fed. 745.

is not essential that the bankrupt should obtain for himself the identical property parted with on the faith of the false statement.³⁵¹

(3) **IN WRITING.**—Of this term the framers of the amendatory act of 1903 have said: "This objection, as is proper, will be of no avail when a commercial report is obtained in the haphazard fashion of a hasty interview. The statement must be in writing, which, of course, implies the signature of the person to be charged thereby." How far a statement made by an employee will avail depends, of course, on the authority given him by his employer and the latter's acquiescence. Where alleged false statements do not appear by the specifications of objection to have been made in writing they are not within the provisions of this section and the discharge should not be refused.³⁵²

(4) **A STATEMENT OF FINANCIAL CONDITION.**—A mere letter, if otherwise within the clause, would seem enough. Details are unnecessary, but the statement ought at least to inform the creditor of the net worth of the debtor, or perhaps of the total of his assets and liabilities. In a majority of cases, these statements will be made on blanks calling for items, and so phrased as to avoid some of the legal pitfalls noted later. A bankrupt, who issues a statement of his financial condition under his signature and does not mention loans made to him by relatives and friends, will be denied a discharge, although the aggregate amount of said loans would not have materially curtailed his credit.³⁵³ An omission to fill out a blank furnished by the creditor does not constitute a "material statement;" there must be a direct statement, either negative or positive, which is false, to justify the denial of a bankrupt's discharge.³⁵⁴

(5) **INTENT TO DECEIVE OR DEFRAUD.**—It has been held that an intent to defraud is essential; the word "false" means more than "erroneous" or "untrue," and imports an intention to deceive, and a materially false statement in writing must have been knowingly or intentionally untrue to bar a discharge.³⁵⁵ Intention to deceive is always material as an element of proof,

351. *In re Dresser & Co.* (D. C., N. Y.), 13 Am. B. R. 616, 144 Fed. 318.

352. *In re Lewis* (D. C., N. Y.), 2 Am. B. R. 711, 163 Fed. 137.

353. *Matter of Brener* (D. C., N. Y.), 20 Am. B. R. 644, 166 Fed. 930; *In re Miller* (D. C., Iowa), 27 Am. B. R. 606, 192 Fed. 730; *In re Arenson* (D. C., N. J.), 28 Am. B. R. 113, 195 Fed. 609.

354. *International Harvester Co. v. Carlson* (C. C. A., 8th Cir.), 33 Am. B. R. 178, 217 Fed. 736.

Falsity of statement, although blanks not filled in.—Where a bankrupt in making a statement in writing on a blank form for the purpose of securing credit, deliberately states his "total liabilities" as \$461.00, when in fact to his knowledge they are \$3,266.69, and this is accompanied by an exaggeration of the valuation of his resources, so as to make it appear to the party extending the credit that he has resources in excess of his liabilities amounting to about \$3,500, when his liabilities are actually equal to, if not in excess of his resources, the omissions or failure to fill in the blanks cannot be attributed to inadvertence or failure of memory, and a discharge should be denied. *Matter of Smith* (D. C., N. Y.), 37 Am. B. R. 230, 232 Fed. 248.

355. *Franklin v. Monning Dry Goods Co.* (C. C. A., 5th Cir.), 33 Am. B. R. 257, 217 Fed. 929 (quoting text with approval); *Schwabacher v. Riddle*, 99 Ill. 343; *Lynch v. Mercantile Trust Co.*, 18 Fed. 486; *Stone v. Covell*, 29 Mich. 359; *Cooper v. Schlesinger*, 111 U. S. 148, 28 L. Ed. 382; *In re Russell* (Ref., N. Y.), 5 Am. B. R. 608; *Matter of Brener* (D. C., N. Y.), 20 Am. B. R. 644, 166 Fed. 930, holding that bankrupt will be denied a discharge where, in a statement of his financial condition, set out over his signature, there was no mention of loans made by relatives and friends, although the aggregate amount of said loans would not have materially curtailed the bankrupt's line of credit; *In re Main* (D. C., Iowa), 30 Am. B. R. 547, 205 Fed. 421; *Gilpin v. Merchants' Nat. Bank* (C. C. A., 3d Cir.), 21 Am. B. R. 429, 165 Fed. 607, revg. *In re Gilpin* (D. C., Pa.), 20 Am. B. R. 374, 160 Fed. 171; *In re Augspurger* (D. C., Ohio), 25 Am. B. R. 83, 181 Fed. 174; *Firestone v. Harvey* (C. C. A., 6th Cir.), 23 Am. B. R. 468, 174 Fed. 574; *Matter of Cloutier Bros.* (D. C., Me.), 36 Am. B. R. 319, 228 Fed. 569; *Doyle v. First Nat. Bank of Baltimore* (C. C. A., 4th Cir.), 36 Am. B. R. 331, 231 Fed. 649; *Aller-Wilmes*

and, by the weight of authority, it is essential to prove such an intent.³⁵⁶ It must be shown that the bankrupt's alleged false statement in writing was either knowingly false or made so recklessly as to warrant a finding that he acted fraudulently.³⁵⁷ If a debtor was misled into signing the statement by the creditor's agent, who filled it out and gave it to the debtor to sign, leaving certain blanks unfilled, the element of intention is lacking and the debtor's

Jewelry Co. v. Osborn (C. C. A., 8th Cir.), 36 Am. B. R. 714, 231 Fed. 907. *Contra*: *In re Terens* (D. C., Wis.), 22 Am. B. R. 895, 175 Fed. 495, and *In re Shaffer* (D. C., W. Va.), 22 Am. B. R. 147, 169 Fed. 724, holding that the good or mistaken faith with which a false statement is made cannot be taken into consideration.

Intent to deceive.—The word "false" means more than merely erroneous or untrue, but is used in its primary legal sense as importing an intention to deceive; and a statement in writing for the purpose of obtaining credit, in order to constitute a bar to a discharge, must have been knowingly and intentionally untrue. *In re Arenson* (D. C., N. J.), 28 Am. B. R. 113, 195 Fed. 609.

The word "false," within the meaning of this clause must be construed to mean false with the knowledge of the party making the statement and further with the view of deceiving or misleading. *Matter of Josephson* (D. C., Ore.), 36 Am. B. R. 505, 229 Fed. 272.

Materially false statement.—A statement in writing to procure credit in order to bar a discharge must be a materially false statement, and the words mean more than simply erroneous or untrue, and import an intention to deceive. A bankrupt will be deemed to intend what he knowingly does. *Matter of Smith* (D. C., N. Y.), 37 Am. B. R. 230, 232 Fed. 248.

356. *In re Russell* (Ref., N. Y.), 5 Am. B. R. 608; *Turner v. Ward*, 154 U. S. 618; *In re Steed* (D. C., No. Car.), 6 Am. B. R. 73, 107 Fed. 682; *Franklin v. Monning Dry Goods Co.* (C. C. A., 5th Cir.), 33 Am. B. R. 257, 217 Fed. 929 (quoting text with approval). *Contra*: *In re Epstein* (D. C., Ark.), 6 Am. B. R. 60, 109 Fed. 878.

Intentionally untrue.—To constitute a bar to a bankrupt's discharge under section 14-b (3) for obtaining property on credit "upon a materially false statement in writing" for the purpose of obtaining such property on credit, the written statement made by the bankrupt should be knowingly and intentionally untrue, and it is not sufficient that the statement be materially untrue. *Peck v. Lowenbein* (C. C. A., 4th Cir.), 24 Am. B. R. 138, 178 Fed. 178.

In re Shaffer (D. C., W. Va.), 22 Am. B. R. 147, 169 Fed. 726, Judge Dayton says: "Creditor must rely upon it (the statement) when parting with his property, and if he did so rely upon it, and it was materially false in fact, it is sufficient to defeat a dis-

charge. If the creditor did not rely on it, or if the debtor did not make the statement for obtaining the property on credit, it will not bar a discharge, no matter how false the statement may be." In the case of *Schaffer v. Koblegard Co.* (C. C. A., 4th Cir.), 24 Am. B. R. 898, 183 Fed. 71 (affirming the above case), it was held that to constitute a bar it must appear that the statement made by the bankrupt was "knowingly and intentionally untrue."

Where bankrupts had made repeated false statements in writing to creditors for the purpose of obtaining goods on credit and one statement in particular was made under such circumstances as to preclude any doubt that it was wilfully and knowingly so made, bankrupts' discharge should be denied. *In re Taff v. Conyers* (D. C., Ga.), 25 Am. B. R. 600, 182 Fed. 899.

Presumption of intent to deceive.—Where bankrupt who was active in the firm's business, knew that it had the previous year sustained great losses, and that inquiries were being made to the commercial agencies concerning the firm, his signature on the statement and his delivery thereof, together with his activity in the business and his participation in the advantages obtained by the deception, raise a presumption of an evil intention; and his mere assertion that he did not know the statement was false will not excuse him. *In re Simon* (D. C., N. Y.), 29 Am. B. R. 808, 201 Fed. 1004.

Fraudulent intent must be shown.—A statement in writing which overstated a bankrupt's assets and understated his liabilities to an extent sufficient to be material, is insufficient of itself to bar his discharge, but fraudulent intent on the bankrupt's part must be shown; and unless credit is shown to have been actually obtained by means of the untrue statement made with such fraudulent intent, no ground for refusal to grant a discharge is established. *In re O'Callaghan* (D. C., Mass.), 29 Am. B. R. 304, 199 Fed. 662.

357. Thus, where a bankrupt in preparing a statement in writing of his financial condition for the purpose of obtaining property on credit, in good faith, omitted an existing liability, he will not be denied a discharge under § 14-b (3). *In re Collins* (D. C., Ark.), 19 Am. B. R. 688, 157 Fed. 120. There must be knowledge of the bankrupt as to the falsity of the statement. *Hamlin v. Radford Grocery Co.* (Tex. Civ. App.), Am. B. R. 373, 182 S. W. 716.

discharge is not barred.³⁵⁸ So also if it appear that the statement was signed by the president of a corporation acting under the advice of his financial adviser, believing that the facts stated were true, he is not guilty of an intent to deceive.³⁵⁹ Where a statement contains an error made in good faith by the bankrupt's bookkeeper it is not false within the meaning of the act.³⁶⁰ These principles lead to the conclusion that if the bankrupt had no knowledge of the alleged false statement, or if the facts stated therein were honestly thought by him to be true it does not constitute a bar.³⁶¹

(6) **MATERIALITY OF FALSE STATEMENT.**—The statement also must be material to the transaction,³⁶² it must have been, if not the moving cause of the sale on credit, a contributing cause, *i. e.*, the seller must to an extent at least have relied on it.³⁶³ The statement must have been made within a reasonable time prior to the extension of credit; for instance where it contains

358. *International Harvester Co. v. Carlson* (C. C. A., 8th Cir.), 33 Am. B. R. 178, 217 Fed. 736. But see *In re Arenson* (D. C., N. J.), 28 Am. B. R. 113, 195 Fed. 609, holding that the fact that a financial statement made by a bankrupt for the purpose of obtaining credit was obtained on a representation that it was a mere matter of form, does not absolve him from the consequences of making a statement which he knows to be absolutely untrue.

359. *Matter of Stafford* (D. C., Conn.), 35 Am. B. R. 747, 221 Fed. 127.

Belief that statement was true.—Where a bankrupt, believing himself in a sound financial condition, away from his books, with his sick wife away from home and in a hurry to get back, made a statement as a general estimate rather than an itemized statement of his exact financial condition, he should not be denied a discharge, because he omitted certain of his debts. *Franklin v. Monning Dry Goods Co.* (C. C. A., 5th Cir.), 33 Am. B. R. 257, 217 Fed. 929.

360. *In re Collins* (D. C., Ark.), 19 Am. B. R. 688, 157 Fed. 120.

361. *Doyle v. First Nat. Bank of Baltimore* (C. C. A., 4th Cir.), 36 Am. B. R. 331, 231 Fed. 649.

362. *Addington v. Allen*, 11 Wend. (N. Y.) 375; *Bruce v. Burr*, 67 N. Y. 237; *Hanna v. Rayburn*, 84 Ill. 533.

363. *In re Goodhile* (D. C., Iowa), 12 Am. B. R. 380, 130 Fed. 782, holding that where the bankrupt obtained goods on credit which were not paid for at bankruptcy, upon a statement in writing which listed as part of her assets land which she, of her own knowledge, knew she did not own, her discharge will be denied; *Aller-Wilmes Jewelry Co. v. Osborn* (C. C. A., 8th Cir.), 36 Am. B. R. 714, 231 Fed. 907. Compare *People v. Haynes*, 11 Wend. 557; *Phelps v. Court*, 83 N. Y. 436; *Matter of Kaplan* (D. C., Pa.), 15 Am. B. R. 534, 141 Fed. 463. See Am. Bankr. Dig. §§ 1020, 1022.

Credit induced by statement.—Where a creditor claims goods as against a trustee in bankruptcy on the ground that the bankrupt obtained such goods by false representa-

tions, it is not necessary that the false representations should be the sole and exclusive consideration for the credit, but only that they were a material consideration, without which in all probability the credit would not have been given. *In re Ganey* (D. C., N. Y.), 4 Am. B. R. 576, 103 Fed. 930. In the case of *In re O'Callaghan* (D. C., Mass.), 29 Am. B. R. 304, 199 Fed. 662, it was held that where the evidence tended to show that credit was extended with knowledge that the bankrupt was in difficulties and with intent to advance only so much as would postpone immediate collapse before an investigation, which would be necessary to justify further credit in any large amount, could be had, an objection to a discharge, because of a false statement will not be sustained.

The statement must have been materially false, have been made with intent to deceive and the creditor must have relied upon it when extending credit. *In re Mintzer* (D. C., N. Y.), 28 Am. B. R. 743, 197 Fed. 648.

Statement relied on; evidence.—Where bankrupt's letter in January ordering goods was accepted a few days after its receipt by the objecting creditor, it cannot be said that in extending credit for goods so ordered, reliance was placed upon a copy of a financial statement furnished the objector by a commercial agency sometime in April following such date. *In re Main* (D. C., Iowa), 30 Am. B. R. 547, 205 Fed. 421; *In re McLellan* (D. C., N. Y.), 30 Am. B. R. 325, 204 Fed. 482; *Matter of Kean* (D. C., N. Y.), 38 Am. B. R. 628, 237 Fed. 682, holding that a statement made two years before credit was extended was not one to be relied on.

Statement as to money in bank.—A bankrupt makes a willfully false statement when he represents and states in writing, for the purpose of obtaining credit and property, that he has money in bank, when he has drawn and delivered checks which, when presented and paid, will exhaust such credit, and he knows the fact, and does not disclose that he has drawn and delivered such checks. *Matter of Smith* (D. C., N. Y.), 37 Am. B. R. 230, 323 Fed. 248.

no reference as to its continuing character it will not be construed as binding the debtor in a transaction eighteen months after its date.³⁶⁴ It is not sufficient to avoid the consequences of a financial statement knowingly false that the amount of credit obtained was small, or that the amount owing at the time of bankruptcy was less than when the statement was made; the main question pertains to the falsity of the statement which induced the credit.³⁶⁵ A fair test would seem to be: was the statement so "materially false" as to warrant a suit for the rescission of the sale? Although it has been held sufficient if the goods were ordered but not actually delivered to the bankrupt.³⁶⁶ Numerous decisions in the State courts determining what are actionable false representations may be consulted with profit.

(7) **FOR THE PURPOSE OF OBTAINING CREDIT FROM THE CREDITOR.**—This element will presumably always exist where a sale results from the statement. Although prior to the amendment of 1910, omitting the word "such," the false statement had to be made with the intent of obtaining such credit as it was planned at the time to afford a basis for; since such amendment the statute would seem to apply to any false statement which has to do with the extension of credit affecting the bankruptcy proceedings.³⁶⁷ This change in the statute should be noted, where cases involving false statements made prior to said amendment are in question.

(8) **STATEMENTS MADE TO MERCANTILE AGENCIES FOR THE PURPOSE OF OBTAINING CREDIT.**—The statute provides that the false statement be "made to any person or his representative for the purpose of obtaining credit from such person."³⁶⁸ The words "such person" refer to the previous words "any person," and the statement is "made to such person" whenever it is made by the bankrupt himself or his duly authorized agent; and it is none the less "made," although the statement itself is not delivered when its contents are correctly communicated by the agent.³⁶⁹ The language of the clause does not necessarily import that the statement shall have been made for the purpose of inducing any particular person to rely upon it.³⁷⁰ Thus, a materially false statement in writing, made to a mercantile agency as a basis of credit and relied upon by customers of such agency, is equivalent to a statement made directly to the persons extending credit.³⁷¹ A false statement made to a mer-

³⁶⁴ In re Braverman (D. C., N. Y.), 28 Am. B. R. 513, 199 Fed. 863; Matter of Kean (D. C., N. Y.), 38 Am. B. R. 628, 237 Fed. 682.

³⁶⁵ In re Arenson (D. C., N. J.), 28 Am. B. R. 113, 195 Fed. 609.

³⁶⁶ In re Simon (D. C., N. Y.), 29 Am. B. R. 808, 201 Fed. 1004.

³⁶⁷ In re Puschkin (D. C., N. Y.), 25 Am. B. R. 742, 183 Fed. 882.

³⁶⁸ Bankr. Act, § 14-b (3), *ante*.

³⁶⁹ **Statement signed by agent of copartnership.**—Where false statements in writing for the purpose of obtaining credit were signed and issued by the agent and manager of a bankrupt copartnership, who was acting within the scope of his authority, the partners are liable for the acts of their agent, which may be set up against them upon their application for a discharge in bankruptcy. In re Schwartz & Co. (D. C., N. Y.), 28 Am. B. R. 670, 201 Fed. 166. See also In re Reed (D. C., Okl.), 26 Am.

B. R. 286, 191 Fed. 920; In re Berry (D. C., N. Y.), 15 Am. B. R. 360, 362, 146 Fed. 623.

³⁷⁰ **Construction of statute.**—In re Dresser (C. C. A., 2d Cir.), 16 Am. B. R. 561, 563, 146 Fed. 383, holding that the provisions of the section are not to receive the strict construction given to criminal statutes, but should receive a reasonable one to effectuate the intention of Congress, so far as that can be ascertained by the language employed. The court said: "We think that intention was to deprive any bankrupt of the benefit of a discharge who has obtained property from any person by means of a written statement false in material matters; and within the fair meaning of the clause and statement is made to such person if it was given to an agent for the purpose of using it in obtaining property for the bankrupt, and if its contents were communicated by the agent to such person."

³⁷¹ **Statements to commercial agencies.**—Judge Hough, in In re Carton (D. C., N. Y.),

cantile agency, or an officer thereof, is regarded as having been made to such agency as the representative of the debtor, which becomes his agent for the purpose of obtaining credit.³⁷² It was held, however, prior to the amendment of 1910, that the ordinary statements of financial condition, made to mercantile agencies for general circulation, are not "materially false statements" within the meaning of the statute, but that statements in the form of special reports may be.³⁷³ And in a recent case it was held that general statements to mercantile agencies, not specifically asked for by prospective creditors, are not included and a discharge should not be refused because of a false statement furnished to the agent of a mercantile agency so that it might fix the rating

17 Am. B. R. 343, 148 Fed. 63, 67, manifestly concurs in this view, for he says: "If, however, such a report as is here shown, be obtained from a merchant by a commercial agency at the request, disclosed or undisclosed, of one or more of the agency's customers, it seems to me incredible that the merchant furnishing such report can be supposed to have given it for any other purpose than of enlightening those persons who habitually deal with him on credit as to his true financial condition. The custom of trade is so well known that when an agency applies to a merchant for a specially signed report of his condition, he must know that such report is for the special purpose of enabling those who usually vend him goods to decide upon his financial responsibility."

Where a bankrupt made a materially false statement in writing to a mercantile agency which recited that it was designed as a basis for credit, and later obtained property on credit from a customer of such mercantile agency, who relied on such statement in extending such credit, it was equivalent to a statement made directly to the person from whom the property was received and debarred the bankrupt from the right to a discharge. In re Augspurger (D. C., Ohio), 25 Am. B. R. 83, 181 Fed. 74.

In re Pincus (D. C., N. Y.), 17 Am. B. R. 331, 147 Fed. 21, it was in substance ruled that a written financial statement made by a party to a commercial agency, which shows on its face that it was made as a basis for credit with the associate members of such company, and which is communicated by such agency to members who give credit on the faith of it, is equivalent to one made directly to them, and if materially false, will debar the debtor from the right to a discharge in bankruptcy.

A statement in writing by a bankrupt to a mercantile agency, though false, will not bar his discharge unless the bankrupt referred the prospective creditor to the said statement as being a true statement of his financial condition, made for the purpose of obtaining credit. Matter of Foster (Ref., Miss.), 24 Am. B. R. 368.

When a person makes a statement to a mercantile agency, he makes it for the purpose of having the statement transmitted by the mercantile agency to its subscribers who propose to do business with him, and that

as to any person to whom his statement is thus transmitted by the mercantile agency and who becomes a creditor upon the faith of it, the statement has precisely the same effect as though it had been made in person by the debtor to the creditor and relied upon by the creditor. In re Russell & Birkett (Ref., N. Y.), 5 Am. B. R. 608.

In order to make a statement substantially true for the purpose of a mercantile agency, a party need not report his contingent liabilities where there is no fraudulent suppression of the fact. If the subscriber to the mercantile agency desires information in regard to such liabilities he should call for a "special report." So held in a case where a subscriber did not report a mortgage securing certain bonds which were supposed to be entirely good. In re Russell & Birkett (Ref., N. Y.), 5 Am. B. R. 608.

Statement made to mercantile agency "in strict confidence."—Where bankrupt furnished to a mercantile agency, upon request, a written statement of his financial condition "in strict confidence for commercial use only," the fact that the statement was materially false and was relied upon by a creditor in making sales to bankrupt more than a year later, is insufficient to bar a discharge, under § 14-b(3) of the bankruptcy act as it stood before the amendment of 1910, in the absence of proof that such statement was made to the mercantile agency as the agent either of the bankrupt or the objecting creditor. Novick v. Reed & Co. (C. C. A., 3d Cir.), 27 Am. B. R. 521, 192 Fed. 20.

Necessity that agency be representative of creditor.—False representations to a mercantile agency are not a bar to a discharge, unless it appear that the agency was, in some sense, the representative of a creditor from whom money or property was obtained, or that the representations made to them were, in some way, communicated to or relied upon by the creditor. Matter of Kretz (D. C., Wash.), 32 Am. B. R. 365, 212 Fed. 784.

372. Matter of Cloutier Bros. (D. C., Me.), 36 Am. B. R. 319, 228 Fed. 569.

373. In re Russell (C. C. A., 2d Cir.), 23 Am. B. R. 850, 176 Fed. 253; Matter of Napier (Ref., Ky.), 23 Am. B. R. 560. It should be noticed that the amendment of 1910 was not considered in the decision of these cases.

in its books and not asked for by any particular customer.³⁷⁴ While within reasonable limits statements made to a mercantile agency are to be regarded as continuing, no invariable rule can be laid down as to the length of time during which the vendor may rely upon the statements made to such agency; each case depends upon its own facts and what is reasonable for a prudent and intelligent business man to do.³⁷⁵

(9) **BY THE BANKRUPT.**—This follows from the nature of the transactions here, in a sense, interdicted.³⁷⁶ A false statement by one partner, made in the course of the partnership business, will not be a bar to the discharge of a partner who did not participate therein and had no knowledge thereof,³⁷⁷ but will be a bar to the discharge of the partnership.³⁷⁸

374. *Matter of Zopper* (C. C. A., 2d Cir.), 33 Am. B. R. 652, 211 Fed. 936.

375. Continuing statements.—*In re Russell & Birkett* (Ref., N. Y.), 5 Am. B. R. 608.

Where a person, about a year prior to his adjudication as an involuntary bankrupt, without solicitation, knowingly made a false and misleading statement to a mercantile agency, to obviate unfavorable reports, with regard to his financial standing, and within ten days attempted to correct said statement by another, which, while not so bad, was nearly so, and referred to it for the purpose of obtaining goods on credit, he will be denied his discharge; such statement, both in its original as well as its corrected form, was a continuing one, and unless recalled was for a reasonable time to be relied upon as stating the truth. *In re Kyte* (D. C., Pa.), 23 Am. B. R. 414, 174 Fed. 867. Statement made two years prior to extension of credit not sufficient, *Matter of Kean* (D. C., N. Y.), 38 Am. B. R. 628, 237 Fed. 682.

In re Terens (D. C., Wis.), 22 Am. B. R. 897, 172 Fed. 939, Judge Quarles says: "It is matter of common knowledge that such statements are frequently intended as a continuing representation for indefinite periods of time. I am of opinion that the date of the statement is immaterial, if property has in fact been obtained upon the strength of it within the four-months period, as is the case here. We are not called upon to decide whether under any circumstances the four-months limitation can be read into the third subdivision of section 14-b, and merely hold that, where goods have been furnished and credit has been extended on the faith of such statement within four months of the bankruptcy, the date of the property statement should be held immaterial."

About a year and six months before the filing of a petition in bankruptcy, bankrupt made a materially false statement in writing for the purpose of obtaining a large bill of goods on credit, which goods were paid for in full. The statement contained a provision that it was to be binding for purchases "now or hereafter made, unless changed by written authority from the undersigned." Subsequently and between six and nine months prior to the filing of the petition, other goods were purchased on credit from the same creditor, which were

never paid for. Upon objection to the bankrupt's discharge on the ground that these goods had been obtained on credit by reason of such statement, held, that this was not an obtaining of property on a false statement in writing within the contemplation of section 14-b (3) of the bankruptcy act. *In re Cotton & Preston* (D. C., Ga.), 25 Am. B. R. 517, 183 Fed. 181; *Ragan, Malone & Co. v. Cotton & Preston* (C. C. A., 5th Cir.), 29 Am. B. R. 597, 200 Fed. 546, in which case a similar statement was under consideration, and the court held that the fact that the first purchase of goods obtained thereunder had been paid for, did not preclude such creditors from urging the falsity of the statement as a bar to the firm's discharge in bankruptcy, it appearing that bankrupt's account was a running account, covering purchases made from time to time for little over one year, on which the credits made at no time left the account fully paid up, and that the statement was relied upon by the creditors in the subsequent credits, as well as the first. And see *In re O'Callaghan* (D. C. Mass.), 29 Am. B. R. 304, 199 Fed. 662.

376. As to fraud practiced by an agent of the bankrupt, see *Durst v. Barton*, 47 N. Y. 167; *Perley v. Catlin*, 31 Ill. 533.

377. False statement by partner.—*In re Cotton & Preston* (D. C., Ga.), 25 Am. B. R. 517, 183 Fed. 181; *Hardie v. Swafford Bros. Dry Goods Co.* (C. C. A., 8th Cir.), 21 Am. B. R. 457, 165 Fed. 588, revg. *In re Hardie & Co.* (D. C., Tex.), 16 Am. B. R. 313, 143 Fed. 553; *Frank v. Michigan Paper Co.* (C. C. A., 4th Cir.), 24 Am. B. R. 261, 179 Fed. 776; *Ragan, Malone & Co. v. Cotton & Preston* (C. C. A., 5th Cir.), 29 Am. B. R. 597, 200 Fed. 546; *Matter of Blank* (D. C., Pa.), 38 Am. B. R. 71, 236 Fed. 801.

378. *Frank v. Michigan Paper Co.* (C. C. A., 4th Cir.), 24 Am. B. R. 261, 179 Fed. 776, holding that such bar to a discharge, however, by reason of a false statement in writing, is confined to such person or persons as actually made such statement with the intention to deceive, and to the partnership entity of which such person was a member, and the intent to deceive cannot be imputed to a partner who, prior to the bankruptcy proceeding against the firm, knew nothing whatever of the writing of the statement.

IX. FRAUDULENT TRANSFER.

a. In general.—If a bankrupt at any time within the four months' period has "transferred, removed, destroyed or concealed, or permitted to be removed, destroyed or concealed, any of his property with intent to hinder, delay or defraud his creditors," his discharge should be refused. Under the law of 1867, the making of both a fraudulent preference and a fraudulent transfer were objections to discharge. The original draft of the amendatory bill of 1903 was the same.³⁷⁹ Under the definition of transfer,³⁸⁰ it is difficult to conceive of a preference that does not amount to a transfer, and, if fraudulent, either transaction will come within the present clause. The words of subdivision 4 are doubtless a definition or explanation of the words "fraudulent transfer" there used. Hinder, delay or defraud creditors applies to the whole body of the bankrupt's creditors, and not a conversion of property belonging to a single creditor.³⁸¹

b. Elements of proof.—The creditor alleging this objection must show, in substance, the commission of the first act of bankruptcy. The variances between the phrasing here and that of § 3-a (1) are immaterial. "Destroyed" occurs here only, but it adds nothing, as "removed" may include it and "concealed"³⁸² surely does. The words of limitation refer to the four months' bankruptcy period, discussed under section three, *ante*. How far an adjudication on the first act of bankruptcy will be *res adjudicata* on an objection to a discharge need not be considered; a court which finds the first will not easily be persuaded to refuse to find the second. Nor is any discussion as to the technical meaning of the words important. Any transfer, destruction, or concealment of property within the inhibition of the statute of frauds, if within the four months' period, will, if seasonably pleaded and duly proven, bar a discharge. If the transfer be made within the limited period it will be a bar although not knowingly and fraudulently made.³⁸³ If made prior to the four

379. Compare Report of Ex. Com. of National Association of Referees in Bankruptcy, previously mentioned.

380. See Bankr. Act. § 1 (25).

381. Matter of Berry & Co. (D. C., N. Y.), 15 Am. B. R. 360, 146 Fed. 623.

Fraud in order to bar a bankrupt's discharge must be a fraud against the estate. Hence, the mere fact that a bankrupt disposed of property on which a creditor had a lien is not a bar to a discharge, where it appears that if the security had remained it would have been insufficient to pay the creditor's claim. Matter of Huber (Ref., D. C., N. D.), 34 Am. B. R. 100.

382. Bankr. Act. § 1 (22).

383. In re Gift (D. C., Pa.), 12 Am. B. R. 244, 130 Fed. 230. See In re Braclin (D. C. Pa.), 24 Am. B. R. 793, 179 Fed. 768; Pirvitz v. Pithan (C. C. A., 8th Cir.), 27 Am. B. R. 621, 194 Fed. 403, holding that a fraudulent transfer to prevent payment of a judgment recovered in an action for personal injuries, bars a discharge.

Transfer for purpose of paying old creditors ratable proportion.—The bankruptcy act recognizes the distinction between intent to defraud and intent to prefer, and while it makes no distinction between intent to de-

lay and intent to hinder, it does distinguish between intent to defraud and intent to delay or hinder. The statute must be construed according to its reasonable intent and only such transfers as not only hinder and delay but also operate as a fraud, i. e., those entered into with actual fraudulent intent or those where from the terms of the agreement or the nature of the transaction itself, the fraudulent intent is presumed to exist as an inference of law, will bar a discharge. A sale and assignment by insolvents, within four months prior to their bankruptcy, of all their property to a corporation formed for the purpose of purchasing the same, a fair consideration being received by the insolvents and turned over by them to an attorney representing them and certain of their creditors with the intent that the same shall be distributed by the attorney ratably among such creditors of the insolvents as would agree to compromise their claim for the amount received, is not such a transfer of property "with intent to hinder, delay or defraud creditors" as will debar the bankrupt from the right to a discharge. Matter of Julius Bros. (C. C. A., 2d Cir.), 32 Am. B. R. 699, 217 Fed. 3, reversing 31 Am. B. R. 132, 209 Fed. 371.

months' period it is no bar, even if made for the purpose of defeating a just claim.³⁸⁴ But in New York a conveyance of real estate made by a bankrupt long anterior to the four months' period, with intent to hinder, delay, and defraud creditors, may be alleged as a ground for objection to his discharge, where the conveyance is not recorded until within the four months' period;³⁸⁵ and whether such conveyance was made with intent to hinder, delay, and defraud creditors, is a question of fact.³⁸⁶ A preferential transfer consisting of a payment of money on account of an existing indebtedness, in the absence of evidence that such payment was made in fraud of creditors, is not within the meaning of this clause.³⁸⁷ An assignment of stock by a bankrupt to his wife to repay borrowed money has been held not to defeat his right to a discharge.³⁸⁸ If a trustee fails in his action to set aside a fraudulent transfer, such transfer

A transfer of the furniture and fixtures of a restaurant by insolvents within four months prior to their bankruptcy to a relative, who does not assume the payment of their debts, is voluntary and without consideration, and is such a transfer of property with intent to hinder, delay or defraud creditors, as will bar the bankrupts from the right to a discharge. *Matter of Aymo and Barattia* (Ref., D. C., N. Y.), 35 Am. B. R. 13.

Fraudulent transfer in violation of Bulk Sales Act.—Where a bankrupt within four months preceding the filing of the petition in bankruptcy, transferred his stock of goods, and at the time executed a false affidavit, that he had no creditors in connection with his business, in order to avoid giving to his transferee a written list of his creditors and to avoid notifying them as required by the Bulk Sales Act, his discharge should be refused on the ground that he made the transfer with intent to hinder, delay, and defraud his creditors. *Matter of DeNomme* (D. C., R. I.), 32 Am. B. R. 744, 214 Fed. 672.

384. Transfers prior to four months' period no bar.—Where a husband more than four months prior to filing his petition conveyed to his wife for full value certain shares of corporate stock for the purpose of raising money to pay the expenses of an impending suit for breach of promise to marry, it is no ground for denying his discharge. *In re Brumbaugh* (D. C., Pa.), 12 Am. B. R. 204, 128 Fed. 971.

A transfer of property by a bankrupt to hinder, delay and defraud creditors, made more than four months prior to filing his petition in bankruptcy, is not a ground for refusing a discharge. *In re Wakefield* (D. C., N. Y.), 31 Am. B. R. 42, 207 Fed. 180.

A sale of real estate, entirely free from fraud, made by the bankrupt six months prior to bankruptcy, through an agent, will not bar a discharge. *Matter of Harris* (Ref., N. J.), 11 Am. B. R. 649. A transfer two years prior to bankruptcy was held not to bar a discharge. *In re Danehy* (C. C. A., 2d Cir.), 11 Am. B. R. 511, 130 Fed. 532.

Where a debtor, several months prior to his adjudication, turned over to his assignee

for creditors' property which he believed to be amply sufficient to pay all his debts the fact that from eleven to twenty months prior to his adjudication he knowingly and fraudulently lost, disposed of, and squandered large sums is not sufficient grounds for denying him a discharge. *In re Boner* (D. C., Va.), 22 Am. B. R. 151, 169 Fed. 727. And so where a bankrupt, with fraudulent intent, transferred an insurance policy to his wife, six years before his bankruptcy, it is not of itself a ground for refusing his discharge. *In re Schickerling* (C. C. A., 2d Cir.), 30 Am. B. R. 312, 204 Fed. 592.

385. Matter of McKane (D. C., N. Y.), 19 Am. B. R. 103, 152 Fed. 733.

386. Matter of McKane (D. C., N. Y.), 19 Am. B. R. 103, 152 Fed. 733.

Deeds executed under secret agreement.—If deeds executed by a bankrupt to his father-in-law more than four months prior to adjudication were mere mortgages or if there was any secret agreement by which the bankrupt retained or was to have title, and he did not disclose these facts on his examination or in his schedules he is guilty of a concealment of assets and a discharge should be refused. *In re Wakefield* (D. C., N. Y.), 31 Am. B. R. 42, 207 Fed. 180.

387. Matter of Maher (D. C., Mass.), 16 Am. B. R. 340, 144 Fed. 503, affg. 15 Am. B. R. 786. See also *In re Battle* (D. C., No. Car.), 19 Am. B. R. 40, 154 Fed. 741; *In re McLellan* (D. C., N. Y.), 30 Am. B. R. 325, 204 Fed. 482; *In re Bouck* (D. C., N. Y.), 28 Am. B. R. 378, 199 Fed. 453; *Matter of Rivkin* (D. C., Conn.), 33 Am. B. R. 170, 216 Fed. 218.

A preference alone, even though it be a voidable one, is no bar to a bankrupt's discharge, since the giving of a preference does not constitute a conveyance of property with intent to delay or defraud creditors. *In re Friedrich* (D. C., Minn.), 28 Am. B. R. 656, 199 Fed. 193.

388. In re Hedley (D. C., N. Y.), 19 Am. B. R. 409, 156 Fed. 314. And see *In re Marcus* (C. C. A., 2d Cir.), 30 Am. B. R. 176, 203 Fed. 29, as to payments to wife during four months' period without intent to defraud.

cannot be set up as a bar to a discharge.³⁸⁹ Cases cited in the proper paragraphs of section three of this work will be found valuable.³⁹⁰ Other cases are collected in the foot-note.³⁹¹

c. **Are general assignments objections to discharge?**—A question which may arise under this clause is whether a previous general assignment is a bar to a discharge. That such an assignment is a transfer is elementary; that it amounts to an intent to hinder or delay creditors is now thought well settled.³⁹² It would seem to follow that if within the interdicted period, a general assignment is a sufficient objection to a discharge. The question is fraught with large results as one of the defects in the administration of the law rests on the proneness of failing debtors to assign under the State systems, thus accomplishing troublesome conflicts of jurisdiction and often mulcting their estates in double fees. An authoritative ruling that general assignments are sufficiently fraudulent to bar a discharge would thus solve many problems. Debtors desiring discharges would not then care to assign.

X. PREVIOUS DISCHARGE IN A VOLUNTARY BANKRUPTCY WITHIN SIX YEARS.

a. **In general.**—The purpose of subdivision 5 is clear. Through oversight, the original law permitted discharges *ad libitum*, and instances of two and even three discharges to the same person in as many years are on record. The English law does not permit a second application, no matter after what duration of time.³⁹³ The law of 1867 allowed it only when the bankrupt's estate was sufficient to pay seventy per cent., but three-fourths of his creditors in value could consent to a discharge on his paying a smaller amount.³⁹⁴ The present clause is apparently an effort to omit the too harsh provisions of the former, and, at the same time, to escape the dangers lurking in any device which calls for the consent of creditors.³⁹⁵

b. **Effect and application.**—The amendment of 1903 was not retroactive, but only fixed a new condition of discharge in case of petitions filed after its passage.³⁹⁶ As to its effect where the creditors petition, but the bankrupt either consents to an adjudication or petition, and is adjudicated while the involuntary proceeding is pending, *quære?* If application for a discharge has been made and it has neither been granted nor refused, the limitation of the clause

³⁸⁹. In re Tiffany (D. C., N. Y.), 17 Am. B. R. 296, 147 Fed. 314.

³⁹⁰. See pp. 90-98, *ante*.

³⁹¹. In re Freeman, Fed. Cas. 5,082; In re Hannahs, Fed. Cas. 6,032; In re Wolfskill, Fed. Cas. 17,930. Compare In re Diehl, 15 Fed. 234. And see In re Jones, Fed. Cas. 7,446; In re Miller (D. C., Va.), 14 Am. B. R. 329, 135 Fed. 591.

³⁹². In re Gutwillig (D. C., N. Y.), 1 Am. B. R. 78, 90 Fed. 475; s. c., on appeal, 1 Am. B. R. 388, 92 Fed. 337; In re Harper (D. C., N. Y.), 3 Am. B. R. 804, 100 Fed. 266; In re Macon Sash, etc. (D. C., Ga.), 7 Am. B. R. 66, 112 Fed. 323; as, however, *revd.* by *Carling v. Seymour Lumber Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 29, 113 Fed. 483; *Scheuer v. Smith* (C. C. A., 5th Cir.), 7 Am. B. R. 384, 112 Fed. 407; In re Milgraum v. Ost (D. C., Pa.), 12 Am. B. R. 306, 129 Fed. 827 (as to sufficiency of specifications). Compare also, under the former law, In re

Chadwick et al., Fed. Cas. 2,569; In re Pierce, Fed. Cas. 11,141; Haas v. O'Brien, 66 N. Y. 597; Mayer v. Hellman, 91 U. S. 496, 23 L. Ed. 377.

³⁹³. English Act of Bankruptcy of 1890, § 8(3) (k).

³⁹⁴. Act of 1867, § 30, R. S., § 5,116.

³⁹⁵. See Report of Ex. Com. of National Association of Referees in Bankruptcy, p. 18, previously mentioned.

³⁹⁶. In re Seaholm (C. C. A., 1st Cir.), 14 Am. B. R. 292, 136 Fed. 144, holding that the words "in voluntary proceedings" have reference to the proceedings in which a discharge was granted, and not to the proceeding in which the second discharge is sought, and where a bankrupt has been discharged from his indebtedness in a voluntary proceeding within six years, a second discharge upon his own application in a subsequent involuntary proceeding is properly withheld.

would not seem applicable. If an application for a discharge had been refused in one proceeding the question of the bankrupt's right to discharge from the same debts in a subsequent proceeding is *res adjudicata*.³⁹⁷ The rule would seem to be that the failure of a bankrupt to apply for a discharge in the prior proceedings precludes him from procuring a discharge in subsequent proceedings from the debts scheduled and provable in the prior proceedings.³⁹⁸ The discharge in the subsequent proceedings must except all debts provable in the first bankruptcy and which could have been discharged therein.³⁹⁹ And the fact that a debt proved in the first proceeding was put in judgment after a refusal of the bankrupt's discharge, does not create a new debt so as to entitle the bankrupt in the second bankruptcy proceeding to retry his right to a discharge from such debt.⁴⁰⁰ And where a discharge has been granted in voluntary proceedings a second discharge cannot be granted within six years in an involuntary proceeding.⁴⁰¹

c. **Measure of time.**—The six years unquestionably begin to run from the date of the order granting the discharge; the time is thus to be measured between such date and the application for the second discharge, not the date of filing a second petition in bankruptcy.⁴⁰² Where, within five years of his

397. *Kuntz v. Young* (C. C. A., 8th Cir.), 12 Am. B. R. 505, 131 Fed. 719; *In re Kuffler* (D. C., N. Y.), 19 Am. B. R. 181, 153 Fed. 667; *Matter of Julius Silverman* (C. C. A., 2d Cir.), 19 Am. B. R. 460, 157 Fed. 675; *In re Elby* (D. C., Iowa), 19 Am. B. R. 734, 157 Fed. 935.

Refusal *res adjudicata*.—It is a settled rule of law that, where a bankrupt has failed to apply for his order of discharge within the time limited by the statute, his right to such order is *res adjudicata*, and he cannot by any subsequent proceedings secure a discharge from the debts provable in the former proceedings. *In re Weintraub* (D. C., N. J.), 13 Am. B. R. 711, 133 Fed. 1000.

Discharge in second proceeding held pending appeal in the first.—Where bankrupts were denied their discharge upon the ground that their application for a discharge in a former bankruptcy, involving the same indebtedness, though applied for in time, and denied after a year from the date of the adjudication was *res adjudicata*, but no order was entered, an appeal from the order denying them a discharge in the second bankruptcy proceeding will not be disposed of until they have had an opportunity to enter an order denying the discharge in the first bankruptcy proceeding and take an appeal therefrom. *Matter of Elkind & Schwartz* (C. C. A., 2d Cir.), 23 Am. B. R. 166, 175 Fed. 64.

398. *Matter of Cooper* (D. C., N. J.), 37 Am. B. R. 625, 236 Fed. 298.

This rule seems to be opposed in the case of *Matter of Skaats* (D. C., Ala.), 37 Am. B. R. 579, 233 Fed. 817, in which it was held that the mere fact that a bankrupt, in a prior voluntary proceeding, failed to apply for a discharge, is not a bar to *res adjudicata* on an application made within six years in a subsequent proceeding; it must be shown

that there was a discharge granted or denied by the court in the prior proceeding.

399. *In re Pullian* (D. C., Tenn.), 22 Am. B. R. 513, 171 Fed. 595.

The failure of a bankrupt to apply for a discharge within the prescribed time limit is a conclusive determination as to all parties then before the court, and in subsequent bankruptcy proceedings the said bankrupt will be granted a discharge, only as to such debts as were incurred since the institution of the first bankruptcy proceedings. *In re Van Borries* (D. C., Wis.), 21 Am. B. R. 849, 168 Fed. 718.

400. *In re Kuffler* (D. C., N. J.), 19 Am. B. R. 181, 153 Fed. 667, *affd.* 22 Am. B. R. 289, 168 Fed. 1021; *In re Schnabel* (D. C., N. Y.), 23 Am. B. R. 22, 166 Fed. 383.

Effect of failure to apply.—The failure of a bankrupt, through the neglect of his attorney, to apply for a discharge within the prescribed time limit, has the same effect as a judgment denying him a discharge from the debts involved in the bankruptcy proceedings and he may not thereafter institute a bankruptcy proceeding for the mere purpose of obtaining a discharge from debts scheduled and provable in the former proceeding. *In re Stone* (D. C., Ore.), 23 Am. B. R. 24, 172 Fed. 947.

401. *Matter of Neely* (D. C., N. Y.), 12 Am. B. R. 407, 134 Fed. 667; *In re Seaholm* (C. C. A., 1st Cir.), 14 Am. B. R. 292, 136 Fed. 144; *Matter of Haase* (D. C., N. Y.), 17 Am. B. R. 528, 155 Fed. 553.

402. *In re Little* (C. C. A., 7th Cir.), 13 Am. B. R. 640, 137 Fed. 521; *In re Jordan* (D. C., Pa.), 15 Am. B. R. 449, 142 Fed. 292. The six years is to be measured backward from the time of the hearing. *Matter of Haase* (D. C., N. Y.), 17 Am. B. R. 528, 155 Fed. 553 (citing *Collier on Bankruptcy*); *In re Chase* (D. C., Mass.), 26 Am. B. R. 456,

discharge, a voluntary bankrupt is again adjudicated a bankrupt, upon his own petition, his motion for leave to withdraw the proceedings because he could not obtain a discharge therein "within six years" after the granting of the former discharge, will be denied where his creditors object.⁴⁰³

XI. REFUSAL TO OBEY A LAWFUL ORDER, OR TO ANSWER A MATERIAL QUESTION APPROVED BY THE COURT.⁴⁰⁴

a. In general.—The nearest equivalent to this new objection is found in the act of 1841, whereby a discharge might be denied a bankrupt who should "wilfully omit or refuse to comply with any orders or directions of such court."⁴⁰⁵ Refusal to obey or to answer are in despite of the court, and the bankrupt may well say he thereby became liable for nothing more than a contempt. The amendatory act has added another consequence. Recalcitrancy is now also an objection to his discharge. But it must be "in the proceedings in bankruptcy."

b. Refusal to obey.—This seems to include failure to answer questions, provided the order requiring the answer is lawful. As has been seen, the words "lawful orders" occur elsewhere in the act. Whether the order is lawful or not will often be the only question. If authorized in words or by implication from the statute, it will be. Contempt of court, provided the order ignored was lawful, under this clause, becomes thus in effect an available objection to discharge. It is suggested, however, that mere neglect, not amounting to refusal to obey, would not be sufficient.

c. Refusal to answer.—This is not essentially different from refusal to obey. On refusal to answer a proper question, the court will usually order the bankrupt to answer. These words were inserted as a means to compel replies where the bankrupt asserts his privilege.⁴⁰⁶ It must appear in the report of the special master that the bankrupt refused to answer "a material question approved by the court."⁴⁰⁷ A bankrupt's refusal to answer a question, upon the ground that it will tend to degrade and incriminate him, will prevent his discharge, although he subsequently signifies his willingness to answer.⁴⁰⁸ But where there is nothing to show that a bankrupt, in giving evasive and disrespectful answers to questions concerning his property, wilfully concealed testimony, preventing his creditors from obtaining the property, his conduct is not ground for refusing to grant him a discharge.⁴⁰⁹ This clause is not in conflict with the fifth amendment to the constitution.⁴¹⁰

186 Fed. 408. The change in the text by inserting the words "application for the," is suggested by the court in the case of *In re Dunphy* (D. C., Me.), 30 Am. B. R. 760, 206 Fed. 680. It seems more reasonable to hold that the period terminates upon the application for the second discharge.

⁴⁰³ *Matter of Smith* (D. C., N. Y.), 19 Am. B. R. 63, 155 Fed. 688.

⁴⁰⁴ Note remarks of Judge Brawley, in *In re Nachman* (D. C., So. Car.), 8 Am. B. R. 180, 114 Fed. 995.

⁴⁰⁵ Act of 1841, § 4.

⁴⁰⁶ See p. 269, *ante*.

⁴⁰⁷ *Matter of Lenweaver* (D. C., N. Y.), 36 Am. B. R. 73, 226 Fed. 987.

⁴⁰⁸ *In re Weinreb* (C. C. A., 2d Cir.), 18 Am. B. R. 387, 153 Fed. 363.

⁴⁰⁹ The purpose of the penalties of the bankruptcy statute is to prevent bankrupts from concealing their property and defrauding their creditors. Ordinary questions of contumacy or contempt of court can be disposed of directly and of themselves are not to be corrected by the withholding of a discharge. *Matter of Fanning* (D. C., N. Y.), 19 Am. B. R. 55, 155 Fed. 701.

⁴¹⁰ *In re Dresser* (C. C. A., 2d Cir.), 16 Am. B. R. 561, 145 Fed. 1,021, holding that the proceeding for a discharge is not a criminal proceeding, and that the constitutional provision protects witnesses in criminal proceedings only.

d. Effect of withdrawal of objections by creditors.—In determining whether a bankrupt is entitled to a discharge, the fact that creditors, who originally objected thereto, have withdrawn from the case, should have no weight, if the court be clearly convinced that the bankrupt has committed the frauds alleged by them; but if there be doubt as to bankrupt's guilt, that fact may properly be considered.⁴¹¹

XII. THE DISCHARGE.

a. In general.—The granting or withholding of a discharge is within the sound judicial discretion of the judge.⁴¹² But a voluntary bankrupt is entitled to his discharge as a legal right unless the objecting creditors establish his guilt, for the burden is not on the bankrupt to satisfy the court that he has done everything the law requires him to do and is guilty of none of the things which the law condemns.⁴¹³ If the judge sustains the specifications or any of them, an order refusing the discharge is granted and entered; such an order precludes another application in the same proceeding.⁴¹⁴ If he overrules them, an order of discharge follows. A discharge may not be refused because the bankrupt has been dilatory in bringing the matter to a hearing,⁴¹⁵ or because one or more debts will not be released by it.⁴¹⁶ The insanity of the bankrupt does not affect his right to a discharge.⁴¹⁷ The referee's findings are not usually reversed except for palpable error.⁴¹⁸ The findings of the special master or referee should specifically state the grounds for the denial of a discharge.⁴¹⁹ Unlike the certificate under the former law, the discharge of to-day is silent as to the debts affected thereby.⁴²⁰ Its effect can only be determined when it is asserted as a bar elsewhere.⁴²¹ Where a bankrupt has been denied a discharge in one proceeding he cannot in a second proceeding be discharged from debts provable in the former proceeding,⁴²² even though they are barred by the

^{411.} *In re Hammerstein* (C. C. A., 2d Cir.), 26 Am. B. R. 757, 189 Fed. 37.

^{412.} *Woods v. Little* (C. C. A., 3d Cir.), 13 Am. B. R. 742, 134 Fed. 229. A discharge should not be granted until the specifications of objection thereto have been disposed of. *In re Randall* (D. C., Pa.), 20 Am. B. R. 305, 159 Fed. 298.

Discretion of bankruptcy court.—Such a denial is discretionary with the bankruptcy court, but only in the same sense in which final orders and decrees in equity are so. Substantial errors in the interpretation or application of the principles and rules of equity jurisprudence governing the matter may be reviewed and corrected. *Lindeke v. Converse* (C. C. A., 8th Cir.), 28 Am. B. R. 596, 198 Fed. 618.

^{413.} *Matter of Johnson* (D. C., Pa.), 32 Am. B. R. 448, 215 Fed. 748.

^{414.} *Matter of Feigenbaum* (C. C. A., 2d Cir.), 9 Am. B. R. 595, 57 C. C. A. 409, 121 Fed. 69, revg. 7 Am. B. R. 339, 151 Fed. 508.

^{415.} *In re Wolff* (D. C., Cal.), 13 Am. B. R. 95, 132 Fed. 396.

^{416.} *In re Blumberg* (D. C., Tenn.), 1 Am. B. R. 633, 94 Fed. 476, holding that the District Court in considering the application for a discharge can consider only the right to a discharge, not the effect of a discharge.

^{417.} *In re Miller* (D. C., Pa.), 13 Am. B. R. 345, 133 Fed. 1017.

^{418.} *In re Covington* (D. C., No. Car.), 6 Am. B. R. 373, 110 Fed. 143.

^{419.} **Necessity for pointing out offense.**—In order to bar a bankrupt's discharge on the ground of having committed an offense punishable by imprisonment, in that he made false oath in relation to the proceedings in bankruptcy, it must be shown wherein the bankrupt made a false oath, and a finding that (1) in verifying the answer and (2) in giving his testimony, the bankrupt made a false oath "either in one or the other," is insufficient. *In re Mayer* (D. C., N. Y.), 28 Am. B. R. 342, 195 Fed. 571.

^{420.} See Form No. 59, and compare *Audubon v. Schufeldt*, 181 U. S. 575, 5 Am. B. R. 829, 45 L. Ed. 1,009. See also *In re Claff* (D. C., Mass.), 7 Am. B. R. 128, 111 Fed. 506.

^{421.} See discussion under Section Seventeen, *post*, and compare for rulings in advance of discharge on application for stays, under Section Eleven and later under this section, subtitle "Effect of the Discharge."

^{422.} *In re Kuffler* (D. C., N. Y.), 16 Am. B. R. 305, 144 Fed. 445; *Blumenthal v. Jones*, 208 U. S. 64, 19 Am. B. R. 288, 55 L. Ed. 390.

statute of limitations.⁴²³ A discharge may be amended after the term at which it was granted.⁴²⁴

b. Postponement of discharge.—Cases have arisen where it is appropriate to withhold temporarily or to postpone a discharge pending the determination of a suit or proceeding in which others beside the bankrupt are parties, where a discharge will tend to affect adversely the rights of such parties. As, for instance, where a bond was given to release certain property of the bankrupt from a writ of garnishment, granted in an action on a contract more than four months prior to bankruptcy;⁴²⁵ and so also when questions have arisen in respect to exempt property claimed by the bankrupt but as to which creditors have asserted certain rights.⁴²⁶

c. Costs.—Costs on contested applications for discharge are discretionary, and are often granted;⁴²⁷ but not to the attorney for the bankrupt out of the estate.⁴²⁸ In voluntary cases it has been held that costs may be allowed to the bankrupt's attorney.⁴²⁹ But in no case should such costs be charged against the objecting creditors.⁴³⁰

d. Vacating discharge.—It has been held that when, after discharge granted, it appears that a creditor has been bought off, this is *prima facie* evidence that the debtor was not entitled to discharge, and his discharge will be vacated.⁴³¹

423. In re Kuffler (D. C., N. Y.), 19 Am. B. R. 181, 153 Fed. 667.

424. In re Kaufman (D. C., N. Y.), 14 Am. B. R. 393, 136 Fed. 262, holding that a discharge releasing a partner from firm debts may be amended so as to release him as an individual from any liability on account of the debts of the firm.

425. Matter of Phillips & Co. (D. C., Ga.), 34 Am. B. R. 877, 224 Fed. 628; In re Maher (D. C., Ga.), 22 Am. B. R. 290, 169 Fed. 997.

Delay of discharge.—A bankrupt's discharge may be delayed for a reasonable time to enable a State court to settle a question as to the claim of a creditor in the exempt property of the bankrupt. Matter of Brown (D. C., Ky.), 35 Am. B. R. 826, 228 Fed. 533.

426. Meinhard & Bro. v. Pincus (C. C. A., 5th Cir.), 29 Am. B. R. 619, 200 Fed. 736; In re Woodruff (D. C., Ga.), 2 Am. B. R. 678, 96 Fed. 317; In re Castleberry (D. C., Ga.), 16 Am. B. R. 159, 143 Fed. 1018; Matter of Brown (D. C., Ky.), 35 Am. B. R. 826, 228 Fed. 533.

427. The power to award costs against a creditor who files specifications of objections in opposition to a bankrupt's discharge is inherent in a district court as a court of equity, and may be exercised in proper cases, although such power is not specifically conferred by the bankruptcy act. Such power should, however, not be exercised unless it appears (1) either, on the one hand, that the bankrupt, since his adjudication, has acquired property, out of which costs, if against him, could be paid, or that there were assets in his estate, against which, in a similar contingency, they would have been chargeable; or, (2) on the other hand, those elements being lacking, that the creditors'

objection was without merit and intended solely to vex or delay. In re Wolpert (Ref., N. Y.), 1 Am. B. R. 436.

Where references were provoked by the bankrupt and costs were legitimately incurred for referee's compensation in conducting hearings before him of the specifications opposing the discharge of the bankrupt, these costs should be taxed to the losing party. Bragassa v. St. Louis Cycle Co. (C. C. A., 5th Cir.), 5 Am. B. R. 700, 107 Fed. 77.

In the Eastern District of New York a creditor upon filing specifications of objection to the granting of a bankrupt's discharge is required, under Rule 41, to deposit with the referee a sum sufficient to guarantee that the expenses of the reference will be paid. In re Fritz (D. C., N. Y.), 23 Am. B. R. 84, 173 Fed. 560.

In the Northern District of New York the costs permitted on application for a discharge are the fees paid the referee and necessary disbursements. The docket fee is not taxable. In re Gaylord (D. C., N. Y.), 5 Am. B. R. 805, 833 Fed. 106.

428. In re Brundin (D. C., Minn.), 7 Am. B. R. 296, 112 Fed. 306; In re Gillardon (D. C., Pa.), 26 Am. B. R. 103, 187 Fed. 289; Matter of Kyte (D. C., Pa.), 26 Am. B. R. 507, 189 Fed. 531.

429. In re Christianson (D. C., N. Dak.), 23 Am. B. R. 710, 175 Fed. 867; In re Kross (D. C., N. Y.), 3 Am. B. R. 187, 96 Fed. 816; In re Keller (D. C., N. Y.), 31 Am. B. R. 51, 207 Fed. 118.

430. In re Gillardon (D. C., Pa.), 26 Am. B. R. 103, 187 Fed. 289.

431. In re Dietz (D. C., N. Y.), 3 Am. B. R. 316, 97 Fed. 563. See also Bell v. Leggett, 7 N. Y. 176.

XIII. EFFECT OF DISCHARGE.

a. **In general.**—A discharge goes to the remedy; it does not cancel the debt. It destroys the remedy on all debts except those falling within the terms of § 17-a, discussed later.⁴³² It does not affect the estate in bankruptcy, so that proved debts may be charged against unadministered assets, delivered to the trustee after the closing of the estate.⁴³³ Its effect on partnership debts and the debts of corporations has already been considered;⁴³⁴ its effect on the liabilities of codebtors will be examined later.⁴³⁵ It does not affect in any way the surplus remaining in the hands of the trustee of a bankrupt partnership nor the claims of individual creditors against such surplus.⁴³⁶ But it discharges the bankrupt's personal liability although it does not affect a lien securing such liability.⁴³⁷ A discharge does not determine whether a particular claim is covered by the discharge or is excepted therefrom, that being a matter for subsequent determination.⁴³⁸ In determining the effect of a discharge decisions of the United States Supreme Court are controlling, since the question is a federal one.⁴³⁹

b. **On liens.**—A discharge is personal to the debtor. It follows, therefore, that a lien in good faith is not affected thereby;⁴⁴⁰ the effect of a discharge being to release the bankrupt's personal liability only.⁴⁴¹ Neither is a judgment evidencing a lien annulled or extinguished except in so far as it imposes a

⁴³² See for a peculiar case, *In re Claff* (D. C., Mass.), 7 Am. B. R. 128, 111 Fed. 506. For instance, a debt for clothing purchased by the bankrupt for his children could not be sued after his discharge. *Schellenberg v. Mullaney*, 112 N. Y. App. Div. 384, 16 Am. B. R. 542, 98 N. Y. Supp. 432. A surrogate's court has jurisdiction and it is its duty to give effect to a discharge. *Matter of Peterson* (Surr. Ct., N. Y.), 137 N. Y. App. Div. 435, 22 Am. B. R. 549, 121 N. Y. Supp. 738.

⁴³³ *Matter of Lighthall* (D. C., N. Y.), 34 Am. B. R. 594, 221 Fed. 791.

⁴³⁴ See pp. 181-183, *ante*.

⁴³⁵ See discussion under Section Sixteen of this work.

⁴³⁶ *Johnson v. Norris* (C. C. A., 5th Cir.), 27 Am. B. R. 107, 190 Fed. 459.

⁴³⁷ *Jensen v. Dorr* (D. C. of App., Cal.), 23 Cal. App. 701, 33 Am. B. R. 87, 139 Pac. 659.

⁴³⁸ *Hanan v. Long* (Sup. Ct., App. Div., N. Y.), 150 N. Y. App. Div. 327, 32 Am. B. R. 132, 134 N. Y. Supp. 786.

⁴³⁹ *Butler-Keyser Manufacturing Co. v. Mitchell & Co.* (Ala. Sup. Ct.), 37 Am. B. R. 195, 70 So. 665.

⁴⁴⁰ Compare Bankr. Act, § 67-d; Am. Bankr. Dig. § 1149; *Paxton v. Scott* (Sup. Ct., Nebr.), 66 Nebr. 385, 10 Am. B. R. 80, 92 N. W. 611; *Elsbree v. Burt* (Sup. Ct., R. I.), 24 R. I. 322, 9 Am. B. R. 87, 53 Atl. 60; *Howard v. Cunliff* (Ct. App., Mo.), 96 Mo. App. 67, 10 Am. B. R. 71, 69 S. W. 737; *McDonald v. Taylor* (N. Y. App. Div.), 144 N. Y. App. Div. 329, 26 Am. B. R. 635, 128 N. Y. Supp. 1048. So held in Illinois in respect to an assignment of

future earnings. *Mallin v. Wenham*, 209 Ill. 252, 13 Am. B. R. 210, 70 N. E. 564. But see *Leitch v. No. Pac. Ry. Co.*, 95 Minn. 35, 14 Am. B. R. 409, 103 N. W. 704; *In re Home Discount Co.* (D. C., Ala.), 17 Am. B. R. 168, 147 Fed. 538. The lien of an execution levied before bankruptcy would not be released by the bankrupt's discharge. *Bassett v. Thackara* (Sup. Ct., N. J.), 72 N. J. L. 81, 16 Am. B. R. 786, 60 Atl. 39. See also *Jensen v. Dorr* (Dist. Ct. of App., Cal.), 23 Cal. App. 701, 33 Am. B. R. 87, 139 Pac. 659; *McCarty v. Light* (Sup. Ct. App. Div., N. Y.), 155 N. Y. App. Div. 36, 33 Am. B. R. 883, 139 N. Y. Supp. 853; *Olsen v. Nelson* (Sup. Ct., Minn.), 125 Minn. 286, 32 Am. B. R. 297, 146 N. W. 1097; *Leslie Paper Co. v. Wheeler* (Sup. Ct., N. Dak.), 23 N. Dak. 477, 32 Am. B. R. 688, 137 N. W. 412.

Discharge personal.—The discharge of a bankrupt is personal to him and does not affect the force of any liens subsisting at the time. *Frey v. McGaw* (Md. Ct. of App.) 127 Md. 23, 35 Am. B. R. 822, 95 Atl. 960.

Effect on lien of mortgage.—Where a plaintiff claiming a lien on property of the bankrupt under a mortgage, brought an action of replevin based on such lien, it is immaterial that the court excluded evidence of the discharge of the defendant in bankruptcy. *Hoeffler Manufacturing Co. v. Machajewski* (Wis. Sup. Ct.), 163 Wis. 184, 37 Am. B. R. 156, 157 N. W. 702.

⁴⁴¹ *Leslie Paper Co. v. Wheeler* (Sup. Ct., N. Dak.), 23 N. Dak. 477, 32 Am. B. R. 688, 137 N. W. 412.

personal liability upon the bankrupt.⁴⁴² The discharge does not affect the right of the trustee or creditors of the bankrupt to have property previously disposed of by the bankrupt for the purpose of fraud, applied to the payment of his debts.⁴⁴³ This doctrine should not, however, be confused with the other which avoids all liens through legal proceedings if within four months of the bankruptcy.⁴⁴⁴ The bankruptcy law does not continue a dischargeable debt for the purpose of permitting a lien to be created after the adjudication, but only to preserve and enforce a lien in existence at the date of the adjudication.⁴⁴⁵ The discharge, when granted, relates back to the date of adjudication, and property acquired by the bankrupt, intervening the filing of the petition and the granting of the discharge, is not appropriated to payment of his debts. Thus, an assignment of unearned wages to secure a dischargeable debt creates no lien until the wages have been earned and cannot be enforced, as to wages earned after the date of adjudication, after the bankrupt has been discharged.⁴⁴⁶

442. *Olsen v. Nelson* (Sup. Ct., Minn.), 125 Minn. 286, 32 Am. B. R. 297, 146 N. W. 1097.

443. The discharge of a debtor in bankruptcy is personal to the bankrupt and does not release his fraudulent grantees from liability for the fraud committed by them and in no way precludes the trustee from recovering property of the estate thus fraudulently transferred. *Stephenson v. Bird* (Sup. Ct., Ala.), 168 Ala. 363, 25 Am. B. R. 909, 53 So. 92. A discharge in bankruptcy does not necessarily affect a specific lien, but only releases the bankrupt from personal liability. *Newberry Shoe Co. v. Collier* (Sup. Ct. of App., Va.), 111 Va. 288, 25 Am. B. R. 130, 68 S. E. 974; *Gregory Co. v. Cale* (Sup. Ct., Minn.), 115 Minn. 508, 27 Am. B. R. 131, 133 N. W. 75; *Robinson v. Tischler* (Sup. Ct., Fla.), 69 Fla. 77, 34 Am. B. R. 137, 67 So. 565.

Levy upon exempt property under waiver of exemption.—A discharge in bankruptcy takes away all personal liability for the debt discharged, but does not affect liens acquired against particular property before the discharge, so that a levy upon property exempt in bankruptcy, made after bankrupt's adjudication, but prior to his discharge, under a judgment entered on a warrant of attorney containing a waiver of exemptions, is not affected by the discharge. *Realty Co. v. Gioshio* (Pa. Com. Pleas, Alle. Co.), 27 Am. B. R. 58. See *In re Harrington* (D. C., N. Y.), 29 Am. B. R. 666, 200 Fed. 1010, citing text.

Fraudulent transfer.—The discharge of a bankrupt does not inure to the benefit of his wife, so as to release property fraudulently conveyed to her from the payment of his debts. *Blick v. Nimmo* (Md. Ct. of App.), 121 Md. 139, 30 Am. B. R. 770, 88 Atl. 116.

Effect upon community property.—An adjudication against a husband in the State of Washington is also an adjudication against the community property and debts, and his discharge, discharges the community. *Gibbons v. Dexter Horton Trust & Savings Bank* (D. C., Wash.), 35 Am. B. R. 632, 225 Fed. 424.

444. See Bankr. Act, § 67-f. A lien on property of the bankrupt, acquired within four months of the time he was adjudged a bankrupt, is not void unless the bankrupt was insolvent at the time the lien was obtained. Thus, in a State court suit, started within four months before bankrupt's adjudication, to set aside a deed to his wife of land alleged to have been paid for by bankrupt, but conveyed to his wife for the purpose of hindering, delaying and defrauding his creditors, in beginning which suit a *lis pendens* was recorded against the property involved in the suit, a decree had been entered by default declaring complainant's debt to be a lien, as of the date of the recordation of the *lis pendens*, upon such property, which meanwhile had been conveyed to bankrupt and allowed to him as a part of his homestead exemption. The bankrupt subsequently sought to set aside such decree on the ground that the debt had been discharged in bankruptcy and the right to a lien on the homestead property adjudicated against the complainant by the bankruptcy court. It was held, that in the absence of evidence showing that the bankrupt was insolvent at the time the lien attached, the lien was not affected by the discharge in bankruptcy and that the bankruptcy court had no jurisdiction of the homestead property and therefore could not adjudicate the rights of the parties with respect thereto. *Newberry Shoe Co. v. Collier* (Sup. Ct. of App., Va.), 111 Va. 288, 25 Am. B. R. 130; 68 S. E. 974.

445. *In re Harrington* (D. C., N. Y.), 29 Am. B. R. 666, 200 Fed. 1010 (quoting text), holding that since the provisions of the bankruptcy act are paramount to State statutes, the fact that under section 150 of the N. Y. Debtor and Creditor Law, the cancellation of record of such judgment could not be had until after the expiration of a year from bankrupt's discharge, is immaterial.

446. **Lien created by assignment of future wages.**—*In re Lineberry* (D. C., Ala.), 25 Am. B. R. 164, 183 Fed. 338; *Leitch v. Northern Pacific Ry. Co.* (Minn. Sup. Ct.),

Likewise an execution *in personam*, founded on a debt provable in bankruptcy, cannot be enforced against the property of a bankrupt acquired subsequent to his discharge.⁴⁴⁷ Liens continuing valid, it often becomes necessary to destroy their effect on possible after-acquired property. Hence, the provisions in the State laws, permitting proceedings to compel the cancellation of docketed judgments barred by a discharge.⁴⁴⁸

95 Minn. 35, 14 Am. B. R. 409, 103 N. W. 704; and *In re Home Discount Company* (D. C., Ala.), 17 Am. B. R. 168, 147 Fed. 538, disapproving *Mallin v. Wenham* (Ill. Sup. Ct.), 209 Ill. 252, 13 Am. B. R. 210, 70 N. E. 564.

In the case of *In re West* (D. C., Or.), 11 Am. B. R. 782, 128 Fed. 205, the court said: "The theory of a lien upon the earnings of future labor is not that it attaches to such earnings from the moment of contract of pledge or assignment, but from the moment of their existence. It is needless to say that there can be no lien upon what does not exist. A pledge or assignment of future earnings in such a case is said to create an equitable interest in such wages. *Stott v. Frany*, 20 Or. 410, 23 Am. St. Rep. 132, 26 Pac. 271. This is true of wages earned upon a general employment, as well as those earned upon a definite contract. In this case the railroad company was under no obligation to employ the bankrupt, nor he to work for the company. If future earnings in such a case can be said to have a potential existence, they are the subject of an agreement for a lien; but the lien, or so-called equitable interest, does not attach until the wages come into existence, and until the lien does attach, there is no lien. The discharge in bankruptcy operated to discharge these obligations as of the date of the adjudication, so that the obligations were discharged before the wages intended as security were in existence. The law does not continue an obligation in order that there may be a lien, but only does so because there is one. The effect of the discharge upon the prospective liens was the same as though the debts had been paid before the assigned wages were earned. The wages earned after the adjudication became the property of the bankrupt clear of the claims of all creditors. *Collier on Bankruptcy*, 809. These debts cannot escape the operation of the Bankruptcy Law by an agreement for a lien upon what the debtor expected to earn, but did not earn until after the adjudication in bankruptcy."

447. *Peterson v. Calhoun* (Sup. Ct., Ga.), 137 Ga. 799, 32 Am. B. R. 854, 74 S. E. 519.

448. In New York, see § 1,268 of the N. Y. Code of Civil Procedure; *Hussey v. Judson*, 43 N. Y. Misc. 370, 11 Am. B. R. 521, 87 N. Y. Supp. 499; *Matter of Peterson* (Surr. Ct. N. Y.), 137 N. Y. App. Div. 435, 22 Am. B. R. 549, 121 N. Y. Supp. 738. Only judgments entered before discharge are affected by this section. *Howe v. Noyes*, 47 N. Y. Misc. 338, 15 Am. B. R. 103, 93 N. Y. Supp. 841. See also *In re Harrington* (D. C.,

N. Y.), 29 Am. B. R. 666, 200 Fed. 1010, quoting text.

In Georgia the lien of a judgment obtained within four months of filing the petition in bankruptcy is not barred by the defendant's discharge. *McKenney v. Cheney*, 118 Ga. 387, 11 Am. B. R. 54, 45 S. E. 433; *In re Weaver* (D. C., Ga.), 16 Am. B. R. 265, 144 Fed. 229.

Effect in California as to excess over homestead exemption.—Plaintiff recovered judgment against defendant who was thereafter adjudged a bankrupt and subsequently received a discharge in bankruptcy. Plaintiff's claim, evidenced by the judgment, was one provable in bankruptcy. A judgment, under the law of California, is not a lien upon property covered by a valid declaration of homestead, regardless of its value, and the levy of an execution thereon creates no lien, but simply serves as a foundation for statutory proceedings to subject the excess above the statutory homestead exemption to the satisfaction of the judgment. At the time of defendant's discharge in bankruptcy no such proceeding had been initiated. Held, that the judgment was merely a personal liability released by defendant's discharge, so as to bar any proceeding to enforce it and that an execution, levied as a prerequisite to a proceeding to reach defendant's homestead property in excess of the statutory amount should be quashed and set aside. *Boggs v. Dunn* (Cal. Sup. Ct.), 100 Cal. 283, 26 Am. B. R. 846, 116 Pac. 743.

North Dakota statute.—In *Leslie Paper Co. v. Wheeler* (Sup. Ct., N. Dak.), 23 N. Dak. 477, 32 Am. B. R. 688, 137 N. W. 412, the court construed chapter 125 of Session Laws 1905 of North Dakota to mean that the legislative intent in the enactment thereof was merely to authorize the cancellation and satisfaction of record of such judgments only as are affected by a discharge in bankruptcy; and held that the legislative purpose was merely to give record notice that judgments extinguished by the bankruptcy proceedings no longer have any vitality to attach as liens to real estate subsequently acquired.

Judgment affecting property of third person.—When it appears that a judgment against a person discharged in bankruptcy may be a lien on property owned by a person not a party to the proceeding for cancellation of the judgment an absolute satisfaction of the judgment should not be ordered. *Olsen v. Nelson* (Sup. Ct., Minn.), 125 Minn. 286, 32 Am. B. R. 297, 146 N. W. 1,097.

c. **On lien of garnishee execution.**—Where it is provided by State statute that an execution under a judgment becomes and continues a lien upon wages, earnings, salary, income from trust funds, and the like, to the amount prescribed, until such execution is fully satisfied,⁴⁴⁹ the earnings and income which become due after the discharge, belong to the bankrupt, and the order directing the levy upon such earnings and income should be modified.⁴⁵⁰

d. **Discharge must be pleaded.**—Being a bar to the remedy it must be pleaded.⁴⁵¹ The better practice is to procure a stay of all pending suits and to stay those that may be brought while the proceeding is pending, and then, when the discharge is granted, to plead it.⁴⁵² It seems, however, that a judgment entered after a petition is filed, but before the discharge, is a mere debt, and the discharge can be used as a bar to proceedings to enforce it. A judgment entered after the discharge, no matter when the suit was begun, is valid even as to the discharge; by not pleading it, the defendant has waived its benefits.⁴⁵³

XIV. EFFECT OF COMPOSITION.

This subject has already been discussed in another place.⁴⁵⁴ A composition in bankruptcy may be pleaded in bar of an action upon a debt discharged, and in order to be available it must be so pleaded.⁴⁵⁵ So long as an order confirming a composition stands, it must have the effect given it by this section, viz., the discharge of the bankrupt from his debts, "other than those agreed to be

449. N. Y. Code Civil Procedure, § 1391.

450. *Ulnor v. Doran*, 167 N. Y. App. Div. 259, 34 Am. B. R. 410, 111 N. Y. Supp. 1148. And see *In re Sims* (D. C., N. Y.), 23 Am. B. R. 899, 176 Fed. 645, holding that wages which arise from services rendered after the petition is filed, are covered by the discharge and that a stay should be issued preventing levy after that time.

451. *In re Rhutassel* (D. C., Iowa), 2 Am. B. R. 697, 96 Fed. 597; *Schreiber v. Shoemaker Piano Forte Mfg. Co.*, 152 N. Y. App. Div. 817, 28 Am. B. R. 858, 137 N. Y. Supp. 747; *First Nat'l Bank of Broadway v. Cootes* (Sup. Ct., W. Va.), 74 W. Va. 112, 32 Am. B. R. 361, 81 S. E. 844 (citing *Collier on Bankruptcy* (8th Ed.), 294); *Bryan v. Orient Lumber & Coal Co.* (Okla. Sup. Ct.), 37 Am. B. R. 206.

The burden of proof is on a judgment creditor to show that his claim is not barred by the debtor's discharge in bankruptcy; and where the question is to be disposed of from the facts alleged in the creditor's pleading, it must be construed in favor of the bankrupt. *Matter of Grout* (Sup. Ct., Vt.), 88 Vt. 318, 33 Am. B. R. 789, 92 Atl. 646.

Judgment on forfeited bailbond.—A bankrupt is not entitled under § 150 of the Debtors and Creditors Law of New York to have a judgment recovered on a forfeited bailbond discharged of record.

452. See generally under Section Eleven of this work. Text quoted in *In re Nuttall* (D. C., N. Y.), 29 Am. B. R. 500, 201 Fed. 557; *Herschman v. Bolster*, 220 Mass. 137, 33 Am. B. R. 747, 107 N. E. 543; *Crocker v. Bergh*, 118 Minn. 316, 34 Am. B. R. 190, 137 N. W. 737.

Effect of § 150 of N. Y. Debtor and Creditor Law.—Where a judgment upon a cause of action *ex contractu* entered by default has been opened and prior to a second judgment by default the defendant has been discharged in bankruptcy, in which proceeding the plaintiff's claim was scheduled and the plaintiff given notice, the bankrupt is entitled to a discharge of the judgment under this section, and the fact that the bankrupt did not obtain a stay from the bankruptcy court or move to open a default taken subsequently to his discharge is immaterial. *Walker v. Muir*, 127 App. Div. 163, 21 Am. B. R. 278, 111 N. Y. Supp. 465; *Matter of Halper* (N. Y. City Ct.), 82 Misc. 205, 31 Am. B. R. 283, 143 N. Y. Supp. 1005; *Matter of Weber* (Ct. of App., N. Y.), 212 N. Y. 290, 32 Am. B. R. 730, 143 N. Y. Supp. 1149.

453. *Herschman v. Bolster* (Sup. Jud. Ct., Mass.), 220 Mass. 137, 33 Am. B. R. 747, 107 N. E. 543.

A discharge does not ipso facto oust the jurisdiction of the State Court to render judgment. *First Nat'l Bank v. Cootes* (Sup. Ct., W. Va.), 74 W. Va. 112, 32 Am. B. R. 361, 81 S. E. 844, citing *Collier on Bankruptcy* (8th Ed.), 294.

454. See under Section Twelve, *ante*.

455. *Consolidated Rubber Tire Co. v. Equipment Co.*, 121 N. Y. App. Div. 764, 19 Am. B. R. 862, 864, 106 N. Y. Supp. 599. Effect of composition as discharge of bankrupt's liability as indorser, see *Easton Furniture Mfg. Co. v. Caminez* (N. Y. App. Div.), 146 N. Y. App. Div. 436, 27 Am. B. R. 29, 131 N. Y. Supp. 157.

paid by the terms of the composition and those not affected by a discharge," and the order of confirmation can only be set aside within the time limited by section 12.⁴⁵⁶ But where an objecting creditor has filed specifications against discharge he is entitled to be heard on appeal on their merits, and his rights cannot be prejudiced by the vote of a majority of the other creditors expressing satisfaction with a proposed compromise.⁴⁵⁷ Where the discharge by order confirming a composition states that the bankrupt has not been guilty of any of the acts which would constitute a bar to the bankrupt's discharge and which composition was opposed by a creditor who alleged that the bankrupt had been guilty of a false statement inducing a sale to him on credit, such creditor is not barred from bringing a subsequent action based on the same deceit alleged as a basis for his opposition to the confirmation of the composition.⁴⁵⁸

⁴⁵⁶. *In re Jersey Island Packing Co.* (D. C., Cal.), 18 Am. B. R. 417, 152 Fed. 839; *In re Wilkens* (D. C., N. Y.), 27 Am. B. R. 225, 191 Fed. 94.

⁴⁵⁷. *Matter of Doyle* (C. C. A., 2d Cir.), 34 Am. B. R. 28, 220 Fed. 434.

⁴⁵⁸. *Friend v. Talcott* 228 U. S. 27, 30 Am. B. R. 31, 57 L. Ed. 718.

SECTION FIFTEEN.

DISCHARGES, WHEN REVOKED.

§ 15. **Discharges, when Revoked.**—*a* The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.

Analogous provisions: In U. S.: Act of 1867, § 34, R. S., § 5120; Act of 1841, § 4; Act of 1800, § 34.

In Eng.: Act of 1890, § 8(8).

Cross-references: To the law: Jurisdiction to revoke discharges, § 2(12).

Proceedings on setting aside composition, § 13.

Discharges; when granted and practice thereon, § 14.

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I. COMPARATIVE LEGISLATION.

a. **Revocation under English act.**—There is no equivalent section in the English law, though a bankrupt's discharge may be revoked in certain cases as a penalty.¹

b. **Under our former laws.**—Our law of 1800, in effect, permitted the impeachment of a discharge whenever or wherever pleaded on any grounds which might have been urged against it in the court of bankruptcy. The act of 1841 provided for a like impeachment on a showing of "some fraud or a wilful concealment by him of his property, . . . contrary to the provisions of this act." The law of 1867, for the first time, provided for a direct proceeding to revoke. The sole ground of revocation, as under the present law, was that the discharge "was fraudulently obtained." The practice on such applications was also provided for; and the limitation was two years, instead of one.²

II. JURISDICTION TO REVOKE DISCHARGE.

a. **Collateral attack.**—The decisions under the law of 1867 on the question as to whether a discharge could be collaterally attacked were not entirely uniform, though the weight of authority was that a discharge once granted was not subject to attack elsewhere.³ There can be little doubt that this is the rule under the present law.⁴ The very nature of the proceeding results in the doctrine that the granting of a discharge is an adjudication between the bankrupt and all parties duly scheduled or with notice, amounting to *res adjudicata* that no other court will allow to be impeached.⁵ Besides, the present law, like its predecessor, declares that such discharge, "not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made."⁶

1. Eng. Act of Bankruptcy, § 8(8); General Rules, 240(3), 244-a.

2. § 34, Act of 1867, R. S., § 5,120.

3. *Dusenberry v. Hoyt*, 53 N. Y. 521; *Black v. Blazo*, 117 Mass. 17; *Corey v. Ripley*, 57 Me. 69; *Commercial Bank v. Buckner*, 20 How. 108; *In re Witkowski*, Fed. Cas. 17,920; *Stevens v. Brown*, 11 N. B. R. 568. *Contra*: *Perkins v. Gay*, 3 N. B. R. 772; *Beardsley v. Holl*, 36 Conn. 270.

4. Remedy by statute is exclusive and an order of discharge may not be questioned or attacked collaterally in any court, State or

Federal. The bankrupt cannot surrender or vacate his discharge. *In re Shaffer* (D. C., N. Car.), 4 Am. B. R. 728, 104 Fed. 982; *Custard v. Wiggerson*, 130 Wis. 412, 17 Am. B. R. 337, 110 N. W. 263.

5. *Hudson v. Bingham*, 8 N. B. R. 494, and cases there cited; *Reed v. Bullington*, 49 Miss. 223, and cases cited.

6. Bankr. Act. § 21-f.

A certified copy of an order granting a discharge to a bankrupt cannot be impeached collaterally. *Custard v. Wiggerson*, 130 Wis. 412, 17 Am. B. R. 337, 110 N. W. 263.

b. Jurisdiction to revoke is exclusive.—It follows, also, under well-known canons of interpretation, that, this method of revocation being prescribed, it excludes all other methods in other courts,⁷ provided the invalidity of the discharge is based on one or more of the grounds specified in the act.⁸ It also excludes any other method amounting to an actual revocation, even in a court of bankruptcy. It seems, however, that such a court has still the usual jurisdiction, where there is no other remedy, to vary, recall, or annul its orders, including, of course, a discharge if application is seasonably made and justice requires it.⁹ In actual practice, the only difference between such an annulment and a revocation proper is that, in the former, a valid discharge may subsequently be granted; while, in the latter, the determination is final, subject, of course, to appeal.¹⁰

III. MEANING OF SECTION.

a. In general.—The striking similarity between this section and § 13, relative to the setting aside of a composition, both in phrasing and in purpose, should be noted. So also should the fact that the revocation of a discharge lifts the bar as to all debts, while § 17 chiefly has to do with those debts to which a discharge is never a bar.¹¹ This section does not apply where the discharge results by operation of law from the confirmation of the bankrupt's offer of composition.¹² The meaning of the various words and clauses is briefly discussed below.

b. "Parties in interest."—This phrase is used elsewhere in the statute. It has the same meaning as where the phrase is used in § 14, authorizing an objection to a discharge on the grounds therein stated. It may mean more than "creditor," but usually is an equivalent. It includes only those persons whose rights would be barred by the discharge.¹³ Only such persons can apply for a revocation.¹⁴ A creditor is not prevented from being a party in interest because

7. *Corey v. Ripley*, 57 Me. 69; *Commercial Bank v. Buckner*, 20 How. 108; *Nicholas v. Murray*, Fed. Cas. 10,223; *Way v. Howe*, 4 N. B. R. 677, 108 Mass. 502.

8. *Poillon v. Lawrence*, 77 N. Y. 207.

9. *In re Dupee*, Fed. Cas. 4,183; *In re Buchstein*, Fed. Cas. 2,076; *In re Dietz* (D. C., N. Y.), 3 Am. B. R. 316, 97 Fed. 563; *In re Bimberg* (D. C., N. Y.), 9 Am. B. R. 601, 121 Fed. 942. But compare *In re Rudwick* (D. C., Mass.), 2 Am. B. R. 114, 93 Fed. 787.

10. **Collateral attack in equity suit.**—In order to revoke a discharge, application must be made under section 15 to the bankruptcy court whose jurisdiction is exclusive; and the District Court has no jurisdiction to entertain a suit brought, not in such court as a court of bankruptcy, but under its general equitable jurisdiction, which collaterally attacks and seeks to set aside an order of discharge. *Atlantic Dynamite Co. v. Reger* (D. C., W. Va.), 29 Am. B. R. 659, 200 Fed. 1,002, quoting the above paragraphs a and b of the text with approval.

11. See discussion under Section Seventeen, post; *In re Mussey* (D. C., Mass.), 3

Am. B. R. 592, 99 Fed. 71; *In re Rhutassel* (D. C., Iowa), 2 Am. B. R. 697, 97 Fed. 951.

12. *In re Jersey Island Packing Co.* (D. C., Cal.), 18 Am. B. R. 417, 152 Fed. 839.

13. Compare Bankr. Act, § 17; *In re Fowler*, Fed. Cas. 4,999.

14. **Parties in interest.**—*In re Ghandler* (C. C. A., 7th Cir.), 14 Am. B. R. 512, 138 Fed. 637; *Matter of Levy* (D. C., N. Y.), 36 Am. B. R. 181, 227 Fed. 1,011, holding that a creditor whose claim is wiped out by the discharge, but who would have the right to proceed against the debtor if the discharge were revoked is a "party in interest" within the meaning of this section.

Creditors who have not been notified of the bankruptcy proceedings are not estopped from asserting their rights by the bankrupt's discharge and, hence, are not "parties in interest." *In re Monroe* (D. C., Wash.), 7 Am. B. R. 706, 114 Fed. 398.

A wife who has failed to prove her claim for alimony in the bankruptcy proceedings, of which she had notice, is not a "party in interest." *Arrington v. Arrington* (D. C., N. Car.), 13 Am. B. R. 89, 132 Fed. 200. See cases cited in notes under Bankr. Act, § 14, subheading "Specifications of objections."

his claim is barred for failure to prove it within a year from the adjudication as required by § 57-n.¹⁵ It must appear that the creditor was such at the time of the bankruptcy.¹⁶ But the failure of a creditor to file proof of a claim, duly scheduled, has no bearing on his application for a discharge.¹⁷ A bankrupt cannot surrender or vacate his discharge. He may revive a discharged debt by a new promise, or waive his discharge by failing to plead it when sued, but he cannot vacate the order of discharge.¹⁸ It has been held, however, that a bankrupt may be permitted to open his discharge for the purpose of correcting a mistake in the schedules presumably made by his attorney.¹⁹

c. "Undue laches."—The meaning of this phrase, which, however, did not occur in the former law, is indicated by the cases decided under it, some of which are cited in the foot-note.²⁰ Each case turns on its own facts.²¹ It will at once be seen that these words are a limitation on those discussed in the next paragraph. Laches may prove a bar inside the year.

d. "Within one year."—This is a limitation and is strictly construed.²² The year undoubtedly begins to run from the date of the order of discharge.²³ While an application for revocation thus cannot be made after the year has elapsed, it is thought that application to the court to vary or annul the order

15. *In re Bimberg* (D. C., N. Y.), 9 Am. B. R. 601, 121 Fed. 942. But see *Arrington v. Arrington* (D. C., N. Car.), 13 Am. B. R. 89, 132 Fed. 200, holding that where a wife failed to prove her claim for alimony in the bankruptcy proceedings of which she had notice, her petition to have her husband's discharge set aside must be dismissed.

16. *In re Chandler* (C. C. A., 7th Cir.), 14 Am. B. R. 512, 138 Fed. 637, in which the court said: "We are of the opinion that the petition should have shown that the petitioners had at the time provable debts against the bankrupt, which were affected by his discharge. Otherwise they are not 'parties in interest,' within the meaning of the statute."

17. *Matter of Walsh* (D. C., N. Y.), 32 Am. B. R. 521, 213 Fed. 643. But see *Arrington v. Arrington* (D. C., N. Car.), 13 Am. B. R. 89, 132 Fed. 200, holding that a failure to prove a provable claim by a creditor who had notice of the proceedings may constitute laches.

18. *In re Shaffer* (D. C., N. Car.), 4 Am. B. R. 728, 104 Fed. 982.

19. *Opening discharge to amend schedule.*—*In re McKee* (D. C., N. Y.), 21 Am. B. R. 306, 165 Fed. 269, holding that, where upon a petition showing liabilities but no assets the members of a partnership were adjudicated bankrupts and granted a discharge, and upon their application made within the year of adjudication for leave to open the discharge, amend the schedules and proceed, it appears that at the time of the adjudication, there was an action pending against them on notes to which they had pleaded an unliquidated counterclaim, but by mistake neither the liability of the suit nor the possible asset represented by the counterclaim

was included in the schedules, the application for leave to open the discharge and to amend the schedules will be granted.

20. *In re Buchstein*, Fed. Cas. 2,076; *In re Murray et al.*, Fed. Cas. 9,953; *In re McIntire*, Fed. Cas. 8,823; *In re Beck*, 31 Fed. 554.

21. *Undue laches, what constitutes.*—*In re Oleson* (D. C., Iowa), 7 Am. B. R. 22, 110 Fed. 796; *In re Hawk* (C. C. A., 8th Cir.), 8 Am. B. R. 71, 114 Fed. 916; *In re Downing* (D. C., N. Y.), 28 Am. B. R. 778, 199 Fed. 329, holding that creditors who have taken an active part in the bankruptcy proceedings who, without reasonable excuse, delay for eight months after having received notice of the bankrupt's discharge to move for revocation, are guilty of laches.

Where the knowledge of fraud of the bankrupt did not come to creditors petitioning for a revocation of the discharge until after it was granted, the petitioners are not guilty of laches. *In re Griffin Bros.* (D. C., Ala.), 19 Am. B. R. 78, 154 Fed. 537.

An application to revoke a discharge granted without objection, made by a creditor who failed to file objections within the time granted for that purpose, will be denied upon the ground of undue laches. *In re Upson* (D. C., N. Y.), 10 Am. B. R. 758, 124 Fed. 980.

22. Text cited in *Matter of Bimberg* (D. C., N. Y.), 9 Am. B. R. 601, 121 Fed. 942.

23. *In re Shaffer* (D. C., N. Car.), 4 Am. B. R. 728, 104 Fed. 982.

When to run.—In an action for revocation on the ground of fraud, the limitation begins to run from the date of the discharge and not from the discovery of the fraud. *Mall & Co. v. Ullrich*, 37 Fed. 653; *In re Brown*, Fed. Cas. 1,983, 19 N. B. R. 312.

may be made after that time, though a court will properly refuse such an application when plainly for the purpose of avoiding this limitation.²⁴

e. "Upon a trial."—The right to a jury trial in bankruptcy cases is fully discussed later.²⁵ It is very doubtful whether, under the present law, an application for revocation of a discharge can be submitted to a jury.²⁶ As stated elsewhere, a hearing before the judge or a special master is a trial.²⁷ But the referee, as such, can no more hear such an application than he can one for a discharge.

f. "Obtained through the fraud of the bankrupt."—These words are not essentially different from those in the former law.²⁸ Fraud is the only ground for revoking a discharge, as will appear hereafter.²⁹

g. "Facts did not warrant the discharge."—The section by these words makes it incumbent upon the applicant to plead and prove that the facts did not warrant the discharge.³⁰ These words are new. In actual practice they can mean little more than what is expressed in "obtained through the fraud of the bankrupt."

IV. GROUNDS FOR REVOCATION.

a. **Fraud as only ground.**—The section authorizes the revocation of the discharge "if it shall be made to appear that it was obtained through the fraud of the bankrupt." Fraud is thus the only ground specified in the statute for which a revocation may be granted.³¹ Coupled with the fraud in obtaining the discharge, grounds which would have originally prevented the granting of the discharge, had they been known and presented in time in the form of objections to its allowance, must be shown.³² If the bankrupt in obtaining his discharge submitted to the court a false affidavit as to giving notice to his creditors of his application therefor, the court would doubtless revoke the discharge.³³

b. **What constitutes fraud for such purpose.**—It would seem that the fraud required to be shown means fraud in fact,³⁴ as the intentional omission of

24. In re Dune, Fed. Cas. 4,183; In re McKee (D. C., N. Y.), 21 Am. B. R. 306, 165 Fed. 269.

25. See discussion under Section Nineteen of this work.

26. See p. 409, *ante*.

27. See p. 361, *ante*.

28. § 34, Act of 1867, R. S., § 5,120.

29. In re Myers (D. C., N. Y.), 3 Am. B. R. 722, 100 Fed. 775; In re Shaffer (D. C., N. Car.), 4 Am. B. R. 728, 104 Fed. 982.

30. In re Toothaker Bros. (D. C., Ct.), 12 Am. B. R. 99, 128 Fed. 187, holding that facts need only be set forth sufficient to have warranted a refusal of discharge; it is not necessary to allege as a conclusion of law that the "facts did not warrant the discharge."

31. In re Meyers (D. C., N. Y.), 3 Am. B. R. 722, 100 Fed. 775; In re Shaffer (D. C., N. Car.), 4 Am. B. R. 728, 104 Fed. 982; In re Hansen (D. C., Or.), 5 Am. B. R. 747,

107 Fed. 252; In re Fritz (D. C., N. Y.), 23 Am. B. R. 84, 173 Fed. 560.

32. In re Griffin Bros. (D. C., Ala.), 19 Am. B. R. 78, 154 Fed. 537; In re Wright (D. C., N. Y.), 24 Am. B. R. 437, 177 Fed. 578, holding that the fraud by which the discharge was obtained must have related to fraud theretofore knowingly practiced by the bankrupt. It must have been an actual fraud, such as could have been urged against the granting of the discharge. See also In re Cuthbertson (D. C., So. Dak.), 29 Am. B. R. 823, 202 Fed. 266.

33. Matter of Walsh (D. C., N. Y.), 32 Am. B. R. 521, 213 Fed. 643.

34. The fraud required to be shown is fraud in fact, involving moral turpitude or intentional wrong, and does not include implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality. In re Cuthbertson (D. C., S. Dak.), 29 Am. B. R. 823, 202 Fed. 266.

assets,³⁵ or of a creditor,³⁶ from the schedules. Thus, where the omission was due to mistake in law and the trustee was informed of the property,³⁷ or where the fraud complained of was committed years before the bankruptcy,³⁸ revocation will not usually be decreed. It was held under the former law that pleading and proof were limited to such acts as would have been available objections to the discharge.³⁹ It may be, however, that this is not now the law; it would seem that any act which amounts to a fraud committed by the bankrupt while obtaining his discharge is sufficient.⁴⁰ His verified petition for discharge may be so phrased as to make many acts or omissions in the bankruptcy, antedating the discharge proceeding, proper frauds that may be asserted on an application of this character. On the other hand, what might have been objections to a discharge may not prove available grounds for revocation. Thus, cases are possible, though not likely, where false swearing in the proceeding may not be a fraud on creditors; refusal to obey a lawful order is usually but a contempt of court. As a rule, however, through the link of the petition for discharge, objections to discharge are, if discovered after the discharge available in proceedings to revoke. It should also appear that grounds exist which, if presented on the application for a discharge, would have prevented the grant thereof.⁴¹ The buying of a creditor's claim for the purpose of defeating the bankrupt act is a ground for revocation.⁴²

c. Knowledge of fraud.—The section requires that "knowledge of the fraud has come to the petitioner since the granting of the discharge." This is essential,⁴³ and, therefore, jurisdictional. Knowledge of the petitioner's attorney has been held to be his knowledge, and revocation refused where it antedates the discharge.⁴⁴ Similar words will be found in the law of 1867.⁴⁵ The pur-

35. *In re Meyers* (D. C., N. Y.), 3 Am. B. R. 722, 100 Fed. 777; *In re Augenstein*, 16 N. B. R. 252; *In re Roosa* (D. C., Iowa), 9 Am. B. R. 531, 119 Fed. 542, holding that where the bankrupt makes no reference in her schedules to her interest in her father's estate, which was vested in her when she filed her petition, and subsequently conveys the same by warranty deed for more than sufficient to pay her debts in full, her discharge must be revoked and set aside upon the application of a creditor, to whom, through the fraud of the bankrupt, notice of the application for discharge was sent to a wrong address. Compare *In re Cuthbertson* (D. C., So. Dak.), 29 Am. B. R. 823, 202 Fed. 266, holding that where the bankrupt who, prior to bankruptcy, had transferred certain real estate to a trustee, so that he might conduct litigation for the purpose of reducing liens on said land, was advised by her counsel, after stating the situation to him, that she had no interest in the land and that it should not be referred to in her bankruptcy proceedings, her failure to schedule such property, or turn it over to her trustee in bankruptcy, did not constitute such fraud as would warrant the revocation of her discharge.

36. *Symonds v. Barnes*, 6 N. B. R. 377; *In re Herrick*, Fed. Cas. 6,419.

37. *In re Hansen* (D. C., Or.), 5 Am. B. R. 747, 107 Fed. 252.

38. *In re Hoover* (D. C., Pa.), 5 Am. B. R. 247, 105 Fed. 354; *In re Corwin*, Fed. Cas. 3,259.

39. This was due to the phrasing of § 34 of that law, which see. Note, also, *Ashley v. Robinson*, 29 Ala. 112; *Poillon v. Lawrence*, 77 N. Y. 207, 214.

40. For instance, *Batchelder v. Low*, 43 Vt. 662; *Alston v. Robinett*, 37 Tex. 56.

41. *In re Griffin Bros.* (D. C., Ala.), 19 Am. B. R. 78, 154 Fed. 637; *In re Oliver* (D. C., N. J.), 13 Am. B. R. 582, 133 Fed. 832, holding that a petition for revocation which contains no allegation showing a violation of § 14 is defective and must be dismissed.

42. *Matter of Luftig* (D. C., Mass.), 15 Am. B. R. 773, 162 Fed. 322.

43. Note *In re Marrienneaux's*, Fed. Cas. 9,088. See *In re Cuthbertson* (D. C., So. Dak.), 29 Am. B. R. 823, 202 Fed. 266.

44. *In re Douglass*, 11 Fed. 403; *In re Mauzy* (D. C., W. Va.), 21 Am. B. R. 59, 61, 163 Fed. 900.

45. See § 34, Act of 1867.

pose of this limitation is to restrict this process to those frauds which shall be discovered after the discharge.⁴⁶ Otherwise, an application for revocation would be equivalent to a retrial before appeal.

V. PRACTICE.

It should be borne in mind that, under this section, the power of the judge to revoke a discharge is confined and limited. It must be exercised (a) upon application of parties in interest; (b) within one year after it has been granted; (c) upon a trial in which it must be shown by petitioners that they have (d) not been guilty of undue laches; (e) that the discharge was obtained through the fraud of the bankrupt; (f) that the knowledge of said fraud has come to the petitioners since the granting of the discharge; and (g) that the actual facts did not warrant the discharge. In each and every one of these particulars the burden of proof is upon the petitioners, and each requirement of the statute is absolutely essential to be proven.⁴⁷ The act, and also the rules and forms are silent as to the practice. The application should be made to the judge and not a referee. The trial must be had before the judge unless he refers it to the referee as a special master.⁴⁸ If for revocation, it should be by petition. The petition should show that the petitioners had provable claims.⁴⁹ What has been said touching objections to a discharge should be read in this connection.⁵⁰ The grounds on which the application rests should be strictly pleaded.⁵¹ Allegations should be made showing that knowledge of the facts constituting grounds for the revocation came to the petitioner since the granting of the discharge.⁵² Amendments will sometimes be allowed.⁵³ An amendment should not be permitted after the expiration of a year from the date of the discharge, within which period the application for a revocation is required to be made.⁵⁴ Reasonable notice should be given the bankrupt, and, it is suggested, should be by personal service; under the analogies of the statute, also, the usual ten-day notice to creditors by mail would seem wise.⁵⁵ The practice on the hearing and afterward does not differ from that on a contested dis-

46. In re Mauzy (D. C., W. Va.), 21 Am. B. R. 59, 163 Fed. 900.

47. In re Mauzy (D. C., W. Va.), 21 Am. B. R. 59, 61, 163 Fed. 900.

48. In re Meyers (D. C., N. Y.), 3 Am. B. R. 722, 100 Fed. 775. See, for practice, under § 14, p. 343, *ante*.

49. In re Chandler (C. C. A., 7th Cir.), 14 Am. B. R. 512, 138 Fed. 637, holding that simply an allegation that the petitioners are creditors of the bankrupt is insufficient. For form of petition to revoke discharge, see Hagar & Alexander's Bankr. Forms (2d ed.), Form No. 286.

50. See pp. 351-366, *ante*.

51. In re McIntire, Fed. Cas. 8,823; Lathrop v. Stewart, 6 McLean, 630.

A petition is insufficient which fails to show what property by the bankrupt, or what representations were made in his schedules as to the property surrendered by him, or that any creditor was deceived as to the facts, or when the alleged fraud was dis-

covered. Vary v. Jackson (C. C. A., 5th Cir.), 21 Am. B. R. 334, 164 Fed. 840.

52. In re Oliver (D. C., N. J.), 13 Am. B. R. 582, 133 Fed. 832.

53. In re Griffin Bros. (D. C., Ala.), 19 Am. B. R. 78, 154 Fed. 537; In re Oliver (D. C., N. J.), 13 Am. B. R. 582, 133 Fed. 832, holding that where the petition does not show that the knowledge of the alleged facts came to petitioner since the granting of the discharge, but in an affidavit of the petitioner annexed thereto, he swears that he obtained such information after the discharge was granted, the petition may be amended to cure the defect.

54. In re Wright (D. C., N. Y.), 24 Am. B. R. 437, 177 Fed. 578; In re Shaffer (D. C., N. Car.), 4 Am. B. R. 728, 104 Fed. 982.

Under the prior bankrupt act, such an amendment was not permitted after the expiration of the time limited by the act. In re Sims, 4 Fed. 440; Mall v. Ullrich, 37 Fed. 653.

55. Compare Bankr. Act, § 58, and see under § 14, *ante*.

charge.⁵⁶ But here the moving creditor, it would seem, should conform more strictly to his pleadings.⁵⁷

VI. EFFECT OF REVOCATION OF DISCHARGE.

a. *In general.*—The revocation of a discharge makes the discharge a nullity, excepting as to those who have acted on the faith of it while operative. The successful party may recover costs.⁵⁸

b. *Application of § 64-c.*—It is provided in subsection *c* of § 64, in effect, that in case the discharge is revoked the property acquired by the bankrupt since the adjudication of bankruptcy shall be applied in payment in full of claims of creditors who sold such property, and the residue, if any, shall be applied to the payment of debts which were owing at the time of the adjudication. A similar effect is given to the setting aside of the confirmation of a composition.⁵⁹ That after-acquired property may be administered in the pending bankruptcy proceeding is one of the anomalies of the statute.⁶⁰ If the trustee is still undischarged, title to property acquired up to the date of the order revoking vests in the trustee, who must thereupon distribute as provided by this section; if there be no trustee, the case may be reopened and one appointed in the usual way.⁶¹ If there be a surplus, it can be paid only to those creditors in the original proceeding whose claims were filed within a year from the beginning of that proceeding.⁶²

56. See pp. 362-366, *ante*.

57. *In re Cuthbertson* (D. C., So. Dak.), 29 Am. B. R. 829, 202 Fed. 266, citing text.

58. *In re Holgate*, Fed. Cas. 6,601.

59. See pp. 331-334, *ante*.

60. Compare subdivision (c) in § 64, *post*.

61. See Bankr. Act, § 2 (8).

62. *In re Shaffer* (D. C., N. Car.), 4 Am. B. R. 728, 104 Fed. 982.

SECTION SIXTEEN.

CO-DEBTORS OF BANKRUPTS.

§ 16. **Co-Debtors of Bankrupts.**—*a* The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.

Analogous provisions: In U. S.: Act of 1867, § 33, R. S., § 5118; Act of 1841, § 4; Act of 1800, § 34.

In Eng.: Act of 1883, § 30(4).

Cross-references: To the law: Bankruptcy of partners, § 5.

Discharge of bankrupt, when granted, § 14-b.

Revocation of discharge, § 15.

Debts not affected by discharge, § 17.

Subrogation of co-debtor of bankrupt in case of payment of obligation, § 57-i.

Proof and allowance of claim of co-debtor, § 63.

SYNOPSIS OF SECTION.

CO-DEBTORS OF BANKRUPTS.

I. Scope of Section, 416.

- a. *Declaratory of the law*, 416.
- b. *Construction*, 416.
- c. *One person as principal and surety*, 416.
- d. *Effect of creditor's acts*, 416.
- e. *Whether discharged co-debtor is a necessary party*, 416.

II. Joint Debts, 417.

- a. *Of partners*, 417.
- b. *Of co-debtors*, 417.

III. Surety Debts, 417.

- a. *Of indorsers*, 417.
- b. *Of obligors on bonds*, 417.
- c. *Attachment bonds*, 418.
- d. *Appeal, replevin, and jail bonds*, 420.
- e. *Of directors of corporations*, 420.

I. SCOPE OF SECTION.

a. Declaratory of the law.—This section is declaratory of a general principle of law. It results from two well-settled doctrines: (1) that a discharge in bankruptcy affects only the personal liability of the debtor, and not that liability as to other persons,¹ (2) and that such a discharge is by operation of law and not by consent.² It was well settled under the former law that the principle thus stated applied only to a discharge in bankruptcy,³ and not to any act of the parties affecting a release;⁴ also that, the creditor having still the right to collect from any other person liable on the debt, a pending suit against such other is not affected by the discharge.⁵ The reported cases under that law are thus as applicable now as then.⁶ Under the present law it is held that where the discharge is effected by the consent of the creditor, as by a composition, the debtor may also be discharged.⁷ The right to execution or supplementary proceedings against the co-debtor is not affected by the bankruptcy proceedings.⁸

b. Construction.—This section should be strictly construed if in derogation of common-law rights and of the express statutory provision of the State where the question arises.⁹

c. One person as principal and surety.—If the surety is also liable as principal and as such his obligation is discharged in bankruptcy, he will also be discharged as surety; no such anomaly can reasonably exist in the law, as discharging a man who is liable both as principal and surety in one capacity, and not in the other.¹⁰

d. Effect of creditor's acts.—It makes no difference under this section whether the creditor proves his claim and gets his dividend.¹¹ The co-debtor or surety may protect himself by proving the claim, and cannot complain if the debtor does not.¹² When the creditor in effect consents to the discharge—as when he has knowledge of a sufficient objection and does not plead it—the discharge being by operation of law only, the liability of the surety remains.¹³

e. Whether discharged co-debtor is a necessary party.—If one of two or more joint debtors is discharged, and suit is brought on the joint debt, it

1. *Meyer v. Dewey*, 103 U. S. 301; *Stephenson v. Bird*, 168 Ala. 363, 422, 25 Am. B. R. 909, 53 So. 92, 93; *Holland v. Cunliff*, 96 Mo. App. 67, 10 Am. B. R. 71, 69 S. W. 737; *First Nat. Bank of Portal v. Lee* (N. Dak. Sup. Ct.), 25 N. Dak. 197, 34 Am. B. R. 555, 141 N. W. 716.

The rights of a creditor against third parties liable jointly with the bankrupt or secondarily for him are not impaired by the bankrupt's adjudication nor by the bankrupt's discharge. *Polk v. Stephens* (Ark. Sup. Ct.), 118 Ark. 438, 35 Am. B. R. 186, 176 S. W. 689.

2. *Mason v. Bancroft*, 1 Abb. N. C. 415; *Ex parte Jacobs*, 44 L. J. B. 34. See *Anthony v. Sturdivant*, 174 Ala. 521, 27 Am. B. R. 356, 56 So. 571.

3. Compare *In re McDonald*, Fed. Cas. 8,753; *Matter of Benedict* (Ref., N. Y.), 18 Am. B. R. 604.

4. *Brown v. Carr*, 7 Bing. 508; *Sigourney v. Williams*, 1 Grav. 623.

5. *Lewis v. U. S.*, 92 U. S. 618, 23 L. Ed. 513; *In re Levy*, Fed. Cas. 8,297; *Payne v. Albe*, 7 Bush (Ky.), 244; *Linn v. Hamilton*, 34 N. J. 305.

6. See Cent. Dig., Vol. 6, "Bankruptcy," §§ 782-786.

7. *Matter of Benedict* (Ref., N. Y.), 18 Am. B. R. 604, holding that an indorser of a note made by the bankrupt would be discharged under such circumstances. For cases under present law, see Am. Bankr. Dig., §§ 1137-1145.

8. *In re De Long* (Ref., N. Y.), 1 Am. B. R. 66; *Penny v. Taylor*, Fed. Cas. 10,957.

9. *Matter of Benedict* (Ref., N. Y.) 18 Am. B. R. 604.

10. *Murphy v. Nicholson* (N. J. Ct. of Er. & App.), 87 N. J. L. 278, 34 Am. B. R. 670, 94 Atl. 62.

11. *Clopton v. Spratt*, 52 Miss. 251.

12. See Bankr. Act, § 57-i.

13. *In re McDonald*, Fed. Cas. 8,753; *Ex parte Jacobs*, 44 L. J. B. 34.

has been a mooted question whether the discharged joint debtor was a necessary party.¹⁴ Since he can unquestionably be made a party, his discharge being only available in bar, the safer practice is to join him as a defendant.

II. JOINT DEBTS.

a. Of partners.—The question of the debts of partners is discussed elsewhere in this work.¹⁵ The words of the section express the rule of law applicable to discharges granted to members of firms as distinguished from partnership discharges. The analogous clause of the former law was held to imply that an individual partner was entitled to a discharge from partnership debts.¹⁶ The same inference follows from the words of the present section.¹⁷

b. Of co-debtors.—A like rule applies here as where two parties make a note jointly, or are joint obligors on a bond. But, where one of two or more joint obligors have been discharged, the others cannot, it seems, insist on contribution, though this doctrine may well be questioned.¹⁸

III. SURETY DEBTS.

a. Of indorsers.—Under the principle stated, the discharge of the maker of a note does not affect the indorser in any way; the holder may proceed and collect the entire debt from him.¹⁹ Familiar principles, however, exonerate the indorser of a demand note, the holder of which is guilty of undue laches in presentment;²⁰ or the indorser of an accommodation note, where the holder, becoming bankrupt, accepts payments under a composition agreement without consent of the indorser.²¹

b. Of obligors on bonds.—The rule as to the obligors of bonds is the same. The obligor continues liable though the principal or a co-obligor be discharged.²² This is peculiarly so where the bond runs to the people, bankruptcy

14. *Camp v. Gifford*, 7 Hill, 169. *Contra*: *Jenks v. Opp.*, 43 Ind. 108; *Dorn v. O'Neale*, 6 Nev. 155.

15. See under §§ 5 and 17 of this work.

16. *In re Downing*, Fed. Cas. 4,044. See also, for effect of English discharge on individual liability, *Ex parte Hammond*, L. R., 16 Eq. 614.

17. *Deaf and Dumb Institute v. Crockett*, 117 N. Y. App. Div. 269, 102 N. Y. Supp. 412, 17 Am. B. R. 233, Compare under § 5, *ante*.

18. *Tobias v. Rogers*, 13 N. Y. 59. But compare *Miller v. Gillespie*, 59 Mo. 220.

19. *National Bank of South Reading v. Sawyer*, 3 N. B. N. Rep. 226; *Smith v. Wheeler*, 55 N. Y. App. Div. 170, 66 N. Y. Supp. 780; *King v. Central Bank*, 6 Ga. 257; *Tiernan Exrs. v. Woodruff*, 5 McLean, 350; *Guild v. Butler*, 16 N. B. R. 347; *In re Curtis*, 109 La. 171, 9 Am. B. R. 286, 33 So. 125. *Stauffer, Etc., Co. v. Abington Co.* (Sup. Ct., La.), 131 La. 715, 32 Am. B. R. 120, 60 So. 202.

20. *In re Crawford*, Fed. Cas. 3,364.

21. *Matter of Benedict* (Ref., N. Y.), 18 Am. B. R. 604. See also *Easton Furniture Co. v. Caminez* (N. Y. App. Div.), 146 N. Y. App. Div. 436, 27 Am. B. R. 29, 131 N. Y. Supp. 157.

22. *Brown & Brown Coal Co. v. Antezak* (Sup. Ct. Mich.), 164 Mich. 110, 25 Am. B.

R. 898, 128 N. W. 774; *Abendroth v. Van Dolsen*, 131 U. S. 66; *In re Stevens*, Fed. Cas. 13,393; *In re De Long* (Ref., N. Y.), 1 Am. B. R. 66. See *Am. Bankr. Dig.* §§ 1138, 1142.

Upon the dissolution of a corporation the bankruptcy of the defendant does not discharge the surety in the dissolving bond. *National Surety Co. v. Medlock* (Ct. of App., Ga.), 2 Ga. App. 665, 19 Am. B. R. 654, 58 S. E. 1131.

Guarantor of lease.—A guarantor of the payment of the rent reserved in a lease is not discharged by the bankruptcy of the tenant. *Witthaus v. Zimmerman*, 91 N. Y. App. Div. 202, 11 Am. B. R. 314, 86 N. Y. Supp. 315.

Appeal bond.—Where the defendant in an attachment suit files a petition in bankruptcy and is finally discharged, his surety on an appeal bond in such an attachment suit is not discharged thereby; and while a judgment may issue against the bankrupt accompanied by a perpetual stay of execution, the surety may be compelled to answer according to the terms of his obligation. *Brown & Brown Coal Co. v. Antezak* (Sup. Ct., Mich.), 164 Mich. 110, 25 Am. B. R. 898, 128 N. W. 774.

Effect on liability of surety on bond.—The ordinary rule that the release of a principal

not, as a rule, affecting such liabilities.²³ A discharge of a principal on a bond given to secure his faithful performance of a building contract, broken prior to his bankruptcy, releases him from his express obligation to indemnify his surety on such bond in case of loss. If the surety pays the loss he is subrogated to the rights of the creditor for the protection of whom the bond was given.²⁴

c. Attachment bonds.—Under the former law, the decisions on this point whether a surety on an attachment bond is released by the bankruptcy of the principal were about equally divided.²⁵ Such bonds being as a rule conditioned to pay a sum of money if the suit should go against the principal, the liability could not arise until the judgment was granted. The bankruptcy intervening, the principal could thus stay the entry of the judgment, and later plead his discharge in bar, and the liability of the sureties thus would never accrue. In these circumstances, the New York rule, resting on the doctrine that the law of 1867 did not dissolve the lien of the attachment and that the bond was a substituted security, held that the plaintiff should be allowed to proceed to judgment, which, if granted, fixed the liability of the sureties.²⁶ The rule under the present bankruptcy act is the same in New York and other States and the creditor is entitled to a special judgment against the bankrupt, execution not to be issued thereon, as a basis for the future action against the surety. And this is so though the attachment was issued within four months of the adjudication.²⁷ On the other hand a rule was adopted in Massachusetts denying the fiction of substituted security and holding that such a bond was a mere personal liability which did not accrue

debtor likewise releases the surety relates to a release by the voluntary action of the creditor, and does not apply to a release or discharge by operation of law as in bankruptcy. *Failor v. Wehe* (Kan. Sup. Ct.), 37 Am. B. R. 311, 158 Pac. 74.

Surety on injunction bond.—Where the liability of a principal and surety on an injunction bond is joint and several, and the liability of the surety does not depend upon the rendition of a judgment against the principal, a discharge in bankruptcy of the principal does not release the surety from liability. *Martin Furniture Co. v. Massey* (Tenn. Sup. Ct.), 37 Am. B. R. 380, 186 S. W. 451.

23. *U. S. v. Knight*, 14 Pet. 315, 10 L. ed. 301; *U. S. v. Herron*, 20 Wall. 251, 22 L. ed. 275; *Rice v. Murphy*, 109 Me. 101, 32 Am. B. R. 665, 82 Atl. 842.

Stay of discharge pending enforcement of rights against garnishees and sureties on garnishment bond, see *In re Maher* (D. C., Ga.), 22 Am. B. R. 290, 169 Fed. 997.

24. *Williams v. United States Fidelity and Guaranty Co.*, 236 U. S. 549, 34 Am. B. R. 181, 59 L. ed. 713, revg. 11 Ga. App. 635, 28 Am. B. R. 802, 75 S. E. 1067.

25. See *Holyoke v. Adams*, 1 Hun (N. Y.), 223, and other cases, *post*.

26. *McCombs v. Allen*, 18 Hun (N. Y.), 190; *affd.* 82 N. Y. 114. See also *In re Albrecht*, Fed. Cas. 145; *Zoller v. Janvrin*, 49 N. H. 114.

27. *In re Maaget* (D. C., N. Y.), 23 Am. B. R. 14, 173 Fed. 232; *Schunack v. Art Novelty Co.* (Sup. Ct., Ct.), 84 Conn. 331,

26 Am. B. R. 731, 80 Atl. 290. See Am. Bankr. Dig. § 1144.

Special judgment against bankrupt and action against surety.—In *U. S. Wind Engine & Pump Co. v. North Pennsylvania Iron Co.*, 227 Pa. St. 262, 75 Atl. 1094, in considering the question, "Is there anything in the law or practice of Pennsylvania to prevent or discountenance a special judgment against one discharged in bankruptcy?" the court said: "The appellee has secured its discharge, and its personal liability is gone; but that does not constitute any reason why a judgment against it should not be entered for the special purpose of fixing and enforcing the liability of the surety. The surety took the risk of appellee's insolvency, a risk that the appellant was supposedly protected against by the very bond in question. So it would be most unfair, to allow the substitution of the bond for the goods attached, and then to deny the formal relief necessary in order to enforce its terms against the surety. There is nothing in our laws or practice or in the announced public policy of the State to require such a ruling." See also *In re Marshall Paper Co.* (C. C. A., 1st Cir.), 4 Am. B. R. 468, 102 Fed. 872, 43 C. C. A. 38; *Holyoke v. Adams*, 59 N. Y. 233; *Brown v. Antezak* (Mich.), 164 Mich. 110, 25 Am. B. R. 898, 128 N. W. 774; *Kendrick & Roberts v. Warren Bros.*, 110 Md. 47, 72, 72 Atl. 461.

Sureties on attachment bonds.—Where in a suit in attachment a claimant of the property attached gives bond with sureties and takes possession of the property, a discharge

until judgment in the principal action, by allowing a stay or a plea in bar, relieved the sureties.²⁸ The latter seems to have been the view of the Supreme Court, though its decision is not authoritative.²⁹ This latter view was adopted in a recent decision in Maryland where the attachment was granted within four months of the adjudication,³⁰ and in Louisiana it has been held, where the property of the debtor was attached and released on bond less than four months before he was adjudged a bankrupt, and the debtor was discharged, that the surety on the bond was released from all liability.³¹ A similar result has been reached in reference to a bond given to discharge a garnishment in an action against the bankrupt upon a claim provable in bankruptcy at the time of his discharge, commenced within the four months' period and pending at the time of his discharge.³² In such case the surety is relieved, not because of the discharge of the bankrupt, but because the lien acquired by the garnish-

in bankruptcy of the claimant before trial of the suit does not release him and his sureties on the bond. *Sanderson v. Buckley* (Miss. Sup. Ct.), 37 Am. B. R. 379, 72 So. 148.

Where a suit has been commenced more than four months prior to the bankruptcy of defendant by attachment of defendant's personal property, which attachment was discharged upon the giving of a bond conditioned for the payment of any judgment that might be recovered, defendant's discharge in bankruptcy, duly pleaded by him, is not a bar to the prosecution of the suit to judgment, although a judgment therein could not be enforced against defendant and the only effect thereof would be to enable plaintiff to charge the sureties on the attachment bond. In such case the court can render a special judgment, with a perpetual stay of execution against defendant, for the purpose of enabling the plaintiff to bring suit against the sureties on the attachment bond. *Butterick Pub. Co. v. Bowen Co.* (R. I. Sup. Ct.), 33 R. I. 40, 26 Am. B. R. 718, 80 Atl. 277.

^{28.} *Hamilton v. Bryant*, 114 Mass. 543; *Braley v. Boomer*, 116 Mass. 527; *Johnson v. Collins*, 117 Mass. 343. Although under a subsequent Massachusetts statute a special judgment is authorized which seems to change the rule laid down in the preceding cases. *Rosenthal v. Nove*, 175 Mass. 559, 56 N. E. 884.

^{29.} *Wolf v. Stix*, 90 U. S. 1, 23 L. ed. 146; *Hill v. Harding*, 107 U. S. 631, 27 L. ed. 493, is a case where the attachment was before the interdicted period.

^{30.} *Crook-Horner Co. v. Gilpin* (Md. Ct. of App.), 112 Md. 1, 23 Am. B. R. 350, 75 Atl. 1049.

The distinction between the two views is explained in *Schunack v. Art Metal Novelty Co.* (Sup. Ct., Ct.), 84 Conn. 331, 26 Am. B. R. 731, 80 Atl. 290, as follows: "In New York the attachment is regarded as not only non-existent, but as possessing no other importance in the situation than as if it had never existed. The Maryland court, on the contrary, discovers such a relation between

the bond and the attachment by virtue of the office of the former under the statute, and of its compulsory substitution for the attachment by the operation of the machinery of the law, set in motion as a statutory incident of the attachment, as to entitle the bond to be regarded in the eye of the law as dependent for its life and efficiency upon the life and efficiency of the attachment."

^{31.} *Windisch-Muhlhauser Brewing Co. v. Simms* (Sup. Ct., La.), 129 La. 134, 26 Am. B. R. 714, 55 La. 739, in which the court said: "Section 16 of the Bankruptcy Act of 1898 merely recognizes this general rule of law. Section 67-f of the same statute, however, strikes with nullity all levies, attachments, or liens obtained through legal proceedings against an insolvent at any time within four months prior to the filing of a petition in bankruptcy in case he is adjudged a bankrupt. It is difficult to conceive how attachment proceedings thus pronounced null and void can produce any legal effect. The attachment being dissolved by operation of the statute, nothing is left but a suit *in personam* which is stayed by the pendency of the bankruptcy proceedings. In such a case, the subsequent discharge of the debtor extinguishes the obligation on which the suit was based, and renders it legally impossible for the creditor to recover judgment against his former debtor. Where an attachment is released on bond, the condition is that the defendant will satisfy such judgment, to the value of the property attached, as may be rendered against him in the pending suit. C. P. art. 259. No proceeding can be had against the surety on such a bond until after the judgment has been rendered against the defendant, and execution issued thereon, and a return of *nulla bona* made by the sheriff. Id. Where no judgment can be rendered and executed against the defendant in attachment, the statutory liability of the surety on the release bond can never arise."

^{32.} *Klipstein v. Allen Miles Co.* (C. C. A., 5th Cir.), 14 Am. B. R. 15, 136 Fed. 385, approved in *In re Mercedes Import Co.* (D. C., N. Y.), 20 Am. B. R. 648.

ment is avoided by the bankruptcy proceedings, which destroyed the remedy by which a judgment can be recovered against the bankrupt.³³

d. Appeal, replevin, and jail bonds.—If the law of the State does not permit the discharge to be pleaded in the appellate court, the discharge of the principal does not relieve the surety of an appeal bond. If it may be pleaded in such court, no final judgment being possible against the principal, the surety is relieved.³⁴ Replevin bonds being merely for the return of a chattel in kind or value, and the trustee having succeeded to the bankrupt's interest, the discharge cannot be pleaded in bar; the liability of the surety may thus ultimately be fixed, and the discharge does not release it.³⁵ In bail bonds, the rule is well settled that, if there has been no breach of the conditions before discharge granted, the sureties will be released, but, if there has, then a liability has accrued which may still be enforced *pro tanto* against them.³⁶ A like doctrine saves to those interested the liabilities of sureties on administrator's and guardian's bonds, and the like.³⁷ It is thought, however, that a court of bankruptcy will stay proceedings in most of the suits in which any of the bonds mentioned in this paragraph have been given, at least until the creditor has had reasonable opportunity to ascertain and collect his dividend; this that he may apply the same in reduction of the amount due from the sureties before entering up judgment against them.³⁸

e. Of directors of corporations.—Directors are sureties in a qualified sense only. Being such, they are, however, within the intendment of this section of the law, and are not released by the discharge of their corporation from any liability to its creditors given by law.³⁹

33. *Klipstein v. Allen Miles Co.* (C. C. A., 5th Cir.), 14 Am. B. R. 15, 136 Fed. 385.

34. *Knapp v. Anderson*, 71 N. Y. 466; *Flagg v. Tyler*, 6 Mass. 32; *Hall v. Fowler*, 6 Hill, 630; *Odell v. Wootten*, 38 Ga. 225. And see *Goyer Co. v. Jones*, 79 Misc. 253, 8 Am. B. R. 437, 30 So. 651. See Am. Bankr. Dig. § 1145.

Discharge pending appeal.—Where pending an appeal from a judgment of a justice's court against him, the defendant is discharged in bankruptcy, and he pleads his discharge in the higher court, and judgment is then rendered in his favor, the surety upon the appeal bond conditioned to pay such judgment as may be rendered against the defendant is not liable. *Goyer Co. v. Jones*, 79 Miss. 253, 8 Am. B. R. 437, 30 So. 651. Compare *Bailey v. Reeves* (Sup. Ct. Miss.) 102 Miss. 438, 28 Am. B. R. 850, 59 So. 800.

A surety on an appeal bond is liable thereon, although his principal, the judgment debtor, was relieved from the payment of the judgment by his discharge in bankruptcy. Where a statutory bond is given in an appeal to the District Court from a judgment of a city court (Kans. Gen. St. 1909, §§ 6488, 6493), and the appeal is dismissed for want of prosecution, the subsequent discharge of the appellants by virtue of the Bankruptcy Act

does not bar an action against the surety on the appeal bond. *Failor v. Wehe* (Kan. Sup. Ct.), 37 Am. B. R. 311, 158 Pac. 74.

35. *Flagg v. Tyler*, 6 Mass. 32. Compare also *Pinkard v. Willis*, 24 Tex. Civ. App. 69, 57 S. W. 891.

36. *Olcott v. Lilly*, 4 Johns. (N. Y.), 409; *Richardson v. McIntyre*, 4 Wash. C. C. 412; *Bennett v. Alexander*, 1 Cranch. C. C. 90; *Claffin v. Coogan*, 48 N. H. 411.

37. *Miller v. Gillespie*, 59 Mo. 220; *Jones v. Knox*, 8 N. B. R. 559; *Reitz v. People*, 16 N. B. R. 10; *Jones v. Russell*, 44 Ga. 460. But see *Mayor v. Walker*, 11 N. B. R. 478. Compare also *Baer v. Grell* (Mun. Ct., N. Y.), 6 Am. B. R. 428; *Goding v. Rosenthal*, 180 Mass. 43, 61 N. E. 222.

Action for escape.—The fact that since the commencement of an action against a sheriff for the escape of a judgment debtor, arrested upon a body execution, the debtor has been discharged in bankruptcy is no defense. *Baer v. Grell* (Mun. Ct., N. Y.), 6 Am. B. R. 428.

38. *In re Martin* (D. C., N. Y.), 5 Am. B. R. 423, 105 Fed. 753.

39. *In re Marshall Paper Co.* (D. C., Mass., 2 Am. B. R. 653, 95 Fed. 419; s. c., on appeal, 4 Am. B. R. 468, 102 Fed. 872. Compare § 4-b as amended by the act of 1903.

SECTION SEVENTEEN.

DEBTS NOT AFFECTED BY A DISCHARGE.

§ 17. **Debts not Affected by a Discharge.**—*a* A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (2) are¹ *liabilities** for² obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, *or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction or for criminal conversation*;* (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.

Analogue provisions: In U. S.: As to discharge being a release, Act of 1867, § 34, R. S., § 5119; Act of 1841, § 4; Act of 1800, § 34; As to debts not affected by a discharge, Act of 1867, § 33, R. S., § 5117; Act of 1841, § 1; As to effect on taxes, Act of 1867, § 28, R. S., § 5101; Act of 1800, § 62.

In Eng.: As to discharge being a release, Act of 1883, § 30(2); As to debts not affected by a discharge, Act of 1883, § 30(1); Act of 1890, § 10.

Cross-references: To the law: Duty of bankrupt to schedule debts, § 7-a(8).

Composition, not to be confirmed if bankrupt guilty of acts barring discharge, § 12-d.

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Offenses under the bankruptcy act, § 29-b.

Proof and allowance of claims, § 63.

Taxes to be paid, § 64-a.

1. Here the words "judgments in actions," in the original law were stricken out by the amendatory act of 1903 and the word "liabilities" substituted therefor.

2. Here the words "frauds, or" were stricken out by the amendatory act of 1903.

* Amendments of 1903 in italics, except that the words "or for breach of promise of marriage accompanied by seduction," were inserted by amendment of 1917, approved March 2, 1917.

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IV. Pleading Discharge, 448.**a. In general, 448.****b. As dependent on time, 448.****V. Revival of Discharged Debt by New Promise, 449.****I. COMPARATIVE LEGISLATION AND SCOPE OF SECTION.**

a. Excepted debts in England.—The English act of 1883 provided broadly that all provable debts shall be released by the discharge, except, in substance, (a) a recognizance, or (b) any debt to the crown or for an offense or any liability on a bail bond given for the appearance of a person charged with an offense against a statute relating to the public revenues, or (c) any debt or liability incurred by means of fraud or fraudulent breach of trust. The amendatory act of 1890 excepted also any liability under a judgment for seduction, support, or criminal conversation. Save in its silence as to debts not scheduled, therefore, the English statute is not materially different from ours. Useful precedents will be found in the reported cases under the English law.³

b. Under our law of 1867.—The differences between the analogous clause in the former law and that now under discussion will appear in subsequent paragraphs. The effect of a discharge on the liability of co-debtors has been considered in the previous section. Aside from this, the former law⁴ excepted from the discharge only (a) fraudulent debts and (b) fiduciary debts. Fiduciary debts only were excepted by the law of 1841, though a discharge could be impeached for fraud or wilful concealment of property wherever pleaded.⁵ There were no excepted classes, save debts to the United States, recognized by the law of 1800.⁶ The tendency is clearly to increase the exceptions; this tendency keeping pace with the widening out of the meaning of the word "debt." In both these directions, the present law, as amended in 1903, has gone further than any other bankruptcy law.

c. Scope of section.—(1) IN GENERAL.—This section and section fourteen on "Discharges," and section sixty-three, on "Provable Debts," should be read together.⁷ There are no ambiguous or doubtful words or phrases in

3. See Baldwin on Bankruptcy (8th ed.), pp. 608-612, and cases cited.

4. Act of 1867, § 33, R. S., § 5,117.

5. Act of 1841, §§ 1, 4.

6. Act of 1800, § 62.

7. Crawford v. Burke, 195 U. S. 176, 12 Am. B. R. 659, 49 L. ed. 147; Katzenstein v. Reid, Murdock & Co. (Ct. Civ. A., Texas), 41 Tex. Civ. App. 106, 16 Am. B. R. 740, 91 S. W. 360.

this section, nor do its provisions, when naturally and fairly read, clash in any particular with those of § 63-a. While § 17 limits the exception from the operation of a discharge to such of the demands or liabilities as are "provable debts," § 63-a limits provability to the classes of demands or liabilities therein defined.⁸ In view of the well known purposes of the bankruptcy law, exceptions to the operation of a discharge thereunder should be confined to those plainly expressed therein.⁹

(2) **PROOF OF NON-DISCHARGEABLE DEBT.**—The effect of the discharge is declared by prescribing that only provable debts shall be released, and then that even certain provable debts shall be excepted. It follows, therefore, that dividends may be paid on a debt, and yet it be not affected by a discharge. In this connection, the practitioner should also bear in mind the following familiar rules: The discharge is available as a plea in bar in a suit on the debt, no more; and, therefore, does not affect vested liens on the bankrupt's property. Nor is it material whether the debt was proved; if it could have been proved, it will be discharged.¹⁰ But, the present law containing no provision that the proving of a debt shall constitute a waiver of other remedies, the creditor loses no remedy by proving; and, unless a discharge is granted and pleaded, a subsequent suit can be maintained.¹¹

d. Determining effect of discharge.—The court in which the debt is proceeded on is the only proper forum to determine whether a discharge releases such debt.¹² This was not so under the former law. Nor have the courts under the present law, always recognized this distinction between the two statutes.¹³ Thus, a discharge should be granted even if the only debt scheduled is clearly not dischargeable.¹⁴ But the Federal courts are often asked to pass upon the effect of discharges not yet granted, as where application is made to stay a suit on a debt to which, it is claimed, the discharge will prove a bar. In so doing, such court will usually determine the question in accordance with the law and decisions of the State in which the debt originated, though, if that law conflicts with the bankruptcy law, the latter will control.¹⁵ Where the bankrupt is sued on a debt existing at the time of filing the petition, the introduction of the order of discharge makes out a *prima facie* defense, the burden then being cast upon the plaintiff to show that, because of the nature of the claim, failure to give notice or other statutory reason, the debt sued on was by law excepted from the operation of the discharge.¹⁶ If the debt has been reduced to judgment, the Federal court, while not bound by the

8. *Matter of United Button Co.* (D. C., Del.), 15 Am. B. R. 390, 140 Fed. 495; *affd.* 17 Am. B. R. 565, 149 Fed. 48.

9. *Gleason v. Shaw*, 236 U. S. 558, 34 Am. B. R. 177, 159 L. ed. 717, *affg.* 28 Am. B. R. 473, 196 Fed. 359.

10. See *Dean v. Justices* (Sup. Ct., Mass.), 173 Mass. 453, 2 Am. B. R. 163, 53 N. E. 893; *In re Stansfield*, Fed. Cas. 13,294; *Lamb v. Brown*, Fed. Cas. 8,011; *In re Kuffler* (D. C., N. Y.), 18 Am. B. R. 587, 153 Fed. 667.

11. *Dingee v. Becker*, Fed. Cas. 3,919; *Whitney v. Crafts*, 10 Mass. 23.

12. *In re Blumberg* (D. C., Tenn.), 1 Am. B. R. 633, 94 Fed. 476; *In re Rhutassel* (D. C., Iowa), 2 Am. B. R. 697, 96 Fed. 597; *In re Thomas* (D. C., Iowa), 1 Am. B. R.

515, 92 Fed. 912; *In re Mussey* (D. C., Mass.), 3 Am. B. R. 592, 99 Fed. 71, holding that the scope of a bankruptcy discharge as affecting debts proved in a prior insolvency proceeding must be left for determination to the creditors' suits to enforce such debts.

13. Compare *Audubon v. Shufelt*, 181 U. S. 575, 5 Am. B. R. 829, 45 L. ed. 1009.

14. *In re McCarthy* (D. C., Ill.), 7 Am. B. R. 40, 111 Fed. 151; *In re Tinker* (D. C., N. Y.), 3 Am. B. R. 580, 99 Fed. 79. *Contra*: *In re Maples* (D. C., Mont.), 5 Am. B. R. 426, 105 Fed. 919.

15. *Woolsey v. Cade*, 15 N. B. R. 238.

16. *Kreitlein v. Fenger*, 238 U. S. 31, 34 Am. B. R. 862, 59 L. Ed. 1184, *revg.* 52 Ind. App. 199, 28 Am. B. R. 908, 97 N. E. 819.

recitals of the judgment, will usually determine the nature of the action from the record of the State court,¹⁷ and stay or refuse a stay accordingly.¹⁸

II. WHAT DEBTS ARE DISCHARGEABLE.

a. Provable debts.—(1) **IN GENERAL.**—Only provable debts are dischargeable.¹⁹ If the debt falls within the category of provable debts enumerated in § 63-a, it is quite as clearly covered by the discharge, unless within the excepted classes.²⁰ An unliquidated claim, which might have been liquidated and proved under § 63-b, is discharged.²¹ A surety debt, as in the case of the liability of the bankrupt on a bond to secure the performance of a building contract, is discharged as to the bankrupt principal thereon, and the surety is subrogated to the rights of the creditor.²² Since only provable debts are discharged, none post-dating the petition in bankruptcy are affected by the discharge.²³ The fact that the debtor's sole purpose in going into bankruptcy was to discharge a particular debt will not affect the validity of the discharge when obtained.²⁴ Reference should be made to § 63a and the cases cited thereunder for the purpose of determining whether a debt is dischargeable as provable. It will not be feasible in this place to declare more than a few general principles in respect to provable debts.

(2) **DEBTS SUSCEPTIBLE OF PROOF, BUT DISALLOWED.**—Provable debts here referred to are not necessarily those which have been proved; debts susceptible of being proved under the act are included.²⁵ A debt which is disallowed because without foundation is not therefore non-provable. The court may determine whether an alleged claim against a bankrupt's estate is valid, and if

17. *Knott v. Putnam* (D. C., Vt.), 6 Am. B. R. 80, 107 Fed. 907, and many cases, *post*, in this section. Compare *Burnham v. Pidcock*, 58 N. Y. App. Div. 273, 5 Am. B. R. 590, 68 N. Y. Supp. 1007; *In re Bullis*, 68 App. Div. 508, 7 Am. B. R. 238, 62 N. Y. Supp. 1047, *affd.* 171 N. Y. 689; *Barnes Mfg. Co. v. Norden* (Sup. Ct., N. J.), 67 N. J. Law 493, 7 Am. B. R. 553, 51 Atl. 454; *Berry v. Jackson* (Sup. Ct., Ga.), 115 Ga. 196, 8 Am. B. R. 485, 41 S. E. 698; *In re Patterson*, Fed. Cas. 10,817; *In re Whitehouse*, Fed. Cas. 17,564; *Warner v. Cronkhite*, Fed. Cas. 17,180.

18. For additional discussion of effect of discharge, see this section, *post*, subtitle "Pleading Discharge."

19. See Bankr. Act, § 63. *In re American Vacuum Cleaner Co.* (D. C., N. J.), 26 Am. B. R. 621, 192 Fed. 939. For interesting case see *Graham v. Richardson* (Sup. Ct., Ga.), 115 Ga. 1002, 8 Am. B. R. 700, 42 S. E. 374, holding that a debt contracted for the purchase price of personalty is released, there being no vendor's lien.

Provable debts will be discharged especially where they are included in the present schedules, unless excepted from the discharge in terms; that is, "specifically" named as excepted. *In re Kuffler* (D. C., N. Y.), 19 Am. B. R. 181, 153 Fed. 667.

20. *Tindle v. Birkett* (Ct. App., N. Y.), 15 Am. B. R. 179, 183 N. Y. 287, *affd.* 205 U. S. 183, 18 Am. B. R. 121, 51 L. ed. 762; *Crawford v. Burke*, 195 U. S. 176, 12 Am.

B. R. 659, 666, 49 L. ed. 147; *In re United Button Co.* (D. C., Del.), 15 Am. B. R. 399, 140 Fed. 495.

21. A "provable debt," as used in section 17 of the bankruptcy act, means any claim that the creditor may make provable through the means provided by section 63-b. *In re Hilton* (D. C., N. Y.), 4 Am. B. R. 774, 104 Fed. 981.

22. *Williams et al. v. U. S. Fidelity Co.*, 236 U. S. 549, 34 Am. B. R. 181, 59 L. Ed. 713, *revd.* 18 Am. B. R. 802.

23. *In re Burka* (D. C., Mo.), 5 Am. B. R. 12, 104 Fed. 326; *In re Marcus* (D. C., Mass.), 5 Am. B. R. 19, 104 Fed. 331; *affd.* s. c., 5 Am. B. R. 365, 105 Fed. 907; *Ruhl-Koblegard Co. v. Gillespie*, 61 W. Va. 554, 22 Am. B. R. 643, 56 S. E. 898.

24. *Tinnegan v. Hall*, 35 N. Y. Misc. 773, 6 Am. B. R. 648, 72 N. Y. Supp. 347.

25. *Wood v. Carr*, 113 Ky. 303, 10 Am. B. R. 577, 13 S. W. 762; *Crawford v. Burke*, 195 U. S. 176, 12 Am. B. R. 659, 666, 49 L. ed. 147, where the court said: "Under this section, whether the discharge of the defendants in bankruptcy shall operate as a discharge of the plaintiff's debt, it not having been reduced to judgment, depends upon the fact whether the debt was 'provable' under the Bankruptcy Act, that is, susceptible of being proved." *Tindle v. Birkett*, 205 U. S. 183, 18 Am. B. R. 121, 51 L. ed. 762; *Clarke v. Rogers*, 228 U. S. 534, 30 Am. B. R. 39, 46, 57 L. ed. 953.

it is ascertained that there is no basis for the claim it may be disallowed, but this does not mean, necessarily, that the claim is non-provable, and therefore not dischargeable.²⁶ It has been held that a discharge will not be granted where the only claims scheduled by the bankrupt are disputed and not admitted by him to be debts,²⁷ but a claim disputed by the bankrupt may be provable, and if it is it follows by operation of law, regardless of the action of the bankrupt that it is dischargeable.²⁸

(3) JUDGMENT DEBTS.—A debt scheduled in a bankruptcy under a former law, but kept alive by a subsequent judgment, will, because provable, be released.²⁹ This includes judgments entered prior to bankruptcy, provided such judgments are provable and not subject to the exceptions, and all proceedings thereunder are nullified.³⁰ A claim reduced to judgment after the commencement of the bankruptcy proceedings, although not scheduled, may be discharged, where the creditor had actual notice of the bankruptcy proceedings in time to file and prove his claim.³¹

(4) FINES, PENALTIES AND DEBTS DUE GOVERNMENT.—Broad and ancient principles also exclude obligations to the State or sovereign, and this, too, whether specially excepted by the law or not; thus, fines imposed as penalties for crimes,³² the obligation of the father of a bastard child to support it and pro-

26. *Lesser v. Gray*, 236 U. S. 70, 34 Am. B. R. 8, 59 L. ed. 471.

27. *Matter of Gulick* (D. C., N. Y.), 26 Am. B. R. 632, 190 Fed. 52, in which the court says: "Two of the claims filed in this case appear to be dischargeable, but the point is that the bankrupt does not admit that they are debts. He may prefer to get a discharge instead of litigating the claim on the merits; but until he admits that they are debts, I do not see what power a bankruptcy court has to discharge such contested claims because they may be established as debts."

28. *Hargadine-McKittrick Dry Goods Co. v. Hudson* (C. C. A., 8th Cir.), 10 Am. B. R. 225, 122 Fed. 232, holding that a claim disallowed for the reason that it was barred by the statute of limitations before the adjudication is a provable debt and released by the bankrupt's discharge; the term "provable debts" does not mean only such debts as are valid and against the allowance of which no defense can be successfully interposed.

29. *In re Herrman* (D. C., N. Y.), 4 Am. B. R. 139, 102 Fed. 753; *affid.* 106 Fed. 987. Compare *In re Claff* (D. C., Mass.), 7 Am. B. R. 128, 111 Fed. 506; *Dean v. Justices* (Sup. Ct., Mass.), 173 Mass. 453, 2 Am. B. R. 163, 53 N. E. 893.

30. *Kruegel v. Murphy and Bolanz* (Tex. Civ. App.), 35 Am. B. R. 676, 177 S. W. 1018.

31. Release from subsequent judgment.—In the case of *Claster v. Soble*, 22 Pa. Super. Ct. 631, 10 Am. B. R. 446, it was held that in case a claim is reduced to judgment, as was done in the case at bar, after the bankruptcy proceedings had been commenced, and although the claim was not scheduled, yet, if the creditor has actual knowledge of the

pendency of the bankruptcy proceedings in time to file and prove his claim, the bankrupt is nevertheless discharged from all liability on such judgment. The court, in referring to the provisions of section 17 of the bankruptcy act, says: "It is very clear from this provision the plaintiffs having admitted that they had knowledge of the proceedings in bankruptcy, that the defendant was discharged from all personal liability on the note upon which the judgment was entered. It follows, of course, that the judgment had no validity, and that all proceedings thereunder were absolutely void."

A claim, provable in bankruptcy, was duly scheduled by a debtor in voluntary bankruptcy proceedings instituted in his true name, the correct name and address of the creditor being given, and a discharge in bankruptcy subsequently had. At the time of bankrupt's adjudication, there was pending in justice's court, an action on said claim by the creditor, wherein, because of a mistake, either of the justice or the creditor, bankrupt was sued by a wrong name and judgment recovered. No evidence was given that the creditor had ever dealt with bankrupt under such wrong name. It was held that bankrupt, by his discharge in bankruptcy, was released from the legal obligation sought to be enforced against him under an execution on the judgment obtained in the justice's court action. *Finnell v. Armoura* (Sup. Ct., Utah), 39 Utah, 316, 26 Am. B. R. 802, 117 Pac. 49.

32. *In re Moore* (D. C., Ky.), 6 Am. B. R. 590, 111 Fed. 145. *Contra*: *In re Alderson* (D. C., W. Va.), 3 Am. B. R. 544, 98 Fed. 588. Compare also *People v. Spaulding*, 10 Paige (N. Y.), 284, and subsequent appeals, 7 Hill, 301, 4 How. (U. S.), 21.

tect the community from that duty,³³ and, of course, all debts not taxes (which are expressly excepted) due the United States,³⁴ or a State so long as the latter acts in a sovereign capacity.³⁵

b. As dependent on the person claiming.—While, as a rule, the debt of every creditor entitled to prove a claim is dischargeable, yet the effect of such discharge is sometimes limited by citizenship or the claimant's relation to other persons or business entities. Thus, the debt of an alien, whether resident or not, is discharged,³⁶ though the discharge cannot be pleaded in a foreign court. On the other hand, the debt of an alien bankrupt discharged by the courts of this country may still be sued on here.³⁷ This is contrary to the English rule,³⁸ and a bankruptcy agreement between the two countries has often been discussed. If the bankrupt, by the laws of his State, is liable for his wife's debts, as for necessities, his discharge will release them.³⁹ So if a woman marries after filing a petition in bankruptcy and thereafter procures a discharge, such discharge will not only release her but also her husband. The status of the claim is fixed at the time of the petition.⁴⁰ If, on the other hand, she is alone responsible, his discharge will not affect her liability.⁴¹ For the dischargeability of debts already barred by the statute of limitations, and those purely contingent at the time of the bankruptcy, see under section sixty-three, *post*.

c. As dependent on the nature of the liability.—(1) **LIABILITY FOR TORTS.**—(I) *In general.*—Under previous laws, liabilities for torts were not discharged unless in judgment,⁴² and this though liquidation was not essential to bring a debt within the excepted classes. The use of the word "judgment" in the act passed in 1898 seemed to emphasize this rule. It is surely still the law where the wrongs relied on are within the terms of subdivision 2 of § 17.⁴³

(II) *Effect of amendment of 1903.*—The amendment of 1903 has substituted the word "liabilities" in place of the word "judgments." And the provision as it now stands affords some basis for the claim that the exception from the operation of the discharge of particular liabilities for torts implies that such liabilities, in general, are not discharged. But this implication does not carry far. The amendment was to an exception in the statute which states what debts shall not be discharged rather than what shall be. A negative provision that liabilities for certain torts shall not be discharged, does not of itself make all other tort liabilities provable debts. Although the language is not wholly in harmony with the other sections of the act, it is apparent that Congress intended by the amendment to preclude the possibility of claims for certain torts being discharged, whether reduced to judgment or not. But there is no evident intention to bring in claims for torts which were never provable under the earlier bankruptcy act.⁴⁴ When, however, the tort

33. *In re Baker* (D. C., Kan.), 3 Am. B. R. 101, 96 Fed. 964; *Hawes v. Cooksey*, 13 Ohio 242.

34. *United States v. Herron*, 20 Wall. 251, 22 L. ed. 275, and cases cited.

35. *State v. Shelton*, 47 Conn. 400; *Commonwealth v. Hutchinson*, 10 Pa. St. 466.

36. *Pattison v. Wilbur*, 10 R. I. 448; *Ring v. Eickerson*, 2 McCrary 259. Note also *In re Clisdell* (D. C., N. Y.), 2 Am. B. R. 424, 101 Fed. 246.

37. *Zarega's Case*, Fed. Cas. 18,204; *In re Shepard*, Fed. Cas. 12,753.

38. *Potter v. Brown*, 5 East, 124; *Cook's Bankruptcy Law*, 520.

39. *Vanderhayden v. Mallory*, 1 N. Y. 452.

40. *Chadwick v. Starrett*, 27 Me. 138.

41. *Mobley v. Cureton*, 6 S. C. 49; *Alling v. Egan*, 11 Rob. (La.) 244.

42. *In re Book*, Fed. Cas. 1,637; *In re Wiggers*, Fed. Cas. 17,623; *Hays v. Ford*, 55 Ind. 52; *Comstock v. Grout*, 17 Vt. 512.

43. Thus, see *Hun v. Cary*, 82 N. Y. 65; *Williamson v. Dickens*, 27 N. C. 259.

44. *Matter of N. Y. Tunnel Co.* (C. C. A., 2d Cir.), 20 Am. B. R. 25, 159 Fed. 688.

grows out of or is the result of consent or a contract, on broad principles and irrespective of the amendment, it will, it is thought, even if not in judgment, be discharged.⁴⁵

(III) *Liabilities which are dischargeable.*—If a creditor waives his tort and presents his claim with the other creditors of the estate, his debt is dischargeable as one in contract, regardless of the tort.⁴⁶ But this rule would not apply where the claim was based upon a tort coming within the excepted classes.⁴⁷ If a debt is founded on a contract it is a provable debt and dischargeable, although the creditor has elected to bring an action for fraud.⁴⁸ A judgment in an action for a tort, which does not fall within any of the excepted classes, is a provable debt and may be discharged.⁴⁹ When it is necessary to consider whether a judgment is released by a discharge, the fact must be determined by the record, and not by any allegation or proof outside of it.⁵⁰

(2) *LIABILITIES FOR CONVERSION.*—It was doubted, under the former bankruptcy laws whether such liabilities before judgment were released.⁵¹ On principle, the original relation being a contractual one, as for instance that between principal and agent, it would seem that a discharge would be a release. Certainly under the present law, it having been long settled that the liability of the converting bankrupt is not within the terms of § 17-a (2),⁵² and the claim being provable in bankruptcy, there can be little doubt. There is probably none since the striking out of the word "frauds" by the amendment of 1903. Indeed, the courts have already established this doctrine so

holding that claim for unliquidated damages founded upon tort is not provable in bankruptcy.

For discussion of this amendment in connection with § 63, providing as to what debts are provable, see *Brown v. United Button Co.* (C. C. A., 3d Cir.), 17 Am. B. R. 565, 149 Fed. 48.

45. Thus, where the liability is for conversion, breach of promise of marriage, or seduction on the ground of loss of services, see subsequent paragraphs. On this subject, generally, see discussion under Section Sixty-three of this work, *post*. *Reinhardt v. Friederich* (Ind. App. Ct.), 58 Ind. App. 421, 34 Am. B. R. 633, 108 N. E. 258, in which a question as to the dischargeability of a claim for damages for malpractice was considered.

46. *Tindle v. Birkett*, 18 Am. B. R. 121, 205 U. S. 183, 185, 51 L. ed. 762; *Mackel v. Rochester* (D. C., Mont.), 14 Am. B. R. 429, 135 Fed. 904.

47. *Mackel v. Rochester* (D. C., Mont.), 14 Am. B. R. 429, 135 Fed. 904, so held when the claim was based upon the actual fraud of the defendant.

48. *Crawford v. Burke*, 195 U. S. 176, 12 Am. B. R. 659, 49 L. Ed. 147; *Fechter v. Postel*, 114 N. Y. App. Div. 776, 17 Am. B. R. 316, 100 N. Y. Supp. 207, where the rule was applied that a debt founded upon contract, express or implied, is provable against the bankrupt's estate, and therefore dischargeable, although the creditor may have elected to bring his action in trover as for a fraudulent conversion instead of in assumpsit; *Reinhardt v. Friederich* (Ind. App.

Ct.), 58 Ind. App. 421, 34 Am. B. R. 633, 108 N. E. 258 (citing text).

Action on contract.—A complaint in an action for breach of contract to pay a certain sum in cash and collected profits of a certain company, and a balance of accounts receivable less outstanding debts, does not state an action in tort, where there is no allegation of a wrongful withholding by the defendant other than an allegation that he agreed to act as agent for the plaintiff in collecting the claims, hence, a judgment for the plaintiffs in such an action is discharged by the subsequent bankruptcy of the defendant. *Hanan v. Long* (App. Div., N. Y.), 150 N. Y. App. Div. 327, 32 Am. B. R. 132, 134 N. Y. Supp. 786.

49. *Burnham v. Pidcock*, 33 N. Y. Misc. 65, 5 Am. B. R. 42, 66 N. Y. Supp. 806, *affd.* 5 Am. B. R. 590, 58 N. Y. App. Div. 273, 68 N. Y. Supp. 1,007, holding that an action for conversion of goods is not essentially an action for fraud and may be discharged.

50. *Burnham v. Pidcock*, 58 N. Y. App. Div. 273, 5 Am. B. R. 590, 68 N. Y. Supp. 1,007, citing *Collier on Bankruptcy* (3d ed), p. 197.

51. *Chapman v. Forsyth*, 2 How. 202; *Hayman v. Pond*, 48 Mass. 328. *Contra*: *Johnson v. Worden*, 47 Vt. 457; *Treadwell v. Holloway*, 46 Cal. 547; *Meador v. Sharpe*, 54 Ga. 125. Compare also *Cole v. Roach*, 37 Tex. 413.

52. *Hennequin v. Clews*, 111 U. S. 676, 28 L. Ed. 565, *affg.* 77 N. Y. 427. Compare *Lawrence v. Harrington*, 122 N. Y. 408, 25 N. E. 406.

firmly as to make it one of the settled questions under the law.⁵³ The change from "judgments" to "liabilities" has affected the doctrine only to fix it more firmly. Thus, dischargeability will be decreed in all cases, such as those of agents, brokers, factors, auctioneers, conditional vendees, and the like, where there is neither a technical trust in the inception of the contractual relation nor moral turpitude in the breach of it;⁵⁴ and cases *contra* under the former laws are no longer reliable.⁵⁵ If suit is brought for the conversion of a stock against a broker, the purchase of the stock is affirmed, and there is a waiver of fraud alleged in such purchase, and the broker's liability for the conversion is released by his discharge.⁵⁶ Any claim for the conversion of personal property, possession of which was not obtained by false representation or pretenses or by actual fraud and wilful and intentional wrong, is

53. Conversion.—In *re* Basch (D. C., N. Y.), 3 Am. B. R. 235, 97 Fed. 761; *Burnham v. Pidcock*, 33 N. Y. Misc. 65, 5 Am. B. R. 42, 66 N. Y. Supp. 806; s. c. on appeal, 58 N. Y. App. Div. 273, 5 Am. B. R. 590, 68 N. Y. Supp. 1097; *Watertown v. Hall*, 66 N. Y. App. Div. 84, 7 Am. B. R. 716, 72 N. Y. Supp. 466; *Cushman v. Arkell*, 65 N. Y. App. Div. 130, 72 N. Y. Supp. 555. See Am. Bankr. Dig. § 1124.

A judgment for a conversion of moneys received by the bankrupt upon sales on commission is not within any of the exceptions created by section 17 of the bankruptcy law and is released by his discharge. In *re* Benedict, 37 N. Y. Misc. 230, 8 Am. B. R. 463, 75 N. Y. Supp. 165. Stockbrokers who repledge securities deposited with them as collateral for loans, thus misapplying such securities are not guilty of a wilful and malicious injury within the meaning of this section. *Wood v. Fisk*, 215 N. Y. 233, 35 Am. B. R. 46, 109 N. E. 177.

A debt, due by reason of the failure of the bankrupt to remit money collected by virtue of a mere contract of agency to collect and pay over to his principals money loaned by him for them, is dischargeable. *Bracken v. Milner* (C. C., Mo.), 5 Am. B. R. 23, 104 Fed. 522. So, where a debt was contracted by the bankrupt under an agreement with the claimant prior to bankruptcy, whereby the bankrupt was to sell a certain commodity and pay over a proportionate amount of the sale price, and the bankrupt fails to remit, such debt is dischargeable. *Bryant v. Kinyon* (Sup. Ct., Mich.), 127 Mich. 152, 6 Am. B. R. 237, 86 N. W. 531.

Misappropriation by partner.—The exceptions of a discharge from a judgment for fraud or for a debt for fraud while acting in a fiduciary capacity do not apply to a misappropriation of money by a partner while engaged in the conduct of the partnership business. *Gee v. Gee* (Sup. Ct., Minn.), 84 Minn. 384, 7 Am. B. R. 500, 87 N. W. 1,116.

A bailee's discharge in bankruptcy is a defense to an action for the conversion of money held by him. *Lewis v. Shaw*, 122 N. Y. App. Div. 96, 19 Am. B. R. 866, 106 N. Y. Supp. 1012.

Fraudulent conversion of property by

commission merchant.—A discharge in bankruptcy is a bar to an action against the bankrupt, based upon the fact that the defendants fraudulently converted to their own use a certain lot of fertilizer, or its proceeds after sale, which was consigned to the defendants to be sold on commission and accounted for by them as agents of the plaintiff; the title to the fertilizer, except after sale in due course, and thereafter to the proceeds, being specifically reserved to the plaintiff. *Butler-Kyser Manufacturing Co. v. Mitchell & Co.* (Ala. Sup. Ct.), 37 Am. B. R. 195, 70 So. 665.

54. Kavanagh v. McIntyre, 128 N. Y. App. Div. 722, 21 Am. B. R. 327, 112 N. Y. Supp. 987; s. c. on appeal, 210 N. Y. 175, 31 Am. B. R. 712, 104 N. E. 135, holding that a broker was not dischargeable of a debt for securities converted and unlawfully sold to third persons, where the proceeds of the sale were misappropriated under such circumstances that the conversion amounted to larceny. This case was disapproved by Judge Hand in *In re Ennis & Stoppani* (D. C., N. Y.), 22 Am. B. R. 679, 171 Fed. 755. And see *Maxwell v. Martin*, 130 N. Y. App. Div. 80, 22 Am. B. R. 93, 114 N. Y. Supp. 349; *Andrews v. Dresser*, 214 N. Y. 671, 108 N. E. 1088; *Wood v. Fisk*, 215 N. Y. 233, 35 Am. B. R. 46, 109 N. E. 1095.

55. As, for instance, Mayor v. Walker, 11 N. B. R. 478.

56. In re Ennis & Stoppani (D. C., N. Y.), 22 Am. B. R. 679, 171 Fed. 755; *Maxwell v. Martin*, 130 N. Y. App. Div. 80, 22 Am. B. R. 93, 114 N. Y. Supp. 349; *Wood v. Fisk*, 215 N. Y. 233, 35 Am. B. R. 46, 109 N. E. 1095.

Broker's failure to return deposit.—Where one deposited a check for a sum of money with bankers and brokers with an order to purchase certain stock, but countermanded the order before the stock was bought and demanded the return of the money, which was not returned, the subsequent discharge in bankruptcy of the bankers and brokers, the debt having been duly scheduled, is a bar to an action to recover the money. *Clark v. Milliken* (App. Term, N. Y.), 70 N. Y. Misc. 492, 25 Am. B. R. 680, 127 N. Y. Supp. 339.

released by the bankrupt's discharge.⁵⁷ The conversion, to fall within the exception as to dischargeability, must be not only intentional or wilful but wrongful and with malice.⁵⁸ A judgment rendered in an action for conversion against one subsequently adjudicated a bankrupt, is released by his discharge,⁵⁹ unless there be evidence of actual fraud in incurring the liability.⁶⁰

(3) **LIABILITIES FOR BREACH OF PROMISE OF MARRIAGE.**—Such liabilities are dischargeable in bankruptcy, except where it appear that the breach of promise of marriage was accompanied by seduction, in which case since the amendment of March 2, 1917, the liability is not dischargeable.⁶¹ The cases as to breach of promise alone are uniform.⁶² And it was held that the liability was dischargeable although seduction accompanied the breach of promise.⁶³ It was held prior to the amendment that in the absence of proof to the contrary, it will be presumed that a judgment in an action for breach of promise to marry, accompanied by a charge of seduction, was awarded for the seduction, and was therefore non-dischargeable.⁶⁴

(4) **SUPPORT OF WIFE AND CHILDREN.**—Contracts and judgments binding a husband to support his wife,⁶⁵ or a father to support his children,⁶⁶ are not released by discharge. To hold otherwise would be giving an effect to the bankruptcy act which was never intended. It is not to be conceived that an act intended for the relief of debtors who are in financial distress will be extended to relieve them from their natural obligations to support their wives and children.

57. *Maxwell v. Martin*, 130 N. Y. App. Div. 80, 22 Am. B. R. 93, 114 N. Y. Supp. 349, citing *Crawford v. Burke*, 195 U. S. 176, 12 Am. B. R. 659; *In re Wenham*, 16 Am. B. R. 690, 153 Fed. 910; *In re Adler*, 18 Am. B. R. 240, 152 Fed. 422; *Lewis v. Shaw*, 122 N. Y. App. Div. 89, 19 Am. B. R. 866, 106 N. Y. Supp. 1012; *Fechter v. Pastel*, 114 N. Y. App. Div. 776, 17 Am. B. R. 316, 100 N. Y. Supp. 207.

58. *Matter of Levitan* (D. C., N. J.), 34 Am. B. R. 789, 224 Fed. 241; *Ulner v. Doran*, 167 N. Y. App. Div. 259, 34 Am. B. R. 410, 152 N. Y. Supp. 655; *In re Arnao* (D. C., N. Y.), 32 Am. B. R. 88, 210 Fed. 395.

59. *Fechter v. Pastel*, 114 N. Y. App. Div. 776, 17 Am. B. R. 316, 100 N. Y. Supp. 207.

60. *Ulner v. Doran*, 167 N. Y. App. Div. 259, 34 Am. B. R. 410, 152 N. Y. Supp. 655.

61. **Breach of promise of marriage.**—*In re McCauley* (D. C., N. Y.), 4 Am. B. R. 122, 101 Fed. 223; *In re Fife* (D. C., Penn.), 6 Am. B. R. 258, 109 Fed. 880; *In re Brumbaugh* (D. C., Penn.), 12 Am. B. R. 204, 128 Fed. 971; *Bond v. Milliken*, 134 Iowa, 447, 17 Am. B. R. 811, 109 N. W. 774. Compare *In re Sidle*, Fed. Cas. 12,844.

62. *Disler v. McCauley*, 66 N. Y. App. Div. 42, 7 Am. B. R. 142, 73 N. Y. Supp. 270; *rev. s. c.*, 35 N. Y. Misc. 411, 6 Am. B. R. 491, 71 N. Y. Supp. 949; *Finnegan v. Hall*, 35 N. Y. Misc. 773, 6 Am. B. R. 648, 72 N. Y. Supp. 347.

63. *In re Warth* (C. C. A., 2d Cir.), 29 Am. B. R. 210, 200 Fed. 408; *Matter of Komar* (D. C., N. Y.), 37 Am. B. R. 683, 234 Fed. 378; *Matter of Grounds* (D. C., N. Y.), 32 Am. B. R. 774, 215 Fed. 280.

64. **Liability for support of wife.**—*Audubon v. Shufeldt*, 181 U. S. 575, 5 Am. B. R. 832, 45 L. Ed. 1009, which related especially to a claim of alimony, but the reasoning applies equally to any claim arising upon a

contract or judgment binding the husband to support his wife; *Dunbar v. Dunbar*, 190 U. S. 340, 10 Am. B. R. 139, 47 L. Ed. 1084, holding that a husband's obligation to support his divorced wife under an agreement to pay her an annuity "during her life or until she remarries," is not a contingent liability provable under the act, and his discharge in bankruptcy does not release him therefrom.

65. **A father's liability under an agreement with his divorced wife to pay to her for the support of his minor children until they respectively become of age, is not a provable debt against his estate in bankruptcy and is not released by his discharge.** *Dunbar v. Dunbar*, 190 U. S. 340, 10 Am. B. R. 139, 47 L. Ed. 1084. In the case of *In re Hubbard* (D. C., Ill.), 3 Am. B. R. 528, 98 Fed. 710, it was held that a discharge in bankruptcy did not release the bankrupt from the obligation to obey an order made by a State court, requiring him to pay a certain sum for the support of his minor children.

Liability for support of bastard.—*In re Baker* (D. C., Kan.), 3 Am. B. R. 101, 96 Fed. 954, it was held that a judgment in a bastardy proceeding against the putative father, adjudging him to pay a certain sum to the mother of the child for its maintenance, was not such a debt as would be released by the discharge of the father in bankruptcy, and it was put upon the ground that by virtue of the judgment and bond given thereon, the father became liable for the maintenance of the illegitimate son the same as if he were his legitimate offspring, and that the bankruptcy law was never intended to affect the liability of the father for the support of his children. But in *McKittrick v. Cahoon*, 89 Minn. 283, 10 Am. B. R. 139, 95 N. W. 223, it was held that where by an order in bastardy proceedings the putative father of a natural child was

(5) **LIABILITY OF FACTOR.**—The liability of a factor to his principal for the proceeds of all goods consigned to him and sold before a demand by the principal for a return of all goods unsold is dischargeable in bankruptcy.⁶⁶ But the refusal of the factor upon grounds not legally tenable and imposed in bad faith to return goods unsold, after demand, renders his liability therefor a debt not dischargeable.⁶⁷

(6) **LIABILITY OF STOCKHOLDERS, DIRECTORS, AND PARTNERS.**—A stockholder's liability for the debts of a corporation declared by a decree which established the amount chargeable is a provable debt and is released by his discharge.⁶⁸ The liability of the director of a discharged corporation has already been discussed.⁶⁹ Partnership debts may also be discharged,⁷⁰ but the effect of the individual discharge of a partner on his partnership debts depends on circumstances.⁷¹ It has been held that a judgment against a partnership is not released by the discharge of a member of the firm.⁷²

III. DEBTS NOT DISCHARGEABLE.

a. **Taxes.**—The first exception from the dischargeability of debts includes debts of the bankrupt which "are due as a tax levied by the United States, the State, county, district or municipality in which he resides." This follows from the doctrine that the liabilities to the sovereign will not be affected, unless he by express words extends the provisions of a statute to himself.⁷³ Indeed, it is thought that taxes would be excepted from the general dischargeability of provable debts, even were the statute silent. There is hardly enough in § 64-a, giving them priority of payment, to warrant the claim that the sovereign intended to waive his exemption here. Besides, the words used in § 63-a seem to take taxes out of the class known as "provable debts," and thus they could not be discharged in any event. Local assessments are, of course, "taxes" in the sense here used, so long as they are levied by one of the governmental entities indicated.⁷⁴ And State franchise taxes imposed on corporations under a State statute are taxes within the meaning of this exception.⁷⁵

required to pay a monthly stipend for its support, and upon refusal a final money judgment was obtained for the total amount due, the rights of the person entitled to recover under the order of filiation were merged in the judgment, and the debt evidenced thereby was not excepted from the operation of section 17 of the bankruptcy act.

66. *Mathieu v. Goldberg* (C. C., N. Y.), 19 Am. B. R. 191, 156 Fed. 541; *In re Adler* (C. C. A., 2d Cir.), 18 Am. B. R. 240, 152 Fed. 422; *In re Benedict*, 38 N. Y. Misc. 230, 8 Am. B. R. 463, 75 N. Y. Supp. 165.

Goods consigned for sale.—The provisions of section 17(4), excepting from discharge debts created by the bankrupt's fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity, do not embrace a debt arising from the sale of goods consigned to the bankrupt for sale upon commission, and upon an alleged contract to return the goods or their specific proceeds. *In re Basch* (D. C., N. Y.), 3 Am. B. R. 235, 97 Fed. 761.

67. *Mathieu v. Goldberg* (C. C., N. Y.), 19 Am. B. R. 191, 156 Fed. 541.

68. *Dight v. Chapman*, 44 Ore. 265, 12 Am. B. R. 743, 75 Pac. 585.

69. See §§ 4, 14 and 16, *ante*. Compare *In re Marshall Paper Co.* (D. C., Mass.), 2 Am. B. R. 653, 95 Fed. 419; s. c., *affd.*, 4 Am. B. R. 468, 102 Fed. 872.

70. *N. Y. Deaf & Dumb Institute v. Crockett*, 117 N. Y. App. Div. 269, 17 Am. B. R. 233, 102 N. Y. Supp. 373, holding that an individual member of a firm may, on his application, made in his own right, obtain a discharge not only from his individual debts but from his firm liabilities, and that the existence or non-existence of firm assets is immaterial to the decision of this question.

71. See discussion under Sections Four and Fourteen, *ante*. Compare *In re Schultz* (D. C., N. Y.), 6 Am. B. R. 91, 109 Fed. 264.

72. *Dodge v. Kaufman*, 46 N. Y. Misc. 248, 91 N. Y. Supp. 727.

73. See *In re Baker* (D. C., Kan.), 3 Am. B. R. 101, 96 Fed. 964, and cases cited.

74. See *In re Ott* (D. C., Iowa), 2 Am. B. R. 637, 95 Fed. 274. See also Report of Ex. Com. of National Ass'n of Referees in Bankruptcy, published March, 1900, p. 19.

75. *Matter of Ashland Co.* (D. C., Mass.), 36 Am. B. R. 194, 229 Fed. 829.

b. Liabilities for certain specified acts.—(1) **IN GENERAL.**—The second subdivision of this section excepts from discharge debts which are based upon “liabilities for obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation.” This subdivision is exceedingly comprehensive in its character, although in some respects it is not as broad as before the amendment of 1903.⁷⁶

(2) **EFFECT OF AMENDMENT OF 1903.**—Some important changes were made in this subdivision by the amendment of 1903. The most vital is the substitution of the word “liabilities” for the words “judgments in actions” at the beginning of this subdivision. This is a substantial return to the phrasing used in the former law,⁷⁷ departed from, it is thought, by the framers of the present statute because of uncertainty whether the word “debt” there used included a “judgment.” This doubt now being removed,⁷⁸ the unwisdom of the change made by the original statute becomes apparent.⁷⁹ To be sure, it will stimulate litigation, but no bankruptcy law should free debtors of fraudulent liabilities or moral duties, merely because a court has not measured them up in terms of dollars; the use of the phrase “judgments in actions” made this more than likely. The words in the English law are, as to fraudulent and fiduciary obligations, “debt or liability”⁸⁰ (the latter of which words is carefully defined⁸¹), and as to alimony and affiliation obligations, “judgments.”⁸² The distinction thus made between moral duties, which must be liquidated, and debts for fraud, which need not be, is narrow and unwise; a bankrupt who is also a moral delinquent should not complain if he is harassed by suits to enforce duties. It is thought, therefore, that the opening of the door accomplished by the amendatory act of 1903 will prove the part of wisdom. It has, at any rate, put an end to the elasticity of construction evidenced by those cases which perforce have already overlooked the literal meaning of “judgment” and construed it to mean “liability.”⁸³

(3) **LIABILITIES FOR FRAUD.**—Before the amendment a bankrupt might have been released from a debt contracted in fraud unless the fraud had been determined and a judgment therefor had been rendered. As the law now

76. *In re Bullis*, 68 N. Y. App. Div. 508, 7 Am. B. R. 238, 73 N. Y. Supp. 1047; s. c. in U. S. Supreme Court *sub nom.* *Bullis v. O’Beirne*, 195 U. S. 606, 13 Am. B. R. 108, 49 L. Ed. 340.

77. Act of 1867, § 33, R. S., § 5,117.

78. *Boynnton v. Ball*, 121 U. S. 457, 30 L. Ed. 985. Compare also *In re Pinkel* (Ref., N. Y.), 1 Am. B. R. 333.

79. Thus, note the unwillingness of the courts in the cases set out in the foot-notes, *post*, in this section, to construe the words “judgments in actions” strictly, and observe the confusion and delays and, in some cases, denials of justice, which would result, if bankruptcy proceedings must be halted while the holder of one out of perhaps a hundred liabilities proceeds to liquidate his claim and thus intrench himself against a discharge.

80. Eng. Act of Bankruptcy of 1883, § 30 (1).

81. *Id.*, § 37 (8).

82. Eng. Act of Bankruptcy of 1890, § 10.

83. *In re Sullivan* (Ref., N. Y.), 2 Am.

B. R. 30; *In re Lewensohn* (D. C., N. Y.), 3 Am. B. R. 594, 99 Fed. 73; *In re Cole* (D. C., N. Y.), 5 Am. B. R. 780, 106 Fed. 837; *Smith & Wallace Co. v. Lambert* (Sup. Ct., N. J.), 69 N. J. Law 487, 11 Am. B. R. 252, 55 Atl. 88, holding that the words “judgments in action,” as used in the act before amendment, refer to judgments exclusively and not to mere debts. Compare also *In re Rhutassel* (D. C., Iowa), 2 Am. B. R. 697, 96 Fed. 597; also *Morse v. Kaufman* (Sup. Ct., Va.), 4 Va. Sup. Ct. 172, 7 Am. B. R. 549; *Howe v. Noyes*, 47 N. Y. Misc. 338, 15 Am. B. R. 103, 93 N. Y. Supp. 476.

Under the act prior to the amendment of 1903, the United States Supreme Court held that only a judgment for damages based upon actual as distinguished from constructive fraud is not discharged by the discharge of the defendant bankrupt. *Bullis v. O’Beirne*, 195 U. S. 606, 13 Am. B. R. 108, 49 L. Ed. 340; *Tindle v. Birkett*, 183 N. Y. 267, 15 Am. B. R. 179, 76 N. E. 25, *affd.* 205 U. S. 183, 51 L. Ed. 762.

stands the frauds which will bar discharge are those connected with the obtaining of property by "false pretenses or false representations."⁸⁴ Only those liabilities strictly within subdivision 2 are now not affected by a discharge. Such frauds as well as those included within the original section are frauds in fact involving moral turpitude or intentional wrong.⁸⁵ As to what is and what is not fraud, each case turns on its own facts.⁸⁶ When a judgment has been entered, the record considered as a whole will determine whether the debt is in fraud.⁸⁷ In order that a judgment may be one recovered for fraud so as to prevent its discharge, the record in the action must show that fraud and deceit was the "gist and gravamen" of the action.⁸⁸

^{84.} *Mackel v. Rochester* (D. C., Mont.), 14 Am. B. R. 429, 135 Fed. 904.

^{85.} *Neal v. Clark*, 95 U. S. 704, 24 L. Ed. 586; *Hennequin v. Clewes*, 111 U. S. 676, 28 L. Ed. 565; *Strang v. Bradner*, 114 U. S. 555, 29 L. Ed. 248; *Noble v. Hammond*, 129 U. S. 65, 32 L. Ed. 621; *Forsyth v. Vehmeyer*, 177 U. S. 177, 44 L. Ed. 723; *In re Blumberg* (D. C., Tenn.), 1 Am. B. R. 633, 94 Fed. 476.

The character of the fraud necessary to save a demand or judgment, from the operation of the act, is positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud, or fraud in law, which may exist without imputation of bad faith or immorality. *Louisville & Nashville R. Co. v. Bryant* (Ky. Ct. of App.), 149 Ky. 359, 28 Am. B. R. 867, 149 S. W. 830.

The term "fraud," as employed in the bankrupt act of 1867, received a definite construction by the Supreme Court of the United States in *Neal v. Clark*, 95 U. S. 704, 24 L. Ed. 586. Mr. Justice Field, speaking for the court, said: "The fraud referred to in that section means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement, and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality. Such a construction of the statute is consonant with equity and consistent with the object and intention of Congress in enacting a general law by which the honest citizen may be relieved from the burden of hopeless insolvency. A different construction would be inconsistent with the liberal spirit which pervades the entire bankrupt system." As the term "fraud" is expressed in the same connection, with the term "embezzlement" in the act of July 1, 1893, it must receive the same construction as given in the act of 1867. *Western Union, etc., Co. v. Hurd* (C. C., Mo.), 8 Am. B. R. 633, 116 Fed. 422.

Intentional fraud necessary to bar operation of discharge.—Frauds which will bar the operation of a discharge in bankruptcy are those connected with the obtaining of property by "false pretenses," or "false representations," involving moral turpitude or intentional wrong; implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality, is insuf-

ficient. *Cooper Grocery Co. v. Gaddy* (Civ. App., Tex.), 27 Am. B. R. 422, 141 S. W. 823, quoting text.

Claim by customer against brokers.—Where a customer of a firm of stock brokers deposited bonds as collateral security for the price of stock which he directed them to purchase, and they, subsequently without the knowledge of the customer pledged the stock and bonds, on which they had been charging him interest and crediting dividends, with a bank for a loan of their own, which was later called and the stock and bonds sold in partial satisfaction thereof, and the brokers were declared bankrupts, the claim of the customer was a provable debt, within the meaning of section 63a (4), released by the discharge in bankruptcy, and was not a fraudulent debt within the meaning of subdivisions 2 and 4 of section 17 of the bankruptcy act. *Pitcairn v. Scully* (Common Pleas, Pa.), 62 Pittsb. Leg. J. 507, 33 Am. B. R. 870.

^{86.} *In re Rhutassel* (D. C., Iowa), 2 Am. B. R. 697, 96 Fed. 597; *In re Bullis* 68 N. Y. App. Div. 508, 7 Am. B. R. 238, 73 N. Y. Supp. 1047; *Culver v. Torrey*, 34 N. Y. Misc. 793, 69 N. Y. Supp. 919; *In re Lieber* (Ref., Pa.), 3 Am. B. R. 217; *Collins v. McWalters*, 35 N. Y. Misc. 648, 6 Am. B. R. 593, 72 N. Y. Supp. 203; *Taylor v. Farmer*, 81 Ky. 458; *Sheldon v. Clewes*, 13 Abb. N. C. (N. Y.) 40; *Classen v. Schoenemann*, 80 Ill. 304; *Gaddy v. Witt* (Civ. App., Tex.), 27 Am. B. R. 457, 142 S. W. 926.

^{87.} *Hangadine-McKittrich Dry Goods Co. v. Hudson* (C. C., Mo.), 6 Am. B. R. 657, 111 Fed. 361; *In re Bullis*, 68 N. Y. App. Div. 508, 7 Am. B. R. 338, 73 N. Y. Supp. 1047; *In re Arkell*, 65 N. Y. App. Div. 130, 6 Am. B. R. 650, 72 N. Y. Supp. 555. See also for interesting cases, *Barnes Mfg. Co. v. Norden* (Sup. Ct., N. J.), 67 N. J. Law 493, 7 Am. B. R. 553, 51 Atl. 454; *Berry v. Jackson* (Sup. Ct., Ga.), 115 Ga. 196, 8 Am. B. R. 485, 41 S. E. 698; *Stevens v. Meyers*, 72 N. Y. App. Div. 128, 8 Am. B. R. 496, 76 N. Y. Supp. 332.

^{88.} *Matter of Benoit*, 124 N. Y. App. Div. 142, 20 Am. B. R. 270, 108 N. Y. Supp. 889; *Drake v. Vernon* (Sup. Ct., So. Dak.), 26 So. Dak. 354, 25 Am. B. R. 69, 128 N. W. 317, quoting *Collier on Bankruptcy* (8th Ed.), p. 319; *Nichols v. Doak*, 48 Wash. 457, 22 Am. B. R. 737, 93 Pac. 919, holding that a

Fraudulent liabilities *per se* should be sharply distinguished from fiduciary liabilities, discussed later; though the latter class of liabilities always involves fraud. Under the former law, it was held that the fraud must exist at the inception of the debt.⁸⁹ Though the words there were "created by the fraud," the same doctrine is probably applicable now, provided the liability is within subdivision 2. Proving such a claim in the bankruptcy proceeding does not amount to a waiver of the exception.⁹⁰ Vested liens on property fraudulently kept from creditors in the bankruptcy proceedings are not discharged or abrogated.⁹¹

(4) PROPERTY OBTAINED BY FALSE PRETENSES OR FALSE REPRESENTATIONS.

—Where a bankrupt has committed fraud consisting of obtaining property by "false pretenses or false representations," his discharge is barred. "Property" as here used has the meaning usually accorded to the word in similar statutes; it means something of substance;⁹² it includes money;⁹³ it does not

judgment against a bankrupt which recites that the recovery was because of his fraud in obtaining certain goods is not discharged.

Fraud gist of action.—The New York Court of Appeals, in discussing the question of fraud, said: "As we interpret, subdivision 2 of section 17 of the Bankruptcy Law, it does not limit the exception to common-law actions of fraud or deceit. The gist and gravamen of the action must have been the positive and intentional fraud of the bankrupt. The record presented must clearly show that such misconduct was the pith of the action, and it may not be dependent upon oral proof or other evidence outside of the record." *O'Beirne v. Allegheny & Kinzua R. Co.*, 151 N. Y. 384, 45 N. E. 873.

Conclusiveness of judgment.—It should distinctively appear that the verdict upon which the judgment was based was the result of evidence showing the fraudulent transaction as alleged in the petition; and where there is no evidence in the record of fraudulent representations, and there has been a trial by jury, upon evidence and instructions presenting issues that did not necessarily involve fraud, it can not be presumed that the judgment was obtained in an action for fraud. *Louisville & Nashville R. Co. v. Bryant* (Ky. Ct. of App.), 149 Ky. 359, 28 Am. B. R. 867, 149 S. W. 830.

Deceit and fraud, in inducing the sale of a farm, for which a judgment was obtained, in a State court, renders such judgment non-dischargeable. *Matter of Shepardson* (D. C., Vt.), 34 Am. B. R. 284, 220 Fed. 186; *Forsyth v. Vehmeyer*, 177 U. S. 177, 3 Am. B. R. 807, 44 L. Ed. 723.

⁸⁹ *United States v. The Rob Roy*, Fed. Cas. 16,179; *Brown v. Broach*, 52 Miss. 536.

⁹⁰ *Frey v. Torrey*, 70 N. Y. App. Div. 166, 8 Am. B. R. 196, affg. s. c., 36 N. Y. Misc. 216, 6 Am. B. R. 448, 73 N. Y. Supp. 201.

⁹¹ "The bankruptcy law is not designed to aid in a fraud or to prevent equitable relief to creditors against fraudulent acts of a debtor; and where the creditors, seeking such equitable relief by reason of previously acquired equitable liens, do not purposely

ignore or violate the terms or the spirit of the bankruptcy law, and no unlawful preference among creditors is sought by those asking such equitable relief, it may be afforded in appropriate proceedings." *Robinson v. Tischler*, 69 Fla. 77, 34 Am. B. R. 137, 67 So. 565.

⁹² See definition of "Property," under § 1, *ante*.

Property includes things of substance and not services.—In the case of *Gleason v. Thaw* (C. C. A., 3d Cir.), 25 Am. B. R. 782, 185 Fed. 345, the court said: "The language used in the seventeenth section of the Bankruptcy Act, to which we have already referred, by which liabilities for obtaining property by false pretenses are exempted from the provable debts discharged in bankruptcy, are the usual and most general words for describing a specific crime. Their use in this connection dates back as far as the Statute of 30 George II, c. 34 (1757), and they have since then, so far as they define the crime, remained unchanged." 19 Cyc. 387. The same language, in substance, has been used in the statutes in this country, and where departed from, it is only by way of enumeration of certain kinds of property that may be included under the general designation. These enumerations all refer to substantive things—to a *res*—and in no case to which our attention has been called is anything included in the enumeration which approaches, in its description or definition, services rendered. Certainly under no proper and strict administration of the criminal law could any one be indicted under the general language of obtaining property under false pretenses, on the ground that services, whose performance has been induced by a false pretense, are property, within the meaning of the Act." The decision of the court in this case was followed by the second circuit in considering a case between the same parties involving the same facts. *Gleason v. Thaw* (C. C. A., 2d Cir.), 28 Am. B. R. 473, 196 Fed. 359, affd. 236 U. S. 558, 34 Am. B. R. 177, 59 L. Ed. 717.

⁹³ *Hallagan v. Dowell* (Sup. Ct., Ia.), 31 Am. B. R. 848, 139 N. W. 883; *Forsyth v.*

include professional services.⁹⁴ It has been held that obtaining an indemnity bond by false statements or representations, is obtaining "credit" within the meaning of the rule, and a debt is created which is not dischargeable.⁹⁵ This provision includes positive fraud, or fraud in fact, as in other cases, involving moral turpitude or intentional wrong; implied fraud, or fraud in law which may exist without the imputation of bad faith or immorality is insufficient.⁹⁶ This bar will usually be available where the sale of goods on credit is brought about by false statements,⁹⁷ and cases arising under the new objection to discharge, based on the giving of materially false statements in writing, will be found valuable.⁹⁸ It must appear, however, that such representations were knowingly and fraudulently made,⁹⁹ and that they were relied on by the other party. It need not be shown that the false representations were made in writing.¹⁰⁰ A debt contracted under such circumstances as to render the bank-

Vehmeyer, 177 U. S. 177, 3 Am. B. R. 807, 44 L. Ed. 723, holding that a representation as to a fact, made knowingly, falsely, and fraudulently, for the purpose of obtaining money from another, and by means of which such money is obtained, creates a debt by means of a fraud involving moral turpitude and intentional wrong, and is not dischargeable in bankruptcy.

94. The exceptions to the operation of a discharge should be confined to those plainly expressed; and while much might be said in favor of extending these to liabilities incurred for services obtained by fraud, the language of the bankruptcy act does not go so far. *Gleason v. Thaw*, 236 U. S. 558, 34 Am. B. R. 177, 59 L. Ed. 717, affg. 28 Am. B. R. 473, 196 Fed. 359.

95. *In re Dunfee* (D. C., N. Y.), 30 Am. B. R. 721, 729, 206 Fed. 745.

96. *Neal v. Clark*, 95 U. S. 704, 24 L. Ed. 586; *Ames v. Moir*, 138 U. S. 306, 34 L. Ed. 951. In *Forsyth v. Vehmeyer*, 177 U. S. 177, 44 L. Ed. 723, the court held that "a representation as to a fact, made knowingly, falsely, and fraudulently, for the purpose of obtaining money from another, and by means of which such money is obtained, creates a debt by means of fraud involving moral turpitude and intentional wrong."

Implied fraud insufficient.—In order that a debt may not be released by a discharge because of fraud, it must be actually founded on the fraud. The mere fact that incidentally to the collection of a debt a sale of property is set aside as fraudulent, does not make the debt one created by fraud, nor prevent its being released by a discharge in bankruptcy. In *re Blumberg* (D. C., Tenn.), 1 Am. B. R. 633, 133 Fed. 845, revg. 1 Am. B. R. 627.

97. *Ames v. Moir*, 138 U. S. 306, 34 L. Ed. 951; In *re Alsberg*, Fed. Cas. 261; *Broadnax v. Bradford*, 50 Ala. 270; *Forsyth v. Vehmeyer*, 177 U. S. 177, 44 L. Ed. 723, holding that a representation as to a fact, made knowingly, falsely, and fraudulently, for the purpose of obtaining money from another, and by means of which such money is obtained, creates a debt by means of a fraud involving moral turpitude and intentional wrong; *Standard Sewing Mach. Co. v. Kat-*

tell, 132 N. Y. App. Div. 539, 22 Am. B. R. 376, 117 N. Y. Supp. 32; *Orr Shoe Co. v. Upshaw & Powledge* (Ga. Ct. of App.), 13 Ga. App. 501, 30 Am. B. R. 534, 79 S. E. 362.

Purchase of goods without intention to pay.—A false representation may consist in the purchasing of goods with no present purpose of paying for them, and in contemplation of a fraudulent insolvency. To buy goods without a present intention to pay is a false representation of one's intention. Therefore to buy goods without a present intention to pay will avoid a discharge. *Atlanta Skirt Co. v. Jacobs* (Ct. of App., Ga.), 8 Ga. App. 299, 25 Am. B. R. 895, 68 S. E. 1077. Where the sale of a flock of sheep is induced by the false and fraudulent representation of the buyer that he would receive a check by mail that day, which he would deliver to the seller, but did not, and never paid for the sheep which he converts to his own use, his discharge in bankruptcy does not release him from the debt. *Rowell v. Ricker* (Sup. Ct., Vt.), 79 Vt. 552, 18 Am. B. R. 651, 66 N. E. 569.

The making by a bankrupt of a materially false statement in writing to any person for the purpose of obtaining property on credit, and upon such statement property is so obtained prevents the granting of a discharge; and the objections may be interposed by any party in interest. In *re Miller* (D. C., Iowa), 27 Am. B. R. 606, 192 Fed. 730, citing *Gilpin v. National Bank* (C. C. A., 3d Cir.), 21 Am. B. R. 429, 165 Fed. 607-612, 91 C. C. A. 445; 20 L. R. A. (N. S.) 1023; *Talcott v. Friend* (C. C. A., 7th Cir.), 24 Am. B. R. 708, 179 Fed. 676-681, 103 C. C. A. 80; In *re Harr* (D. C., Mo.), 16 Am. B. R. 213, 143 Fed. 421-423; In *re Brener* (D. C., N. Y.), 20 Am. B. R. 644, 166 Fed. 930; In *re Augspurger* (D. C., Ohio), 25 Am. B. R. 83, 181 Fed. 174.

98. See *ante*.

99. *Allen v. Hickling*, 11 Ill. App. 549.

100. *Katzenstein v. Reid, Murdock & Co.* (Tex. Civ. App.), 41 Tex. Civ. App. 106, 16 Am. B. R. 740, 91 S. W. 360; *Talcott v. Friend* (C. C. A., 7th Cir.), 24 Am. B. R. 708, 179 Fed. 676, holding that section 17-a of the bankruptcy act, providing that a discharge shall release a bankrupt from all of

rupt liable to arrest upon the charge of obtaining money by false statements of facts will not be discharged.¹⁰¹ If suit is brought to recover on a contract, and an answer is interposed setting up a discharge, a reply alleging that the contract was based on "false pretenses and false representations," is inconsistent with the complaint and will not affect the discharge.¹⁰² A fraudulent representation by one partner will by law be imputed to the others, and the debt as to them will not, therefore, be discharged.¹⁰³ Where a liability against a bankrupt has been prosecuted to judgment, the record is decisive as to the character of the claim upon which the judgment is founded, and cannot be affected by oral evidence except in case of ambiguity.¹⁰⁴

(5) **WILFUL AND MALICIOUS INJURIES TO THE PERSON OR PROPERTY OF ANOTHER.**—(I) *In general.*—Here subdivision 2 stopped, prior to the amendatory act of 1903. Under it, much doubt arose as to whether certain judgments founded on moral delinquencies were dischargeable. The former conflict concerning the effect of a judgment for breach of promise of marriage accompanied by seduction is an instance.^{1,5} Unaccompanied by seduction such a judgment is dischargeable.¹⁰⁶

(II) *Wilful and malicious.*—This provision contemplates something more restricted than malice in the broadest sense, and covers all cases in which the facts of intent and malice are judicially ascertained, however the act may be characterized by the allegations.¹⁰⁷ An injury to person or property is a malicious injury within this provision if it was intentional, wrongful and without just cause or excuse, even in the absence of hatred, spite or ill will.¹⁰⁸ The word "wilful" as here used means nothing more than inten-

his provable debts except such as are "liabilities for obtaining property by false pretenses or false representations," is not affected by section 14-b(3), which makes the obtaining of property by means of a materially false statement in writing a ground for refusing a discharge. *Aff. sub. nom. Friend v. Talcott*, 228 U. S. 27, 30 Am. B. R. 31, 57 L. Ed. 718.

101. *In re Lewis* (D. C., N. Y.), 20 Am. B. R. 711, 163 Fed. 137.

102. *Strauch v. Flynn* (Sup. Ct., Minn.), 108 Minn. 313, 22 Am. B. R. 246, 122 N. W. 320, holding that if plaintiff had sued on the fraud—that is, to recover damages for deceit—a plea of discharge by the decree in bankruptcy would not have availed defendant.

103. A false representation by one partner, by means of which property was obtained by the partnership, will in law be imputed to the other partners to the extent of holding them civilly liable for the debt and their discharge in bankruptcy will not discharge their liability as to such debt. *Frank v. Michigan Paper Co.* (C. C. A., 4th Cir.), 24 Am. B. R. 261, 179 Fed. 776, citing *Collier on Bankruptcy* (6th Ed.), p. 225; *Strong v. Bradner*, 114 U. S. 555 (29:248); *Shroeder v. Frey*, 60 Hun (N. Y.) 58, 14 N. Y. Supp. 71; *aff. 131 N. Y. 562*. Consult also *Gee v. Gee*, 84 Minn. 384, 7 Am. B. R. 500, 87 N. W. 1116.

104. *Chambers v. Kirk* (Sup. Ct., Okla.), 41 Okla. 696, 32 Am. B. R. 175, 139 Pac. 986.

105. See p. 430, cases cited under II, c, (3), *ante*. Under the amendment of 1917, approved March 2, liability for breach of promise

of marriage accompanied by seduction is not dischargeable.

106. *Bond v. Milliken*, 134 Iowa, 447, 109 N. W. 774.

107. *Flanders v. Mullin*, 80 Vt. 124, 18 Am. B. R. 708, 66 Atl. 789, holding that where, in an action for injuries sustained by the plaintiff while undergoing surgical treatment at the hands of the defendant, the plaintiff obtains judgment and the findings of the court determine the willful and malicious character of the acts complained of in the declaration, the judgment is not released by the defendant's discharge in bankruptcy.

108. *In re Munro* (D. C., N. Y.), 28 Am. B. R. 369, 195 Fed. 817, citing *Tinker v. Colwell*, 193 U. S. 473, 11 Am. B. R. 568, 24 Sup. Ct. 505, 48 L. Ed. 754. See Am. Bankr. Dig. §§ 1098, 1103.

Judgment by default for negligence.—Judgments by default entered upon a declaration in trespass charging that the defendant assaulted the plaintiff's wife by recklessly, carelessly and negligently running into her and knocking her down without alleging that the act was intentional, willful or malicious, are barred by the defendant's discharge in bankruptcy. *Matter of Grout* (Sup. Ct., Vt.), 13 Vt. 318, 33 Am. B. R. 789, 92 Atl. 646.

Liability for fraudulently receiving payment of note.—A claim by the payee of a note to whom the maker had transferred another note as security, based upon the fact that the maker of the first note failed to notify the maker of the collateral note of

tional, while the malice here intended is nothing more than that disregard of duty which is involved in the intentional doing of a wilful act to the injury of another.¹⁰⁹ A wrongful act, done intentionally, without just cause or excuse is malicious, although actual malice involving ill-will or hatred of the person injured was not apparent.¹¹⁰ It must be shown that the injury was wrongful and intentional.¹¹¹ Under this subdivision, as it now stands, it has been held that a court of bankruptcy may not determine for itself whether the injuries complained of were wilful and malicious, but is estopped by the judgment of another court on this question.¹¹²

the transfer thereof, but falsely represented that he still held it and received the payment thereof, is not one for obtaining property by false pretenses, and it cannot be said that the liability arose from wilful and malicious injuries to the property of the payee, within the meaning of section 17 of the bankruptcy act. *First National Bank v. Bamforth* (Vt. Sup. Ct.), 37 Am. B. R. 315, 96 Atl. 600.

109. "Wilful and malicious injury," in the bankruptcy act and everywhere in the law, does not necessarily involve hatred or ill will as a state of mind, but arises from "a wrongful act, done intentionally, without just cause or excuse." "In order to come within that meaning as a judgment for a wilful and malicious injury to person or property, it is not necessary that the cause of action be based upon special malice, so that without it the action could not be maintained." *Tinker v. Colwell*, 193 U. S. 473, 485, 11 Am. B. R. 568, 48 L. Ed. 754; *McChristal v. Clisbee*, 190 Mass. 120, 16 Am. B. R. 838, 76 N. E. 511, holding that a judgment, for assault and battery, false imprisonment and malicious prosecution is not released by bankrupt's discharge. See *In re Lorde* (D. C., N. Y.), 16 Am. B. R. 201, 144 Fed. 320, where the court held that a judgment against a landlord for injuries from the bite of tenant's dog, over which the landlord had no control, was released by the landlord's discharge in bankruptcy; *In re Munro* (D. C., N. Y.), 28 Am. B. R. 369, 195 Fed. 817, quoting text.

Conversion of stocks.—Where brokers hold stocks bought for a customer, as security for a balance due on the purchase price, and from time to time sell them to third persons without the knowledge of the owner, and continue to do so after they have realized enough to pay the balance due and apply the avails to their own purposes so that their acts constitute larceny, a claim for such conversion is not released by the broker's discharge in bankruptcy. *Kavanaugh v. McIntyre*, 128 App. Div. 722, 21 Am. B. R. 327, 112 N. Y. Supp. 987, quoting *Collier on Bankruptcy* (6th Ed.), p. 225. See also opinion of Justice J. A. Kellogg at trial term in *N. Y. Sup. Court, Kavanaugh v. McIntyre*, 27 Am. B. R. 279.

Conversion amounting to larceny.—A judgment for conversion recovered against a bankrupt in a State court before filing the petition in bankruptcy is not dischargeable,

where the wrongful acts of the bankrupt were practically larcenous so that the judgment for conversion was for a wilful injury to the person or property of another. *Matter of Arnao* (D. C., N. Y.), 32 Am. B. R. 88, 210 Fed. 395.

Gross and wilful negligence.—The liability which is excepted is that which results from actual malice or willfulness or a purpose to inflict the injury complained of; and the mere allegation in a complaint, in an action to recover for injuries received by the plaintiff as the result of being struck by defendant's automobile, that defendant was guilty of such "gross and wilful negligence" as to entitle the plaintiff to punitive damages, does not constitute the willfulness contemplated; nor does the verdict of the jury in such action in favor of the plaintiff determine, or necessarily present, the element of willfulness. *Hiteshue v. Jones* (Pa. C. of Com. Pl.), 60 Pa. L. J. 645, 28 Am. B. R. 854.

110. *Peters v. United States ex rel. Kelly* (C. C. A., 7th Cir.), 24 Am. B. R. 206, 177 Fed. 885, revg. 22 Am. B. R. 177, 166 Fed. 613; *Matter of Halper* (N. Y. City Ct.), 82 N. Y. Misc. 205, 31 Am. B. R. 283, 143 N. Y. Supp. 1005; *Kavanaugh v. McIntyre*, 210 N. Y. 175, 31 Am. B. R. 712, 104 N. E. 135.

111. *Tompkins, as Admr., v. Williams*, 137 N. Y. App. Div. 521, 23 Am. B. R. 886, 122 N. Y. Supp. 152, holding that the administration of chloral to an intoxicated guest by a saloon keeper is not necessarily a malicious or intentional injury; *Matter of Halper* (N. Y. City Ct.), 82 N. Y. Misc. 205, 31 Am. B. R. 238, 143 N. Y. Supp. 1005, holding that "wilful and malicious" do not necessarily involve hatred or ill-will as a state of mind, but arise from a wrongful act done intentionally without just cause or excuse. The wrong which is excluded from the effect of the discharge must be both intentional and malicious. *Matter of Levitan* (D. C., N. J.), 34 Am. B. R. 789, 224 Fed. 241.

112. *Peters v. United States ex rel. Kelly* (C. C. A., 7th Cir.), 24 Am. B. R. 206, 177 Fed. 885, revg. 22 Am. B. R. 177, 166 Fed. 613, holding that, where a judgment for damages for overstepping her authority as a teacher in administering corporal punishment was rendered against bankrupt under a declaration containing a count for trespass *vi et armis*, in a State where such a judgment cannot lawfully be rendered except

(III) *Judgments for personal injuries*.—A judgment obtained for the alienation of a husband's affections is for a wilful and malicious injury to the person and property of another, and is not dischargeable;¹¹³ nor is a judgment in an action for negligent treatment by a surgeon;¹¹⁴ nor a judgment for slander;¹¹⁵ nor a judgment for a libel;¹¹⁶ nor a judgment for an assault and battery.¹¹⁷ A judgment in favor of the plaintiff in an action for false imprisonment is not a "liability for wilful and malicious injury to the person," where the complaint contains no allegation of malice on the part of the defendant.¹¹⁸ A judgment entered upon a recognizance given by the bankrupt upon taking a poor debtor's oath after being arrested upon a judgment against him for assault is not released by his discharge in bankruptcy;¹¹⁹ nor is a judgment for costs awarded the defendant in an action for slander.¹²⁰ A judgment against a bankrupt for damages based on the value of an unexpired term of a lease to premises, the possession of which was retained by the bankrupt, the owner being wrongfully deprived of possession by force, threats and fear inspired thereby, is a liability for a "wilful and malicious injury to property," and is not dischargeable.¹²¹

(6) *ALIMONY DUE OR TO BECOME DUE*.—A discharge in bankruptcy does not release a bankrupt from liability for the payment of "alimony due or to become due."¹²² There were many cases prior to the amendment of 1903. Some held that alimony due or to grow due was dischargeable;¹²³ others that alimony due before the bankruptcy was barred by the discharge;¹²⁴ some implied that alimony to accrue was not; while the majority of cases held to the broader view that alimony, whether due or not, was not a debt at all, but a duty, liquidated in terms of money for convenience only, and, therefore, neither provable nor dischargeable.¹²⁵ In its ultimate analysis, the question

upon proof of a willful and malicious injury, the constitutional requirement that such judgment receive full faith and credit impels the conclusion that the jury, under proper instructions, based their verdict on sufficient evidence, and therefore the judgment must be considered one for willful and malicious injury not affected by a discharge in bankruptcy.

113. *Leicester v. Hoadley* (Sup. Ct., Kan.), 66 Kan. 172, 9 Am. B. R. 318, 71 Pac. 318, so held, where such alienation had been accomplished by schemes and devices of the judgment debtor, and resulted in the loss of support and impairment of health to the wife.

114. *Flanders v. Mullin*, 80 Vt. 124, 18 Am. B. R. 708, 66 Atl. 789.

115. *Drake v. Vernon* (Sup. Ct., So. Dak.), 26 So. Dak. 354, 25 Am. B. R. 69, 128 N. W. 317.

116. *McDonald v. Brown* (Sup. Ct., R. I.), 23 R. I. 546, 10 Am. B. R. 58, 51 Atl. 213; *National Surety Co. v. Medlock* (Sup. Ct., Ga.), 19 Am. B. R. 654; *Thompson v. Judy* (C. C. A., 6th Cir.), 22 Am. B. R. 154, 169 Fed. 553.

117. *McChristal v. Clisbee*, 190 Mass. 120, 16 Am. B. R. 838, 76 N. E. 511.

118. *Johnston v. Bruckheimer*, 133 N. Y. App. Div. 649, 22 Am. B. R. 242, 118 N. Y. Supp. 189.

119. *In re Colala* (D. C., Mass.), 13 Am. B. R. 292, 133 Fed. 255.

120. *Drake v. Vernon* (Sup. Ct., So. Dak.), 26 S. Dak. 354, 25 Am. B. R. 69, 128 N. W. 317.

121. *In re Munro* (D. C., N. Y.), 28 Am. B. R. 664, 197 Fed. 450.

122. Bankr. Act, § 17-a (2).

123. *In Kentucky alimony due and unpaid before adjudication in bankruptcy was held to be a provable and dischargeable debt. Fite v. Fite*, 22 Ky. L. Rep. 1638, 5 Am. B. R. 461, 61 S. W. 26; *In re Houston* (D. C., Ky.), 2 Am. B. R. 107, 94 Fed. 119.

124. *In re Challoner* (D. C., Ill.), 3 Am. B. R. 442, 98 Fed. 82; *Turner v. Turner* (D. C., Ind.), 6 Am. B. R. 289, 108 Fed. 785; *In re Van Orden* (D. C., N. J.), 2 Am. B. R. 801, 96 Fed. 86.

In New York alimony in arrears and unpaid before the filing of a petition was not covered by the discharge. Maisner v. Maisner, 62 N. Y. App. Div. 286, 6 Am. B. R. 295, 70 N. Y. Supp. 1107. But a judgment recovered in this State for alimony due under a decree of divorce granted in another State, is simply a money judgment, and was held a provable and dischargeable debt. *In re Williams' Estate* (Surr. Ct., N. Y.), 23 Am. B. R. 394, 118 N. Y. Supp. 562.

125. *Young v. Young*, 35 N. Y. Misc. 335, 7 Am. B. R. 171, 71 N. Y. Supp. 944; *Barclay v. Barclay*, 184 Ill. 375, 56 N. E. 636; *Deen v. Bloomer*, 191 Ill. 416, 61 N. E. 131; *Welty v. Welty*, 195 Ill. 335, 63 N. E.

turned on what alimony is, a debt or a duty, and reference was usually had to the decision of the State granting the decree. Thus, it was thought, prior to the amendment of 1903, the Kentucky rule, which declared alimony both past and future merely a debt,¹²⁶ was not affected by *Audubon v. Shufeldt*,¹²⁷ wherein the Supreme Court held a judgment of the local courts of the District of Columbia awarding alimony not affected by the defendant's discharge.¹²⁸ Indeed, the national scope of this opinion was questioned, both the court below and the Supreme Court being, it was thought, without jurisdiction to determine the effect of the discharge in the proceeding in which it was granted.

(7) MAINTENANCE OR SUPPORT OF WIFE OR CHILD.—The broad principle that obligations to the sovereign are not discharged seems to exempt support or bastardy orders from the general rule that all provable disabilities are discharged. A husband's obligation to support his divorced wife under an agreement to pay her an annuity, "during her life, or until she remarries," is not a provable debt against the husband's estate in bankruptcy, and is not released by his discharge.¹²⁹ This clause refers only to the involuntary liability under the common law for support of wife and children, and to any one who relieves their want. It does not refer to liabilities for goods purchased by a husband or parent and used by wife or child;¹³⁰ nor does it apply to medical attendance furnished upon the express or implied contract of the husband or parent to pay therefor, provided there is no breach of duty on the part of the husband or parent.¹³¹ The reported cases are few,¹³² but the

161; *In re Shepard* (D. C., N. Y.), 5 Am. B. R. 857, 97 Fed. 187; *In re Smith* (Ref., N. Y.), 3 Am. B. R. 67, and cases cited; *People v. Grell*, 65 N. Y. Supp. 522; *In re Nowell* (D. C., Mass.), 3 Am. B. R. 837, 99 Fed. 931. Compare also *Audubon v. Shufeldt*, 181 U. S. 575, 5 Am. B. R. 829, 45 L. Ed. 1009; *In re Lachemeyer*, Fed. Cas. 7,966; *Wetmore v. Markoe*, 196 U. S. 68, 13 Am. B. R. 1, 49 L. Ed. 390.

A judgment for alimony included in his schedules is not discharged by a husband's discharge in bankruptcy, and the wife is not precluded from objecting to the cancellation of such judgment, upon the ground that a discharge has been granted, merely because she may have other remedies which she may pursue in the State court upon the order awarding alimony. *Maier v. Maier* (N. Y. Sup. Ct.), 77 N. Y. Misc. 145, 28 Am. B. R. 856, 135 N. Y. Supp. 1038.

126. *In re Houston* (D. C., Ky.), 2 Am. B. R. 107, 94 Fed. 119; *Fite v. Fite*, 22 Ky. L. Rep. 1,638, 5 Am. B. R. 461, 61 S. W. 26.

127. 181 U. S. 575, 5 Am. B. R. 829, 45 L. Ed. 1009. Compare also for remedies, *Wagner v. Houston* (C. C. A., 6th Cir.), 4 Am. B. R. 596, 104 Fed. 133.

128. *In North Carolina*, in the case of *Arrington v. Arrington* (Sup. Ct., N. Car.), 131 N. Car. 143, 10 Am. B. R. 103, 42 S. E. 554, the court distinguished the case of *Audubon v. Shufeldt*, 181 U. S. 575, 5 Am. B. R. 829, 45 L. Ed. 1009, and held that a final judgment for alimony entered in another State upon a decree for an absolute divorce is a provable and dischargeable debt. It was

contended that the United States Supreme Court based its decision upon the fact that a decree for alimony is not a final judgment or decree; but a decree for alimony entered in a court in another State, being held final by the courts of North Carolina, the reasoning of the United States Supreme Court is not conclusive in that State. *In Wetmore v. Wetmore*, 196 U. S. 68, 13 Am. B. R. 1, 49 L. Ed. 390, the Supreme Court in effect held that the amendment of 1903, excepting alimony from a discharge in bankruptcy, is merely declaratory of the law as it previously existed.

129. *Dunbar v. Dunbar*, 190 U. S. 340, 10 Am. B. R. 139, 47 L. Ed. 1084, affg. 180 Mass. 170, 62 N. E. 248. See *McKittrick v. Cahoon*, 89 Minn. 383, 10 Am. B. R. 139, 95 N. W. 223.

130. *Schellenberg v. Mullaney*, 112 N. Y. App. Div. 384, 16 Am. B. R. 542, 98 N. Y. Supp. 432, citing *Collier on Bankruptcy* (4th Ed.), 199.

131. *In re Ostrander* (D. C., N. Y.), 15 Am. B. R. 96, 139 Fed. 592, holding that the provision has probable application to cases where the person applying for discharge from his debts had so betrayed his moral and legal duty as a husband or parent that another was justified in providing the maintenance and support denied by the one upon whom the law places the primary duty.

132. *In re Baker* (D. C., Kan.), 3 Am. B. R. 101, 96 Fed. 954; *In re Hubbard* (D. C., Ill.), 3 Am. B. R. 528, 98 Fed. 710; *In re Cotton*, Fed. Cas. 3,269; *Hawkes v. Cooksey*, 13 Ohio St. 242. See also p. —, *ante*.

efficacy of the principle is not to be doubted, even without the affirmative declaration of the amendatory act of 1903. Since then, such obligations are not affected by a discharge in bankruptcy.

(8) SEDUCTION OF AN UNMARRIED FEMALE.—There was sharp conflict of authority under the law as it existed prior to the amendment of 1903 in respect to whether in such a case a judgment was barred. It seemed to turn on whether, under the laws of the State, the gravamen of the suit was loss of services or wilful wrong.¹³³ Thus, in New York, the father is the suitor, and the injury can hardly be termed wilful and malicious as to him.¹³⁴ In other States, the daughter may sue, and, though it is always doubtful whether that which is consented to can be wilful and malicious, the weight of authority was against discharging liabilities to her of this character.¹³⁵ Were there nothing in the statute that seemed to refer to this class of wrongs, the broad principle that mere liabilities resting entirely in tort are not affected by bankruptcy would probably save them from the effect of a discharge, though the same question seems to have arisen under the English act of 1883, which was silent on the point.¹³⁶ Each country has been forced to remedial legislation. Our amendatory law of 1903, like the English act of 1890,¹³⁷ has now settled the question. Such liabilities, whether to father or to daughter, are hereafter excepted from the effect of a discharge.¹³⁸ But liabilities of this character need not be reduced to judgment to be within this exception, as in England.

(9) CRIMINAL CONVERSATION.—Here the same difficulty existed. It is only by a stretch of meaning that a judgment of this character can be held "an injury to the person or property" of the husband, however heinous be the wrong.¹³⁹ However, the law was settled in New York in favor of the non-dischargeability of such a judgment, and by the court of last resort.¹⁴⁰ On principle, this conclusion is eminently right; as an interpretation of mere words, it may be doubted. The question has, however, been determined, the country over, by the amendatory act of 1903. Liabilities of this character are not barred by a discharge. As the law now stands no liability growing out of breach of moral duty, whether in connection with the domestic relations or otherwise, save breach of promise of marriage, is affected by the judgment debtor's discharge.

(10) OTHER WILFUL AND MALICIOUS INJURIES.—It is well settled that, aside from the liabilities excepted by the amendatory act of 1903, obligations

133. Compare *In re Sullivan* (Ref., N. Y.), 2 Am. B. R. 30, with *In re Maples* (D. C., Mont.), 5 Am. B. R. 426, 105 Fed. 919.

134. *In re McCauley* (D. C., N. Y.), 4 Am. B. R. 122, 101 Fed. 223; *Disler v. McCauley*, 7 Am. B. R. 138, 73 N. Y. Supp. 270, 66 N. Y. App. Div. 42, revg. s. c., 6 Am. B. R. 491; *In re Sullivan* (Ref., N. Y.), 2 Am. B. R. 30.

135. *In re Maples* (D. C., Mont.), 5 Am. B. R. 426, 105 Fed. 919. And compare, as disagreeing with the New York rule, *In re Freche* (D. C., N. J.), 6 Am. B. R. 470, 109 Fed. 620.

136. See Eng. Act of 1883, § 30 (1).

137. See Eng. Act of 1890, § 10.

138. Judgment in action for breach of promise where seduction is alleged.—In the absence of a showing to the contrary, a

judgment in an action in form for breach of promise to marry, wherein seduction is proven, will be presumed to have been awarded for the seduction, and hence is not dischargeable under the amendment of 1903 to section 17a (2) of the Bankruptcy Act, excepting from a bankrupt's discharge liability for the seduction of an unmarried female. *In re Warth* (C. C. A., 2d Cir.), 29 Am. B. R. 210, 200 Fed. 408, revg. 28 Am. B. R. 41.

139. Compare *In re Tinker* (D. C., N. Y.), 3 Am. B. R. 580, 99 Fed. 79.

140. *Colwell v. Tinker*, 169 N. Y. 531, 7 Am. B. R. 334, 62 N. E. 688, 58 L. R. A. 765, affg. s. c., 6 Am. B. R. 434. This case was affirmed by the United States Supreme Court in 193 U. S. 473, 11 Am. B. R. 568, 48 L. Ed. 754.

claimed to be within this subdivision must be (a) both wilful and malicious injuries and (b) to the person or property of another.¹⁴¹ Such, it is thought, would be a slander or a libel, and probably a malicious prosecution or an assault, and the cases *contra* under former laws are no longer controlling;¹⁴² but a liability for trespass or for arrest due to negligence, even if after liquidation, is not. Each case will depend on its own facts. However, as this subdivision tends to impair the bankrupt's remedy, the statute being highly remedial, these exceptions should be so construed as to affect that remedy only so far as is necessarily required by its express terms.

c. Debts not scheduled.—(1) **IN GENERAL.**—There is a notable departure in the provisions of subdivision 3 of this section from the weight of authority under the former law. Jurisdiction of the creditor now depends, not on the petition and the adjudication,¹⁴³ but on the facts, 'either that the debt was "duly scheduled in time for proof and allowance,"¹⁴⁴ or, if not, that the "creditor had notice or actual knowledge of the proceedings in bankruptcy." The cases thus far are uniform in interpreting the words of this subdivision to mean what they say.¹⁴⁵ The Supreme Court has also impliedly sustained the constitutionality of these provisions.¹⁴⁶

(2) **NAME AND ADDRESS OF CREDITOR.**—Extreme exactness must be used in describing the creditor by name, or he will not be "duly scheduled;"¹⁴⁷ the

141. Compare *In re Tinker* (D. C., N. Y.), 3 Am. B. R. 580, 99 Fed. 79; *In re Sullivan* (Ref., N. Y.), 2 Am. B. R. 30.

142. For instance, *In re Simpson*, Fed. Cas. 12,879. See cases, p. —, *ante*.

143. *Black v. Blazo*, 117 Mass. 17; *Platt v. Parker*, 6 T. & C. 377; *Lamb v. Brown*, Fed. Cas. 8,011.

144. **Time for proof and allowance.**—Where a debtor in filing his schedules in bankruptcy omitted therefrom any reference to plaintiff's claim and failed to schedule such debt at all until within four days of the expiration of the year for proving claims, so that the plaintiff did not have time to have his debt proved and allowed, such debt was not duly scheduled "in time for proof and allowance" and therefore was not discharged. *McCreery & Co. v. Brown* (Pa. Ct. of Com. Pl.), 61 Pa. L. J. 80, 29 Am. B. R. 238.

145. *Fider v. Mannheim*, 81 N. W. 2; *Colins v. McWalters*, 35 N. Y. Misc. 648, 6 Am. B. R. 593, 72 N. Y. Supp. 203; *Tyrrel v. Hammerstein*, 33 N. Y. Misc. 505, 6 Am. B. R. 430, 67 N. Y. Supp. 717; *In re Beerman* (D. C., Ga.), 7 Am. B. R. 431, 112 Fed. 662; *Hayer v. Comstock* (Sup. Ct., Iowa), 115 Iowa 187, 7 Am. B. R. 493, 88 N. W. 351; *In re Monroe* (D. C., Wash.), 7 Am. B. R. 706, 114 Fed. 393; *Zimmerman v. Ketchum* (Sup. Ct., Kan.), 66 Kan. 98, 11 Am. B. R. 190, 71 Pac. 264; *Broadway Trust Co. v. Mannheim*, 47 N. Y. Misc. 415, 14 Am. B. R. 122, 95 N. Y. Supp. 93; *Custard v. Wigderson* (Sup. Ct., Wis.), 130 Wis. 412, 17 Am. B. R. 337, 110 N. W. 263; *Finnell v. Armoura* (Sup. Ct., Utah), 39 Utah 316, 26 Am. B. R. 802, 806, 117 Pac. 49.

Judgment note waiving exemptions.—Where a creditor of a bankrupt, holding a

judgment note with a waiver of exemption, does not present it in bankruptcy proceedings, although he has knowledge of such proceedings, he cannot thereafter enforce judgment on the note. *Claster v. Soble*, 22 Pa. Super. Ct. 631, 10 Am. B. R. 446.

The purpose of this subdivision was to remedy a defect in the previous bankruptcy act by which a debt was discharged, even though the name of the creditor was omitted from the schedules, provided such omission was not willful nor fraudulent, even though the creditor had no notice nor knowledge of the proceedings. *Broadway Trust Co. v. Mannheim*, 47 N. Y. Misc. 415, 14 Am. B. R. 122, 95 N. Y. Supp. 93; *Tyrrel v. Hammerstein*, 33 N. Y. Misc. 505, 6 Am. B. R. 430, 67 N. Y. Supp. 717.

146. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 8 Am. B. R. 1, 46 L. Ed. 1113.

147. See p. 260, *ante*.

What constitutes "duly scheduled."—The claim of a creditor named "Custard" is not duly scheduled under the name of "Custard," and is not affected by the bankrupt's discharge. *Custard v. Wigderson* (Sup. Ct., Wis.), 130 Wis. 412, 17 Am. B. R. 337, 110 N. W. 263. Where a creditor's address in the schedules was given "Leader Building, 5th avenue, Pittsburgh, Pa.," instead of "Maeder Building, 5th avenue, Pittsburgh, Pa.," which is his proper address, it was held to be insufficient. *Reed v. Dippell* (Ct. of Common Pleas, Pa.), 61 Pa. Dist. 126; 17 Am. B. R. 371. Where the schedule gives the address of creditors as "317 Main street, New York city," there is no presumption that notices so addressed reached them at "317 Main street, Cincinnati, Ohio." *Wertheimer v. Howard*, 47 N. Y. Misc. 145, 14 Am. B. R. 547, 93 N. Y. Supp. 518. Where a surviving partner

schedule of the residence of a creditor as "unknown," when it could have been ascertained by the exercise of reasonable diligence, would prevent a discharge of the debt.¹⁴⁸ A failure to use due efforts to learn the street number of a judgment creditor, will deprive the petitioner of the right to a discharge of such judgment.¹⁴⁹ The act itself does not require the street number to be inserted. The cases holding this essential were decided under bankruptcy rules in force in the district where the bankruptcy occurs. Both as to the use of initials and the omission of a street address the act must be given a general construction, as in the light of the fact that letters directed to persons by their initials are constantly, properly and promptly delivered in the largest cities of the country, even when the street number is not given.¹⁵⁰ It is clear also that where the failure to schedule the actual owner of the debt

is correctly described in the schedules as the creditor, and had actual notice, although his residence was incorrectly stated in the schedules, his debt will be discharged. *Kaufman v. Schreier*, 108 N. Y. App. Div. 298, 17 Am. B. R. 314, 95 N. Y. Supp. 729.

In *Liesum v. Krauss*, 35 N. Y. Misc. 376, 71 N. Y. Supp. 1022, the creditor's name was Liesum, but he was scheduled as Liesman, and his debt was held not discharged. See also *Columbia Bank v. Birkett*, 9 Am. B. R. 481, 174 N. Y. 112; *affd. sub nom Birkett v. Columbia Bank*, 195 U. S. 345, 12 Am. B. R. 691, in which case the bankrupts had scheduled a debt represented by their promissory note in the name of the payee, when they knew it was held by a discount bank, which had no notice or actual knowledge of the bankruptcy proceedings prior to the bankrupt's discharge; it was held that the bank was not bound thereby and could recover on the note against the bankrupts.

Where a bankrupt in his schedule of creditors, in scheduling a debt, gave as the name of a creditor, "C. Ferger," instead of "Charles Ferger," and his residence merely as "Indianapolis," and the proof showed that the information furnished in the schedules did not result in the creditor's receiving notice of the bankruptcy proceedings, the debt was not duly scheduled so as to be discharged. *Kreitlein v. Ferger* (Ind. App. Ct.), 52 Ind. App. 199, 28 Am. B. R. 908, 97 N. E. 819, 98 N. E. 1005, *revd.* in 238 U. S. 21, 34 Am. B. R. 862, 59 L. Ed. 1184, holding that the failure to give the street address was not fatal to the validity of the schedules.

As to failure to schedule name and residence of receiver of corporation appointed in action to enforce liability of stockholder, where names of creditors are scheduled, see *Longfield v. Minnesota Sav. Bank*, 95 Minn. 54, 14 Am. B. R. 413, 103 N. W. 706.

The use of ditto marks to indicate the residence of a creditor is ineffectual. *Haack v. Theise*, 51 N. Y. Misc. 3, 16 Am. B. R. 699, 99 N. Y. Supp. 905. The listing of the name of a creditor by an initial instead of the full Christian name is not such a defect as to deprive the bankrupt of a discharge of the debt. *Kreitlein v. Ferger*, 238

U. S. 31, 34 Am. B. R. 862, 59 L. Ed. 1184, *revg.* 52 Ind. App. 199, 28 Am. B. R. 908, 97 N. E. 819.

148. *Schiller v. Weinstein*, 47 N. Y. Misc. 622, 15 Am. B. R. 183, 94 N. Y. Supp. 763.

Failure to state that address was unknown. — A debt arising on a promissory note is not discharged where the schedules failed to state the name and address of the holder of the note or that the address was unknown and the addresses of the persons who were accommodated and the place where the debt was contracted and whether the liability was joint, several or individual. *Hazard Mfg. Co. v. Brown* (Ct. of Common Pleas, Pa.), 25 Am. B. R. 903.

Judgment creditor scheduled as unknown. — Where a bankrupt in scheduling a judgment set forth the residence and occupation of the judgment creditors as "Unknown — California," though he had actual knowledge of their residence and post-office address, and the judgment creditors did not learn of the bankruptcy proceedings until long after bankrupt's discharge, the judgment was not properly scheduled so as to come within the terms of bankrupt's discharge, and a motion to cancel said judgment because of the discharge should be denied. *Miller v. Guasti* 226 U. S. 170, 29 Am. B. R. 201, 57 L. Ed. 173, *affg.* 203 N. Y. 259, 26 Am. B. R. 797, 96 N. E. 416.

149. *Cagliostro v. Indelli*, 53 N. Y. Misc. 44, 17 Am. B. R. 685, 102 N. Y. Supp. 918, holding that where a bankrupt schedules the residence of judgment creditor as "Mulberry street, New York City," and, owing to failure to give the street number, the creditor, who had resided in one house in said street for more than ten years last past, receives no notice of the bankruptcy proceedings, and denies any knowledge thereof, the claim will not be discharged.

150. Failure to give street and number. — The act itself does not require the street number of a creditor to be given, and an omission thereof is not in itself sufficient to withhold the privilege of discharge in respect to the creditor's debt. *Kreitlein v. Ferger*, 238 U. S. 31, 34 Am. B. R. 862, in which the court discusses the improper scheduling in debts as follows: "There are

was intentional, such debt will not be discharged,¹⁵¹ but not if there was actual notice.¹⁵²

(3) NOTICE OR KNOWLEDGE; PROOF.—A written notice need not be served upon the creditor, but actual knowledge is sufficient, and facts occurring before or after the commencement of the proceedings are competent to establish such knowledge.¹⁵³ "Actual knowledge of the proceedings" contemplated by this section is a knowledge in time to avail a creditor of the benefits of the law—in time to give him an equal opportunity with other creditors—not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate or to deprive him of dividends;¹⁵⁴ and it has been held that actual knowledge of an attorney employed to collect a judgment against the bankrupt is sufficient.¹⁵⁵ Knowledge obtained from reading the newspapers and from verbal communication has been held to be sufficient.¹⁵⁶ Mere casual conversation with a disinterested party in which a mortgagee is informed that the mortgagor has gone into bankruptcy, does not constitute notice so as to relieve the mortgagor of his obligations under the mortgage, where it appears that the claim was not scheduled.¹⁵⁷ It has been held that the burden of proof is upon the bankrupt to establish the fact that the debt was duly scheduled or that the creditor had notice or actual knowledge of the proceedings.¹⁵⁸ But the Supreme Court in a recent case has stated

only a few instances, under the Bankruptcy Act, in which the courts have had occasion to deal with the subject, or to construe section 7(8),—requiring claims to be duly listed,—in connection with section 17, which provides that a discharge shall release the debtor from all provable debts 'except such as * * * (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy * * *'

"It has been held that a claim is not duly scheduled if the name of the creditor is improperly spelled, *Custard v. Wigderson*, 130 Wis. 416, 17 Am. B. R. 337, 110 N. W. 263, 10 Ann. Cas. 740; or if the street number is given, but the name of the city of his residence is omitted, *Troy v. Rudnick*, 198 Mass. 563, 85 N. E. 177; or if the creditor is listed as residing in one city when he actually lives in another, *Marshall v. English-American Loan & T. Co.*, 127 Ga. 376, 56 S. E. 449; or if the creditor's name is given, but the schedule falsely recites 'Residence unknown,' *Birkett v. Columbia Bank*, 195 U. S. 345, 12 Am. B. R. 691, 49 L. Ed. 231; *Miller v. Guasti*, 226 U. S. 170, 29 Am. B. R. 201, 57 L. Ed. 173; *Parker v. Murphy*, 215 Mass. 72, 31 Am. B. R. 646, 102 N. E. 85. These decisions, however, were based on extrinsic proof and on a finding that, as a matter of fact, the name was misspelled, or the creditor's residence was improperly listed, or that the bankrupt knew the creditor's address and falsely stated that the residence was 'unknown.' None of them holds that, as a matter of law, the discharge was rendered inoperative merely because the street number was not given in the schedule."

151. *Columbia Bank v. Birkett*, 9 Am. B. R. 481, 174 N. Y. 112; *affd. sub nom. Birkett v. Columbia Bank*, 195 U. S. 345, 12 Am. B. R. 691, 49 L. Ed. 231, holding that where bankrupts schedule a debt, represented by their promissory note, in the name of their payee, when they know it is held by a discount bank, and in this matter deprive the bank of notice of their proceeding in bankruptcy, the bank may subsequently recover on the note.

152. *Zimmerman v. Ketchum*, 76 Kan. 98, 11 Am. B. R. 190, 71 Pac. 264.

153. *Knapp v. Harold*, 11 Am. B. R. 190 note, 25 Ohio C. C. Rep. 213; *New England Advertising Co. v. Lebson* (Pa. Ct. Com. Pleas), 29 Am. B. R. 62, holding that notice of bankruptcy proceedings to an agent of the creditor who sought to collect the claim against the bankrupt constitutes sufficient knowledge.

Service of process or personal notice is not essential to the binding force of a discharge. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 8 Am. B. R. 1, 46 L. Ed. 1113.

154. *Birkett v. Columbia Bank*, 195 U. S. 345, 12 Am. B. R. 691, 49 L. Ed. 231.

155. *Keefauver v. Hevenor*, 163 N. Y. App. Div. 531, 32 Am. B. R. 580, 148 N. Y. Supp. 434.

156. *Kaufman v. Scheier*, 108 N. Y. App. Div. 298, 17 Am. B. R. 314, 95 N. Y. Supp. 729; *Morrison v. Vaughan*, 119 N. Y. App. Div. 184, 18 Am. B. R. 704, 104 N. Y. Supp. 169.

157. *Wheeler v. Newton*, 168 N. Y. App. Div. 782, 35 Am. B. R. 25, 154 N. Y. Supp. 431.

158. *Weidenfeld v. Tillinghast*, 54 Misc. 90, 18 Am. B. R. 531, 104 N. Y. Supp. 712. See Am. Bankr. Dig. § 1116.

Burden of proof.—A bankrupt has the

that where the bankrupt is sued on a debt existing at the time of filing the petition, the introduction of the order of discharge, containing a recital that the bankrupt has been discharged from all provable debts, "excepting such as are by law excepted from the operation of a discharge in bankruptcy,"¹⁵⁹ makes out a *prima facie* defense, the burden being then cast upon the plaintiff to show that, because of the nature of the claim, failure to give notice or other statutory reason, the debt sued on was by law excepted from the operation of the discharge.¹⁶⁰

d. Fiduciary debts.—(1) **IN GENERAL.**—The language of the present bankruptcy acts as to debts created while acting in a "fiduciary capacity" is not materially different from that of the act of 1867, and the same rules of construction should be applied.¹⁶¹ Manifestly the words "were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity" refer to such technical trusts as were included in the phrase "fiduciary debts" so frequently used in cases under the former law,¹⁶² and not trusts which the law implies from the contract.¹⁶³ Fraud of officers or of persons in a fiduciary capacity is what is here meant, and not the ordinary fraud of an ordinary debtor in so disposing of his property as to hinder, delay or defraud his creditors.¹⁶⁴ The distinction between

burden of proving that a debt was duly scheduled and that the creditor had either statutory or other actual notice of the bankruptcy proceedings, and if there is no evidence of scheduling the debt, and the creditor had no actual notice of the bankruptcy proceedings, the bankrupt is not discharged. *Bogart v. Cowboy State Bank* (Tex. Civ. App.), 37 Am. B. R. 387, 182 S. W. 678.

^{159.} See Official Form No. 59, *post*.

^{160.} *Kreitlein v. Ferger*, 238 U. S. 21, 34 Am. B. R. 862, 59 L. Ed. 1184. It may be doubted whether the court in this case intended to lay down the rule that where a schedule omitted the creditor's name, the burden rests upon the plaintiff to show that he had no notice, for the court says: "The authorities, however, differ as to whether, under section 17 (3), the burden is on the plaintiff to show that he had no notice, or on the bankrupt to show that the creditor had notice in time to have proved his claim and had it allowed. *Steele v. Thalheimer*, 74 Ark. 518, 86 S. W. 305; *Van Norman v. Young*, 228 Ill. 430, 81 N. E. 1060; *Alling v. Straka*, 118 Ill. App. 184(2); *Hallagan v. Dowell*, 139 N. W. 883; *Parker v. Murphy*, 215 Miss. 72, 102 N. E. 85; *Wineman v. Fisher*, 135 Mich. 608, 98 N. W. 404; *Laffoon v. Kerner*, 138 N. C. 285, 50 S. E. 654; *Fields v. Rust*, 36 Tex. Civ. App. 351, 82 S. W. 331; *Bailey v. Gleason*, 76 Vt. 117, 118, 5 Atl. 537; *Custard v. Wigderson*, 130 Wis. 414, 17 Am. B. R. 337, 110 N. W. 263, 10 Ann. Cas. 740. In view of the scope of his testimony that he did not know of the bankruptcy, it is not necessary in this case to discuss that mooted point, unless it must be held that, because of the failure to set out the number of *Ferger's* house in Indianapolis, his claim was not duly scheduled."

^{161.} *Leslie v. Shaw*, 122 N. Y. App. Div. 99, 19 Am. B. R. 866, 106 N. Y. Supp. 1,012.

^{162.} *Bracken v. Miller* (C. C., Me.), 5 Am. B. R. 23, 104 Fed. 522; *First Nat. Bank v. Bamforth* (Vt. Sup. Ct.), 37 Am. B. R. 315, 96 Atl. 600.

The words "fraud," "embezzlement" and "misappropriation" have been held not to refer to the individual debtor referred to in subdivision (2) of this section. *In re Bullis*, 68 N. Y. App. Div. 508, 7 Am. B. R. 238, 73 N. Y. Supp. 1047.

^{163.} *Bracken v. Milner* (C. C., Mo.), 5 Am. B. R. 23, 104 Fed. 522.

^{164.} *Morse v. Kaufman* (Sup. Ct., Va.), 4 Va. Sup. Ct. 172, 7 Am. B. R. 549; *Reeves v. McCracken* (N. J. Eq.), 69 N. J. Eq. 203, 13 Am. B. R. 680, 60 Atl. 332, where it was held only technical trusts were within the section, and it had no application to an alleged fraudulent transfer; *Barrett v. Prince* (C. C. A., 7th Cir.), 16 Am. B. R. 64, 143 Fed. 302, holding that where it is alleged that the bankrupt had embezzled and fraudulently converted to his own use certain goods and chattels, but set forth no facts constituting fiduciary relationship or disclosing fraud, embezzlement, misappropriation or defalcation, the bankrupt is entitled to a discharge; *Matter of Adler* (C. C. A., 2d Cir.), 16 Am. B. R. 414, 144 Fed. 695; *Matter of Floyd* (Ref., D. C., N. Y.), 15 Am. B. R. 277.

Setting aside sale as fraudulent.—The mere fact that incidentally to the collection of a debt a sale of property is set aside as fraudulent does not make the debt one created by fraud, nor prevent its being released by a discharge. *In re Blumberg* (D. C., Tenn.), 1 Am. B. R. 633, 133 Fed. 845, *revq.* 1 Am. B. R. 627.

mere frauds in fact and wrongs committed by private or public trustees was not so clearly indicated in the former law. Subdivision 2, with the limitations already indicated, now has to do with the one; subdivision 4 with the other. The words used in the act of 1841, "debts contracted in consequence of a defalcation as a public officer or executor, administrator, guardian or trustee, or while acting in any fiduciary capacity" are very similar to and illuminate those in the present law.

(2) CONSTRUCTION OF WORDS "WHILE ACTING AS AN OFFICER OR IN ANY FIDUCIARY CAPACITY."—Some difficulty formerly existed as to the construction of the qualifying words "while acting as an officer or in any fiduciary capacity." It was held in a number of cases that such words only applied to a "defalcation," and did not limit "fraud," so that under this subdivision any debt created by fraud could not be discharged.¹⁶⁵ But the Supreme Court in the case of *Crawford v. Burke*,¹⁶⁶ has established a contrary doctrine, and the true interpretation is that such words qualify and limit each of the words "fraud," "embezzlement" and "misappropriation," as well as the word "defalcation."¹⁶⁷

(3) WHO ARE FIDUCIARY DEBTORS.—Manifestly only public officers and trustees; and not, as we have already seen, agents, factors, commissionmen, and the like.¹⁶⁸ A naked bailee of money under an express agreement to

165. In *re Butts* (D. C., N. Y.), 10 Am. B. R. 16, 120 Fed. 960; In *re Wollock* (D. C., Ill.), 9 Am. B. R. 685, 120 Fed. 516; *Frey v. Torrey*, 70 N. Y. App. Div. 166, 8 Am. B. R. 196, 75 N. Y. Supp. 40, affd. 175 N. Y. 501.

166. 195 U. S. 176, 12 Am. B. R. 659, 49 L. Ed. 147.

167. The limitation of the application of this subdivision to fraud, embezzlement, misappropriation, or defalcation of the bankrupt while acting as an officer or in any fiduciary capacity is not according to the decision in some jurisdictions. For instance, in the case of *Crawford v. Burke*, 201 Ill. 581, 11 Am. B. R. 15, 66 N. E. 833, it was held that the exception contained in the fourth subdivision applied to debts fraudulently created where no judgment had been obtained, or to those created by the embezzlement of the bankrupt regardless of the fact that he was not acting as an officer or in a fiduciary capacity. This case has been reversed by the Supreme Court of the United States, reported 195 U. S. 176, 12 Am. B. R. 659, 49 L. Ed. 147. In the case of *Watertown Carriage Co. v. Hall*, 176 N. Y. 313, 11 Am. B. R. 15, it was held that a complaint alleging that the defendant wrongfully and fraudulently embezzled and misappropriated the plaintiff's money stated a cause of action to which the discharge of the defendant in bankruptcy was no defense; the court cited in support of its contention the case of *Crawford v. Burke*, 201 Ill. 581, 11 Am. B. R. 15, 66 N. E. 833. In the case of *Frey v. Torrey*, 79 N. Y. App. Div. 166, 8 Am. B. R. 196, 75 N. Y. Supp. 40; affd. on opinion below, 175 N. Y. 501, it was held that the words "While acting as an officer or in any fiduciary capacity," do not qualify the words "fraud,"

"embezzlement," and "misappropriation," but only the word "defalcation." This case was in effect overruled by *Crawford v. Burke*, 195 U. S. 176, 12 Am. B. R. 659, 49 L. Ed. 147, which held that such words qualified "fraud," "embezzlement" and "misappropriation," as well as "defalcation." *Tindle v. Birkett*, 183 N. Y. 267, 15 Am. B. R. 179, affd. 205 U. S. 183, 18 Am. B. R. 121, 51 L. Ed. 762; *First Nat. Bank v. Bamforth* (Vt. Sup. Ct.), 37 Am. B. R. 315, 96 Atl. 600.

The words "embezzlement" or "misappropriation" may not be construed independently of "in a fiduciary capacity." In *re Ennis & Stoppani* (D. C., N. Y.), 22 Am. B. R. 679, 171 Fed. 755.

The word "defalcation" is broader than "embezzlement" or "misappropriation," and neither class of debts so created should be construed out of the section. In *re Butts* (D. C., N. Y.), 10 Am. B. R. 16, 120 Fed. 960.

Fiduciary capacity.—An indebtedness of a bankrupt arising from the embezzlement or misappropriation of the funds of a national bank, while he was an officer thereof, is incurred in a "fiduciary capacity." *Harper v. Rankin* (C. C. A., 4th Cir.), 15 Am. B. R. 608, 141 Fed. 626, affg. 13 Am. B. R. 430, 133 Fed. 970. In *Hyde & Sons v. Lesser*, 95 N. Y. App. Div. 320, 12 Am. B. R. 659 (note), 87 N. Y. Supp. 878, it was held that a discharge is not a release from liability for fraud, though such fraud was not perpetrated while acting as an officer or in any fiduciary capacity.

168. See p. 444, *ante*. And compare *Chapman v. Forsyth*, 2 How. 202; *Hennequin v. Clews*, 111 U. S. 676, 28 L. Ed. 565; In *re Brown*, Fed. Cas. 1,979; In *re Basch* (D. C.,

keep safely and pay over on request is not acting in a "fiduciary capacity."¹⁶⁹ But the refusal of a factor, upon grounds not legally tenable, to return unsold goods after demand, renders his liability therefor a debt created by his fraud, embezzlement or misappropriation while acting in a fiduciary capacity.¹⁷⁰ Although it may not be entirely free from doubt, the term "officer" has been held to mean officers of private corporations and to be of broader application than the words "public officer" as used in the act of 1867.¹⁷¹ An officer of a corporation is an "officer" within the meaning of this provision,¹⁷² but the managing partner of a firm of two members is not.¹⁷³ It is thought, the word "misappropriation" means little more than its companion word "embezzlement." The term "fraud . . . in any fiduciary capacity"

N. Y.), 3 Am. B. R. 235, 97 Fed. 761; *In re Bullis*, 68 N. Y. App. Div. 508, 7 Am. B. R. 238, 73 N. Y. Supp. 1047.

"A factor or agent who sells the goods of his principal and fails to pay over the money collected is not guilty of misappropriation, while acting in a fiduciary capacity, within the meaning of the Bankruptcy Act." *In re Adler* (C. C. A., 2d Cir.), 18 Am. B. R. 240, 152 Fed. 422; *In re Ennis & Stoppani* (D. C., N. Y.), 22 Am. B. R. 679, 171 Fed. 755; *Keefauver v. Hevenor*, 163 N. Y. App. Div. 531, 32 Am. B. R. 580, 148 N. Y. Supp. 434 (citing text).

The term "fiduciary" has been held by the United States Supreme Court, as well as other courts, to apply to what may be understood as technical or express, rather than implied, trusts, and as excluding from such interpretation frauds by commissionmen, brokers, agents, etc. *Gee v. Gee*, 84 Minn. 384, 7 Am. B. R. 500, 87 N. W. 1116.

Failure to pay over proceeds of sale.—Where bankrupts pledged as security for loans certain accounts for merchandise sold, under an agreement to hold in trust for the pledgees any returned merchandise or to deliver the same to the pledgees who were to be considered as having sole title thereto, unless bankrupts should pay the pledgees for the goods or resell them and pay over the proceeds, a claim based upon the failure of bankrupts to pay over the proceeds of the sale of certain returned merchandise is dischargeable under section 17, the liability not being one created while acting in a "fiduciary capacity" nor constituting a willful injury to property within the meaning of said section. *In re Toklas Bros.* (D. C., N. Y.), 29 Am. B. R. 709, 201 Fed. 377.

169. *Lewis v. Shaw*, 122 N. Y. App. Div. 966, 19 Am. B. R. 866, 106 N. Y. Supp. 1012.

Deposit of check for purchase of stock.—Where one deposited a check for a sum of money with bankers and brokers with an order to purchase certain stock, but countermanded the order before the stock was bought and demanded the return of the money, which was not returned, the bankers and brokers did not contract with the defendant while acting in a "fiduciary capacity," within the meaning of section 17 of the bankruptcy act. *Clarke v. Milliken* (App. Term, N. Y.), 70

N. Y. Misc. 492, 25 Am. B. R. 680, 127 N. Y. Supp. 339.

170. *Mathieu v. Goldberg* (C. C., N. Y.), 19 Am. B. R. 191, 156 Fed. 541.

171. *Harper v. Rankin* (C. C. A., 4th Cir.), 15 Am. B. R. 608, 141 Fed. 626, 72 C. C. A. 320, followed in *In re Gulick* (D. C., N. Y.), 26 Am. B. R. 362, 190 Fed. 52. See *Matter of Wenman* (D. C., N. Y.), 16 Am. B. R. 690, 153 Fed. 910, holding that there may be some doubt as to whether the term "officer" applies to any officer, including an officer of a corporation.

Meaning of word "officer."—In the case of *In re Harper* (D. C., Va.), 13 Am. B. R. 430, 133 Fed. 970, the court said: "While the question has not, so far as I am advised, been decided, it seems to me that the change in phraseology from 'public officer' to 'officer' shows an intent to change the meaning of the law in this respect. For authority in supporting this view, we need go no further back than to the language so recently used by the Supreme Court in the case of *Crawford v. Burke*: Our own view, however, is that a change in phraseology creates a presumption of a change in intent, and the Congress would not have used such different language in section 17 from that used in section 33 of the Act of March 2, 1867, c. 14, Stat. 533, without thereby intending a change of meaning. The substitution of the word 'officer' for the phrase 'public officer' cannot properly be considered intentional. The exact phraseology of such legislation is of too great importance to justify such a presumption. The change of language, therefore, evidenced some change of meaning, and I have been unable to ascribe to it any other change of meaning than to include officers of private corporations. The word 'officer' is clearly of broader meaning than the words 'public officer.' That a director and vice-president of a private corporation, such as a national banking association, is an 'officer' of such corporation not only in popular language, but in the language of almost countless judicial decisions and law text books, and the acts of Congress will not be disputed."

172. *In re Gulick* (D. C., N. Y.), 26 Am. B. R. 362, 190 Fed. 52.

173. *Martin v. Starrett*, 97 Nebr. 653, 34 Am. B. R. 220, 151 N. W. 154.

clearly refers to wrongs committed by such private trustees as attorneys,¹⁷⁴ executors,¹⁷⁵ guardians,¹⁷⁶ and trustees in general.¹⁷⁷ The debt, however, should be due from the trustee, executor, administrator, or guardian in his official capacity.¹⁷⁸ It has been held that the "fiduciary capacity" here referred to relates to that of a trustee of an express trust.¹⁷⁹ It relates to a technical trust, only, and has no reference to an implied trust.¹⁸⁰ In order to bring a debt within this exception the fiduciary relation must have existed previously to or independently of the particular transaction from which the debt arises;¹⁸¹ it does not embrace debts arising out of a particular transaction conducted by an agent.¹⁸² When a partnership is dissolved by the death of one of the partners the survivor becomes a trustee and holds the partnership moneys in a "fiduciary capacity" for the representatives of the deceased.¹⁸³ But it is well settled that the sureties on the bonds of such

174. *Flanagan v. Pearson*, 42 Tex. 1; *Heffner v. Jayne*, 39 Ind. 463; *White v. Platt*, 5 Den. (N. Y.), 274. *Contra*: *Wolcott v. Hodge*, 81 Mass. 547.

175. *Crisfield v. State*, 55 Md. 192; *Laramore v. McKenzie*, 60 Ga. 532. And compare *Amoskeag Mfg. Co. v. Barnes*, 49 N. H. 312; *Brown v. Hannagan* (Sup. Jud. Ct., Mass.), 210 Mass. 246, 27 Am. B. R. 294, 96 N. E. 714.

176. *Carlin v. Carlin*, 8 Bush (Ky.) 141; *Halliburton v. Carter*, 55 Mo. 435; *Simpson v. Simpson*, 80 N. C. 332; *In re Maybin*, Fed. Cas. 9,337.

177. *Flagg v. Ely*, 1 Edm. Sel. Cas. 206; *Pinkston v. Brewster*, 14 Ala. 315; *Kingsland v. Spalding*, 3 Barb. Ch. (N. Y.) 341.

178. *Coleman v. Davis*, 45 Ga. 489; *Madison v. Dunkle*, 114 Ind. 262, 16 N. E. 593; *Amoskeag Mfg. Co. v. Barnes*, 49 N. H. 312.

179. *Matter of Wenman* (D. C., N. Y.), 16 Am. B. R. 690, 153 Fed. 910, in which Holt, District Judge, says: "The authorities establish that the phrase 'while acting as an officer or in any fiduciary capacity' qualify all the preceding words 'fraud, embezzlement, misappropriation or defalcation,' and do not simply refer to the last word 'defalcation,' and that the 'fiduciary capacity' referred to in this section relates to that of a trustee of an express trust."

Agent to collect funds.—A discharge in bankruptcy does not release an agent from liability to account for moneys collected upon certain notes and mortgages entrusted to him in a fiduciary capacity for collection. *Williams v. Virginia-Carolina Chemical Co.* (Ala. Sup. Ct.), 182 Ala. 413, 31 Am. B. R. 64, 62 So. 755.

But see *American Agri. Chemical Co. v. Berry* (Me. Sup. Ct.), 110 Me. 528, 31 Am. B. R. 142, 87 Atl. 218, holding that where a bankrupt has failed to pay or account for fertilizer shipped to him for sale under a contract providing that he would hold the proceeds of sales and goods remaining unsold "in trust" and separate for the settlement of his account, his liability is not created "in a fiduciary capacity" so as to be excepted from his discharge.

180. *First National Bank v. Bamforth* (Vt. Sup. Ct.), 37 Am. B. R. 315, 96 Atl. 600.

The term "fiduciary capacity," as used in the bankruptcy act, applies to technical trusts, and not to those arising by implication of law from the contract of parties. *Martin v. Starrett*, 97 Nebr. 653, 34 Am. B. R. 220, 151 N. W. 154.

181. *First Nat. Bank v. Bamforth* (Vt. Sup. Ct.), 37 Am. B. R. 315, 96 Atl. 600, citing *Cronan v. Coting*, 104 Mass. 245, 6 Am. Rep. 232; *Bryant v. Kinyon*, 127 Mich. 152, 86 N. W. 531, 53 L. R. A. 801; *Henniquin v. Clews*, 77 N. Y. 427, 33 Am. Rep. 641; *Goodman v. Herman*, 172 Mo. 344, 72 S. W. 546, 60 L. R. A. 885; *Bracken v. Milner* (C. C., Mo.), 5 Am. B. R. 23, 104 Fed. 522; *American Agri. Chemical Co. v. Berry*, 110 Me. 528, 31 Am. B. R. 142, 87 Atl. 218, 45 L. R. A. (N. S.) 1106, Ann. Cas. 1915A, 1293; *Hammond & Burt v. Noble*, 57 Vt. 193; *Upshur v. Briscoe*, 138 U. S. 365, 11 Sup. Ct. 313, 34 L. Ed. 931.

182. **Mere agency insufficient to show fiduciary relation.**—An agent intrusted by his principal with beer to deliver to laborers under his supervision, and, after deducting the purchase price thereof from their wages, to turn the same over to such principal, does not act in a "fiduciary capacity" so as to except from his discharge in bankruptcy a claim for money so collected by him and converted to his own use. *In re Camelo* (D. C., N. Y.), 28 Am. B. R. 353, 195 Fed. 632; *Knott v. Putnam* (D. C., Vt.), 6 Am. B. R. 80, 107 Fed. 907; *Bryant v. Kenyon*, 127 Mich. 152, 6 Am. B. R. 237, 86 N. W. 531, 53 L. R. A. 801. "In all cases of agency there is trust and confidence reposed, as indeed there is in all sales on credit; but the bankruptcy law refers to those technical trusts such as grow out of the relation of executor, administrator, guardian, trustee and the like." Judge Ray in *In re Camelo* (D. C., N. Y.), 28 Am. B. R. 353, 195 Fed. 632. See opinion in *Upshur v. Briscoe*, 138 U. S. 375, 376, 11 Sup. Ct. 313, 34 L. Ed. 931.

183. *Haggerty v. Badkin* (C. Ch., N. J.), 72 N. J. Eq. 473, 18 Am. B. R. 302, 66 Atl.

trustees are not bound to a fiduciary obligation, and a discharge of the surety will be an available bar.¹⁸⁴ On the other hand, partners¹⁸⁵ and bankers,¹⁸⁶ like agents, factors,¹⁸⁷ and commissionmen, do not usually act in a fiduciary capacity. After a discharge in bankruptcy the burden of proving that the debt was created by fraud, or by one acting in a fiduciary capacity, is on the plaintiff.¹⁸⁸

IV. PLEADING DISCHARGE.

a. In general.—This subject is discussed elsewhere.¹⁸⁹ A discharge being only available in bar, it must be regularly pleaded.¹⁹⁰ Under the former law, the method was prescribed.¹⁹¹ Now, though there is no certificate, any form of plea corresponding to the practice of the court in which it is entered will be sufficient. A certified copy of the order of discharge or confirming the composition, with brief allegations identifying it and fixing the time, is the usual method.¹⁹² A reply or replication to an answer setting up a discharge, as that the debt sued on is for fraud, is not necessary in the code States; proof of that fact may be made without such a plea.¹⁹³ It must appear that the liability pleaded against existed at the time of the bankruptcy. A discharge can only be pleaded by the bankrupt or his privies in title.¹⁹⁴

b. As dependent on time.—If the suit is pending at the time of bankruptcy, it may be stayed until the discharge is granted.¹⁹⁵ If not stayed and a judgment is entered before discharge, the discharge may be availed of as a bar to further remedies on the judgment.¹⁹⁶ The same is true if the action is begun

42, holding that, where complainant's intestate, immediately after having deposited with defendant the sum of \$500, as and for his share of the capital of a proposed partnership between them, was taken ill and died within a few days, and pending his sickness defendant deposited the money to his own credit in the bank and, after the death of the intestate, converted the money to his own use, the defendant held the money in a "fiduciary capacity."

184. *Ex parte Taylor*, Fed. Cas. 13,773; *U. S. v. Throckmorton*, Fed. Cas. 16,516; *Steele v. Graves*, 68 Ala. 21; *Reitz v. People*, 72 Ill. 435; *Fowler v. Kendall*, 44 Me. 448; *McMinn v. Allen*, 67 N. C. 131.

185. *Pierce v. Shippee*, 90 Ill. 371; *Hill v. Sheibley*, 68 Ga. 556.

The implied trust relation existing between partners, under which their liabilities to each other must be determined, does not bring their affairs within the definition of the excepted term, "fiduciary." *Gee v. Gee*, 84 Minn. 384, 7 Am. B. R. 500. The words "fiduciary capacity" as used in this subdivision refer to technical or express trusts, and exclude the relationship of agents, brokers and partners to funds held generally by them in such capacities. *Karger v. Orth* (Sup. Ct., Minn.), 116 Minn. 124, 27 Am. B. R. 212, 133 N. W. 471.

186. *Shaw v. Vaughan*, 52 Mich. 405; *Maxwell v. Evans*, 90 Ind. 596.

187. *In re Butts* (D. C., N. Y.), 10 Am. B. R. 16, 120 Fed. 966; *Harrington & Goodman v. Herman* (Mo. Sup.), 172 Mo. 344, 72 S. W. 546.

188. *Sherwood v. Mitchell*, 4 Den. 435.

189. See discussion under Section Fourteen, *ante*.

190. For general remedies under a discharge under present law, see *Bank of Commerce v. Elliott* (Sup. Ct., Wis.), 109 Wis. 648, 6 Am. B. R. 409, 85 N. W. 417, and compare *Collins v. McWalters*, 35 N. Y. Misc. 648, 6 Am. B. R. 593, 72 N. Y. Supp. 203, (citing *Collier on Bankruptcy* (3d Ed.), p. 198). See also *Dimock v. Revere Copper Co.*, 117 U. S. 559, 29 L. Ed. 994; *Horne v. Spellman*, 78 Ill. 206, 410; *In re Wesson*, 88 Fed. 855; *First Nat'l Bank v. Cootes* (Sup. Ct., W. Va.), 74 W. Va. 112, 32 Am. B. R. 361, 81 S. E. 844, citing *Collier on Bankruptcy* (8th Ed.), 294.

191. See Act of 1867, § 34, R. S., § 5,119.

192. *Bryant v. Kingston*, 86 N. W. 531; *Morse v. Cloyes*, 11 Barb. (N. Y.) 100; *Stoll v. Wilson*, 38 N. J. 198. For effect of order as evidence, see § 21-f, *post*.

193. *Argall v. Jacobs*, 87 N. Y. 110; but is otherwise in the common-law States, *Cutter v. Folsom*, 17 N. H. 139.

194. *Upshur v. Briscoe*, 138 U. S. 365, 34 L. Ed. 931; *Fleitas v. Richardson*, 147 U. S. 550, 37 L. Ed. 276. See also *Baer v. Grell* (Mun. Ct., N. Y.), 6 Am. B. R. 428.

195. See p. 289, *ante*.

196. *Wolf v. Stix*, 99 U. S. 1, 25 L. Ed. 309; *Hill v. Harding*, 130 U. S. 699, 32 L. Ed. 1083.

Stay of further proceedings under judgment.—A judgment recovered against a bankrupt after proceedings in bankruptcy and before his discharge is annulled thereby,

after the bankruptcy. If the suit is commenced after the discharge, a stay cannot be granted, and the discharge itself must be pleaded.¹⁹⁷ Where, however, the cause is on appeal when the discharge becomes available, it usually will not act as a bar, though this depends on the practice and law of each State.¹⁹⁸ The usual method of pleading where the discharge was not available in time is by motion to open default and for leave to interpose a plea in bar by answer original or supplemental.¹⁹⁹ Such an application is addressed to the discretion of the court and may be denied, if there has been a long delay in making it,²⁰⁰ or on jurisdictional grounds. It will not be granted where the judgment antedates the bankruptcy and then resulted in a vested lien.²⁰¹

V. REVIVAL OF DISCHARGED DEBT BY NEW PROMISE.

This is the converse of failure to assert a discharge in bar. A debt discharged is not a debt paid. The moral obligation remains, and is a sufficient consideration for a new promise to pay.²⁰² An oral promise will be sufficient, unless a written promise is required by local statute.²⁰³ Whether oral or in writing, it must be definite, express, distinct, and unambiguous.²⁰⁴ It would

and he has the absolute right, if not guilty of laches, to have further proceedings thereon perpetually enjoined, for he had no opportunity to plead in bar a discharge which had not then been granted. On the other hand, where the judgment is recovered after the discharge has been granted, no matter when the action was begun, it is valid and enforceable, for the bankrupt has had his opportunity to plead in bar his discharge. *Crocker v. Bergh*, 118 Minn. 316, 34 Am. B. R. 190, 136 N. W. 737.

197. *Dimock v. Revere Copper Co.*, 117 U. S. 559, 29 L. Ed. 994.

198. *Wolf v. Stix*, 99 U. S. 1, 25 L. Ed. 309; *Cornell v. Dakin*, 38 N. Y. 253; *Bank v. Onion*, 16 Vt. 470; *Haggerty v. Morrison*, 59 Mo. 324.

199. *Boynton v. Ball*, 121 U. S. 457, 30 L. Ed. 985; *Holyoke v. Adams*, 59 N. Y. 233; *Richards v. Nixon*, 20 Pa. St. 19; *Fellows v. Hall*, Fed. Cas. 4,722.

200. *Medbury v. Swan*, 46 N. Y. 200.

201. *Barstow v. Hansen*, 2 Hun (N. Y.), 333.

202. *Mutual Reserve, etc., v. Beatty* (C. C. A., 9th Cir.), 2 Am. B. R. 244, 93 Fed. 747; *Dusenberry v. Hoyt*, 53 N. Y. 521; *Marshall v. Tracy*, 74 Ill. 379; *Maxim v. Morse*, 8 Mass. 127; *In re Merriman*, 44 Conn. 587.

New promise to pay; consideration.—Although the moral obligation of a bankrupt to pay a discharged debt is a sufficient consideration for a promise to pay, a cause of action rests upon the new promise, and not upon the old debt; the statute of limitations against joint obligors is not affected by a new promise of the bankrupt, because they are only liable on the old debt. *Polk v. Stephens* (Ark. Sup. Ct.), 118 Ark. 438, 35 Am. B. R. 186, 176 S. W. 689.

203. *Smith v. Stanchfield* (Sup. Ct., Minn.), 84 Minn. 343, 7 Am. B. R. 498, 87 N. W. 917; *Henly v. Lanier*, 75 N. C. 172; *Apperson v. Stewart*, 27 Ark. 619; *Mandell*

v. Levy (N. Y. App. T.), 47 Misc. 147, 14 Am. B. R. 549, 93 N. Y. Supp. 545; *Holt v. Akerman* (Ct. of Errors and App., N. J.), 84 N. J. L. 371, 32 Am. B. R. 673, 86 Atl. 408.

Oral promise to pay under Arkansas statute.—Under section 3665 of Kirby's Arkansas Digest providing that no promise to pay a debt or obligation which has been discharged in bankruptcy shall be valid unless such promise is in writing, the payment of one dollar on a note and an oral promise to pay the balance does not revive the debt after a discharge in bankruptcy. *Polk v. Stephens* (Ark. Sup. Ct.), 118 Ark. 438, 35 Am. B. R. 186, 176 S. W. 689.

204. *In re Lorillard* (C. C. A., 2d Cir.), 5 Am. B. R. 602, 107 Fed. 677; *Tompkins v. Hazen*, 5 Am. B. R. 62, 165 N. Y. 18, 58 N. E. 762; *Smith v. Stanchfield* (Sup. Ct., Minn.), 84 Minn. 343, 7 Am. B. R. 498, 87 N. W. 917; *In re Collier*, 93 Fed. 191; *Allen v. Ferguson*, 18 Wall. 1; *Church v. Winkley*, 73 Mass. 460; *Thornton v. Nichols and Lemon* (Sup. Ct., Ga.), 11 Am. B. R. 304, 45 S. E. 785. As to effect of absolute promise to pay debt, between adjudication and date of discharge, see *Old Town Nat. Bank v. Parker* (Md. Ct. of App.), 121 Md. 61, 30 Am. B. R. 602, 87 Atl. 1107; *Holt v. Akerman* (Ct. of Errors and App., N. J.), 84 N. J. L. 371, 32 Am. B. R. 673, 86 Atl. 408. See *Am. Bankr. Dig.* § 1156.

Evidence of oral promise.—Where in an action to recover on a note, for premiums paid on a life insurance policy assigned to plaintiff, to foreclose a lien on said policy and upon stock deposited by defendant with plaintiff as collateral, the defendant set up a discharge in bankruptcy and the plaintiff claimed a new promise to pay, testimony by the president of the plaintiff bank, as to the facts and circumstances under which the indebtedness on the note and for the life insurance premiums was incurred and the interviews and correspondence between the par-

not be sufficient to make a conditional offer of payment which was not accepted by the creditor.²⁰⁵ A promise to pay a provable debt, notwithstanding a discharge, is as effectual when made after the filing of the petition and before the discharge, as if made after the discharge.²⁰⁶ Cases under the former law were numerous and will prove as valuable under this.²⁰⁷

ties relating thereto before the bankruptcy, was admissible as relating to the fact whether there had been a subsequent promise to pay. *Underwood v. First National Bank of Galveston* (Tex. Civ. App.), 37 Am. B. R. 198, 185 S. W. 395.

205. *International Harvester Co. v. Lyman* (Sup. Ct., Minn.), 90 Minn. 275, 10 Am. B. R. 450, 96 N. W. 87.

206. *Zavelo v. Reeves*, 227 U. S. 625, 29 Am. B. R. 493, 57 L. Ed. 676.

Under the New Jersey statute for the prevention of frauds and perjuries it has been ruled that a promise to pay made by a bankrupt after his adjudication but before his discharge is ineffectual to revive a debt re-

leased by his discharge. *Holt v. Akarman* (Ct. of Errors and App., N. J.), 84 N. J. L. 371, 32 Am. B. R. 673, 86 Atl. 408.

207. See *Jersey City Ice Co. v. Archer*, 122 N. Y. 376; *Otis v. Garlin*, 31 Me. 567; *Wheeler v. Wheeler*, 28 Ill. App. 385; *Willis v. Cushman*, 115 Ind. 100, 17 N. E. 168; *Craig v. Seitz*, 63 Mich. 727, 30 N. W. 347; *Cambridge Institution v. Littlefield*, 60 Mass. 210; *Dusenberry v. Hoyt*, 53 N. Y. 521; *Badger v. Gilmore*, 33 N. H. 361; *Murphy v. Crawford*, 114 Pa. St. 496, 7 Atl. 142; *Shuman v. Strauss*, 52 N. H. 404. See also article in the *National Bankruptcy News and Reports* for February 15, 1900.

SECTION EIGHTEEN.

PROCESS, PLEADINGS, AND ADJUDICATIONS.

§ 18. **Process, Pleadings, and Adjudications.**—*a* Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits¹ *to enforce a legal or equitable lien** in courts of the United States, *except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time.**

b The bankrupt, or any creditor, may appear and plead to the petition within† *five* days after the return day, or within such further time as the court may allow.

c All pleadings setting up matters of fact shall be verified under oath.

d If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this act, and make the adjudication or dismiss the petition.

e If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.

f If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed

1. Here the words "in equity" were stricken out by the amendatory act of 1903, and the words in italics substituted.

* Amendments of 1903 in italics.

† Here the word "five" was substituted for the word "ten" by such amendatory act.

by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee.

g Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee.

Analogous provisions: In U. S.: As to service of process, Act of 1867, § 40, R. S., § 5025 (as amended by Act of June 22, 1874); Act of 1841, § 1; Act of 1800, § 3; As to appearances, pleading, trial and adjudication, Act of 1867, §§ 41, 42, R. S., §§ 5026 (as amended by the Act of June 22, 1874), 5028, 5029, 5030, 5031; Act of 1841, § 1; Act of 1800, § 3.

In Eng.: Act of 1883, § 7(1), General Rules 153, 154, 155, 156, 156-A; As to appearances, pleading, and trial, § 7(2) (3) (4) (5), General Rules 157-169; As to receiving order, § 8(1), General Rules 176; 177; As to adjudication, § 20(1), General Rules 190, 192, 192-A, 193.

Cross-references: To the law: Definitions of "adjudication," "bankrupt," "creditor," "oath," "petition," § 1 (2) (4) (9) (17) (20):

Jurisdiction to adjudge person a bankrupt, § 2(1).

Acts of bankruptcy; against whom petition may be filed, § 3-a, b.

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See also Supplementary Forms; Hagar and Alexander's Forms in Bankruptcy (2d Ed.), Part I, Petition and Adjudication, Forms Nos. 1-41.

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The practice under the present law differs so much from that under the law of 1867, that any extended reference to the latter would but confuse. Practice in bankruptcy is regulated largely by the General Orders and Forms,² supplemented by local rules and sometimes additional forms, and,

2. See cross-reference to General Orders and Forms, just before the schedule. See also General Order XXXVIII, providing that the forms annexed to the General Orders shall be observed and used with such altera-

tions as may be necessary to suit the circumstances of any particular case. See also Supplementary Forms, *post*, and Hagar and Alexander's Bankruptcy Forms (2d Ed.), Part I.

where none of these apply, by the equity practice in the United States courts.³ The equity practice of the Federal courts is independent of, and unaffected by State laws as to procedure in State courts.⁴ Throughout this work, an effort is made to explain the practice suggested by each section of the law and the paragraphs on "practice" found elsewhere should always be consulted. It may be suggested, however, to practitioners in the code States, that the technical observance of rules and formulas, there made so much of by both the bar and the bench, will generally not be necessary in bankruptcy practice. A clear understanding of the remedy desired and a common sense method of seeking it will usually be sufficient, even though there be modal slips or omissions. Numerous forms supplementing the official forms will be found in "Supplemental Forms," *post*.

II. SCOPE AND LIMITATION OF SECTION.

a. Scope.—This section has only to do with such practice as is incident to a proceeding in bankruptcy from the moment a petition is duly filed to the moment that the petition is either dismissed or results in an adjudication coupled with a reference to the referee. In voluntary cases this time is inappreciable. In involuntary cases it may extend through months. Further, though thus limited, § 18 is silent as to certain procedure usually availed of in involuntary cases, as that on stays and seizure of assets; and the succeeding section is controlling on jury trials.

b. Limitation of section.—For convenience of reference the limitations of § 18 are here set forth.

It does not have to do with:

1. *Who may and who may not file a voluntary petition*; for that, see §§ 4-a, 59-a; or

2. *Who may and who may not file an involuntary petition*; for that, see § 59-b; or

3. *Against whom and when an involuntary petition may be filed*; for that, see §§ 3-b, 4-b; or

4. *In what court a petition must be filed*; for that, see § 2 (1); or

5. *Whether and, if so, how petitions may be filed by or against partners or corporations*; for that, see §§ 4-b, 5-a; or

6. *The jurisdictional allegations in voluntary petitions*; for that, see §§ 2 (1), 4-a, 5-a, and, for the schedules to accompany the same, § 7 (8); or

7. *The jurisdictional allegations in involuntary petitions*; for that, see §§ 2 (1), 3-a-b, 4-b, 5-a, 59-b; or

3. Equity rules.—In proceedings in equity to carry into effect provisions of bankruptcy act, or to enforce rights and remedies given by it, rules of equity practice are to be followed as near as may be. See Gen. Order, XXXVII; Equity Rules, *post*.

Bankruptcy proceedings are purely equitable in their character and within the limits prescribed by the bankruptcy acts and the special rules of practice prescribed by the Supreme Court are to be administered in accordance with the general principles and practice of equity. *Westall v. Avery* (C. C. A., 4th Cir.), 22 Am. B. R. 673, 171 Fed. 626. A proceeding in bankruptcy is a pro-

ceeding in equity, and the taking of evidence and the review by appeals of hearings therein are governed by the practice in suits in equity, except where otherwise specified. *First Nat. Bank of Philadelphia v. Abbott* (C. C. A., 8th Cir.), 21 Am. B. R. 436, 165 Fed. 852.

4. *Westall v. Avery* (C. C. A., 4th Cir.), 22 Am. B. R. 673, 171 Fed. 626.

The rules prescribed by the State codes of practice cannot be applied in equity cases in the United States courts, although such codes are largely applied in common law cases. *Matter of Brown* (D. C., Ky.), 35 Am. B. R. 826, 228 Fed. 533.

8. *The office for filing and the number of copies to be filed*; for that, see § 59-a in voluntary cases, and § 59-c in involuntary cases, and, for schedules, § 7 (8); or

9. *The answer and procedure thereon when less than three creditors petition*; for that, see § 59-d-e; or

10. *The intervention of creditors other than the petitioning creditors*; for that, see § 59-f; or

11. *The dismissal of petitions other than on the merits*; for that, see § 59-g; or

12. *The (a) interference with the alleged bankrupt's property pending adjudication; or (b) stays other than against suits; or (c) stays against suits*; for these, see §§ 2 (7) (15), 11; or

13. *The appointment of receivers or the custody of the bankrupt's property before adjudication*; for that, see §§ 2 (3) (15), 3-e, 69.

III. PETITIONS.

a. **In general.**—The allegations in and the manner of drawing petitions are further discussed under sections three, four, five and fifty-nine of this work. The specific allegations to be made to meet the requirements of such sections are there more fully considered. Petitioning and intervening creditors should be bound by the allegations of their petition.⁵ It will only be necessary at this place to consider those rules which are of general application.

b. **Framing petitions.**—General Order V provides that "all petitions and the schedules filed therewith shall be printed or written out plainly, without abbreviation or interlineation except such abbreviation or interlineation may be for the purpose of reference."

c. **Forms to be used.**—The official forms should, where possible, be used; in some districts it is the practice to refuse to consider petitions unless they are on the prescribed printed forms.⁶ The simple forms of bankruptcy practice found in the general orders and forms prescribed by the Supreme Court should be followed without unnecessary departure therefrom.⁷ The caption should properly refer to the proceeding, but if the body of the petition is sufficient a defect in the caption is not material.⁸ Blanks printed without ruling and of such size as to permit use in typewriting machines will be found most convenient. Forms Nos. 1, 2, and 3 are suggestive of the petitions by individuals, by partners, and in involuntary cases. That in partnership cases is not entirely reliable;⁹ and that for involuntary cases is less so.¹⁰

5. *Harris v. Tapp* (D. C., Ga.), 37 Am. B. R. 564, 235 Fed. 918.

6. *Mahoney v. Ward* (D. C., N. Car.), 3 Am. B. R. 770, 100 Fed. 278. Compare *In re White* (D. C., Penn.), 14 Am. B. R. 241, 135 Fed. 199.

7. *Gage & Co. v. Bell* (D. C., Tenn.), 10 Am. B. R. 696, 124 Fed. 371; *Sabin v. Blake-McFall Co.* (C. C. A., 9th Cir.), 35 Am. B. R. 179, 223 Fed. 501, holding that the provisions of the bankrupt act and the procedure promulgated thereby should be closely followed in the preparation of petitions and all other papers.

An answer which does not admit or unevasively deny upon oath the material facts of the petition may be stricken from the files for non-compliance with the Supreme Court

orders prescribing the form for answers. *Bradley Timber Co. v. White* (C. C. A., 5th Cir.), 10 Am. B. R. 329, 121 Fed. 779.

8. *Matter of Gorman* (D. C., Hawaii), 2 U. S., D. C. Hawaii 439, 15 Am. B. R. 587, holding that the caption of a petition in the matter of the bankruptcy of a firm and of a member thereof does not necessarily render the petition insufficient where such caption contains only the name of the individual.

9. See criticisms and suggestions under Section Five, *ante*. See also "Supplementary Forms," *post*. For additional forms, see Hagar and Alexander's *Bankruptcy Forms* (2nd Ed.) Nos. 1-9, inclusive.

10. Consult Section Three, *ante*, for allegations as to acts of bankruptcy; Section Four, *ante*, for allegations as to the excepted

If a partner does not join in a petition for involuntary bankruptcy, that fact should be stated, his address given, and the prayer of the petition ask for a subpoena to him as though he were an alleged involuntary bankrupt.¹¹

d. Facts alleged.—(1) **JURISDICTIONAL FACTS.**—All facts essential to the exercise of jurisdiction should be alleged with definiteness and certainty, as in the case of other pleadings in law or equity.¹² The purpose of a pleading is to advise the opposing parties and the court of the facts constituting the cause of action; all these facts should be set forth plainly and without equivocation.¹³ A disjunctive statement states neither one fact nor the other and, if one or the other fact is jurisdictional, the petition is insufficient.¹⁴ The necessary allegations in both voluntary and involuntary petitions are discussed at length in other places.¹⁵

(2) **ACTS OF BANKRUPTCY.**—General averments as to acts of bankruptcy are insufficient.¹⁶ The allegations should not be made in the language of the statute, without details in respect to the particular act relied upon.¹⁷ The

classes; Section Fifty-nine, *post*, for allegations as to number of petitioning creditors, the amount of their claims, etc.

11. *In re Russell* (D. C., Iowa), 3 Am. B. R. 91, 97 Fed. 32; *In re Murray* (D. C., Iowa), 3 Am. B. R. 90; *Mahoney v. Ward* (D. C., N. Car.), 3 Am. B. R. 770, 100 Fed. 278.

Adjudications of firm.—A petition to adjudicate a partnership a voluntary bankrupt which is made by some of the partners without giving notice of the filing of the petition to the non-joining partners is irregular and will not warrant the adjudication of the firm as bankrupts. *In re Altman* (D. C., N. Y.), 2 Am. B. R. 407, 95 Fed. 263.

12. *Clarke v. Henne & Meyer* (C. C. A., 5th Cir.), 11 Am. B. R. 583, 594, 127 Fed. 288; *In re Plotke* (C. C. A., 7th Cir.), 5 Am. B. R. 171, 175, 104 Fed. 964, where the court said: "The essential facts must appear affirmatively and distinctly, and it is not sufficient that jurisdiction may be inferred argumentatively."

13. *In re First Nat. Bank of Belle Fourche* (C. C. A., 8th Cir.), 18 Am. B. R. 265, 270, 128 Fed. 630.

14. *In re Laskaris* (Ref., N. Y.), 1 Am. B. R. 480, holding that a voluntary petition in bankruptcy which states disjunctively that the petitioner has had his principal place of business, or has resided, or has had his domicile for the greater portion of six months next immediately preceding the filing of the petition, in a place stated, is insufficient upon its face to confer jurisdiction.

15. See under §§ 2, 3, 4, 5, and 59. For forms suggested as substitutes for Forms Nos. 2 and 3, see "Supplementary Forms," *post*.

16. *Matter of Mason-Seaman Transportation Co.* (D. C., N. Y.), 37 Am. B. R. 677, 235 Fed. 974. See Am. Bankr. Dig. §§ 215, *et seq.*

17. *In re Cliffe* (D. C., Penn.), 2 Am. B. R. 317, 94 Fed. 354; *In re Bellah* (D. C., Del.), 8 Am. B. R. 310, 116 Fed. 69; *In re Stone*

(D. C., Pa.), 30 Am. B. R. 392. See cases cited under Section Three.

Language of statute.—Acts of bankruptcy should not be charged in the language of the statute. *In re Deer Creek Water & Power Co.* (D. C., Pa.), 29 Am. B. R. 356, 205 Fed. 205. General averments that the alleged bankrupts within the four months' period, while insolvent, committed an act of bankruptcy by transferring "a certain portion of their property to one or more of their creditors with intent to prefer," and that they have transferred and concealed large sums of money and valuable securities "with intent to hinder, delay and defraud creditors, which concealment was and is continuous, are insufficient to sustain the petition. *In re Rosenblatt & Co.* (C. C. A., 2d Cir.), 28 Am. B. R. 401, 193 Fed. 638.

Insufficient allegations.—*In re Cliffe* (D. C., Penn.), 2 Am. B. R. 317, 94 Fed. 354; a petition averred that the defendant was insolvent and charged as an act of bankruptcy that he "on the 27th day of January, 1899, suffered, while insolvent, other creditors to obtain a preference through legal proceedings, and not having at least five days before sale or final disposition of his property affected by such preference vacated such preference." There were no other details of the preference alleged. The petition was deemed insufficient.

In re Nelson (D. C., Wis.), 1 Am. B. R. 63, 98 Fed. 76, the petition alleged that the defendant had within four months next prior to the filing of it "transferred, while insolvent, large amounts and value of his property to one or more of his creditors, with an intent to prefer said creditors over his other creditors." This was held insufficient.

Sufficient allegation.—An averment in a petition in involuntary bankruptcy that the defendant at a certain time received a specified sum of money from a specified source, which sum "he has ever since concealed and secreted with intent to hinder, delay or defraud his creditors," is not defective for want

petition in involuntary proceedings may set forth several and distinct acts of bankruptcy.¹⁸

(3) **NATURE OF CLAIMS.**—The petition should set forth the nature of the claims of the petitioning creditors;¹⁹ but it has been held that where the petition shows on its face, and there is established on the trial, a sufficient petitioning creditor, the absence of a statement of the amount of his claim may be disregarded.²⁰ No specific method of setting forth a claim is provided by the Bankruptcy Act; the only requirement necessary is that the language used be of sufficient definiteness to identify the claim in the mind of the alleged bankrupt.²¹ If filed by an agent the authority to act should be set forth.²² Legal conclusions, as an allegation that the petitioner has a provable claim, will not suffice.²³

(4) **DUPLICATE PETITIONS.**—The schedules, and presumably the petition in voluntary cases, must be drawn and verified in triplicate.²⁴ In involuntary cases, in duplicate.²⁵ The failure to file duplicate petitions is waived by answer without presenting the objection.²⁶

e. Petition to be filed.—A petition should not be sent directly to a judge but should be filed with the clerk of the court.²⁷ Where a petition is delivered to the clerk outside of his office and not during office hours and he takes the same and marks it filed, it will be deemed duly filed.²⁸ It must be accompanied by the fees of the officers, or, in lieu thereof, by a pauper affidavit.²⁹

f. Petition confers jurisdiction.—(1) **IN GENERAL.**—The moment the petition is filed, jurisdiction begins. This is the commencement of the proceeding, even though the subpoena does not immediately issue,³⁰ or, if issued, is not served

of particularity; the manner and details of the concealment being matters of evidence, and not of averment. In re Bellah (D. C., Del.), 8 Am. B. R. 310, 116 Fed. 69. Allegation as to suffering or permitting preference held sufficient although failing to allege that debtor failed to vacate within five days prior to "final disposition." Ravenna Nat. Bank v. Curtiss (D. C., Ohio), 30 Am. B. R. 818.

18. Bradley Timber Co. v. White (C. C. A., 5th Cir.), 10 Am. B. R. 329, 121 Fed. 779, affg. 9 Am. B. R. 441.

19. In re White (D. C., Penn.), 14 Am. B. R. 241, 135 Fed. 199, holding that an involuntary petition defective in failing to state the nature of the claims of the petitioners is amendable.

Requisite amount of claims.—Since the existence of provable debts due to each of the petitioning creditors, or at least to the number required by the bankruptcy act, is necessary to give the bankruptcy court jurisdiction of an involuntary proceeding the existence of such debts or claims and their nature should be alleged with such particularity and definiteness as will enable the court to find from the petition the essential jurisdictional fact. In re Farthing (D. C., N. Car.), 29 Am. B. R. 732, 202 Fed. 557.

Definiteness of allegations as to amount.—An allegation in an involuntary petition in bankruptcy that a claim of one of the petitioning creditors is for a certain sum due on open account from the alleged bankrupt, upon a stated account rendered on a certain date, is sufficient. Sabin v. Blake-McFall

Co. (C. C. A., 9th Cir.), 35 Am. B. R. 179, 223 Fed. 501.

20. In re Pangborn (D. C., Mich.), 26 Am. B. R. 40, 185 Fed. 673.

21. Sabin v. Blake-McFall Co. (C. C. A., 9th Cir.), 35 Am. B. R. 179, 223 Fed. 501.

22. Matter of Livingston (D. C., Hawaii), 2 U. S., D. C., Hawaii 254, 13 Am. B. R. 357.

23. Hoffschlager Co. v. Young Nap (D. C., Hawaii), 2 U. S., D. C., Hawaii 96, 12 Am. B. R. 515, 517; In re Nelson (D. C., Wis.), 1 Am. B. R. 63, 98 Fed. 76, holding that issuable facts and not conclusions should be alleged.

24. Bankr. Act, § 7 (8).

25. Bankr. Act, § 59-c. And see In re Bellah (D. C., Del.), 8 Am. B. R. 310, 321, 116 Fed. 69, holding that though termed copies they are duplicate originals; In re Stevenson (D. C., Del.), 2 Am. B. R. 66, 94 Fed. 110.

26. In re Plymouth Cordage Co. (C. C. A., 8th Cir.), 13 Am. B. R. 665, 135 Fed. 1000.

27. See General Order II. Compare In re Sykes (D. C., Tenn.), 6 Am. B. R. 264, 106 Fed. 669.

28. In re Wolf (D. C., N. J.), 2 Am. B. R. 322.

29. Bankr. Act, § 51-a (2).

30. Bankr. Act, § 1 (10); Shute v. Patterson (C. C. A., 8th Cir.), 17 Am. B. R. 99, 147 Fed. 509; In re Appel (D. C., Neb.), 4 Am. B. R. 722, 103 Fed. 931; In re Stein (C. C. A., 2d Cir.), 5 Am. B. R. 288, 105 Fed. 749; In re Lewis (D. C., N. Y.), 1 Am. B. R. 458, 91 Fed. 632.

within the time limited.³¹ The filing of a petition in bankruptcy is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate.³² •

(2) FILING OF PETITION AS NOTICE.—As has been stated in a recent case:³³ “Indeed, the condition at the time of the filing of the petition measures the extent of the estate, and the rights of all creditors of the bankrupt and all parties interested in the property throughout all the provisions of the law.” So far as the jurisdiction of the court is concerned the filing of the petition operates as a *lis pendens* and is notice to all the world; this is in recognition of the often repeated maxim that “the filing of the petition in bankruptcy is a caveat to all the world and in effect an attachment and injunction.”³⁴ How-

31. *In re Frischberg* (Ref., N. Y.), 8 Am. B. R. 607.

32. *Bailey v. Baker Ice Machine Co.*, 239 U. S. 268, 35 Am. B. R. 814, 60 L. Ed. 275; *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 306, 27 Am. B. R. 262, 56 L. Ed. 208. And see discussion of Referee Olmstead in *Matter of Wellmade Gas Mantle Co.* (Ref., Mass.), 36 Am. B. R. 62.

33. *Board of County Commissioners v. Hurley* (C. C. A., 8th Cir.), 22 Am. B. R. 209, 212, 169 Fed. 92. And see *Corbet v. Riddle* (C. C. A., 4th Cir.), 31 Am. B. R. 330, 209 Fed. 811.

34. Filing of petition as caveat.—*In re Billing* (D. C., Ala.), 17 Am. B. R. 80, 145 Fed. 395; *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224, 46 L. Ed. 405; *Clay v. Waters* (C. C. A., 8th Cir.), 24 Am. B. R. 293, 178 Fed. 385; *State Bank of Chicago v. Cox* (C. C. A., 7th Cir.), 16 Am. B. R. 32, 143 Fed. 91; *In re Granite City Bank* (C. C. A., 8th Cir.), 14 Am. B. R. 404, 137 Fed. 818; *In re Kolin* (C. C. A., 7th Cir.), 13 Am. B. R. 531, 134 Fed. 557; *In re Smith & Shuck* (D. C., Iowa), 13 Am. B. R. 103, 132 Fed. 301; *In re Mertens*, (D. C., N. Y.), 12 Am. B. R. 699, 131 Fed. 507; *In re Tweed* (D. C., Iowa), 12 Am. B. R. 648, 131 Fed. 355; *In re Reynolds* (D. C., Mont.), 11 Am. B. R. 758, 760, 127 Fed. 760; *In re Chesapeake Shoe Co.* (C. C. A., 4th Cir.), 10 Am. B. R. 466, 122 Fed. 593; *In re Breslauer* (D. C., N. Y.), 10 Am. B. R. 33, 121 Fed. 910; *In re Frazier* (D. C., Mo.), 9 Am. B. R. 21, 117 Fed. 746; *In re Gutman & Wenk* (D. C., N. Y.), 8 Am. B. R. 252, 114 Fed. 1009; *In re Pekin Plow Co.* (C. C. A., 8th Cir.), 7 Am. B. R. 369, 112 Fed. 308; *In re Krinsky Bros.* (D. C., N. Y.), 7 Am. B. R. 535, 112 Fed. 972; *Tube City Mining and Milling Co. v. Otterson* (Ariz. Sup. Ct.), 16 Ariz. 305, 35 Am. B. R. 500, 146 Pac. 203; *Cohen v. Nixon & Wright* (D. C., Ga.), 37 Am. B. R. 646; *Matter of Wellmade Gas Mantle Co.* (Ref., Mass.), 36 Am. B. R. 62; *Pugh v. Loesel* (C. C. A., 5th Cir.), 33 Am. B. R. 580, 219 Fed. 417; *Matter of Schou* (D. C., Conn.), 32 Am. B. R. 494, 213 Fed. 514; *Miles Paint Mfg. Co.* (D. C., Pa.), 32 Am. B. R. 793; *Matthews & Sons v. Webre Co.* (D. C., La.), 32 Am. B. R. 180, 213 Fed.

396, holding that an order of sale in foreclosure, granted by a state court in a proceeding commenced after the filing of the petition in bankruptcy, but prior to the adjudication, is necessarily void; see Am. Bankr. Dig. § 236.

Notice to creditors.—Thus the filing of a petition in involuntary proceedings is notice thereof to all the creditors of the alleged bankrupt. *In re Billing* (D. C., Ala.), 17 Am. B. R. 80, 145 Fed. 395.

Property in another district.—It is immaterial that the property affected by the filing of the petition is in another district. *In re Granite City Bank* (C. C. A., 8th Cir.), 14 Am. B. R. 404, 137 Fed. 818; *In re Dempster* (C. C. A., 8th Cir.), 22 Am. B. R. 751, 172 Fed. 353.

Lis pendens.—*In Matter of Zotti* (Ref., N. Y.), 23 Am. B. R. 60, affd. 23 Am. B. R. 812, 178 Fed. 304, the court said: “The filing of a bill in equity in the United States court is considered the same as the filing of a *lis pendens* in a state which requires such filing. * * * The filing of the petition was a command to all having possession of property which the bankrupt at that moment owned, to hold the same subject to the orders of the court. The ‘rem’ was reached by the filing of the petition, no matter where it was.”

Effect on property in possession of bankrupt.—The exclusive jurisdiction of the bankruptcy court is so far *in rem* that the estate is regarded as *in custodia legis* from the filing of the petition. *Bailey v. Baker Ice Machine Co.* (U. S. Sup. Ct.), 239 U. S. 268, 35 Am. B. R. 814, 60 L. Ed. 275; *Matter of Continental Coal Corp.* (C. C. A., 6th Cir.), 38 Am. B. R. 168, 238 Fed. 113; *State of Missouri v. Angle* (C. C. A., 8th Cir.), 38 Am. B. R. 394, 236 Fed. 644.

The filing of an involuntary petition in bankruptcy brings into custodia legis all property then in the possession of the bankrupt or its common law assignee, although a replevin suit by a vendor against the assignee is pending. *Matter of Wellmade Gas Mantle Co.* (C. C. A., 1st Cir.), 37 Am. B. R. 7, 233 Fed. 250.

Caveat and injunction.—The filing of the petition in bankruptcy and the adjudication themselves constitute a caveat and an in-

ever, according to several recent cases, the application of this maxim is limited.³⁵ Its effect upon the jurisdiction of a court of bankruptcy in respect to the bankrupt's property, as dependent upon possession, is considered under § 23, *post*.

g. Amendments of petitions.—(1) **IN GENERAL.**—The amendment of a petition in bankruptcy is permissible as in the case of pleadings in other actions and proceedings. The general rules of pleadings and practice relative to amendments apply to petitions in bankruptcy. The amendment of a petition³⁶ is a matter of discretion.³⁷ This general power of amendment is not abrogated or

junction by the court against any interference with the property of the bankrupt by all persons who have no liens upon, title, or debatable claims to it at the time the petition is filed, and the taking and disposition of it by any of them violates that injunction. *Darrough v. First National Bank of Claremore* (Okla. Sup. Ct.), 37 Am. B. R. 75, 156 Pac. 191.

Effect of filing petition in involuntary proceeding as staying sale by sheriff.—The filing of a petition in bankruptcy is sufficient notice to a sheriff, if brought to his attention, to prevent the sale of the bankrupt's property, advertised to take place soon after filing the petition. *Matter of Miles Paint Mfg. Co.* (D. C., Pa.), 32 Am. B. R. 793.

Effect of levy after petition filed.—The court cannot be ousted of its jurisdiction by any officer seeking to make a levy upon the bankrupt's property by virtue of process issuing out of a state court. *Matter of Schou* (D. C., Conn.), 32 Am. B. R. 494, 213 Fed. 514.

A bank cannot lawfully pay a note, after a petition in bankruptcy has been filed against the maker. *Matter of Midland Motor Co.* (C. C. A., 7th Cir.), 37 Am. B. R. 364, 224 Fed. 368.

35. Limitation of application of doctrine.—This maxim was stated in *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224. Subsequently the Supreme Court said: "The remark made in *Mueller v. Nugent* that the filing of the petition [in bankruptcy] is a caveat to all the world and in fact an attachment and injunction was made in regard to the particular facts in that case." *York Mfg. Co. v. Cassell*, 201 U. S. 344, 15 Am. B. R. 638, 50 L. Ed. 782. And in *Matter of Mertens* (C. C. A., 2d Cir.), 15 Am. B. R. 362, 369, 144 Fed. 818, the court said: "While the filing of a petition in bankruptcy is a caveat to all the world, the notice ought not to have the effect of paralyzing all business dealings with the debtor, or to prevent the lienors or pledgees from enforcing their contracts." *In re Rathman* (C. C. A., 8th Cir.), 25 Am. B. R. 246, 261, 183 Fed. 913, the court, speaking of this maxim, said: "The later decisions of the Supreme Court adjudge that this statement applies only to parties who have no substantial claim of a lien upon or a title to the property of the bankrupt, and that against those who have such claims of existing liens or titles when the petition in bankruptcy is filed, that filing is neither a caveat nor an attachment, that

it creates no lien and that until the bankruptcy court by some act of one of its officers takes actual possession of the property, or makes such claimants parties to the proceeding by some order or process, or notice of the proceeding comes to them, their liens, titles and remedies are unaffected thereby and they are strangers to the proceeding." But in the case of *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 27 Am. B. R. 262, 56 L. Ed. 208, the Supreme Court reaffirmed the doctrine of *Mueller v. Nugent*, *supra*, and stated that "The exclusive jurisdiction of the bankruptcy court is so far *in rem* that the estate is regarded as *in custodia legis* from the filing of the petition." See also *Matter of Zotti* (C. C. A., 2d Cir.), 26 Am. B. R. 234, 186 Fed. 84, affg. 23 Am. B. R. 812, 178 Fed. 304; *Christopherson v. Harrington* (Minn. Sup. Ct.), 118 Minn. 42, 32 Am. B. R. 842, 136 N. W. 289; *Tube City Mining & Milling Co. v. Otterson* (Ariz. Sup. Ct.), 16 Ariz. 305, 35 Am. B. R. 500, 146 Pac. 203.

The mere filing of a petition in involuntary bankruptcy does not give jurisdiction, nor establish facts upon which jurisdiction may depend. *Matter of Pennington & Co.* (D. C., Ky.), 35 Am. B. R. 832, 228 Fed. 388.

36. Consult Bankr. Act, § 7, for amendments of schedules. For amendment of petitions generally, see Am. B. R. Dig. § 231.

37. Discretion to amend.—In the case of *Armstrong v. Fernandez*, 208 U. S. 324, 19 Am. B. R. 746, the court said: "The power of a court of bankruptcy over amendments is undoubted and rests in the sound discretion of the court." *Wilder v. Watts* (D. C., S. C.), 15 Am. B. R. 57, 138 Fed. 426, to the effect that the amendments are usually allowed if the acts of justice will be promoted, but as they are not matters of right the court must exercise its discretion in permitting them. The privilege of amending a petition in involuntary bankruptcy is a matter resting in the discretion of the court, not to be reviewed, except when such discretion has been abused. *In re Rosenblatt & Co.* (C. C. A., 2d Cir.), 28 Am. B. R. 401, 193 Fed. 638; *Sabin v. Blake-McFall Co.* (C. C. A., 9th Cir.), 35 Am. B. R. 179, 223 Fed. 501, confirming its amendment of an involuntary petition filed after expiration of time fixed for that purpose; *Matter of Frank* (C. C. A., 3d Cir.), 38 Am. B. R. 674.

The exercise of jurisdiction to amend an involuntary petition is within the sound discretion of the court, having in mind the in-

restricted in any sense by the provisions of General Order XI which relates to the amendment of petitions and schedules.³⁸ A petition may be amended to bring it within the terms of an amendatory act.³⁹ The permitting or refusal of an amendment, being within the discretion of the court, will not be interfered with unless there is an abuse of such discretion. An amendment will not be allowed unless it clearly appear that the ends of justice will be promoted thereby.⁴⁰ It will be denied if the application is made after an unreasonable delay⁴¹ or when the allegation in effect will become the basis of a new and independent proceeding.⁴²

(2) WHEN ALLOWED.—(I) *To conform to evidence.*—If evidence is adduced without objection, the petition, if deemed insufficient, may be amended to conform thereto, and when so amended it relates to and takes effect as of the date of the filing of the original petition.⁴³ An amendment for the purpose of conforming the pleadings to the facts proven is frequently permitted, even on the coming in of a special master's report.⁴⁴ There must be in the record as it stands, the substance of that which is to be supplied by amendment.⁴⁵ An amendment of an original petition may be allowed before proceeding to a new trial where it is necessary because of evidence adduced upon a former trial.⁴⁶

(II) *Correction of mistakes or defects.*—It will usually be granted to cure an error due to mistake of counsel,⁴⁷ or one purely clerical.⁴⁸ Where the defect does not pertain to the jurisdiction of the court, either in respect to the parties or the subject-matter, an amendment will usually be permitted.⁴⁹ But if the defect goes to the jurisdiction of the court, the right thereto is not so clear.⁵⁰

terests of creditors. *International Silver Co. v. New York Jewelry Co.* (C. C. A., 6th Cir.), 37 Am. B. R. 91, 233 Fed. 945.

38. *Gleason v. Smith* (C. C. A., 3d Cir.), 16 Am. B. R. 602, 145 Fed. 895; *In re Bellah* (D. C., Del.), 8 Am. B. R. 310, 116 Fed. 69.

39. *In re Seammon*, Fed. Cas. 12,427; *In re Scull*, Fed. Cas. 12,568.

40. *Wilder v. Watts* (D. C., S. C.), 15 Am. B. R. 57, 138 Fed. 426; *Woolford v. Diamond State Steel Co.* (D. C., Del.), 15 Am. B. R. 31, 138 Fed. 582. See *In re Farthing* (D. C., No. Car.), 29 Am. B. R. 732, 202 Fed. 557.

41. *In re Freudenfels*, Fed. Cas. 5,112-a.

42. *In re Hyde & Co.* (D. C., N. Y.), 4 Am. B. R. 602, 103 Fed. 617; *In re Mercur* (D. C., Penn.), 8 Am. B. R. 275, 116 Fed. 655, *affd.* (C. C. A., 3d Cir.), 10 Am. B. R. 505, 122 Fed. 384, where it was held that the right to amend can go no further than to bring forward and make effective that which is in some form already in the record.

43. *Chicago Motor Vehicle Co. v. American Oak Leather Co.* (C. C. A., 7th Cir.), 15 Am. B. R. 804, 141 Fed. 518, holding that, where the petition in an involuntary proceeding, though alleging specific acts of bankruptcy, charges generally the giving of a preference to unknown creditors, and some of the testimony taken before the referee, without objection, related to alleged preferences not specified in the petition, and testimony relating thereto is also received on behalf of the alleged bankrupt, the findings of the referee that such transfers constitute acts of bankruptcy are justified, and the court may per-

mit the petition to be amended as of the date of its filing so as to charge such transfers as acts of bankruptcy.

44. *In re Lange* (D. C., N. Y.), 3 Am. B. R. 231, 97 Fed. 196; *In re Miller* (D. C., N. Y.), 5 Am. B. R. 140, 104 Fed. 764; *In re Bininger*, Fed. Cas. 1,420; *In re Gallinger*, Fed. Cas. 5,202; *Chicago Motor Vehicle Co. v. American Oak Leather Co.* (C. C. A., 7th Cir.), 15 Am. B. R. 804, 141 Fed. 518, 72 C. C. A. 576; *Hark v. Allen Co.* (C. C. A., 3d Cir.), 17 Am. B. R. 3, 146 Fed. 665.

45. *In re Mercur* (C. C. A., 3d Cir.), 10 Am. B. R. 505, 122 Fed. 384. In the case of *Matter of Frank* (C. C. A., 3d Cir.), 38 Am. B. R. 674, it was held that an amended petition should not be permitted in which petitioners swear to positive averments of facts, where they had testified that they had no such knowledge as would justify the averments.

46. *Matter of Hark Bros.* (D. C., Penn.), 15 Am. B. R. 460, 142 Fed. 179, *affd. sub nom.* *Hark v. Allen Co.* (C. C. A., 3d Cir.), 17 Am. B. R. 3, 146 Fed. 665.

47. *In re Hill*, Fed. Cas. 6,485. See also *In re Freund* (Ref., N. Y.), 1 Am. B. R. 25.

48. *In re Bellah* (D. C., Del.), 8 Am. B. R. 310, 116 Fed. 49; *Gleason v. Smith* (C. C. A., 3d Cir.), 16 Am. B. R. 602, 145 Fed. 895.

49. *In re Shoesmith* (C. C. A., 7th Cir.), 13 Am. B. R. 645, 135 Fed. 684.

50. *In re Rosenfelds*, Fed. Cas. 12,061. See also *Woolford v. Diamond State Steel Co.* (D. C., Del.), 15 Am. B. R. 31, 138 Fed. 582.

Thus, where an involuntary petition shows upon its face that the claims of the petitioners in the aggregate are less than \$500, the petition is fatally defective and may not be amended by joining others as creditors.⁵¹ But Federal courts have the power to permit amendments of pleadings by the insertion or correction of jurisdictional as well as other averments.⁵² Thus, a petition may be amended to cure defects, such as those which pertain to the averments of the residence or place of business of a bankrupt,⁵³ especially where rights of creditors have accrued which would be affected by its dismissal.⁵⁴ An involuntary petition may be amended so as to show that the alleged bankrupt is subject to the act.⁵⁵

(III) *As to number of creditors and amount of claims.*—An amendment is permissible by the insertion of an averment that all the bankrupt's creditors are less than twelve.⁵⁶ An insufficiency in the allegations of the petition as to the number of the creditors⁵⁷ or the nature and amounts of their claims⁵⁸ is not to be regarded as an incurable jurisdictional defect, and may be supplied by amendment.

(IV) *As to status of bankrupt.*—The petition may be amended so as to aver that the alleged bankrupt is not a wage-earner or a person engaged chiefly in farming or the tillage of the soil.⁵⁹ If there is an error in the name of the alleged bankrupt the petition may be amended so as to correct it.⁶⁰

51. In re Stein (D. C., Penn.), 12 Am. B. R. 364, 130 Fed. 377.

But the rule is different if the amount set forth in the petition exceeds \$500, and thereafter it develops that the provable claims of the original petitioners are less than \$500; in such a case an amendment may be permitted prior to the adjudication and other creditors permitted to join in the petition. In re Ryan (D. C., Penn.), 7 Am. B. R. 562, 114 Fed. 373; In re Mackay (D. C., Del.), 6 Am. B. R. 577, 110 Fed. 355; In re Mammoth Pine Lumber Co. (D. C., Ark.), 6 Am. B. R. 84, 109 Fed. 308.

52. In re Plymouth Cordage Co. (C. C. A., 8th Cir.), 13 Am. B. R. 665, 135 Fed. 1000.

53. In re Weinmann, 2 N. B. N. & R. 51.

54. In re Hammond (D. C., N. Y.), 20 Am. B. R. 776, 163 Fed. 548.

55. International Silver Co. v. New York Jewelry Co. (C. C. A., 6th Cir.), 37 Am. B. R. 91, 233 Fed. 945.

56. In re Plymouth Cordage Co. (C. C. A., 8th Cir.), 13 Am. B. R. 665, 135 Fed. 1000; Matter of Haff (C. C. A., 2d Cir.), 13 Am. B. R. 362, 136 Fed. 78.

57. In re Mackey (D. C., Del.), 6 Am. B. R. 577, 110 Fed. 355; In re Bellah (D. C., Del.), 8 Am. B. R. 310, 110 Fed. 69; Ryan v. Hendricks (C. C. A., 7th Cir.), 21 Am. B. R. 570, 166 Fed. 94, holding that if a petition fails to clearly set forth the number of creditors, the amount of their claims and the occupation of the debtor, it may be amended.

58. Conway v. German (C. C. A., 4th Cir.), 21 Am. B. R. 577, 166 Fed. 67; In re White (D. C., Penn.), 14 Am. B. R. 241, 135 Am. 199.

59. Beach v. Macon Grocery Co. (C. C. A.,

5th Cir.), 9 Am. B. R. 762, 120 Fed. 736; In re Brett (D. C., N. J.), 12 Am. B. R. 492, 130 Fed. 981; In re White (D. C., Penn.), 14 Am. B. R. 241, 135 Fed. 199; In re Plymouth Cordage Co. (C. C. A., 8th Cir.), 13 Am. B. R. 665, 135 Fed. 1000.

It is no abuse of discretion to permit an involuntary petition to be amended so as to aver that the alleged bankrupt is not "a wage-earner nor a person engaged chiefly in farming or tillage of the soil." *Armstrong v. Fernandez*, 208 U. S. 324, 19 Am. B. R. 746, 52 L. Ed. 514; In re Crenshaw (D. C., Ala.), 19 Am. B. R. 502, 155 Fed. 271; In re Mero (D. C., Conn.), 12 Am. B. R. 171, 128 Fed. 633; In re Pilger (D. C., Wis.), 9 Am. B. R. 244, 118 Fed. 206.

Error to deny amendment.—In *Conway v. German* (C. C. A., 4th Cir.), 21 Am. B. R. 577, 166 Fed. 67, it was held error to deny a motion for an amendment in this respect. The court said: "Such an averment so far as this case is concerned, is a mere negative one, and not of a jurisdictional character. There is no contention made here by the defendants that they belong to the inhibited class, and hence cannot be adjudicated bankrupts, and as a matter of fact they do belong to that class. Were they seeking to come within the inhibited class, it would be essential for them to make proof of their averment, but they are not, and while technically speaking it should have been stated in the petition, that they were not persons coming within that class, still it was not essential so to do, and in no sense affected the merits of the case, and the amendments desired should have been permitted."

60. *Gleason v. Smith* (C. C. A., 3d Cir.), 16 Am. B. R. 602, 145 Fed. 895.

(V) *As to existence of partnership.*—Where one member of a firm has not made the other members parties to a petition in a voluntary proceeding he may amend his petition so as to bring in such partners.⁶¹ And a petition against two persons alleging that a partnership existed may be amended by striking out all reference to one of them when it appeared that such partnership did not exist.⁶²

(VI) *Defective verification.*—A defective verification to an involuntary petition may be amended.⁶³ But an involuntary petition, which has not been verified in compliance with section 18-c of the act, may not be amended by filing *nunc pro tunc* another petition reciting the same facts and properly verified.⁶⁴

(VII) *Insertion of new act of bankruptcy.*—As a general rule an involuntary petition cannot be amended by setting out therein an act of bankruptcy not referred to in the original petition and occurring more than four months before application for the order allowing the amendment.⁶⁵ But such an amendment may be permitted if clearly in furtherance of justice, and if its omission from the original petition is properly excused.⁶⁶ Even if the court has power to allow an amendment to a petition setting up a new, separate, and independent act of bankruptcy which occurred more than four months before the application to insert it in the petition, it ought not to do so, except upon a showing that the petitioner was duly diligent and that the interests of justice require such action.⁶⁷ The tendency of the decisions is toward a more liberal practice in granting amendments and in some of the later decisions it has been held that it is discretionary with the court to permit the petitioner to insert by amendment additional acts of bankruptcy.⁶⁸ Where the amendment offered shows

61. *In re Freund* (Ref., N. Y.), 1 Am. B. R. 25.

62. *In re Richardson* (D. C., Mass.), 27 Am. B. R. 590, 192 Fed. 50.

63. *Armstrong v. Fernandez*, 208 U. S. 324, 19 Am. B. R. 746, 52 L. Ed. 514; *International Silver Co. v. New York Jewelry Co.* (C. C. A., 6th Cir.), 37 Am. B. R. 91, 233 Fed. 945.

64. *Matter of Frank* (D. C., Pa.), 37 Am. B. R. 19, 234 Fed. 665.

65. *In re Perlrefter* (D. C., N. Y.), 25 Am. B. R. 576, 177 Fed. 299; *In re Pure Milk Co.* (D. C., Ala.), 18 Am. B. R. 735, 154 Fed. 459; *In re Haff* (C. C. A., 2d Cir.), 13 Am. B. R. 362, 135 Fed. 742, 68 C. C. A. 380; *Wilder v. Watts* (D. C., S. Car.), 15 Am. B. R. 57, 138 Fed. 426. See also *Matter of Riggs Restaurant Co.* (C. C. A., 2d Cir.), 11 Am. B. R. 508, 130 Fed. 691; *Reed v. Cowley*, Fed. Cas. 11,644; *In re Morse*, Fed. Cas. 9,851; *In re Leonard*, Fed. Cas. 8,255.

Later act of bankruptcy.—A petition in involuntary bankruptcy may not be amended by the insertion of a further and later act of bankruptcy than the one set up originally. *In re Sears* (C. C. A., 2d Cir.), 8 Am. B. R. 713, 117 Fed. 294; *In re Cleary* (D. C., Pa.), 24 Am. B. R. 742, 179 Fed. 990. But see to the contrary *In re Hamrick* (D. C., Ga.), 23 Am. B. R. 721, 175 Fed. 279.

No act of bankruptcy originally alleged.—Where the original petition in an involuntary proceeding fails to allege an act of bankruptcy, it will not be amended so as to

allege an act committed more than four months before the application for the amendment. *In re Pure Milk Co.* (D. C., Ala.), 18 Am. B. R. 735, 154 Fed. 459; *Armour & Co. v. Miller* (C. C. A., 5th Cir.), 31 Am. B. R. 356, 209 Fed. 784.

66. *Hark v. Allen Co.* (C. C. A., 3d Cir.), 17 Am. B. R. 3, 146 Fed. 665; *White v. Bradley Timber Co.* (D. C., Ala.), 8 Am. B. R. 671, 116 Fed. 768, quoting this proposition from *Collier on Bankruptcy*; *Wilder v. Watts* (D. C., S. Car.), 15 Am. B. R. 57, 138 Fed. 423, holding that where the proposed amendment is not served upon the alleged bankrupt, and no excuse is made for its omission from the original petition, though known to the petitioner, the application for leave to amend is not in furtherance of justice and will be denied.

67. *Matter of Forbes* (D. C., Mass.), 37 Am. B. R. 511, 235 Fed. 316; *Matter of Lewis Shoe Co.* (D. C., Mass.), 38 Am. B. R. 134, 235 Fed. 1017.

68. *Pittsburgh Laundry Supply Co. v. Imperial Laundry Co.* (C. C. A., 3d Cir.), 18 Am. B. R. 756, 154 Fed. 662; *Hark v. C. M. Allen Co.* (C. C. A., 3d Cir.), 17 Am. B. R. 3, 146 Fed. 665; *In re Nusbaum* (D. C., N. Y.), 18 Am. B. R. 598, 152 Fed. 835; *In re Hamick* (D. C., Ga.), 23 Am. B. R. 721, 175 Fed. 279.

"A liberal policy in regard to the allowance of amendments to pleadings, both at common law and in equity is to be encouraged, where the amendments proposed tend to prevent a failure of justice through

acts of bankruptcy of like character as the one attempted to be shown in the original petition, the amendment should be allowed.⁶⁹ Thus, where an involuntary petition alleges the giving of a preference as an act of bankruptcy, an amendment will be allowed so as to permit the petitioner to set up the giving of another preference.⁷⁰

(VIII). *Amended petition filed after four months.*—An amended petition may be filed after four months have elapsed since the commission of the act of bankruptcy charged, especially where the same act is relied on, and it is alleged in substantially the same words; the amended petition relates back to the date of the original petition.⁷¹ But the doctrine of relation back is not applicable where the amendment sets up a new cause of action, or where to cause it to relate back would have the effect of depriving an adverse party of a substantial right on which no attack was made in the original pleading.⁷²

(2) PRACTICE.—General Order XI provides that “amendments shall be printed or written, signed and verified, like original petitions and schedules. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed.” This provision is not exclusive of the power to permit amendments inherent in the court.⁷³ Failure to verify an

technicalities, and where their allowance does not affect injuriously any just right of the opposite party.” *Hark v. Allen Co.* (C. C. A., 3d Cir.), 17 Am. B. R. 3, 146 Fed. 665.

Insolvency when act was committed.—The court has power to amend a petition in involuntary bankruptcy, which alleges insolvency only at the date of filing the petition, so as to show insolvency at the date the act of bankruptcy alleged was committed, where the facts disclosed by the schedules filed show the existence for several years previous of all debts except one, the assertion of such other debt on that date, and also indicate that the statement of assets runs back over that period. *In re Pangborn* (D. C., Mich.), 26 Am. B. R. 40, 185 Fed. 673.

69. *White v. Bradley Timber Co.* (D. C., Ala.), 8 Am. B. R. 671, 116 Fed. 768.

Where essential facts are alleged.—An insolvent who confesses judgment to his wife in an amount equal to the value of his only assets, and withholds execution, does not commit an act of bankruptcy within the meaning of section 3a (3) of the Bankruptcy Act; but an involuntary petition stating such facts may be amended so as to allege the acts of bankruptcy defined in clauses (1) and (2) of the same section. *Matter of Irish* (D. C., Pa.), 36 Am. B. R. 185, 228 Fed. 573.

70. *In re Lange* (D. C., N. Y.), 3 Am. B. R. 231, 97 Fed. 196; *In re Miller* (D. C., N. Y.), 5 Am. B. R. 140, 104 Fed. 764. See also *Chicago Motor Vehicle Co. v. American Oak Leather Co.* (C. C. A., 7th Cir.), 15 Am. B. R. 804, 141 Fed. 518, 72 C. C. A. 576.

Where the alleged preferential payments relied on as acts of bankruptcy occurred more than four months prior to the filing of an amended petition which asserts them, and were charged for the first time in that petition, and are new and independent preferen-

tial acts charged by way of substitution for the acts alleged in the original petition, and not mere enlargements and amendments to the alleged acts of bankruptcy set out in petitions filed within the proper four months' period, then and in that case the transactions have not arisen within the four months' period immediately preceding the filing of the petition and cannot be relied on as acts of bankruptcy. Where in an original petition in involuntary proceedings it was alleged that certain preferential payments were made to a bank within four months, an amended petition, which shows that said payment to the bank was in fact a payment made to creditors through the medium of the bank, is a mere explanation of the first act of bankruptcy charged, and not substituted or new items. *Matter of Brown Commercial Car Co.* (C. C. A., 7th Cir.), 36 Am. B. R. 45, 227 Fed. 387.

71. *Millan v. Exchange Bank* (C. C. A., 4th Cir.), 24 Am. B. R. 889, 183 Fed. 753; *Ryan v. Hendricks* (C. C. A., 7th Cir.), 21 Am. B. R. 570, 166 Fed. 94; *First State Bank of Corinth v. Haswell* (C. C. A., 8th Cir.), 23 Am. B. R. 330, 174 Fed. 209.

A bankruptcy court has jurisdiction to permit an amendment of an involuntary petition more than four months after the alleged preferential transfer, where the original petition was filed within four months, and omitted only the information necessary to enable the bankrupt to meet the charge. *International Silver Co. v. New York Jewelry Co.* (C. C. A., 6th Cir.), 37 Am. B. R. 91, 233 Fed. 945. But see *Matter of Lewis Shoe Co.* (D. C., Mass.), 38 Am. B. R. 134, 235 Fed. 1017.

72. *Armour & Co. v. Miller* (C. C. A., 5th Cir.), 31 Am. B. R. 356, 209 Fed. 784.

73. *In re Bellah* (D. C., Del.), 8 Am. B. R. 310, 116 Fed. 49.

amended petition as required by such general order may be corrected subsequently.⁷⁴ Amendments before adjudication can, it is thought, be granted only by the judge, and not by a referee sitting as a special master, though there is authority for the opposite view.⁷⁵ The practice varies. The application to amend may take the form of an oral motion on the trial.⁷⁶ The application to amend is not absolutely required to be in writing, although it is better practice to submit a written application. Notice of the application to amend may be waived by an express written consent to the amendment.⁷⁷ Usually it is made on a petition or affidavits, accompanied by a copy of or including the proposed amendments,⁷⁸ on due notice to the other parties. If granted, it relates back to the time the petition was filed and has the same effect as if included in the original petition.⁷⁹ The amendment does not advance the date of filing the petition so as to affect the four months' period as to preferences.⁸⁰ In conformity with this General Order a petition or application for leave to amend should show why the allegation proposed to be set forth by the amendment was not included in the original petition.⁸¹ An amendment which introduces new matter should be met by an answer, or it will be taken as admitted.⁸² It is thought that Equity Rules XXVIII to XXX suggest a good practice where amendment of an involuntary petition is desired. General Order VI has been held to imply a limitation on amendment.⁸³

IV. PROCESS AND SERVICE.

a. In general.—There is no need of process in voluntary cases; an adjudication usually follows and a reference is forthwith made to the referee. On the filing of an involuntary petition, the clerk must at once issue a subpoena. The failure to make timely service of a subpoena does not terminate the proceeding.⁸⁴

b. When returnable.—Subsection *a* provides that the process "shall be returnable within fifteen days, unless the judge shall for cause fix a longer

74. *International Silver Co. v. New York Jewelry Co.* (C. C. A., 6th Cir.), 37 Am. B. R. 91, 233 Fed. 945.

75. *In re Strait* (Ref., N. Y.), 2 Am. B. R. 308.

76. *Compare In re Waite*, Fed. Cas. 17,044. But there must be a formal application to amend, otherwise the question is not properly before the court. *In re Pressed Steel Wagon Goods Co.* (D. C., Mich.), 27 Am. B. R. 44, 193 Fed. 811.

77. *International Silver Co. v. New York Jewelry Co.* (C. C. A., 6th Cir.), 37 Am. B. R. 91, 233 Fed. 945.

78. See "Supplementary Forms," *post*, for forms for amendment of schedules, which may be adapted to cases where petitions only are to be amended. For form of petition to amend, see *Hagar & Alexander's Bankruptcy Forms*, (2d Ed.) No. 46.

79. *In re Beerman* (D. C., Ga.), 7 Am. B. R. 431, 112 Fed. 662; *In re Williams*, Fed. Cas. 17,700; *Bank v. Sherman*, 101 U. S. 403, affg. Fed. Cas. 12,765; *Chicago Motor Vehicle Co. v. American Oak Leather Co.* (C. C. A., 7th Cir.), 15 Am. B. R. 804, 141 Fed. 518, 72 C. C. A. 576; *Ryan v. Hendricks* (C. C. A., 7th Cir.), 21 Am. B. R. 570, 166 Fed. 94; *First State Bank of Corinth v.*

Haswell (C. C. A., 8th Cir.), 23 Am. B. R. 330, 174 Fed. 209.

80. *First State Bank of Corinth v. Haswell* (C. C. A., 8th Cir.), 23 Am. B. R. 330, 174 Fed. 209.

81. *In re Pure Milk Co.* (D. C., Ala.), 18 Am. B. R. 735, 154 Fed. 682, citing *Collier on Bankruptcy* on this proposition; *In re Portner* (D. C., Pa.), 18 Am. B. R. 89, 149 Fed. 799, holding that in the absence of information as to why the omission occurred in the original petition, the petitioner will be given time to secure such information and insert it in his petition for amendment. *In White v. Bradley Timber Co.* (D. C., Ala.), 8 Am. B. R. 671, 116 Fed. 768, where it was held that in the absence of showing why the acts of bankruptcy, set up in a proposed amended petition, were omitted from the original petition, a motion for leave to amend will be denied.

82. *In re Bining*, Fed. Cas. 1,420.

83. *In re Sears* (C. C. A., 2d Cir.), 8 Am. B. R. 713, 117 Fed. 294. But see to the contrary *In re Hamrick* (D. C., Ga.), 23 Am. B. R. 721, 175 Fed. 279.

84. *Gleason v. Smith* (C. C. A., 3d Cir.), 46 Am. B. R. 602, 145 Fed. 895.

time.”⁸⁵ Intervening Sundays should be counted.⁸⁶ This time is shorter than in the equity practice. An effort was made by the framers of the Ray amendatory bill to reduce the period to ten days. The Senate thought otherwise, and the law, therefore, remains as originally passed, viz.: “within fifteen days.”

c. Form of subpoena.—Forms in Bankruptcy, No. 5, is that ordinarily used as a subpoena to the alleged bankrupt. Form No. 4, being an order requiring the alleged bankrupt to show cause why the prayer of the petition should not be granted, is clearly an inadvertent inheritance from the practice under the former law, and, to say the least, confusingly superfluous. Under the present law, the subpoena has taken its place; the order to show cause is no longer required, and should be ignored as contrary to the law. Equity Rule XII requires a memorandum to be placed at the bottom of the subpoena, that the defendant is to enter his appearance in the suit in the clerk's office, on or before the day at which the writ is returnable. It has been held, however, that this memorandum is not essential.⁸⁷ A power of attorney to appear in response to a creditors' petition is not necessary. The duties of the clerk on the entry of appearances and pleas are prescribed in the General Orders. General Order III requires the subpoena to issue out of the court, under the seal thereof, and be tested by the clerk. A defect in this regard will be waived by an appearance without objection.⁸⁸

d. Service of process.—(1) **IN GENERAL.**—Service of the petition and writ of subpoena is to be made in the same manner that service of similar process is had upon the commencement of a suit of equity in the courts of the United States. This reference to the equity practice seems in effect to have enacted Equity Rule XIII into the law.⁸⁹ In case service cannot be made upon the bankrupt, it may be made under this rule by leaving the papers with an adult member of his family at his home.⁹⁰ Under the act as amended it has been held that service of a copy of an involuntary petition with a subpoena upon the clerk of the hotel of which the alleged bankrupt was proprietor and where he usually resided, is valid without publication.⁹¹ Personal service out of the district is unavailing.⁹²

(2) **SERVICE BY PUBLICATION.**—Where personal service, or service as authorized by Equity Rule XIII may not be made, notice must be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States. The section should be read in connection with section 8 of act of Congress of March 3, 1875 (now § 57 of Judicial Code), to the effect that when the alleged bankrupt is not an inhabitant of nor found within the district, and shall not voluntarily appear, it shall be lawful for the court to make an order directing such alleged bankrupt to appear to answer the petition

⁸⁵ The words “return day,” as used in this section, refer to the day fixed as the latest limit for the marshal's or other serving officer's return of the writ of subpoena into court. In re McDonald (D. C., Hawaii), 30 Am. B. R. 120.

⁸⁶ In re Francis Levy Outfitting Co., Ltd. (D. C., Hawaii), 29 Am. B. R. 13.

⁸⁷ Matter of Wing Yick Co. (D. C., Hawaii), 2 U. S., D. C., Hawaii 257, 13 Am. B. R. 360.

⁸⁸ Matter of Abbey Press C. C. A., 2d Cir.), 13 Am. B. R. 11, 134 Fed. 51.

⁸⁹ In re Risteen (D. C., Mass.), 10 Am. B. R. 494, 122 Fed. 732. See Equity Rules, *post*.

⁹⁰ In re Norton (D. C., N. Y.), 17 Am. B. R. 504, 148 Fed. 301.

⁹¹ In re Risteen (D. C., Mass.), 10 Am. B. R. 494, 122 Fed. 732.

⁹² Note Jobbins v. Montague, Fed. Cas. 7,329; Herndon v. Ridgway, 17 How. 424. But see Hills v. McKinniss Co. (D. C., Ohio), 26 Am. B. R. 333, 188 Fed. 1012.

by a day to be fixed, which order shall be served on such absent alleged bankrupt "if practicable, wherever found."⁹³ The amendatory act of 1903 added the exception that "unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time."⁹⁴ The proper basis for service by publication is an affidavit showing that personal service of process upon the bankrupt is impracticable, because he is absent from the jurisdiction or cannot be found.⁹⁵ The order for service by publication should designate the day upon which the defendant is required to appear, and demur, answer or plead.⁹⁶

(3) SERVICE ON CORPORATIONS, INFANTS, LUNATICS, ETC.—The statute makes no special provision relative to service on such parties. In the absence of controlling Federal rules of practice, the method prescribed by the State law may be followed, but, it seems, service cannot usually be made within the district on the officer of a non-resident corporation, temporarily therein.⁹⁷ The better practice in all cases not covered by Federal rules, is to secure an order directing how service shall be made.

(4) SERVICE ON NON-JOINING PARTNER.—Where one of two or more partners does not join in a voluntary petition for the bankruptcy of the firm, the proceeding is voluntary as to the petitioning partners and involuntary as to the non-joining partner; before an adjudication can be had, a subpoena must issue, and, with a copy of the petition, be served on the latter; and he may defend as though an alleged involuntary bankrupt.⁹⁸ If the petition be against a partnership, one of whose members is an absentee, he must be brought in by publication as if the petition were against him solely.⁹⁹

(5) SERVICE ON ABSENTEES.—An absconding debtor may be proceeded against in bankruptcy; the present law does not deny him a discharge although most previous laws, here and elsewhere, have. Cases of abscondence are frequent, and the method of service in such cases, especially where the debtor has left the country, differs in different districts.¹⁰⁰ That such method might be uniform and existing doubt be cleared up, the amendatory act of 1903 has provided a summary means of serving such a debtor by publication. It may have been that the words "as provided by law for notice by publication in suits in equity," in the original statute referred to § 738 (now Judicial Code, § 57)¹⁰¹ of the Revised Statutes, a bankruptcy proceeding being in the nature of a creditor's bill to assert an equitable lien. Still, there was doubt. There can be none now. Thus, absentee bankrupts can, in fact must, be served hereafter in the way prescribed by the section of the Revised Statutes above referred to, save that, unless the judge shall otherwise direct, the publication shall be

93. *Hills v. McKinniss Co.* (D. C., Ohio), 26 Am. B. R. 329, 188 Fed. 1012. See also *Bauman Diamond Co. v. Hart* (C. C. A., 5th Cir.), 27 Am. B. R. 632, 192 Fed. 498, holding that the order directing service by publication should be published.

94. As to number and times of publication, see *In re McDonald* (D. C., Hawaii), 30 Am. B. R. 120.

95. *Matter of Hoshida* (D. C., Hawaii), 32 Am. B. R. 451. Citing *Collier on Bankruptcy* (9th Ed.), 420.

96. *Bauman Diamond Co. v. Hart* (C. C.

A., 5th Cir.), 27 Am. B. R. 632, 192 Fed. 498.

97. *Godley v. Morning News*, 156 U. S. 518. Service on a director not legally elected is of no force. *In re Plasmon Co.* (D. C., N. Y.), 14 Am. B. R. 487.

98. General Order VIII.

99. *In re Murray* (D. C., Iowa), 3 Am. B. R. 601, 96 Fed. 600.

100. *In re Burka* (D. C., Tenn.), 5 Am. B. R. 843, 107 Fed. 674.

101. As modified concerning the time of publication by the act of March 3, 1875, now Judicial Code, § 57.

"not more than once a week for two consecutive weeks,¹⁰² and the return day shall be ten days after the last publication." In other words, service on absentees under the amendment, will take less than two weeks longer than personal service within the district.¹⁰³

(6) EFFECT OF SERVICE ON JURISDICTION IN PERSONAM AND IN REM.—It is not thought that that portion of § 738 (now Judicial Code, § 57) which, in cases of service by publication, limits the jurisdiction thus acquired to the property of the bankrupt within the district, is applicable to a proceeding in bankruptcy. The whole theory of that proceeding is against such a view. On adjudication, the trustee becomes vested with the bankrupt's property, wherever it is, and, subject to the orders of the court whose officer he is, may take possession of it and dispose of it as freely as the bankrupt could before the petition was filed.¹⁰⁴ Even should the opposite view prevail, ancillary proceedings in the other districts will supply the necessary jurisdiction.¹⁰⁵

(7) MEANING OF AMENDMENTS OF 1903.—The changes made by the amendatory act probably mean that (a) service must hereafter be either personal under the rules in equity¹⁰⁶ within the district or by publication, (b) that, in either event, the return day shall be, in the one case, not more than fifteen, and in the other case not more than ten days after the last publication, while (c) the jurisdiction, both *in personam* and *in rem*, at least remains as it was before the amendments.¹⁰⁷

(8) EFFECT OF DELAY IN SERVICE.—The provision of subsection *a* relative to the time within which a subpoena is returnable do not necessarily affect the time within which a subpoena must be served. The subsection should be deemed to be directory merely, and intended to secure system, uniformity and dispatch in the conduct of public business.¹⁰⁸ It therefore follows that the jurisdiction of the court is not affected by a failure to serve the subpoena within fifteen days subsequent to its issue.¹⁰⁹

(9) DEFECTS IN SUBPENA OR SERVICE.—Any objection as to the sufficiency of the subpoena or the regularity of its service is waived by the appearance of the bankrupt.¹¹⁰ If such defects exist, the bankrupt should move either to quash the subpoena or to set aside the order of publication.¹¹¹

(10) PROOF OF SERVICE.—If the subpoena is served by the marshal or his deputy, return is made by the usual certificate duly indorsed. If served by some other designated person, by affidavit thereof.¹¹²

V. APPEARANCES AND PLEADINGS.

a. Who may appear and plead.—Subsection *b* provides that either the bankrupt or any creditor may appear and plead to the petition. The term "bank-

102. In re Bellamy, Fed. Cas. 1,266. See also In re Hall, Fed. Cas. 5,922; Hills v. McKinniss Co. (D. C.; Ohio), 26 Am. B. R. 329, 188 Fed. 1012.

103. For form of order, see "Supplementary Forms," *post*; Hagar & Alexander's Bankruptcy Forms (2d Ed.), No. 45.

104. Compare Bankr. Act, § 70-a.

105. Compare Lathrop v. Drake, 91 U. S. 516; 23 L. Ed. 414; Shainwald v. Lewis, 5 Fed. 513; Mason v. Hartford, 19 Fed. 53.

106. Compare In re Risteen (D. C., Mass.), 10 Am. B. R. 494, 122 Fed. 732.

107. For reasons for these changes, see

Report of Ex. Com. of Referees in Bankruptcy, published March, 1900, p. 24.

108. In re Stein (C. C. A., 2d Cir.), 5 Am. B. R. 288, 105 Fed. 749.

109. Matter of Frischberg (Ref., N. Y.), 8 Am. B. R. 606; Gleason v. Smith (C. C. A., 2d Cir.), 16 Am. B. R. 602, 145 Fed. 895; In re Stein (C. C. A., 2d Cir.), 5 Am. B. R. 288, 105 Fed. 749.

110. In re Smith (D. C., Conn.), 9 Am. B. R. 98, 117 Fed. 961.

111. Romaine v. Union Ins. Co., 28 Fed. 625, at 634-635; Gregory v. Pike, 79 Fed. 520.

112. See Equity Rule XV.

rupt" here means the alleged bankrupt.¹¹³ The term "creditor" includes any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney or proxy.¹¹⁴ Under the former law, creditors, even if secured or preferred, and even attachment creditors, could resist an involuntary petition.¹¹⁵ Under the present law the right to resist is limited to a creditor who owns a demand or claim provable in bankruptcy. The authority thus conferred upon a creditor to plead to the petition is in recognition of the interest which he may have in permitting his debtor to continue a business where such debtor is not insolvent and if left alone may be able to meet his obligations.¹¹⁶ Some doubt has arisen as to whether an attachment creditor may plead to the petition. The definition of the term "creditor," it has been held, should not be so construed as to preclude a creditor from resisting an adjudication where the issues raised by his answer establish *per se*, not strictly a provable claim but rights as a creditor in fact which entitle him to the protection of the court.¹¹⁷ And in a carefully considered case it has been stated that from the fact that this section makes express provision for the exercise by the bankrupt or by any creditor of a right to appear and resist an adjudication of involuntary bankruptcy does not preclude the court from permitting participation in the proceedings by other parties shown to be interested in the result thereof, as, for instance, in the case of a judgment creditor who obtained a judgment for a personal injury, not "wilful and malicious," subsequent to filing the petition but before adjudication.¹¹⁸ It is held that an attaching creditor may be a party to a proceeding in involuntary proceedings.¹¹⁹ A

113. Bankr. Act, § 1(4).

114. Bankr. Act, § 1(9).

115. In re Hatje, Fed. Cas. 6,215; In re Bergerson, Fed. Cas. 1,342; In re Jack, Fed. Cas. 7,119. Consult also In re Frost, Fed. Cas. 5,134; In re Green Pond R. Co., Fed. Cas. 5,786; In re Williams, Fed. Cas. 17,703.

116. In re Billing (D. C., Ala.), 17 Am. B. R. 80, 145 Fed. 395.

117. In re Moench & Sons (D. C., N. Y.), 10 Am. B. R. 590, 123 Fed. 965.

118. Others interested in proceedings.—In the case of Jackson v. Wauchula Mfg. & Timber Co. (C. C. A., 5th Cir.), 36 Am. B. R. 408, 230 Fed. 409, the court said: "Obviously, as the plaintiff is the owner of the judgment he had recovered, he was vitally concerned in the question of the estate of the judgment defendant—which was the thing brought under the sole control of the bankruptcy court by the filing of the involuntary petition—being subjected to the diminishing process of a bankruptcy administration, out-comes to be expected being a lessening of the chance of his demand being satisfied out of the estate in existence, and a discharge of the judgment defendant, operating to release its liability under the judgment. From the fact that the Bankruptcy Act (§ 18b) makes express provision for the exercise by the bankrupt or by any creditor of a right to appear and plead to a petition for involuntary bankruptcy, it does not follow that it was a purpose of the Act to withhold from the court of bankruptcy the power of permitting participation in the proceedings by other parties shown to be interested in the

result of them. Nothing in the Act stands in the way of the conclusion that the court of bankruptcy has the power to permit an involuntary petition to be resisted by one other than the debtor or a creditor within the meaning of the Act, who shows that he has an interest in the estate in the court's charge which would be prejudicially affected by an adjudication of bankruptcy on that petition and the consequences which might be expected to follow from such adjudication. Blackstone v. Everybody's Store (C. C. A., 1st Cir.), 30 Am. B. R. 497, 207 Fed. 752; Altonwood Park Co. v. Gwynne (C. C. A., 2d Cir.), 20 Am. B. R. 31, 160 Fed. 448, 87 C. C. A. 409; In re Cooper Brothers (D. C., Pa.), 20 Am. B. R. 392, 159 Fed. 956; In re Simonson (D. C., Ky.), 1 Am. B. R. 197, 92 Fed. 904. When such an interest is shown by an applicant for leave to take up a valid defense which the alleged bankrupt made in due time, but subsequently unwarrantably abandoned, the application may not properly be denied upon the ground of a lack of power in the court to permit the applicant to participate in the proceeding."

119. In re Moench & Sons Co. (D. C., N. Y.), 10 Am. B. R. 590, 123 Fed. 965; In re Hornstein (D. C., N. Y.), 10 Am. B. R. 308, 113 Fed. 421; In re Schenkein (Spec. M., N. Y.), 7 Am. B. R. 162, 113 Fed. 421. See also In re Burlington Malting Co. (D. C., Wis.), 6 Am. B. R. 369, 109 Fed. 777; In re Rogers Milling Co. (D. C., Ark.), 4 Am. B. R. 540, 102 Fed. 687.

Where the attachment creditor is the petitioner he may be required to surrender his

preferred creditor or one who is secured and stands alone on his security should not be permitted to oppose an adjudication of involuntary bankruptcy.¹²⁰ This doctrine excludes resistance to involuntary proceedings by creditors who are secured in full. It has been held that a receiver of a corporation in possession of its property may contest the adjudication of the corporation as a bankrupt, on the ground that it is his right and duty to see that the jurisdiction of the court which appointed him is not improperly ousted.¹²¹

b. Effect of voluntary appearance by bankrupt.—A voluntary appearance by the bankrupt is equivalent to personal service, but only so far as to confer jurisdiction of the person.¹²²

c. When to appear and plead.—Subsection *b* provides that the appearance must be within five days after the return day or within such further time as the court may allow. The amendment of 1903 changed the time within which to appear and plead from ten to five days. The time does not expire until the last day limited.¹²³ As the creditors are entitled to resist the petition, an adjudication should not be made before the expiration of the full time, even though the bankrupt voluntarily appears and consents to the adjudication.¹²⁴ But the adjudication is not necessarily null because it is made before the expiration of the time for creditors to appear and contest it, and it will be sustained when not directly attacked by a creditor.¹²⁵ The provisions of § 59-f providing that

attachment lien before an order of adjudication will be made. In *re Hornstein* (D. C., N. Y.), 10 Am. B. R. 308, 122 Fed. 266.

120. Creditors of bankrupt.—In the case of *In re Columbia Real Estate Co.* (C. C. A., 7th Cir.), 7 Am. B. R. 441, 112 Fed. 643, the court referred to the definition of the term "creditor" contained in §§ 1(9), and 59-b to the effect that petitioners for the adjudication shall be "creditors who have provable claims against" the alleged bankrupt, and said: "We are of the opinion from these provisions and their consistency with the general tenor of the act that the intention clearly appears that the only claimants who are entitled to hearing on the issue of involuntary bankruptcy, aside from the bankrupt, are the creditors of the bankrupt; that creditors having security or priority are excluded therefrom to the extent of their security or priority, and can be recognized only in that issue for unsecured or unpreferred amounts; that even as a creditor one who is secured and stands alone on his security can neither invoke nor oppose an adjudication of involuntary bankruptcy."

121. Matter of Hudson River Electric Power Co. (D. C., N. Y.), 23 Am. B. R. 191, 173 Fed. 934; *Blackstone v. Everybody's Store, Inc.* (C. C. A., 1st Cir.), 30 Am. B. R. 497, 207 Fed. 752; *Butler & Co. v. Pelmenberg* (C. C. A., 1st Cir.), 30 Am. B. R. 502, 516, 207 Fed. 705.

122. In re Mason (D. C., N. Car.), 3 Am. B. R. 599, 99 Fed. 256; In *re Altman* (Ref., N. Y.), 1 Am. B. R. 689; *Shutts v. Bank* (D. C., Ind.), 3 Am. B. R. 492, 98 Fed. 705; In *re Frischberg* (Ref. N. Y.), 8 Am. B. R. 607; In *re Western Investment Co.*

(D. C., Okl.); 21 Am. B. R. 367, 170 Fed. 677.

Objection to jurisdiction.—Entire want of jurisdiction over the subject-matter may be taken advantage of at any time. It is never too late to make such an objection, and the jurisdiction may be attacked collaterally. But where the objection goes merely to a want of jurisdiction of the person or the thing, there may be a waiver of the objection, or restriction as to the manner and time of making it. A creditor cannot prove his claim, participate in the election of the trustee and distribution of the assets, and then, upon the application for a discharge, object to the jurisdiction on account of the bankrupt's non-residence. In *re Mason* (D. C., N. Car.), 3 Am. B. R. 599, 99 Fed. 256.

Withdrawal of appearance.—If the alleged bankrupt appears generally, such appearance cannot be withdrawn so as to divest the court of jurisdiction. In *re Ulrich*, 3 Ben. 355.

123. Day v. Beck, etc., Co. (C. C. A., 5th Cir.), 8 Am. B. R. 175, 114 Fed. 834.

124. In re Humbert (D. C., Iowa), 4 Am. B. R. 76, 100 Fed. 439. Compare *In re Columbia Real Estate* (D. C., Ind.), 4 Am. B. R. 411, 101 Fed. 965, where adjudication by consent on the day the petition was filed was, however, held not null and void. See also for far-reaching effect of an adjudication by default, *In re American Brewing Co.* (C. C. A., 7th Cir.), 7 Am. B. R. 463, 112 Fed. 752.

125. In re Western Investment Co. (D. C., Okl.), 21 Am. B. R. 367, 170 Fed. 677; In *re Columbian Real Estate Co.* (D. C., Ind.), 4 Am. B. R. 411, 101 Fed. 965, wherein the court said: "There is nothing in section 18

creditors other than the original petitioners may at any time enter their appearance and file an answer was not intended to permit creditors to come in at any time, but such provisions are limited by and should be construed with subsection *b* of this section.¹²⁶ The absolute right of a creditor to answer or demur ceases upon the expiration of such time and an appearance or pleading thereafter is within the judicial discretion of the court.¹²⁷ Appearance or pleading, or both, may be permitted "within such further time as the court may allow," and a meritorious pleading filed late may be considered, if so ordered by the judge.¹²⁸ Where the answer or demurrer is not simply for the purpose of delay, the time to plead or answer may be extended in proper cases.¹²⁹ But the court will not usually grant long extensions, or those for which good reasons are not given.¹³⁰ A mere stipulation, not brought to the attention of the court or resulting in an order, is, in the absence of rules to the contrary, not sufficient.¹³¹

d. How appearances are made.—The statute does not prescribe the manner of making appearances. A practice is suggested in General Orders IV and XXXII, and Equity Rule XVII. There is no form prescribed, but those used in the equity practice may be followed.¹³² Appearances may be in person or by attorney; if the latter, the attorney must be one admitted to practice in the district court of the district.¹³³ But the proceedings will not be set aside upon the ground that the attorney appearing for a voluntary bankrupt has not been admitted to practice in the Federal courts.¹³⁴ The appearance in

of the bankruptcy act which precludes a waiver of process, a voluntary appearance of the bankrupt, and an answer admitting bankruptcy on the day the petition is filed. An adjudication on a voluntary appearance and an answer admitting the averments of the petition would certainly conclude the bankrupt who entered the appearance and filed the answer. It may be when an adjudication has been made without service of process, and before the expiration of 15 days that the creditors might, upon seasonable application, procure an order vacating the adjudication so far as to allow them to plead and be heard in opposition to the petition. But such right must be exercised with reasonable promptness after actual or constructive notice of the adjudication."

126. *In re Mutual Mercantile Agency* (D. C., N. Y.), 6 Am. B. R. 607, 111 Fed. 152.

127. *In re First Nat'l Bank of Belle Fourche* (C. C. A., 8th Cir.), 18 Am. B. R. 265, 152 Fed. 64, holding that it was no abuse of discretion to deny an application for permission to answer where the application was not made until more than five weeks after the adjudication and the creditors were aware of the filing of the petition within forty-eight hours thereafter, and the administration of the estate had proceeded in the meantime without objection.

Revision of adjudication.—There is no time fixed in the bankruptcy act within which a petition for revision of an adjudication in bankruptcy shall be presented, but as an appeal from adjudication is required to be taken within ten days, by analogy it would seem that a petition for revision ought to

be taken within a similar time, unless there are circumstances excusing the delay; but courts have generally held that a petition for revision must be presented within six months. *Blanchard v. Ammons* (C. C. A., 9th Cir.), 25 Am. B. R. 590, 183 Fed. 556.

Appearance and pleading by creditors.—Where it is sought to put in default all persons who have a right to appear and plead to an involuntary petition, the usual subpoena limiting the time in which to appear to five days should be issued; otherwise the adjudication will not be binding on those who do not consent to it if they appear within a reasonable time and ask to plead. *B. R. Electric & Telephone Mfg. Co. v. Aetna Life Ins. Co.* (C. C. A., 8th Cir.), 30 Am. B. R. 424, 206 Fed. 885.

128. *General Order XXXII. Compare In re Simonson* (D. C., Ky.), 1 Am. B. R. 197, 92 Fed. 904.

129. *In re Cooper Bros.* (D. C., Pa.), 20 Am. B. R. 392, 159 Fed. 956; *Blackstone v. Everybody's Store, Inc.* (C. C. A., 1st Cir.), 30 Am. B. R. 497, 207 Fed. 752, holding that the grant of an extension is discretionary and will not be disturbed on appeal.

130. *In re Heinsfurter* (D. C., Iowa), 3 Am. B. R. 109, 97 Fed. 198.

131. *In re Simonson* (D. C., Ky.), 1 Am. B. R. 197, 92 Fed. 904.

132. For forms see "Supplementary Forms," *post*; *Hagar & Alexander's Bankruptcy Forms* (2d Ed.), No. 12.

133. *General Order IV.*

134. *In re Kindt* (D. C., Iowa), 3 Am. B. R. 546, 98 Fed. 867.

court of an attorney-at-law licensed to practice there carries with it the presumption of authority to appear and act for his client in the proceeding in which he seeks to represent him. His mere appearance is *prima facie* evidence that he is duly authorized to represent and act for his client, and this presumption is conclusive in the absence of countervailing evidence.¹³⁵ The authority of an attorney to appear cannot be questioned by the answer of the defendant debtor.¹³⁶

e. Pleadings which may be entered; answer or demurrer.—(1) **IN GENERAL.**—The pleadings which may be entered in a bankruptcy proceeding are those fixed by the equity rules established by the Supreme Court.¹³⁷ The bankrupt or any creditor may (a) demur or answer,¹³⁸ and the petitioning creditors may (b) except to the answer, or, in proper cases, may (c) file a general replication. If the demurrer is sustained, leave to answer is usually granted. In these ways, the issue is framed.¹³⁹ But the judge may modify these rules in "any particular case so as to facilitate a speedy hearing."¹⁴⁰

(2) **AMENDMENTS.**—Amendments to all pleadings, other than the petition, and perhaps even amendments to involuntary petitions, should be made in accordance with the practice outlined in the equity rules.¹⁴¹ If a jury trial is desired, it should be applied for when the answer is entered, but in a separate paper.¹⁴² Where the creditor shows no proposed amended answer, no newly discovered facts, and no information as to what new defenses he desires to set up, he should not be permitted to amend.¹⁴³

(3) **ANSWER OR DEMURRER.**—The form of the answer is suggested by Form No. 6; but "the denial of bankruptcy," may also contain any available defense or counterclaim.¹⁴⁴ The form prescribed by the Supreme Court is not exclusive in its provisions.¹⁴⁵ If the answer is prolix and admixed with supposed grounds of demurrer, and does not admit or unequivocally deny the material facts of the petition, it may be stricken out.¹⁴⁶ If it requires argument to show that an answer is frivolous it may not be overruled on that ground.¹⁴⁷ When a petition does not show all the jurisdictional facts, as that the alleged bankrupt is not

^{135.} *In re Gasser* (C. C. A., 8th Cir.), 5 Am. B. R. 32, 104 Fed. 537, holding that an attorney admitted to practice in the district court, who enters his appearance and files objections to the discharge of a bankrupt, must be presumed to have authority to do so without any special written power of attorney to take such action.

^{136.} *Gage Co. v. Bell* (D. C., Tenn.), 10 Am. B. R. 696, 124 Fed. 371.

^{137.} General Order XXXVII. Compare for meaning of "proceedings in bankruptcy," *Bardes v. Bank*, 178 U. S. 524, 4 Am. B. R. 163, 44 L. Ed. 1175.

^{138.} The two have even been combined in one pleading. *In re Stern* (C. C. A., 2d Cir.), 8 Am. B. R. 569, 116 Fed. 604. For a case where demurrer was interposed, see *In re Ewing* (C. C. A., 2d Cir.), 8 Am. B. R. 269, 115 Fed. 707. See also *In re Randall*, Fed. Cas. 11,551; *Orem v. Harley*, Fed. Cas. 10,567.

^{139.} See Equity Rules XXXI to XLVI, LIX and LXI to LXVI.

^{140.} General Order XXXVII.

^{141.} See Equity Rules XXVIII to XXX. Compare *In re Hyde & Gload Mfg. Co.* (D. C., N. Y.), 4 Am. B. R. 602, 103 Fed. 617.

See also "Amendment of Petition," in this section, *ante*.

^{142.} See under Section Nineteen of this work, and for forms, "Supplementary Forms," *post*; *Hagar & Alexander's Bankruptcy Forms* (2d Ed.), Nos. 22, 23, 24.

^{143.} *Knapp & Spencer Co. v. Drew* (C. C. A., 8th Cir.), 20 Am. B. R. 355, 160 Fed. 413.

^{144.} *In re Paige* (D. C., Ohio), 3 Am. B. R. 679, 99 Fed. 538. Compare *Hill v. Levy* (D. C., Va.), 3 Am. B. R. 374, 98 Fed. 94; *Leidigh Carriage Co. v. Stengel* (C. C. A., 6th Cir.), 2 Am. B. R. 383, 95 Fed. 637; *Bray v. Cobb* (D. C., N. Car.), 1 Am. B. R. 153, 91 Fed. 102. See cases digested. Am. B. R. Dig., §§ 260, 261. For forms of answers, see *Hagar & Alexander's Bankruptcy Forms* (2d Ed.), Nos. 19-21.

^{145.} *In re Paige* (D. C., Ohio), 3 Am. B. R. 679, 99 Fed. 538.

^{146.} *Bradley Timber Co. v. White* (C. C. A., 5th Cir.), 10 Am. B. R. 329, 121 Fed. 779, affg. 9 Am. B. R. 441.

^{147.} *Consolidated Rubber Tire Co. v. Vehicle Equipment Co.*, 121 N. Y. App. Div. 64, 19 Am. B. R. 862, 106 N. Y. Supp. 599.

within the excepted classes, the proper plea is a demurrer.¹⁴⁸ In such a case, however, as in all cases where the defense goes to the jurisdiction, the objection may be taken by answer as well,¹⁴⁹ but, where the answer is on the merits, it waives the demurrer,¹⁵⁰ or special defense to the jurisdiction of the court.¹⁵¹ Where both an answer and demurrer are interposed, both to the entire petition, the demurrer will be deemed waived by the answer.¹⁵² A demurrer cannot, it seems, be interposed to an answer, but the points which might be raised by such a demurrer may be raised on the hearing of the petition and answer.¹⁵³ Where an involuntary petition charges as an act of bankruptcy a preferential transfer within the four months' period, a denial of the commission of the act of bankruptcy is sufficient as a denial of insolvency, where it is so regarded by the practitioners and the parties proceed to the taking of proof.¹⁵⁴ Where the answer is multifarious and in response to a multifarious petition, leave will be granted to amend and file as of the day the original petition was filed.¹⁵⁵ If no replication is filed to the answer, the latter is taken as true, and, if it alleges jurisdictional defects and no proofs are taken, a dismissal must result.¹⁵⁶ Useful precedents will be found in the numerous cases on equity rules and practice in the Federal courts. Some of the defenses urged under the former law will be found in the foot-note.¹⁵⁷

148. *Green River Dep. Bank v. Craig Bros.* (D. C., Ky.), 6 Am. B. R. 381, 110 Fed. 137.

149. *In re Taylor* (C. C. A., 7th Cir.), 4 Am. B. R. 515, 102 Fed. 728.

150. *Green River Dep. Bank v. Craig Bros.* (D. C., Ky.), 6 Am. B. R. 381, 110 Fed. 137; *Leidigh Carriage Co. v. Stengel* (C. C. A., 6th Cir.), 2 Am. B. R. 383, 95 Fed. 637; *In re Cliffe* (D. C., Penn.), 2 Am. B. R. 317, 94 Fed. 354. And this is so though the answer expressly asserts an intention not to waive the objection. *Green River Dep. Bank v. Craig Bros.* (D. C., Ky.), 6 Am. B. R. 381, 110 Fed. 137. By reserving an answer the bankrupt waives any error in a previous ruling on a demurrer. *Pollack v. Meyer Brothers Drug Co.* (C. C. A., 8th Cir.), 36 Am. B. R. 835, 233 Fed. 861.

151. *Clark-Herren-Campbell Co. v. Clafflin Co.* (C. C. A., 5th Cir.), 33 Am. B. R. 414, 218 Fed. 429.

152. *In re Cooper Bros.* (D. C., Pa.), 20 Am. B. R. 392, 159 Fed. 956.

Waiver of demurrer.—Where a trustee in bankruptcy filed a petition alleging that the bankrupt had property belonging to his estate which he knowingly and fraudulently concealed from his trustee, and on this petition a rule was granted to show cause why he should not transfer to the trustee property to the amount claimed, and the bankrupt filed a demurrer and answer to the whole petition, it was held that the demurrer was waived by the answer and that it was proper for the referee to refuse to discharge the rule on the bankrupt to deliver the property to the trustee. *In re Koplin* (D. C., Penn.), 24 Am. B. R. 534, 175 Fed. 1013.

153. *Goldman v. Smith* (D. C., Ky.), 1 Am. B. R. 266, 98 Fed. 182, and cases there

cited. But where the counsel on both sides have argued a demurrer to an answer, as raising the sufficiency thereof, the court may dispose of the question. *Goldman v. Smith* (D. C., Ky.), 1 Am. B. R. 266, 98 Fed. 182.

154. *Troy Wagon Works v. Vastbinder* (D. C., Penn.), 12 Am. B. R. 352, 130 Fed. 232.

Insufficient denial of insolvency.—Upon the petition of creditors for an adjudication of bankruptcy against their debtor, it being alleged that there had been a conveyance of a large amount of real estate in trust for the benefit of a creditor with intent to prefer such creditor, the alleged bankrupt answered denying "that within four months next preceding the date of filing of said petition . . . he transferred while insolvent a portion of his property . . . for the use of the Bank of Commerce and Trust Company," etc. Held, that the answer was not in proper form as it contained no express denial of insolvency, such denial being only by way of negative pregnant and would have been stricken out before issue joined, but that by replying to said answer and joining issue thereon, petitioning creditors lost their right to move to strike out the plea. *Cummins Grocery Co. v. Talley* (C. C. A., 6th Cir.), 26 Am. B. R. 484, 187 Fed. 507.

155. *Mather v. Coe* (D. C., Ohio), 1 Am. B. R. 504, 92 Fed. 333. See also *In re Ogles* (D. C., Tenn.), 1 Am. B. R. 671, 93 Fed. 426.

156. *In re Taylor* (C. C. A., 7th Cir.), 4 Am. B. R. 515, 102 Fed. 728.

157. *In re Williams*, Fed. Cas. 17,703; *In re Skelley*, Fed. Cas. 12,921; *In re Cornwall*, Fed. Cas. 3,250; *In re Sheehan*, Fed. Cas. 12,738; *In re Derby*, Fed. Cas. 3,815; *In re Martin*, Fed. Cas. 9,150; *In re Cal. P. R. Co.*, Fed. Cas. 2,315.

VI. VERIFICATION OF PLEADINGS.

a. **In general.**— Subsection *c* provides that “all pleadings setting up matters of fact shall be verified under oath.” Such verification must be had before one of the officers designated in § 20. This requirement applies to specifications of objections to the discharge of a bankrupt, such specifications being deemed pleadings within the meaning of the word as used in this subsection.¹⁵⁸ All pleadings setting up matters of fact must “be verified under oath.” By analogy to this requirement, district rules often also require petitions in a proceeding subsequent to the adjudication to be under oath. Under the former law, each of the petitioning creditors was obliged to verify the petition,¹⁵⁹ and this is probably so now; but, in case the petition is not verified by one of several petitioning creditors, a motion to dismiss for want of jurisdiction¹⁶⁰ will be overruled, and an opportunity given to supply the omission.¹⁶¹ The defect of want of verification may be waived by failure to object.¹⁶² A defect in the verification is not jurisdictional and answering on the merits waives it.¹⁶³ The filing of an answer without special objection to the failure of verification will constitute a waiver.¹⁶⁴ A verification made before a notary public is defective in the statement of the venue if it does not show the verification to have been taken within the jurisdiction of the notary.¹⁶⁵ Where the petitioning creditor or pleader is a partnership, the oath should be by one of the partners; where a corporation, by an officer, in each case acquainted with the facts.¹⁶⁶ The verification of an involuntary petition is not subject to the rules of competency with respect to hearsay testimony, and hence a statement in the verification that the petitioner believed the matter alleged in the petition on information and belief to be true is not sufficient ground for the dismissal of the petition, although such statement should not be used and is mere surplusage.¹⁶⁷

158. *In re Baerncopf* (D. C., Penn.), 9 Am. B. R. 133, 117 Fed. 975; *In re Taylor* (D. C., Ala.), 26 Am. B. R. 143, 147, 188 Fed. 479; *In re Miller* (D. C., Iowa), 27 Am. B. R. 606, 192 Fed. 730. See cases cited under Section Fourteen of this work, p. 329, *ante*.

159. *In re Rosenfields*, Fed. Cas. 12,061; *In re Simmons*, Fed. Cas. 12,864.

160. *Ex parte Jewett*, Fed. Cas. 7,303.

161. *Green River Dep. Bank v. Craig Bros.* (D. C., Ky.), 6 Am. B. R. 381, 110 Fed. 137, wherein the court said: “A motion for a rule to require a proper verification would probably be the better step, and if such rule was not complied with, the court might then dismiss the petition for that reason.”

162. *In re Main* (D. C., Iowa), 30 Am. B. R. 547, 205 Fed. 421.

163. *Leidigh Carriage Co. v. Stengel* (C. C. A., 6th Cir.), 2 Am. B. R. 383, 95 Fed. 637; *Simonson v. Sinsheimer*, 95 Fed. 948, affg. S. C., 1 Am. B. R. 197, 92 Fed. 904; *In re Herzikopf* (D. C., Cal.), 9 Am. B. R. 90, 118 Fed. 101.

164. *Badders Clothing Co. v. Burnham-Munger-Root Dry Goods Co.* (C. C. A., 8th Cir.), 36 Am. B. R. 115, 228 Fed. 470, holding statements in an answer, that the petition does not conform to the bankruptcy act, and that the facts alleged do not confer jurisdic-

tion nor entitle petitioners to relief, are too general to challenge the verification, and defects therein may be deemed to have been waived.

165. *In re Brumelkamp* (D. C., N. Y.), 2 Am. B. R. 318, 95 Fed. 814.

166. Where a corporation and a partnership join in an involuntary petition, the president of the corporation and a member of the firm may make the verification. *In re Walker* (C. C. A., 9th Cir.), 21 Am. B. R. 132, 164 Fed. 680.

167. *Matter of Ball* (D. C., N. Y.), 19 Am. B. R. 609, 156 Fed. 682.

A verification made by the petitioning creditors that the statements contained in an involuntary petition were true, “according to the best of their knowledge, information and belief,” is defective, as not complying with the official form, but since the verification is not jurisdictional, such defect is not fatal, so as to work a dismissal of the petition, and may be cured by amendment. *In re Farthing* (D. C., N. Car.), 29 Am. B. R. 732, 202 Fed. 557.

Verification on knowledge and belief.— The verification of an involuntary petition, by a statement that “the facts contained in the foregoing petition are true,” as the petitioners “verily believe,” is insufficient, where there is nothing in the petition showing or

If it appear upon the trial that the petitioners who verified the petition had no knowledge of any of the acts alleged therein, and that they did not make oath to the notary public who attached his jurat thereto, the verification is inadequate, and the petition should be dismissed,¹⁶⁸ and in such a case it may not be amended by filing *nunc pro tunc* another petition reciting the same facts and properly verified.¹⁶⁹ A verification is defective if made before a notary public who is one of the attorneys for the party making the verification.¹⁷⁰ But a verification may be made before an attorney, as notary public, who is not yet the attorney of record of the affiant.¹⁷¹

b. Verification by attorney.—There is some conflict among the authorities whether an attorney in fact may verify a petition where the facts are within his knowledge. The weight of authority seems to be in favor of the proposition that he may verify the petition.¹⁷² Though, when the creditor is present and the facts are within his knowledge, he doubtless ought to make the verification.¹⁷³ General Order IV requires no other evidence of an attorney's authority than the fact of his admission to practice in the circuit or district court.¹⁷⁴ The affidavit should be positive, based upon actual knowledge of the attorney.¹⁷⁵

VII. TRIALS IN INVOLUNTARY CASES

a. Without a jury.—Subsection *d* provides in effect that if the facts alleged in the petition are duly traversed by an answer, the judge must "determine, as soon as may be, the issues presented by the pleadings, without the interven-

tending to show that the qualification as to the petitioners' belief was necessary to suit the circumstances of the particular case. Although a verification of a petition in involuntary bankruptcy upon belief is insufficient, the defect is not jurisdictional and may be cured by amendment. *Sabin v. Blake-McFall Co.* (C. C. A., 9th Cir.), 35 Am. B. R. 179, 223 Fed. 501.

^{168.} *Matter of Frank* (D. C., Pa.), 37 Am. B. R. 19, 234 Fed. 665 [affd. (C. C. A., 3d Cir.) 38 Am. B. R. 674], in which case the court said "The filing of a petition in bankruptcy is not a matter to be recklessly undertaken. The business, the credit, the financial standing, the property and reputation of the person against whom the petition is filed are at stake. The filing of the petition is frequently followed by the appointment of a receiver, which results in taking away from the alleged bankrupt all of his property, closing up and ruining his business and destroying his credit. Thus irreparable damage may result from an honest mistake. Stringent as the provisions of the Act are, they do not contemplate that creditors may invoke the jurisdiction of the court where, without knowledge of the facts, they recklessly subscribe to a petition setting out acts of bankruptcy without even the so-called 'formality' of having appeared before a notary public for the purpose of making oath to the petition, and where the notary public falsely certifies that oath was made before him. Such a certificate is not a verification. It is a falsification."

^{169.} *Matter of Frank* (D. C., Pa.), 37 Am. B. R. 19, 234 Fed. 665, affd. (C. C. A., 3d Cir.) 38 Am. B. R. 674.

^{170.} *In re Brumelkamp* (D. C., N. Y.), 2 Am. B. R. 318, 95 Fed. 814.

^{171.} *In re Kindt* (D. C., Iowa), 3 Am. B. R. 443, 101 Fed. 107.

^{172.} *In re Vastbinder* (D. C., Penn.), 11 Am. B. R. 118, 126 Fed. 417; *In re Hunt* (D. C., Iowa), 9 Am. B. R. 251, 118 Fed. 282; *In re Herzikopf* (D. C., Cal.), 9 Am. B. R. 90, 118 Fed. 101; *Matter of Livingston* (D. C., Hawaii), 2 U. S. D. C., Hawaii 54, 13 Am. B. R. 357; *Rogers v. DeSoto Placer Mining Co.* (C. C. A., 9th Cir.), 14 Am. B. R. 252, 136 Fed. 407; *In re Chequasset Lumber Co.* (D. C., N. Y.), 7 Am. B. R. 87, 112 Fed. 56; *Matter of Miles Paint Mfg. Co.* (D. C., Pa.), 32 Am. B. R. 794, holding that the practice of signing petitions in bankruptcy by attorneys for their clients is not to be encouraged, and should not be tolerated, unless a good and sufficient reason is made to appear affirmatively in the affidavit to the petition. *In re Simonson* (D. C., Ky.), 1 Am. B. R. 197, 92 Fed. 904, seems to be contra, though the exact question was not there at issue.

^{173.} *Matter of Herzikopf* (D. C., Cal.), 9 Am. B. R. 90, 118 Fed. 101.

^{174.} *In re Herzikopf* (D. C., Cal.), 9 Am. B. R. 90, 118 Fed. 101; *Matter of Miles Paint Co.* (D. C., Pa.), 32 Am. B. R. 794, holding that an attorney who signs a petition in bankruptcy on behalf of his clients need not attach his written authority.

^{175.} *In re Vastbinder* (D. C., Penn.), 11 Am. B. R. 118, 126 Fed. 417.

Positive terms.—*In re Vastbinder* (D. C., Penn.), 11 Am. B. R. 118, 126 Fed. 417, the court said: "There can be no doubt

tion of a jury, except in cases where a jury trial is given by this act." The trial is brought on on the notice required by the practice of the district court in which the proceeding is, or under the district bankruptcy rules. Customarily, the consent of the court to setting the issue for trial on a day certain, other than during a regular term, is necessary. The burden of proof is on the petitioners, save, in certain circumstances, where the issue is solvency.¹⁷⁶ Thus, creditors must prove that their claims aggregate \$500 over securities, or an adjudication will be refused.¹⁷⁷ The proof must be confined to the acts of bankruptcy alleged in the petition,¹⁷⁸ though, it seems, if the evidence shows the commission of an act of bankruptcy not alleged, the court may allow an amendment.¹⁷⁹ On the other hand, where the proof shows domicile where domicile is not alleged, the petition will be considered amended in accordance with the proof.¹⁸⁰ The practice on the trial itself is like other civil trials in the Federal courts, including the taking and reading of depositions.¹⁸¹

b. Trial by jury.—The trial of the issues may be without the intervention of a jury except in cases where a jury trial is given by the act. Section 19 of the act prescribes when the alleged bankrupt is entitled as a matter of right to a trial by jury. This right pertains solely to the question of his insolvency or whether or not he has committed the alleged act of bankruptcy. In such cases when a jury trial is demanded it must be granted. If no demand is made the court may, in its discretion, submit any specified issue of fact to a jury, in which case the verdict of the jury will be advisory merely and not binding upon the court.¹⁸² This is in recognition of the equity jurisdiction possessed by the court.¹⁸³

c. Trial by referee or special master.—Subsection *d* of this section provides that if the facts alleged in the petition are controverted, the judge shall determine as soon as may be the issues presented by the pleadings, etc. As the term "judge" does not include a referee; it is evident that there is no authority to refer the issues to a referee. The testimony must be weighed and considered by the judge and his personal judgment exercised in the determination of each issue.¹⁸⁴ Though a reference to a special master or like ministerial officer

as to the right of an attorney in fact to make the necessary oath when the facts are within his own knowledge, and this will be assumed where the oath is in positive terms."

^{176.} See Bankr Act, § 3-c-d. As to burden of proof see discussion under § 3, and cases digested Am. B. R. Dig. § 265.

^{177.} In re West (C. C. A., 2d Cir.), 5 Am. B. R. 734, 108 Fed. 940, holding that, where an adjudication is made without such proof, the Circuit Court of Appeals would reverse the adjudication without costs and remand the proceeding to the district court to take proofs upon the question of the amount of the petitioners' claims, and, if the requisite amount should be shown, to reinstate the decree.

^{178.} In re Sykes, Fed. Cas. 13,708; Doan v. Compton, 2 N. B. R. 607.

^{179.} In re Lange (D. C., N. Y.), 3 Am. B. R. 231, 97 Fed. 197; but for a limitation on this doctrine, see In re Sears (C. C. A., 2d Cir.), 8 Am. B. R. 713, 117 Fed. 294. See further under this section, *anté*, subtitle "Amendments of petitions."

^{180.} In re Elmira Steel Co. (D. C., N. Y.), 5 Am. B. R. 484, 109 Fed. 456. Compare In re Stout (D. C., Mo.), 6 Am. B. R. 505, 109 Fed. 794.

^{181.} See Bankr. Act, § 21-b; U. S. R. S., §§ 861, 870; and observe Equity Rules LXVII to LXIX and LXXI.

^{182.} In re Neasmith (C. C. A., 6th Cir.), 17 Am. B. R. 128, 131, 147 Fed. 160; Oil Well Supply Co. v. Hall (C. C. A., 4th Cir.), 11 Am. B. R. 738, 128 Fed. 875; Morss v. Franklin Coal Co. (D. C., Penn.), 11 Am. B. R. 423, 125 Fed. 998; see cases digested Am. B. R. Dig., § 270.

^{183.} Idaho, etc., Co. v. Bradbury, 132 U. S. 509, 23 L. Ed. 433; Wilson v. Riddle, 123 U. S. 608, 31 L. Ed. 280.

^{184.} In re King (C. C. A., 7th Cir.), 24 Am. B. R. 606, 179 Fed. 694. Compare In re Lavoc (C. C. A., 2d Cir.), 13 Am. B. R. 400, 134 Fed. 237, 67 C. C. A. 19; Clark v. Am. Mfg. Co. (C. C. A., 4th Cir.), 4 Am. B. R. 351, 101 Fed. 962.

may be ordered, to hear and report the testimony (with or without advisory findings thereupon), when the issue involves extended testimony and its hearing in open court appears to be impracticable.¹⁸⁵ However, such a reference should not be granted to determine issues of the place of residence and principal place of business of the alleged bankrupt; jurisdictional issues of that nature should be determined by the judge as a condition precedent to a reference of other issues.¹⁸⁶ The powers of such a special master, his compensation, and the method of bringing on and conducting a trial before him are in all respects similar to that on like references on contested discharges.¹⁸⁷ The master's report is brought up either by exceptions or on motion to confirm,¹⁸⁸ and the judge then enters the order of adjudication or dismissal, in accordance as the facts shall warrant.¹⁸⁹ He is, of course, not bound to follow the master's conclusions.

VIII. ADJUDICATION OR DISMISSAL.

a. In general.—Subsection *d* requires the judge "as soon as may be" to determine the issues, and make the adjudication or dismiss the petition. When a creditor's petition has once been filed, there must be either an adjudication or a dismissal.¹⁹⁰ If the former, the order is entered substantially as in Form No. 12. If the bankruptcy is that of a partnership and the individuals composing it, the form should be so changed as to amount to an adjudication of the partnership as such and of each member, all as distinct entities.¹⁹¹ Under the former law, it was held that a mere memorandum of the adjudication was not sufficient.¹⁹² An order must be entered and recorded. So also of the dismissal, which should be substantially in the words of Form No. 11. Both the statute and the general orders provide for costs to the prevailing party.¹⁹³ If petitioning creditors move for an adjudication upon the pleadings, they admit the facts properly pleaded in the answer, and a denial of the motion is in effect a determination that the answer is sufficient in law to defeat the petitioners' application.¹⁹⁴ Where the petition is sufficient an adjudication must be granted unless the answer is responsive to the averments of the petition.¹⁹⁵ When a

185. *In re King* (C. C. A., 7th Cir.), 24 Am. B. R. 606, 179 Fed. 694.

For form of reference, see Supplementary Forms, No. 131; Hagar & Alexander's Bankruptcy Forms (2d Ed.), Nos. 27, 28.

Reference granted.—A reference may be made to a special commissioner to take and report the testimony, with his opinion thereon, on the application of the alleged bankrupt for a trial of the proceeding without a jury; the objection that such a course is more expensive than a trial by the judge himself is not valid. *In re Lavoc* (C. C. A., 2d Cir.), 13 Am. B. R. 400, 134 Fed. 237, 67 C. C. A. 19. See cases digested; Am. B. R. Dig., § 269.

186. *In re King* (C. C. A., 7th Cir.), 24 Am. B. R. 606, 179 Fed. 694.

187. See under this section, *ante*, sub-title "Reference to Special Master," and observe Equity Rules LXXIII to LXXXIV.

188. See also "Supplementary Forms," Nos. 139, 140, *post*; for exceptions to master's report and orders thereon, see Hagar & Alexander's Bankruptcy Forms (2d Ed.), Nos. 34-36.

189. *Clark v. Am. Mfg. Co.* (C. C. A., 4th Cir.), 4 Am. B. R. 351, 101 Fed. 962.

190. "Judge."—The term judge as used in this section does not include a referee, and the issues cannot be referred. *In re King* (C. C. A., 7th Cir.), 24 Am. B. R. 606, 179 Fed. 694.

See, for remedy where adjudication has been dismissed, *Neustadter v. Chicago Dry Goods Co.* (D. C., Wash.), 3 Am. B. R. 96, 96 Fed. 830; *In re Billing* (D. C., Ala.), 17 Am. B. R. 80, 145 Fed. 395. As to dismissal of proceedings, see cases digested, Am. B. R. Dig., §§ 272-274; as to adjudication, Am. B. R. Dig., §§ 277-282.

191. See pp. 179, 180, *ante*. For forms of orders of dismissal see Hagar & Alexander's Bankruptcy Forms (2d Ed.), Nos. 31, 36, 41; of order of adjudication, *Id.* Nos. 27, 29; denying adjudication, *Id.* No. 30.

192. *In re Boston*, etc., Fed. Cas. 1,678; *In re Hill*, Fed. Cas. 6,484.

193. Bankr. Act, § 3-e; General Order XXXIV.

194. *In re Waugh* (C. C. A., 9th Cir.), 13 Am. B. R. 187, 133 Fed. 281.

195. *Matter of Cohn* (D. C., Pa.), 33 Am. B. R. 686, 220 Fed. 106.

debtor waives its demand for a jury trial, confesses its insolvency and the commission of one of the acts of bankruptcy alleged and formally admits the essential allegations of the creditors' petition, it is the duty of the bankruptcy court to promptly enter an adjudication of bankruptcy.¹⁹⁶

b. Adjudication on voluntary appearance.—An adjudication on a voluntary appearance by the bankrupt and an answer filed by him admitting the averments of the petition will conclude the bankrupt.¹⁹⁷ But, if such appearance is made and answer filed prior to the expiration of the time for answering, the rights of the creditors to plead to the petition are not affected.¹⁹⁸ On a hearing upon a petition and answer the averments of the answer must be taken as true.¹⁹⁹

c. Dismissal after trial.—If it appears from the pleadings or upon the trial that the court has no jurisdiction, either of the person or subject-matter, the petition should be dismissed.²⁰⁰ The court should direct such dismissal as soon as the want of jurisdiction appears.²⁰¹ If the petition is not sustained by the proof, dismissal will follow as a matter of course. Even if the petition contains a prayer for the appointment of receivers, selected by collusion between the alleged bankrupt and petitioning creditors, the adjudication should be ordered and the prayer for such receivers disregarded.²⁰² The fact that a suit is begun, after a petition in bankruptcy is filed, for the foreclosure of a mortgage on a portion, or on all, of the bankrupt's property, even if the value of the property is less than the amount claimed to be due on the mortgage, is not a sufficient reason for denial of an adjudication of bankruptcy. While it is necessary that a person owe debts in order to be adjudicated a bankrupt, it is not necessary that he have assets.²⁰³

d. Dismissal by consent.—Where a dismissal is directed by the consent of parties, and not on the merits, the creditors are entitled to at least ten days' notice by mail, as will appear hereafter in the discussion under § 58-a and § 59-g. Some doubt has arisen as to the necessity of notice to all the creditors owing to a decision to the effect that the court may at any time before adjudication dismiss a petition upon the bankrupt's motion, without notice to those creditors who have not intervened or appeared in the proceeding.²⁰⁴ It seems

196. *Vulcan Sheet Metal Co. v. North Platte, etc., Co.* (C. C. A., 8th Cir.), 33 Am. B. R. 686, 220 Fed. 106.

197. *In re Columbia Real Estate Co.* (D. C., Ind.), 4 Am. B. R. 411, 419, 101 Fed. 965.

198. **Rights of creditors on voluntary appearance of bankrupt.**—In the case of *In re Humbert Co.* (D. C., Iowa), 4 Am. B. R. 76, 100 Fed. 439, the court said: "A waiver on the part of the bankrupt of this period of time cannot deprive creditors of the right to appear in opposition to the petition, and until that time has elapsed it cannot be known whether a contest will or will not be made on behalf of creditors." *In re Woods* (D. C., Penn.), 13 Am. B. R. 240, 133 Fed. 82.

199. *Matter of Cohn* (D. C., Pa.), 33 Am. B. R. 839, 220 Fed. 956.

200. *In re Plotke* (C. C. A., 7th Cir.), 5 Am. B. R. 171, 175, 104 Fed. 964.

201. *In re Columbia Real Estate Co.* (D. C., Ind.), 4 Am. B. R. 411, 417, 101 Fed. 956,

in which the court said: "Want of jurisdiction is a question that the court should consider whenever or however raised, even if the parties forbear to make it or consent that the case may be heard on its merits."

202. *Birmingham Coal & Iron Co. v. Southern Steel Co.* (D. C., Ala.), 20 Am. B. R. 151, 160 Fed. 212.

203. *Vulcan Sheet Metal Co. v. North Platte, etc., Co.* (C. C. A., 8th Cir.), 33 Am. B. R. 686, 220 Fed. 106.

204. *Matter of Levi* (C. C. A., 2d Cir.), 15 Am. B. R. 294, 142 Fed. 962, holding that, where no list of creditors has been filed and there is no suggestion of collusion between the petitioning creditors and the alleged bankrupt, the court may in its discretion at any time before adjudication dismiss the petition upon the bankrupt's motion without notice to other creditors not intervening or appearing in the proceeding; and the exercise of such discretion, in the absence of abuse, is not reviewable in the Circuit Court of Appeals.

more in accordance with the statute, however, to apply the broad rule of law that, since every creditor has, once a petition is filed, the right to intervene, a petition should not be dismissed without notice to him.²⁰⁵ A petition certainly cannot be dismissed without the consent of all the petitioning creditors,²⁰⁶ and the provisions of the statute above referred to seem clearly to require that notice to the creditors be given. There are exceptions to the rule, as, where there are no assets, no claims proven, and no trustee appointed; though in such a case the petition is withdrawn, not dismissed.²⁰⁷ The practice of omitting such notice is dangerous, however, and the courts will usually decline to grant dismissals without proof of the names and addresses of creditors and due notice to them of the pending proceeding and the motion to dismiss.²⁰⁸ Even if a minority of the petitioning creditors object to the dismissal it should not be directed although the court may specify that it would be for the best interests of the creditors.²⁰⁹ Where all the petitioning creditors in good faith move for a dismissal of their petition the court should not retain the proceeding to determine issues raised by the answer, some of which it had no power to try.²¹⁰ A voluntary bankruptcy proceeding may not be dismissed by consent of the parties on motion after adjudication.²¹¹

e. Intervention by other creditors.—It is provided in § 59-f that “creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.” This subject will be considered at length under that section. Any creditor may join in a petition already filed and pending, as a rule, at any time between the filing of the petition and the order of adjudication or dismissal.

f. Effect of adjudication generally.—An adjudication confers jurisdiction both complete and exclusive, and *in rem* as well as *in personam*.²¹² The adjudication

205. *In re Plymouth Cordage Co.* (C. C. A., 8th Cir.), 13 Am. B. R. 665, 13 Fed. 1,000; *In re Lewis* (D. C., Del.), 11 Am. B. R. 683, 129 Fed. 147; *Matter of Lederer* (D. C., N. Y.), 10 Am. B. R. 492, 125 Fed. 96. This seems not to have been the law under the former act. See *Ex parte Harris*, Fed. Cas. 6,110; *In re Gile*, Fed. Cas. 5,423.

Decree erroneous, not void.—A decree dismissing the proceeding without notice is merely erroneous, not absolutely void, and if application to review the decree is not timely made, it will be sustained. *In re Plymouth Cordage Co.* (C. C. A., 8th Cir.), 13 Am. B. R. 665, 13 Fed. 1,000; *In re Jemison Mercantile Co.* (C. C. A., 5th Cir.), 7 Am. B. R. 588, 112 Fed. 966, 50 C. C. A. 641.

206. *In re Cronin* (D. C., Mass.), 3 Am. B. R. 552, 98 Fed. 584; *In re Lewis* (D. C., Del.), 11 Am. B. R. 683, 129 Fed. 147.

207. *In re Hebbart* (D. C., N. Y.), 5 Am. B. R. 8, 104 Fed. 322; *In re Colaluca* (D. C., Mass.), 13 Am. B. R. 292, 133 Fed. 255.

No dischargeable debts.—A petition in voluntary bankruptcy which schedules no dischargeable debt may be dismissed as a matter of discretion. *In re Colaluca* (D. C., Mass.), 13 Am. B. R. 292, 133 Fed. 255; *In re Maples* (D. C., Mont.), 5 Am. B. R. 426, 105 Fed. 919; *In re Yates* (D. C., Cal.), 8 Am. B. R. 69, 114 Fed. 365.

208. Creditors notified.—Where the alleged bankrupt's answer gives the names and addresses of his creditors in response to a petition alleging that they number less than twelve, such creditors should be notified of the motion to dismiss. *In re Jemison*, etc. (C. C. A., 5th Cir.), 7 Am. B. R. 588, 112 Fed. 966.

209. *In re Lewis* (D. C., Del.), 11 Am. B. R. 683, 129 Fed. 147; *In re Cronin* (D. C., Mass.), 3 Am. B. R. 552, 98 Fed. 584.

210. *Bernard v. Abel* (C. C. A., 9th Cir.), 19 Am. B. R. 383, 156 Fed. 649.

211. *Matter of McKee* (D. C., Texas), 32 Am. B. R. 731, 214 Fed. 885.

212. Decree operates in rem.—In the case of *Carter v. Hobbs* (D. C., Ind.), 1 Am. B. R. 215, 92 Fed. 594, the court said: “The decree operates *in rem*, and from the moment of the adjudication in bankruptcy the bankrupt's estate is *in custodia legis* and under the jurisdiction of this court; it is fundamental that no court or individual can interfere with such court and possession; the assertion of any right against, or to participate in the *res so in custodia legis*, must be sought in the court in whose custody it is; an attempt to assert such right elsewhere would be regarded as a contempt.”

transfers the title of the bankrupt's property wherever situated, and vests the same in the trustee, to be administered by him under the authority and control of the bankruptcy court.²¹³ All persons named in the schedules as creditors are parties and affected thereby. So, also, are all persons in any way interested in the *res*.²¹⁴ As to such parties the adjudication is conclusive to the extent of the matters necessarily determined in making the adjudication.²¹⁵ An adjudication cannot be attacked for the first-time on discharge by a creditor who had proceeded that far under it.²¹⁶

g. Effect of adjudication on rights of creditors.—The adjudication is, like other judicial determinations, subject to the well-settled rule that matters which have been once litigated and determined by the judgment of a court cannot again be made the subject of legal contention as between the parties to such judgment and their privies. So that where the question of the bankrupt's residence,²¹⁷ or the question of insolvency,²¹⁸ or the amount of the petitioner's claim,²¹⁹ were at issue, the adjudication in respect thereto is binding upon the parties and their privies in all subsequent proceedings. Creditors are bound as parties, whether they appear or not, in respect to all issues which must necessarily be determined by the adjudication; otherwise there would be no end to controversy as to these matters, as every creditor might claim the right to be heard by independent suit.²²⁰ But where it appears that the requisite number of creditors join in the petition and it is not necessary to determine the validity of the claim of any one of them for the purpose of conferring jurisdiction, the adjudication is not *res adjudicata* as to the validity or amount of

213. *Robertson v. Howard*, 229 U. S. 254, 30 Am. B. R. 611, 57 L. ed. 1174; *In re Baum* (C. C. A., 8th Cir.), 22 Am. B. R. 295, 169 Fed. 410; *In re Scruggs* (D. C., Ala.), 31 Am. B. R. 94, 205 Fed. 673.

214. *Carter v. Hobbs* (D. C., Ind.), 1 Am. B. R. 215, 92 Fed. 594. As to effect generally of adjudication, see Am. B. R. Dig. § 279.

215. *In re Uhfelder Clothing Co.* (D. C., Cal.), 3 Am. B. R. 428, 98 Fed. 409; *Board of Commerce v. Security Trust Co.* (C. C. A., 6th Cir.), 34 Am. B. R. 782, 225 Fed. 454, holding that the adjudication fixes the status theretofore existing as alleged in the petition; *In re Billing* (D. C., Ala.), 17 Am. B. R. 80, 145 Fed. 395.

216. *In re Polakoff* (Ref., N. Y.), 1 Am. B. R. 358; *In re Mason* (D. C., N. C.), 3 Am. B. R. 599 (and foot-note), 99 Fed. 256; *In re Ordway*, Fed. Cas. 10,552.

217. *In re Hintze* (D. C., Mass.), 13 Am. B. R. 721, 134 Fed. 141.

218. *Des Moines Savings Bank v. Morgan Jewelry Co.* (Sup. Ct., Iowa), 123 Iowa 432, 12 Am. B. R. 781, 99 N. W. 121; *In re Chappell* (D. C., Va.), 7 Am. B. R. 608, 113 Fed. 545; *In re Virginia Hardware Mfg. Co.* (D. C., Ark.), 15 Am. B. R. 135, 139 Fed. 209; *In re Witherbee* (C. C. A., 1st Cir.), 30 Am. B. R. 314, 202 Fed. 896.

Adjudication binding on question of insolvency.—The creditors of a bankrupt are parties to the proceeding to have him so adjudged and are precluded by the adjudication from questioning bankrupt's insolvency

at the time the petition was filed. *Cook v. Robinson* (C. C. A., 9th Cir.), 28 Am. B. R. 182, 194 Fed. 785.

Adjudication as evidence of insolvency.—While secured creditors are not bound by an adjudication in bankruptcy, and may litigate the same issues in another proceeding, still it is *prima facie* evidence of what is therein decreed, that the bankrupts were insolvent at that date, and may be considered as of some weight in determining whether the bankrupts were insolvent at the date of a transfer made over four and one-half months before. *Cawthorn v. Burley State Bank* (Sup. Ct., Idaho), 26 Idaho 432, 33 Am. B. R. 794, 144 Pac. 1608.

219. *In re Uhfelder Clothing Co.* (D. C., Cal.), 3 Am. B. R. 425, 98 Fed. 409.

220. *Cook v. Robinson* (C. C. A., 9th Cir.), 28 Am. B. R. 182, 194 Fed. 785. In the case of *In re American Brewing Co.* (C. C. A., 7th Cir.), 7 Am. B. R. 463, 470, 112 Fed. 752, 758, 50 C. C. A. 517, the court said: "If it were necessary in order to bind creditors by a judgment in bankruptcy that they should appear and answer, as they have a right to do, then an adjudication could be prevented simply by creditors abstaining from appearing in the proceedings. But it is well settled that the proceedings are in large part *in rem*, and are binding whether the bankrupt or creditors appear or not." As to adjudication as *res adjudicata*, see Am. B. R. Dig. § 281.

the claims of such creditors offered for allowance before the referee.²²¹ However, an adjudication in a contested bankruptcy proceeding is *res adjudicata* and conclusive upon those who have not actually taken part in the contest only as to the status of the bankrupt and not as to the commission of a particular act of bankruptcy, although it be the one alleged in the petition.²²² Where a petition charges different acts of bankruptcy and the adjudication does not show upon which one of them it proceeded, it does not render either charge *res adjudicata* in further proceedings.²²³ The adjudication will constitute the breach of an executory contract for services²²⁴ and will terminate the agency of a bankrupt connected with the estate transferred by his bankruptcy.²²⁵ Where a bankrupt is denied his discharge, creditors may proceed against him again as to after-acquired property, notwithstanding an appeal from the order denying his discharge.²²⁶ A mere adjudication does not operate as a stay of execution or prosecution of a claim, where the defendant has not been discharged, and the enforcement of such claim has not been regularly stayed.²²⁷

h. Vacating adjudication.—(1) **IN GENERAL.**—An application to vacate the adjudication is unusual but, in given circumstances, proper.²²⁸ The practice is not prescribed, but may be on petition or written motion and such notice as the court may order. It can be made only by the bankrupt²²⁹ or a person who could have resisted the original petition, in other words, by one who has a claim provable in the case.²³⁰ The fact that a creditor stated in his petition that he appeared specially, and did not submit himself to the jurisdiction of the court, is no ground for refusing to vacate the adjudication.²³¹ The application must be made to the court that granted the order.²³²

(2) **APPLICATION TO BE MADE SEASONABLY.**—The adjudication may be set aside upon the application of creditors, where it was made prior to the expiration of five days after the filing of the petition, although the bankrupt appeared and consented to adjudication.²³³ But such an application must be made promptly.²³⁴ Creditors who would assail the adjudication should act

²²¹ *Matter of Continental Corporation* (Ref., Ohio), 14 Am. B. R. 538.

Effect on liability of bankrupt.—An adjudication in bankruptcy does not discharge the liability of the bankrupt to his creditors. *Baltimore Bargain House v. Busby* (Ga. Sup. Ct.), 143 Ga. 734, 35 Am. B. R. 119, 85 S. E. 875. It absolves the bankrupt from no agreement, no contract, and discharges no liability. *Watson v. Merrill* (C. C. A., 8th Cir.), 14 Am. B. R. 454, 136 Fed. 359.

²²² *Matter of McCrum* (C. C. A., 2d Cir.), 32 Am. B. R. 604, 214 Fed. 207.

²²³ *Matter of Julius Bros.* (C. C. A., 2d Cir.), 32 Am. B. R. 699, 217 Fed. 3, revg. 31 Am. B. R. 132, 209 Fed. 371.

²²⁴ *Matter of Schultz & Guthrie* (D. C., Mass.), 37 Am. B. R. 604, 235 Fed. 907.

²²⁵ *McKey v. Clark* (C. C. A., 9th Cir.), 37 Am. B. R. 699, 233 Fed. 928.

²²⁶ *In re Barton's Estate* (D. C., Ark.), 10 Am. B. R. 569, 144 Fed. 540.

²²⁷ *Mass v. Kuhn*, 130 N. Y. App. Div. 68, 22 Am. B. R. 91, 114 N. Y. Supp. 444.

²²⁸ *In re Ives* (D. C., Mich.), 6 Am. B. R. 652, 111 Fed. 495; *In re De Forest*, Fed. Cas. 3,745. As to vacating or setting aside adjudications, see Am. B. R. Dig. § 282.

²²⁹ See *In re Salaberry* (D. C., Cal.), 5 Am. B. R. 847, 107 Fed. 95.

²³⁰ *In re Yates* (D. C., Cal.), 8 Am. B. R. 69, 114 Fed. 365; *Matter of New York Tunnel Co.* (C. C. A., 2d Cir.), 21 Am. B. R. 531, 166 Fed. 284. This follows necessarily from the definition of creditor in § 1(9). This was not so under the law of 1867. See *In re Derby*, Fed. Cas. 3,815; *In re Bush*, Fed. Cas. 2,222.

²³¹ *Matter of Altonwood Park Co.* (C. C. A., 2d Cir.), 20 Am. B. R. 31, 160 Fed. 448.

²³² *Graham v. Boston, etc.*, 118 U. S. 161, 30 L. Ed. 196; *Chapman v. Brewer*, 114 U. S. 158, 29 L. Ed. 83; *In re Ives*, Fed. Cas. 7,115; *Lewis v. Sloan*, 68 N. C. 557.

²³³ *B. R. Electric & Telephone Mfg. Co. v. Aetna Life Ins. Co.* (C. C. A., 8th Cir.), 30 Am. B. R. 424, 206 Fed. 885.

²³⁴ *In re Ives* (D. C., Mich.), 6 Am. B. R. 653, 111 Fed. 495; *In re Niagara Contracting Co.* (D. C., N. Y.), 11 Am. B. R. 643, 127 Fed. 782; *In re Urban and Suburban* (D. C., N. J.), 12 Am. B. R. 687, 132 Fed. 140; *In re Warsham* (C. C. A., 8th Cir.), 15 Am. B. R. 672, 142 Fed. 121, where no effort was made to vacate for a period of one

with reasonable promptness after they received notice of the proceeding and of the reasons of their objections; if creditors knew of the filing of the petition in ample time for them to demur or answer, they should not be permitted, where two months had elapsed, and the condition of the property and the relations of the parties had materially changed, to stay the proceedings and vacate the adjudication, for a cause which might have been set up by demurrer or answer.²³⁵ After affirmance of an adjudication on appeal the district court may not grant a rehearing and thus permit a re-examination of the questions with which the appellate court has dealt.²³⁶

(3) **GROUND FOR VACATING.**—An adjudication in involuntary proceedings obtained by the consent of the bankrupt, where he appeared generally by attorney and in person, filed schedules and otherwise recognized the proceedings, will not be vacated in the absence of proof that he was induced to give his consent by fraud.²³⁷ Being in the nature of a motion for a new trial, the application should rest on a showing of facts, on their face seeming to entitle the moving party to the relief. An adjudication will not be set aside where it was warranted by proof of an act of bankruptcy sufficiently alleged, although other acts were not properly pleaded or proved.²³⁸ An adjudication may be vacated on the ground that the alleged bankrupt was not subject to adjudication, but even in such a case the adjudication is not void, and the court should consider the laches of the petitioner and all other circumstances affecting the right to the relief.²³⁹ Although a creditor may move to vacate an adjudica-

year; *In re Billing* (D. C., Ala.), 17 Am. B. R. 80, 145 Fed. 395, where motion to vacate was denied because the time for an appeal had elapsed.

Laches in making application.—Where the adjudication was made March 28, 1907, and the order to show cause why the same should not be vacated was entered Aug. 2, 1907, upon the petition of a creditor who had no notice of the bankruptcy proceeding until June 14, 1907, his delay, there being no intervening rights, is insufficient to constitute such laches as will debar him from showing that the whole bankruptcy proceedings were invalid. *Matter of Altonwood Park Co.* (C. C. A., 2d Cir.), 20 Am. B. R. 31, 160 Fed. 448. Where three years have elapsed since the adjudication of a husband, the wife is precluded by laches from appearing and contesting the allegations of insolvency in the petition. *Matter of Gibbons* (D. C., Wash.), 35 Am. B. R. 620, 225 Fed. 420.

After adjudication of term.—It has been held that an adjudication in bankruptcy will not be vacated by an application presented after the adjournment of the term of court at which the adjudication was made. *Matter of Ives* (D. C., Mich.), 6 Am. B. R. 653, 111 Fed. 495. Where three years have elapsed since the adjudication of a husband, the wife is precluded by laches from appearing and contesting the allegations of insolvency in the petition. *Matter of Gibbons* (D. C., Wash.), 35 Am. B. R. 620, 225 Fed. 420.

²³⁵ *In re First Nat. Bank of Belle Fourche* (C. C. A., 8th Cir.), 18 Am. B. R. 265, 274, 152 Fed. 64; *In re Marion Con-*

tract & Construction Co. (D. C., Ky.), 22 Am. B. R. 81, 166 Fed. 618.

Five weeks' delay.—It is not an abuse of the court's discretion to refuse to permit a creditor to attack an adjudication where the motion is first made seven weeks after the filing of the petition and the appointment of receivers, and five weeks after the adjudication, and the creditors were aware of the filing of the petition within forty-eight hours thereafter, and the administration of the estate had, in the meantime, proceeded without objection. *In re First Nat. Bank of Belle Fourche* (C. C. A., 8th Cir.), 18 Am. B. R. 265, 152 Fed. 264.

²³⁶ *In re Lennox* (D. C., Mass.), 24 Am. B. R. 922, 181 Fed. 428.

Effect of appeal.—Under section 1-a (2) of the bankruptcy act defining "adjudication," the mere taking of an appeal and the dismissal of the same, either by the appellant or the appellate court, is not a final confirmation, so as to change the date of adjudication from the time the original decree is made to the dismissal of the appeal. *Moore Bros. v. Cowan* (Ala. Sup. Ct.), 173 Ala. 536, 26 Am. B. R. 902, 55 So. 903.

²³⁷ *In re Gill* (D. C., Ga.), 28 Am. B. R. 333, 195 Fed. 643.

²³⁸ *In re Lyman* (C. C. A., 2d Cir.), 11 Am. B. R. 466, 127 Fed. 123.

²³⁹ *In re New England Breeders' Club* (C. C. A., 1st Cir.), 22 Am. B. R. 124, 165 Fed. 517, rev'd, 21 Am. B. R. 349; *In re New York Tunnel Co.* (C. C. A., 2d Cir.), 21 Am. B. R. 531, 164 Fed. 284.

An order of adjudication entered against

tion upon a voluntary petition because of the bankrupt's non-residence,²⁴⁰ yet where the petition alleges residence and the creditor assents thereto and proves his claim, he cannot thereafter move to vacate the adjudication.²⁴¹

(4) NOT TO BE ATTACKED COLLATERALLY.—Where the record shows jurisdiction, the adjudication is subject to impeachment only by a direct proceeding in a competent court and may not be attacked collaterally in an action by the trustee to set aside a preference,²⁴² nor in any other similar action or proceeding.²⁴³

IX. DEFAULTS.

a. Where the judge is in the district or division.—If no pleadings are filed on or before the last day for filing, the judge must "on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition." The last three words suggest that, in default cases, the judge is required to do more than grant the prayer of the petition; he must examine the petition and ascertain whether it alleges facts sufficient to bring it within the requirements of the statute; if not, he should dismiss it, notwithstanding the bankrupt's default. Even if an answer is filed after the time to file it has expired, but before adjudication, an adjudication on default must be granted.²⁴⁴ The presence of the judge on the next day after the time to plead expires, seems to make an immediate adjudication imperative. Otherwise, it must be as soon thereafter as practicable. The failure to contest the petition by any person having the right so to do establishes the truth of its allegations, and an adjudication thereon is binding as against everybody.²⁴⁵

a corporation upon its default will be vacated upon the petition of interested parties to enable them to raise the question whether the corporation is subject to adjudication as a bankrupt, and the receiver of the corporation having no knowledge of such adjudication may move to vacate it. In re Hudson River Elec. Power Co. (D. C., N. Y.), 21 Am. B. R. 915, 167 Fed. 986. See same matter (D. C., N. Y.), 23 Am. B. R. 191, 173 Fed. 934, *affd.* 25 Am. B. R. 504, 183 Fed. 701.

240. In re Scott (D. C., Mass.), 7 Am. B. R. 39, 111 Fed. 144.

241. In re Hintze (D. C., Mass.), 13 Am. B. R. 721, 134 Fed. 141.

242. Huttig Mfg. Co. v. Edwards (C. C. A., 8th Cir.), 20 Am. B. R. 349, 160 Fed. 619, citing *Michaels v. Post*, 21 Wall. 398, 22 L. Ed. 520; *Sloan v. Lewis*, 22 Wall. 150, 22 L. Ed. 832.

243. *Gilbertson v. United States* (C. C. A., 7th Cir.), 22 Am. B. R. 32, 168 Fed. 672. See cases digested Am. Bankr. Dig. § 280.

Collateral attack.—The ground of an adjudication cannot be collaterally attacked, for as to the bankrupt and the creditors the adjudication is as binding as a judgment *inter partes* upon due hearing in a court of competent jurisdiction. In re Hecox (C. C. A., 8th Cir.), 21 Am. B. R. 314, 164 Fed. 823; In re Dempster (C. C. A., Cir.), 22 Am. B. R. 751, 172 Fed. 353.

Federal courts have exclusive jurisdiction to adjudge a person a bankrupt and to appoint a receiver, and where the order of a Federal court is irregular, improvident, or

unauthorized, it should be corrected or questioned in that forum and not in the State court by collateral attack. *Moore Bros. v. Cowan* (Sup. Ct., Ala.), 173 Ala. 536, 26 Am. B. R. 902, 55 So. 903. A decision of the bankruptcy court sustaining an involuntary petition, although erroneous, is conclusive unless reversed or vacated, and cannot be attacked in a suit to restrain attachment proceedings brought against the bankrupt. *Larkin-Green Logging Co. v. Sabin* (C. C. A., 9th Cir.), 35 Am. B. R. 86, 222 Fed. 814. An adjudication cannot be attacked collaterally on the ground that the principal place of business of the bankrupt was not in the district. *Roszell Bros. v. Continental Coal Corp.* (D. C., Ky.), 38 Am. B. R. 31, 235 Fed. 343, *affd. sub nom.* *Matter of Continental Coal Corporation* (C. C. A., 6th Cir.), 38 Am. B. R. 168, 238 Fed. 113.

In a criminal prosecution for the concealment of assets from the trustee, the defendant cannot attack the adjudication, upon the ground that it was made by the referee when the judge, in fact, was not absent from the district, if the order of reference recites his absence. *Gilbertson v. U. S.* (C. C. A., 7th Cir.), 22 Am. B. R. 32, 168 Fed. 672.

244. *Bray v. Cobb* (D. C., N. Car.), 1 Am. B. R. 153, 91 Fed. 102; for effect of such adjudication, see *In re American Brewing Co.* (C. C. A., 7th Cir.), 7 Am. B. R. 463, 112 Fed. 752.

245. In re Billing (D. C., Ala.), 17 Am. B. R. 80, 145 Fed. 395.

b. Where the judge is absent.—If the judge is not within the district or division the day after the time to plead expires, the clerk must “forthwith refer the case to the referee.” “Division of the district” here means the divisions into which some of the Federal districts are divided by the general law, and not the referee districts.²⁴⁶ This is done by an order of reference substantially in the words of Form No. 15. On its receipt, the functions and duties of the judge as to making the adjudication or dismissing the petition devolves on the referee.²⁴⁷

X. TRIALS IN VOLUNTARY CASES.

a. In general.—Subsection *g* provides that upon filing a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. The practice here is the same as where default was made in an involuntary case, and no pleading had been filed in opposition to the petition on the last day for filing. The judge, if in the district or division, must adjudicate or dismiss; if he is absent, the clerk must forthwith refer the case to the referee, who then proceeds in the stead of the judge. It seems that an answer cannot be interposed to a voluntary petition.²⁴⁸ While creditors may contest any petition in involuntary bankruptcy, no provision is made by the Bankruptcy Act for contesting a petition in voluntary bankruptcy.²⁴⁹ The proper method of attack is by petition or motion to set aside the adjudication. A motion to set aside an adjudication may be granted where a bankrupt at the time of filing the petition had not resided within the district the required length of time, but the proceedings will be continued under a second order of adjudication, where when the motion was made the bankrupt had resided in the district a sufficient time to give the court jurisdiction.²⁵⁰

b. Voluntary petition while involuntary petition pending.—There was some doubt under the former law whether a debtor, against whom a creditors’ petition was pending, could be adjudicated on his voluntary petition subsequently filed.²⁵¹ And this, even though under that law petitions could be dismissed by consent and without a general notice to creditors. Under the present law it seems well established that the pendency of an involuntary petition will not prevent an insolvent debtor, prior to adjudication thereon, from filing a voluntary petition.²⁵² The tendency of the decisions is to adjudicate on the voluntary petition and, by subsequent steps, protect the rights of the petitioning creditors flowing from their earlier petition.²⁵³ A voluntary proceeding takes precedence over an involuntary proceeding commenced in another dis-

^{246.} Compare *In re Polakoff* (Ref., N. Y.), 1 Am. B. R. 358.

^{247.} See discussion under Section Thirty-eight of this work.

^{248.} *In re Jehu* (D. C., Iowa), 2 Am. B. R. 498, 94 Fed. 638.

^{249.} *Matter of Pennington & Co.* (D. C., Ky.), 35 Am. B. R. 832, 228 Fed. 388.

^{250.} *In re Tully* (D. C., N. Y.), 19 Am. B. R. 604, 156 Fed. 634.

^{251.} *In re Flanagan*, Fed. Cas. 4,850; *In re Stewart* Fed. Cas. 13,419; *In re Canfield*, Fed. Cas. 2,380. Compare *In re Mussey* (D. C., Mass.), 3 Am. B. R. 592, 99 Fed. 71.

^{252.} See p. 478, *ante*, and under Section Fifty-nine, *post*.

^{253.} *Matter of Pennington & Co.* (D. C., Ky.), 35 Am. B. R. 832, 228 Fed. 388.

Rights of petitioning creditors.—Thus it is still an open question whether an adjudication can be made on the voluntary petition at once, reserving to the petitioning creditors the right to bring forward their proceeding and consolidate as of the date they filed (see *In re Stegar* (D. C., Ala.), 7 Am. B. R. 665, 113 Fed. 978), or whether adjudication must be withheld until the notice is given (*In re Dwyer* (D. C., N. Dak.), 7 Am. B. R. 532, 112 Fed. 777). The former seems the wiser practice. Otherwise great injury to assets may result from the delay. See also *In re Waxelbaum* (D. C., N. Y.), 3 Am. B. R. 392, 98 Fed. 589.

trict, especially where the basis of the jurisdiction in the voluntary proceeding, the domicile or residence of the bankrupt, has been clearly established, while the basis of the involuntary proceeding, the principal place of business of the bankrupt is doubtful.²⁵⁴

XI. ORDER OF REFERENCE AND EFFECT.

Under this section two facts must exist in order to warrant the clerk in referring the case to the referee, viz.: (1) That no pleadings have been filed within the time provided for pleading; (2) the absence of the judge from the district, or the division, "on the next day after the last day on which pleadings may be filed." In view of the terms of clause "d" of the section, the requirement that "no pleadings have been filed" should be construed to mean no pleadings in opposition to the petition, and the fact that an answer confessing the allegations of the petition has been filed ought not to be a legal obstacle to the reference of a case by the clerk to the referee.²⁵⁵ The order of reference required under subsections *f* and *g*, where the judge is absent from the district or division of the district in which the petition is filed or pending, should be in the form prescribed by Form No. 15.²⁵⁶ If made after adjudication, Form No. 14 is applicable;²⁵⁷ it has been held that such an order may be made by the deputy clerk, the act of signing being ministerial and not judicial.²⁵⁸ This order and a copy of the petition and schedules in voluntary cases, and of the petition at least in involuntary cases, must be sent by mail or delivered personally by the clerk to the proper referee. The order fixes a day on which the bankrupt must appear and after which the referee shall have jurisdiction. This should usually be the following day. It is thought, however, that the referee has complete jurisdiction the moment the order is made; Form No. 14, to this extent at least, is not in accord with the law. In effect the referee then becomes, as to that proceeding, a court of original jurisdiction,²⁵⁹ and the judge a court of appeal.²⁶⁰ After reference to the referee, the practice on both

²⁵⁴ *Matter of Pennington & Co.* (D. C., Ky.), 35 Am. B. R. 832, 228 Fed. 388.

²⁵⁵ *Matter of Sage* (D. C., Mo.), 35 Am. B. R. 436, 224 Fed. 525. In this case it appeared that on the sixth day after a petition in bankruptcy was filed, the bankrupt appeared and filed an answer, admitting the substantial allegations of the petition, and consenting that he be adjudged a bankrupt, and asking that the case be at once referred to the referee, and the clerk, without issuing a subpoena fixing the return day or finding or specifying that the judge was absent "on the next day after the last day on which pleadings may be filed," as required by section 18 of the Bankruptcy Act, found and recited in his order of reference that the judge was absent "at the time of the filing of the petition." It was held that although the procedure was irregular the defects were not jurisdictional and did not

render the adjudication subject to collateral attack.

²⁵⁶ *Absence of district judge.*— That an order of reference in a voluntary bankruptcy recites the absence of the district judge from the district does not affect the jurisdiction of the bankruptcy court, acquired upon the filing of the petition, to adjudge the petitioner a bankrupt; such recital relates only to the course of procedure within the jurisdiction of the court, and is not open to collateral attack. *Gilbertson v. United States* (C. C. A., 7th Cir.), 22 Am. B. R. 32, 168 Fed. 672.

²⁵⁷ *In re Bellamy*, Fed. Cas. 1,268.

²⁵⁸ *Gilbertson v. United States* (C. C. A., 7th Cir.), 22 Am. B. R. 32, 168 Fed. 672. *Contra*: *Bray v. Cobb* (D. C., N. Car.), 1 Am. B. R. 153, 91 Fed. 102.

²⁵⁹ General Order XII. See also under Sections Thirty-eight and Thirty-nine.

²⁶⁰ See General Order XXVII.

voluntary and involuntary proceedings is identical, and is discussed under different sections of this work.²⁶¹

261. Practice after reference.—For notice of the first meeting and how given, see Bankr. Act, § 58; for proceedings at first meeting, see §§ 55, 56. General Orders IV, XXV; for proof of claims, see § 57, General Order XXI; for appointment and qualification of trustees, see §§ 45, 46, General Orders XIII, XIV, XV, XVI; for bond of trustee and effect when certified copy recorded, see §§ 21-c, 50; for examination of the bankrupt,

see §§ 7(9), 21-a, General Order XXII; for setting aside of exemptions, see § 6, General Order XVII; for duties of trustee, see § 47, General Order XVII; for appointment of appraisers, see § 70-b; for sales of assets, see §§ 58-a(4), 70-b, General Order XVIII; for stays, see §§ 2(15), 11; for declaration and payment of dividends, see § 65; for final meetings, see §§ 57-f, 58-a(6), etc.

SECTION NINETEEN.

JURY TRIALS

§ 19. **Jury Trials.**—*a* A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

b If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.

c The right to submit matters in controversy, or an alleged offense under this act, to a jury shall be determined and enjoyed, except as provided by this act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury.

Analogous provisions: In U. S.: As to jury trials in involuntary proceedings, Act of 1867, §§ 41, 42, R. S., § 5026; Act of 1841, § 1; As to jury trials upon specifications filed against a discharge, Act of 1867, § 31, R. S., § 5111; Act of 1841, § 4; As to trials of issues of fact in the district court, R. S., § 566; As to trials of issues of fact in the circuit court, R. S., §§ 648, 649.

In Eng.: Act of 1883, § 102(3), General Rules 94-97.

Cross-references: To the law: Acts of bankruptcy, § 3.

Adjudication where facts are controverted, § 18-d.

Depositions may be taken; notices, § 21-b, c.

Reference of cases after adjudication, § 22.

Who may file petitions, § 59.

Insolvency when preferences were given, § 60-b.

Recovery of property transferred while bankrupt was insolvent, § 67-e.

To the Forms: Order for jury trial, Form No. 7.

See Hagar and Alexander's Bankruptcy Forms (2d Ed.), Nos. 22, 23.

SYNOPSIS OF SECTION.

JURY TRIALS

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I. JURY TRIAL IN CONTESTED ADJUDICATIONS.

a. *Comparative legislation*.—In England, a jury trial in bankruptcy proceedings is always discretionary,¹ but, where the facts are disputed, will usually be granted.² Under the law of 1841, trial by jury could be demanded by the debtor within ten days after a decree adjudging him a bankrupt "to ascertain the facts of such bankruptcy."³ By the law of 1867, the demand must have been made in writing on the return day, and then the jury was "to ascertain the fact of such alleged bankruptcy."⁴

b. *Jury trials; when granted*.—The present law clearly limits the issues to be submitted to a jury to two; (a) the question of insolvency and (b) whether the alleged act of bankruptcy has been committed.⁵ It is not thought, however, that this precludes the jury from passing on any other pertinent question, as, whether the alleged bankrupt was domiciled within the district the required time, or whether a petitioning creditor has a provable debt, or whether the debtor is in one of the excepted classes not amenable to involuntary bankruptcy, provided the judge submits such an issue to them.⁶ Subsection a merely declares on what issues in a contested adjudication trial by jury is a matter of right.

1. Eng. Act of Bankruptcy of 1883, § 102(3).

2. In re Carvill, 1 Morrell, 150.

3. Act of 1841, § 1.

4. Act of 1867, § 41.

5. Day v. Beck, etc., Co. (C. C. A., 5th Cir.), 8 Am. B. R. 175, 114 Fed. 834; In re Christensen (D. C., Iowa), 4 Am. B. R. 99, 101 Fed. 802; Simonson v. Sinsheimer (C. C. A., 7th Cir.), 3 Am. B. R. 824, 100 Fed. 426; Bernard v. Abel (C. C. A., 9th Cir.), 19 Am. B. R. 383, 389, 156 Fed. 649; citing Collier on Bankruptcy (6th ed.), 257.

General assignment.—Where a petition in involuntary bankruptcy alleges that within the four months' period, the alleged bankrupt made a general assignment for the benefit of

creditors, and the answer denies each and every allegation of the petition, and a demand for a jury trial is filed therewith, the alleged bankrupt is entitled to a jury trial of the question whether he has made such general assignment. Day v. Beck, etc., Hardware Co. (C. C. A., 5th Cir.), 8 Am. B. R. 175, 114 Fed. 834.

6. See McNaughton v. Osgood, 114 N. Y. 574; McClure v. Gibbs, 157 N. Y. 413; Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672; In re Neasmith (C. C. A., 6th Cir.), 17 Am. B. R. 128, 147 Fed. 160; Oil Well Supply Co. v. Hall (C. C. A., 4th Cir.), 11 Am. B. R. 738, 128 Fed. 875; In re Farthing (D. C., No. Car.), 29 Am. B. R. 732, 202 Fed. 557.

The right to a jury trial in respect to the questions specified upon application of the person against whom an involuntary petition has been filed, as provided in this section, is absolute and cannot be withheld at the discretion of the court.⁷ In that respect it differs from the trial of an issue out of chancery, which a court of equity is not bound to grant, nor bound by the verdict if such trial be granted.⁸ Acts of bankruptcy are used in this connection, as they are set forth in a preceding section of the statute, and are thus given a definite meaning. Whether one be chiefly engaged in farming has no relation, within this meaning, to any act of bankruptcy; and like other jurisdictional questions is for the court.⁹ Subsection *a* does not confer upon a petitioning or answering creditor the right to a trial by jury of an issue pertaining to alleged acts of bankruptcy or the insolvency of the alleged bankrupt.¹⁰ The right is confined to the debtor; but a debtor cannot bring in issue before a jury the intention alone, with which he, while insolvent, permitted a creditor to have a preference.¹¹ Upon motion the issues will be limited to the insolvency of the alleged bankrupt and the act of bankruptcy charged in the petition to have been committed.¹² The issue of insolvency involves the question of a fair valuation of the bankrupt's property, and the validity and amount of petitioners' claims.¹³ The question as to whether an alleged bankrupt is a partner, when decisive of the question of his solvency, must be kept open for the jury.¹⁴ Where the issue is insolvency, the burden is upon the petitioning creditors.¹⁵ The question of an alleged bankrupt's insanity may be submitted to the jury as an essential part of the defense that he did not commit an act of bankruptcy.¹⁶ Where the bankruptcy court, having exclusive jurisdiction, also has custody of certain money, and the distribution of the fund is the only issue before the court, there is no question under the Bankruptcy Act or other law, to be submitted to a jury for determination.¹⁷

c. How jury trial demanded.—The demand must be by a written application. No form is prescribed,¹⁸ but any statement signed by the bankrupt and indicating the demand will be sufficient. If the application is granted, an order substantially in Form No. 7 should be entered by the clerk. Such an application can be made only by "a person against whom an involuntary petition has been filed;" thus an answering creditor has not the right to a jury trial, even on the two specified questions.¹⁹ The application must be made within

7. *Elliott v. Toepfner*, 187 U. S. 327, 9 Am. B. R. 50, 47 L. Ed. 200; *Day v. Beck & Gregg Hardware Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 175, 114 Fed. 834.

8. *Elliott v. Toepfner*, 187 U. S. 327, 9 Am. B. R. 50, 47 L. Ed. 200. But see *Oil Well Supply Co. v. Hall* (C. C. A., 4th Cir.), 11 Am. B. R. 738, 128 Fed. 875, holding that where a district court certifies a case to the circuit court for trial by jury, after such a trial had been waived, the verdict is advisory and may be disregarded.

9. *Stephens v. Merchants Bank* (C. C. A., 7th Cir.), 18 Am. B. R. 560, 154 Fed. 341.

10. *In re Herzikopf* (C. C. A., 9th Cir.), 9 Am. B. R. 745, 121 Fed. 544.

11. *In re Harris* (D. C., Ala.), 19 Am. B. R. 204, 156 Fed. 875.

12. *Morss v. Franklin Coal Co.* (D. C., Penn.), 11 Am. B. R. 423, 125 Fed. 998.

13. *Schloss v. Strelow & Co.* (C. C. A., 3d Cir.), 19 Am. B. R. 359, 156 Fed. 663.

14. *In re Neasmith* (C. C. A., 6th Cir.), 17 Am. B. R. 128, 147 Fed. 160; *Buffalo Milling Co. v. Lewisburg Dairy Co.* (D. C., Pa.), 20 Am. B. R. 279, 159 Fed. 319.

15. *McGowan v. Knittel* (C. C. A., 3d Cir.), 15 Am. B. R. 1, 137 Fed. 453, 1,015.

16. *In re Ward* (D. C., N. J.), 20 Am. B. R. 482, 161 Fed. 755.

17. *Matter of Gibbons* (D. C., Wash.), 35 Am. B. R. 620, 225 Fed. 420.

18. See, however, "Supplementary Forms," *post*; *Hagar and Alexander's Bankruptcy Forms*, 2d Ed. No. 22.

19. See *Bankr. Act*, § 18-b.

five days after the return day. If there has been a general extension of time to plead, it seems that a demand filed after the original day to plead, but before the extension of time expires, will be too late.²⁰

d. Effect of failure to demand.—It is clear that, if no application for a jury trial is filed within the time limited, the right is waived.²¹ At the same time, even after such a waiver, an issue or issues of fact may be framed and sent to the jury, though the court in that event will not be bound by its findings.²² Where, however, the proceeding is only constructively involuntary, as some partnership proceedings, and the case has already been referred to the referee, the time does not expire until the day set for the hearing.²³ Where a stipulation is entered into by the attorneys of the parties in interest, waiving trial by jury and submitting the case to the trial judge, he is constituted an arbitrator, and his decision will not be disturbed where there is evidence to support it.²⁴

II. HOW A JURY IS OBTAINED.

a. In general.—As under the former law, perhaps before and certainly after the amendatory act of 1874,²⁵ the trial may be had at a stated term which has a jury in attendance, or before a special jury called for that purpose.²⁶ But the statute does not specify how such a special jury is to be paid, and this clause, in actual practice, will be found of little avail. The additional clause, permitting the certification of the cause to a circuit court, is of no force since the abolishment of that court by the judicial code.

b. The trial.—The trial before a jury is conducted and subject to the immemorial rules surrounding a trial at common law.²⁷ The right to introduce evidence by way of deposition is unquestioned,²⁸ and the method of taking evidence is further suggested by the equity rules.²⁹ The judge can take the case from the jury by directing a verdict, if no question of fact develops, or he can set the verdict aside.³⁰ If each party asks the court to direct a verdict in his favor, it is equivalent to a request for a finding of facts, and if the court directs the verdict, both parties are concluded on such findings.³¹ As has already been suggested, he can submit issues to them, other than those peculiarly

20. Consult *Bray v. Cobb* (D. C., N. Car.), 1 Am. B. R. 153, 91 Fed. 102.

21. In *re Neasmith* (C. C. A., 6th Cir.), 17 Am. B. R. 128, 147 Fed. 160; *Oil Well Supply Co. v. Hall* (C. C. A., 4th Cir.), 11 Am. B. R. 738, 128 Fed. 875.

22. See cases cited in foot-note, *supra*. In such a case the verdict is advisory only. In *re Neasmith* (C. C. A., 6th Cir.), 17 Am. B. R. 128, 147 Fed. 160.

23. In *re Murray* (D. C., Iowa), 3 Am. B. R. 601, 96 Fed. 600.

24. *Fort Worth Co. v. Shapleigh Co.* (C. C. A., 5th Cir.), 34 Am. B. R. 21, 221 Fed. 257.

25. See § 14 of Act of June 22, 1874. And consult In *re Heydette*, Fed. Cas. 6,444; In *re Gebhardt*, Fed. Cas. 5,294.

26. See, under the former law, In *re Findlay*, Fed. Cas. 4,789.

27. *Elliott v. Toepfner*, 187 U. S. 327, 9 Am. B. R. 54, 47 L. Ed. 200; *Duncan v. Landis* (C. C. A., 3d Cir.), 5 Am. B. R. 649, 106 Fed. 839.

28. See Bankr. Act, § 21-b. See also *Ex parte Fisk*, 113 U. S. 713, 28 L. Ed. 1117.

29. Equity (Rules LXVII-LXXI (Appendix A, *post*)). As to burden of proof, see *Brock v. Hoppock*, Fed. Cas. 1,912; In *re Scudder*, Fed. Cas. 12,563; In *re Oregon Printing Co.*, Fed. Cas. 10,560.

30. In *re Jelsh*, Fed. Cas. 7,257; In *re Corse*, Fed. Cas. 3,254.

31. *Bradley Timber Co. v. White* (C. C. A., 5th Cir.), 10 Am. B. R. 329, 121 Fed. 779, affg. 9 Am. B. R. 441. See *Thompson v. Simpson*, 128 N. Y. 283; *Bentell v. Magone*, 157 U. S. 154, 39 L. Ed. 654.

theirs to determine.³² The verdict will usually be special,³³ and in the form of an answer to one or both the statutory issues raised in the case. The judge is, of course, bound by the jury's determination of questions of fact submitted to them in response to a demand as a matter of right.

III. TRIAL BY JURY OF OFFENSES OR OTHER CONTROVERSIES.

a. Meaning of the subsection.—Subsection *c* unquestionably refers to all issues that may arise in bankruptcy proceedings and as a part thereof, other than contested adjudications. The seventh amendment to the constitution gives an absolute right to trial by jury in all actions at law where the amount in question exceeds twenty dollars. It has, therefore, been suggested that other issues which, were they not parts of a proceeding, as for instance, a motion to expunge a claim duly proved, would be mere actions at law, must, on demand of either party, be submitted to a jury.³⁴ *Barton v. Barbour*,³⁵ decided by the Supreme Court under the former law, seems, however, to be conclusive; it holds that trials without a jury in bankruptcy proceedings are not a violation of constitutional right. Nor does the reference to the Revised Statutes³⁶ made by this subsection change the rule. The district court does not try equity causes by jury; no more did the circuit court, in which, even in actions at law, a jury might be dispensed with by consent. Nor do the words "to submit matters in controversy, or an alleged offense under this act" become meaningless, in this view. Offenses, being crimes, must be tried by jury; actions to recover back property are clearly matters in controversy outside bankruptcy proceedings proper.³⁷ The words quoted clearly refer to these and like controversies, which are not strictly "proceedings in bankruptcy."³⁸ This would seem to be the test. Besides, "hearing" and "trial" are not in the present statute set off against each other.³⁹ The generic word "trial" is used in the present act as indicating a judicial determination of a controverted question, either without or with a jury. If, however, the action is to recover property fraudulently transferred and laid in either Federal court, it is doubtful whether a jury trial can be had as matter of right. If not a part of the proceeding in bankruptcy, such a trial is certainly in equity. The judge could, however, frame an issue and submit it to the jury; and in many cases this will be done. Contempts are clearly not within this subsection, and they will be heard by the judge.⁴⁰ But where an action is brought in a State court to recover the value of personal property claimed to have been disposed of by the bankrupt in fraud of creditors, it may be that, under the State laws, either party is entitled to a jury trial.⁴¹

b. Jury trials on contested discharges.—What has gone before indicates that a bankrupt when petitioning for a discharge has not the right to demand a

32. *In re Rude* (D. C., Ky.), 4 Am. B. R. 319, 101 Fed. 805.

33. Compare *In re King*, Fed. Cas. 7,782.

34. Compare *In re Christensen* (D. C., Iowa), 4 Am. B. R. 99, 101 Fed. 802.

35. 104 U. S. 126, 26 L. Ed. 672.

36. See R. S., §§ 566, 648, 649.

37. Compare *In re Baudouine* (C. C. A., 2d Cir.), 3 Am. B. R. 651, 101 Fed. 574, revg. s. c., 3 Am. B. R. 55, 96 Fed. 536. And see *In re Russell* (C. C. A., 2d Cir.), 3 Am. B. R. 658, 101 Fed. 248.

38. For meaning of the words quoted, see *Bardes v. Bank*, 178 U. S. 524, 4 Am. B. R. 163, 44 L. Ed. 1175.

39. Compare Act of 1867, § 41, R. S., § 5,026, "upon such hearing or trial," with the use of the word "trial" alone in cases where a jury is clearly not intended, in §§ 13 and 15, Act of 1898.

40. *Ripon Knitting Works v. Schrieber* (D. C., Wash.), 4 Am. B. R. 299, 101 Fed. 810.

41. *Allen v. Gray*, 201 N. Y. 504, 25 Am. B. R. 423, 94 N. E. 652.

jury trial. This was otherwise under the former law.⁴² The omission of the present law to give this right in very words is significant of an intention to deny it. No cases are yet to be found in the books. However, as previously suggested, the judge can, in his discretion, send a specified issue to a jury, and, when the objection to a discharge consists in an offense against the act, will often feel constrained so to do. In such cases he is, of course, not bound by the verdict.

⁴². See Act of 1867, § 31, R. S., § 5,111; son, Fed. Cas. 8,151.
Gordon v. Scott, Fed. Cas. 5,620; In re Law-

SECTION TWENTY.

OATHS, AFFIRMATIONS.

§ 20. **Oaths, Affirmations.**—*a* Oaths required by this act, except upon hearings in court, may be administered by (1) referees; (2) officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country.

b Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.

Analogous provisions: In U. S.: As to oaths to schedules and inventory, Act of 1867, § 11, R. S., § 5017; As to oaths to proofs of debt, Act of 1867, § 22, R. S., §§ 5076, 5077, 5079, also § 5076-A; Act of 1841, §§ 5, 7; As to affirmations, Act of 1867, § 48.

In Eng.: None.

Cross-references: To the law: Oath includes affirmation, § 1(17).

Verification of petitions, § 18-c.

Examination of witnesses under oath, § 21-a.

Punishment for false oath, § 29.

Proof of claims consists of statement under oath, § 57-a.

To the General Orders: Execution of letter of attorney, XXXI(5).

SYNOPSIS OF SECTION.

OATHS AND AFFIRMATIONS.

I. Oaths, 493.

- a. *Comparison with former act*, 493.
- b. *How oaths are authenticated*, 494.
- c. *Oaths before attorneys of record*, 494.
- d. *Defects in forms*, 494.

II. Affirmations, 494.

I. OATHS.

a. **Comparison with former act.**—The present act is here much more liberal than its predecessor. Prior to the amendatory act of 1874, even proofs of claim could be sworn to only before a register or circuit court commissioner; if the oath was to the petition or inventory, it could also be sworn to before the judge. Now, an oath to any paper to be used in a bankruptcy proceedings can be taken before any officer authorized to administer oaths in proceedings in either the Federal or State courts of the place where taken. This will in most States include, besides the judge, the referee, United States commissioners, notaries public, justices of the peace, commissioners of deeds, and civil

magistrates in general. An oath taken before a notary public of one State, over his signature and seal, is sufficient for use in proceedings in another State and no further proof is needed, in the first instance, of his official character.¹ If in foreign countries, it must be before a diplomatic or consular officer of the United States there resident; an oath before a foreign local magistrate will not be sufficient.

b. How oaths are authenticated.—If the officer taking the oath has a seal, he should impress it on the paper.² If not, the better practice is to secure a certificate from some clerk of a court of record, that he is such an officer. It is not thought, however, that such certificates are necessary, other than to the effect that in the State where taken the officer is authorized to administer oaths in proceedings before its courts. No certificate is, therefore, necessary when the claim is to be filed in the State within which it is verified; the referee should take judicial cognizance of the fact that the officer was so authorized.³ Powers of attorney can be acknowledged before a referee, a United States commissioner, or a notary public,⁴ but it has been held that the power to administer oaths granted by this section carries with it the incidental power to take acknowledgments of letters of attorney.⁵ A person authorized to take affidavits and acknowledgments will not be permitted to do so "before himself" and attest to his own veracity or identity.⁶

c. Oaths before attorneys of record.—Under the former act, proofs of debt could not properly be taken before the claimant's attorney of record.⁷ This, it seems, is not so now,⁸ unless the attorney has previously filed an appearance.⁹ A proof is nothing more than an affidavit, and, while amounting to a *prima facie* case,¹⁰ when filed, is not evidence on a motion or petition to expunge. The better practice, however, is to see that a petition is sworn to or a claim is verified before some one other than the claimant's attorney.¹¹

d. Defects in forms.—The forms are in this particular frequently misleading. Several seem to indicate that they must be sworn to before the referee. The oaths to the schedules¹² are either unnecessary, or, if not so, ought to have a jurat similar to the oaths to the petition. But, where possible, the forms of oaths prescribed should be followed.¹³

II. AFFIRMATIONS.

The words of this subsection require no discussion. The word "oath" includes "affirmation" wherever used in the statute.¹⁴

1. In re Pancoast (D. C., Pa.), 12 Am. B. R. 275, 129 Fed. 643; Matter of Morse (D. C., N. Y.), 32 Am. B. R. 207, 210 Fed. 900, holding that a petition in involuntary bankruptcy proceedings may be properly verified before a commissioner of deeds.

2. In re Nebe, Fed. Cas. 10,073. Compare In re Phillips, Fed. Cas. 11,098.

3. In re Merrick, Fed. Cas. 9,463.

4. See General Order XXI (5). But see In re Sugenhimer (D. C., N. Y.), 1 Am. B. R. 425, 91 Fed. 744, holding that a power of attorney acknowledged before a foreign consul is sufficient.

5. In re Roy (D. C., N. Y.), 26 Am. B. R. 4, citing under the Act of 1867, the cases of In re Butterfield, Fed. Cas. 2,048; In re McDuffey, Fed. Cas. 8,778.

6. Matter of Grossman (D. C., N. Y.), 34 Am. B. R. 32, 225 Fed. 1020.*

7. In re Keyser, Fed. Cas. 7,748; In re Nebe, Fed. Cas. 10,073.

8. In re Kimball (D. C., Mass.), 4 Am. B. R. 144, 100 Fed. 177. See as to verification of petition in bankruptcy, cases cited under § 18, subheading "Verification of pleadings."

9. In re Kindt (D. C., Iowa), 3 Am. B. R. 443, 98 Fed. 403.

10. In re Sumner (D. C., N. Y.), 4 Am. B. R. 123, 101 Fed. 224.

11. Thus, note In re Brumelkemp (D. C., N. Y.), 2 Am. B. R. 318, 95 Fed. 814.

12. See Form No. 1.

13. In re Keeler, Fed. Cas. 7,638.

14. See Bankr. Act, § 1(17).

SECTION TWENTY-ONE

EVIDENCE.

§ 21. **Evidence.**—*a* A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt* *and his wife,** to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act: *Provided, That the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt.†*

b The right to make depositions in proceedings under this act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided.

c Notice of the taking of the depositions shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim notice shall also be served upon the claimant, and when in opposition to a discharge notice shall also be served upon the bankrupt.

d Certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence.

e A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened.

f A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be

* The words "who is a competent witness under the laws of the State in which the proceedings are pending" which occurred here in the original law, were stricken out by the amendatory act of 1903.

† Amendments of 1903 in italics.

evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.

g A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart.

Analogous provisions: In U. S.: As to examinations of third parties, Act of 1867, §§ 22, 26, R. S., §§ 5081, 5087; Act of 1800, §§ 14, 15; As to depositions, etc., Act of 1867, §§ 5, 7, 38, R. S., §§ 5003, 5004, 5005, 5006; Act of 1841, § 7; Act of 1800, §§ 14, 15; As to certified copies as evidence, Act of 1867, § 38, R. S., § 4992; As to effect of and purpose of recording certified copy of bond, Act of 1867, § 14, R. S., §§ 5044, 5054; Act of 1800, § 11; As to certified copy of order of discharge as evidence, etc., Act of 1867, § 34, R. S., § 5119.

In Eng.: As to examination of third parties, Act of 1883, § 27. See also General Rules 61-72.

Cross-references: To the law: Definitions of "bankrupt," "creditor," "officer," § 1 (4) (9) (18).

Jurisdiction of bankruptcy court to issue process, § 2(15).

Punishment for contempt on examination, §§ 2(16), 41.

Examination of bankrupt, § 7(9).

Composition, confirmation or setting aside, § 12.

Discharge, order granting or revoking, § 14.

Oaths or affirmation, how taken, § 20.

Jurisdiction of referees in respect to examinations, § 38(2) (4) (5).

Referee to make records of evidence, and to cause evidence to be preserved, § 39-a (4) (9).

Notice to creditors of examinations of bankrupt, § 58-a(1).

To the General Orders: Conduct of proceedings, IV.

Indemnity for expenses incurred on examinations, X.

Bankrupt subject to orders of referee, XII(1).

Examinations, how conducted, XXII.

Compensation of officers, etc., XXXV.

To the Forms: Order for examination of bankrupt, No. 28.

Examination of bankrupt or witness, No. 29.

Summons to witness; return of summons to witness, No. 30.

See also Supplementary Forms; Hagar and Alexander's Bankruptcy Forms (2d Ed.), Nos. 210-231.

SYNOPSIS OF SECTION.

EVIDENCE.

I. Compulsory Examination, 497.

a. *Comparative legislation*, 497.

b. *Scope of subsection*, 497.

c. *Who may apply*, 498.

d. *Time of making application*, 499.

I. Compulsory Examination—Continued.**e. Persons who may be examined, 500.**(1) *IN GENERAL, 500.*(2) *AMENDMENTS OF 1903, 501.*(3) *WIFE OF THE BANKRUPT AS A WITNESS, 501.***f. Right to counsel, 502.****g. Scope and conduct of examination, 502.****h. Production of books and papers, 503.****i. Privileged communications, 504.****j. Criminating questions, 505.****k. The use of examination in proceedings in other courts, 506.****l. Refusal to appear and testify; contempts, 507.****m. Practice, 507.****II. Depositions, 508.****a. In general, 508.****b. Notice to adverse party, 509.****c. Practice, 509.****III. Certified Copies as Evidence, 509.****a. In general, 509.****b. Order approving bond of trustee, 509.****c. Order on discharge or composition, 510.****d. Confirming composition as evidence of revesting of bankrupt's property, 510.****I. COMPULSORY EXAMINATION.**

a. Comparative legislation.—The English bankruptcy act is similar to our own in respect to the compulsory examination of third parties.¹ In addition to other designated persons, the court may summon for examination any person deemed "capable of giving information respecting the debtor, his dealings or property," and the scope, method, and effect of examinations is prescribed and regulated by the General Rules.² All previous laws in this country have provided for the examination of third parties, in aid of administration.³ The law of 1867 did so in different words, but much to the same effect. Cases decided under that act will be found useful precedents, and many of the most important ones are cited hereafter in their appropriate places.

b. Scope of subsection.—Subsection *a* provides for the compulsory examination of any person, "including the bankrupt." It should be noted, however, that, while the bankrupt is thus made a compulsory witness as to his own "acts, conduct, or property," by § 7 (9), he must also appear and be ready to testify concerning the same things at the first meeting of creditors. His examination at that time is considered elsewhere;⁴ and whatever is there said will apply equally to an examination of a bankrupt under this subsection. In effect, the only difference, so far as the examination of the bankrupt goes, is one of practice. Where first meetings are kept alive by continuances, as is customary, his examination can be had or resumed so long as the meeting lasts. If the meeting has been adjourned, an examination of the bankrupt can, under § 7 (9), still be had "at such times as the court shall order," or it can be required under the subsection now discussed. Clearly, therefore, the main

¹ Eng. Bankr. Act of 1883, § 27.

§§ 5,081, 5,087; Act of 1800, §§ 14, 15.

² General Rules 61-72.³ Act of 1867, §§ 22, 26, U. S. R. S., thereunder.⁴ Bankr. Act, § 7-a(9) and discussion

purpose of § 21-a is to authorize and regulate the examinations of third parties, rather than of the bankrupt.⁵ Without the power so to examine, the remedy of the statute against preferences and fraudulent transfers would often be unavailing. The issuance of an order directing the examination of a third person concerning the bankrupt estate is within the discretion of the court.⁶ The examination concerning "the acts, conduct and property of a bankrupt," is not less broad in its scope than the examination of the bankrupt himself, as provided in § 7.⁷ Much of what has already been said as to the examination of the bankrupt⁸ applies with equal force here. If the person to be examined appears before a referee, it is the referee's duty to receive the evidence offered, note objections, and generally follow the equity practice.⁹

c. Who may apply.—The application for examination may be made by the bankrupt, a creditor or any officer.¹⁰ In this respect the present law is somewhat broader than the act of 1867.¹¹ "Officer" has been held to include a receiver.¹² A creditor whose claim has not yet been presented may apply.¹³ When a person listed as a creditor states that he has a claim against the bankrupt's estate, and demands an examination to decide whether he will take an affirmative part in the bankruptcy proceedings the court may direct the exam-

5. Purpose of examination under § 21-a.—In the case of *Matter of Bryant* (D. C., Pa.), 26 Am. B. R. 504, 188 Fed. 530, the court quotes the text with approval and says: "That it is the intention of the law to require a bankrupt to submit freely to examination concerning his estate is very apparent. Applications may be granted at any time before final disposition of the estate, in the exercise of a sound discretion of the judge or his referee. Surely the bankrupt should not be unnecessarily harassed, vexed, or annoyed, but where it appears that the creditors may be benefited by further examination, or for any other good reason appearing, the order should be allowed. The vigorous and skillful use of examinations of insolvent bankrupts is often the only means by which creditors are enabled to prevent the Bankruptcy Act being turned into a shield for dishonesty. If hardship and inconvenience results from such examination, as it sometimes may, it should be remembered that a discharge of the bankrupt from his debts is a great privilege and a prize that will reward the honest debtor amply for such inconvenience."

"Nor was the trustee required to set forth the nature and character of the testimony in detail intended to be adduced. The very purpose of an examination under section 21-a is to discover property of the bankrupt, or to learn of its whereabouts and as to the acts of the bankrupt with respect thereto. Such an examination is in its very nature an investigation intended to satisfy the minds of those whose judgment it is true is frequently not well founded by which the honest debtor has all to gain."

6. In *re Andrews* (D. C., Mass.), 12 Am. B. R. 267, 130 Fed. 383, wherein the court

said: "The examination of third persons concerning the bankrupt estate is anomalous, and, if it were wholly beyond the control of the court's discretion, would be oppressive."

7. The object of the examination of the bankrupt and other witnesses to show the condition of the estate is to enable the court to discover its extent and whereabouts, and to come into possession of it, that the rights of creditors may be preserved." No specific issue can be made up, but any fact or circumstance is relevant and material which fairly tends to establish something which may become important in the administration of the estate. *Ulmer v. United States* (C. C. A., 6th Cir.), 34 Am. B. R. 143, 219 Fed. 641, citing *Cameron v. United States*, 231 U. S. 710, 31 Am. B. R. 604, 58 L. ed. 448.

8. See under Bankr. Act. § 7-a (9), *ante*.

9. General Order, XXII; In *re Sturgeon* (C. C. A., 2d Cir.), 14 Am. B. R. 681, 139 Fed. 608.

10. For statutory definition of "officers" see Bankr. Act, § 1(18). See cases digested Am. B. R. Dig. § 42.

11. Where claims were being investigated, under the former law only the bankrupt, a creditor, or the assignee could apply (§ 22), though the court could itself require the attendance of any person (§ 26).

12. In *re Fixen* (D. C., Cal.), 2 Am. B. R. 822, 96 Fed. 748; In *re Fleischer* (D. C., N. Y.), 18 Am. B. R. 194, 151 Fed. 81.

13. See § 1(9), and consult In *re Walker* (D. C., N. D.), 3 Am. B. R. 35, 96 Fed. 550; In *re Jehu* (D. C., Iowa), 2 Am. B. R. 498, 94 Fed. 638; *Matter of Rose* (D. C., Pa.), 19 Am. B. R. 169, 163 Fed. 636. Compare, however, In *re Ray*, Fed. Cas. 11,589, under former law.

ination.¹⁴ Ordinarily the trustee will make the application and the creditor desiring the examination should appeal to him, and upon his refusal apply directly to the court.¹⁵ An application for the examination of a bankrupt under this section should be made upon notice to the bankrupt.¹⁶ While the present law does not in words authorize the court to proceed *proprio motu*, as did that of 1867, the general powers conferred on it by § 2 (15) seem to imply such an authority.

d. **Time of making application.**—Being in aid of administration only,¹⁷ an examination of third persons should not be asked after the estate is wound up, and, it has been held, a pending accepted composition is a sufficient closing of the estate to warrant a refusal if application is then made.¹⁸ In such a case, the witnesses can usually be summoned and examined in the composition proceeding.¹⁹ Whether an examination may be had of the bankrupt under this subsection prior to his adjudication is a doubtful question. In the second circuit,²⁰ it is held that where a receiver has been appointed upon the filing of an involuntary petition, the administration of the alleged bankrupt's estate has begun, and the alleged bankrupt may be required to appear, at the instance of the receiver, and submit to an examination touching his acts, conduct and property. And in the fifth circuit it has been held that the court may, under this section, grant an order for the examination of an involuntary bankrupt, before adjudication and in the absence of a receivership; but that an examination under such circumstances can be useful only in rare instances, since there would be no officer of the bankruptcy court authorized to seize the assets when discovered.²¹ But in other circuits it is held that an order under

14. In re Kuffler (D. C., N. Y.), 18 Am. B. R. 587, 153 Fed. 667.

15. In re Andrews (D. C., Mass.), 12 Am. B. R. 267, 130 Fed. 383.

16. Rawlins v. Hall-Epps Clothing Co. (C. C. A., 5th Cir.), 33 Am. B. R., 237, 217 Fed. 884.

17. In re Cobb (Ref., Mass.), 7 Am. B. R. 104, wherein the court said: "It is to be noted in the first place that the examination of a witness under section 21-a, upon the application of the trustee, is an entirely distinct and independent proceeding from the ordinary bankrupt's examination held at the first meeting of creditors or at some adjournment thereof, at which the bankrupt's counsel is usually and generally allowed to cross-examine such witnesses as are presented. The examination of the witness under section 21-a is taken solely for his information to enable him to act intelligently in the premises and to take such steps as may be necessary for the protection and preservation of the estate."

18. In re Tift, Fed. Cas. 14,032.

19. See In re Ash, Fed. Cas. 571. And compare In re Sumner (D. C., N. Y.), 4 Am. B. R. 123, 101 Fed. 224.

20. Cameron v. United States (C. C. A., 2d Cir.), 27 Am. B. R. 657, citing Wechsler v. United States (C. C. A., 2d Cir.), 19 Am. B. R. 1, 158 Fed. 579, 86 C. C. A. 37, *revd.* on other grounds in Supreme Court, 231

U. S. 710, 31 Am. B. R. 604, 58 L. Ed. 445. See cases digested Am. B. R. Dig. § 51.

Process of administration.—United States v. Liberman (D. C., N. Y.), 23 Am. B. R. 734, 176 Fed. 161; Matter of Fleischer (D. C., N. Y.), 18 Am. B. R. 194, 151 Fed. 81, in which the court reasons that the filing of the petition and the appointment of a receiver to protect the estate of the alleged bankrupt brings the estate into the "process of administration" required by this subsection. In speaking of the desirability of permitting an examination prior to adjudication the court said: "The desirability and importance of promptly conducting an investigation into the affairs of any person petitioned into the bankruptcy court has been too often shown to be open to doubt. To wait until adjudication to ascertain from the bankrupt's own lips the *situs* of his property and his own explanation of the situation in which the creditors find themselves is in many cases giving those guilty of fraud just the necessary time to permit the fraud to be consummated, and the fruits thereof secured. In my opinion, it is not too much to say that a vigorous and skillful use of early examinations of involuntary bankrupts is the one thing which enables creditors to prevent this statute being easily turned into a shield for dishonesty and a potent aid to fraud."

21. Rawlins v. Hall-Epps Clothing Co. (C. C. A., 5th Cir.), 33 Am. B. R. 237, 217 Fed. 884.

this section requiring the bankrupt to be examined is unauthorized.²² Under analogous provisions of former laws such an examination was permitted.²³ It was formerly believed that a reasonable interpretation of the statute did not justify this practice, because it was difficult to conceive how an estate can properly be said to be "in process of administration under this act," when the question of bankruptcy remains undetermined and upon a trial of the issues it may follow that the court has no occasion for the exercise of its jurisdiction. But the Supreme Court has held that where a petition has been filed and a receiver appointed to take possession of the property, the estate was "in process of administration" within the meaning of this section, and the district court had jurisdiction to order an examination of the bankrupt.²⁴

e. Persons who may be examined.—(1) **IN GENERAL.**—Subject to the limitations on the scope of the examination and the usual privileges of witnesses from answering certain classes of questions, any designated person may be subpoenaed and examined in a bankruptcy proceeding.²⁵ It has even been held that a person liable to suit at the instance of a trustee may be compelled to testify.²⁶ Where, however, the purpose is palpable to drag out evidence for use against the third party witness in another court, the examination will be kept within proper bounds. Officers of a bankrupt corporation may be examined concerning the acts, conduct or property of the corporation,²⁷ and so may the officers of a corporation in respect to the relation which a bankrupt stock-

22. *Skubinsky v. Bodek* (C. C. A., 3d Cir.), 22 Am. B. R. 689, 172 Fed. 332; *In re Thompson* (D. C., Penn.), 24 Am. B. R. 655, 179 Fed. 874; *In re Crenshaw* (D. C., Ala.), 19 Am. B. R. 266, 155 Fed. 271; *In re Davidson* (D. C., Mass.), 19 Am. B. R. 833, 158 Fed. 678; *In re Back Bay Automobile Co.* (D. C., Mass.), 19 Am. B. R. 835, 158 Fed. 679, revg. 19 Am. B. R. 33.

Explanation of rule.—In *Skubinsky v. Bodek* (C. C. A., 3d Cir.), 22 Am. B. R. 689, 172 Fed. 332, the court said: "The special reference before adjudication to inquire into 'matters pertaining to the business and conduct of the alleged bankrupt,' was premature, inquisitorial and not to be tolerated. Common fairness requires that the alleged bankrupt, before being subjected to such a proceeding and before any order can properly be made in that behalf, should have the opportunity to make defense to the petition seeking his adjudication as a bankrupt."

Examination upon written interrogatories.—An alleged bankrupt cannot before adjudication be subjected to an examination upon written interrogatories at the instance of petitioning creditors. *In re Thompson* (D. C., Penn.), 24 Am. B. R. 655, 179 Fed. 874.

In the case of *Matter of Wilkesbarre Light Co.* (C. C. A., 3d Cir.), 31 Am. B. R. 451, 208 Fed. 539, it was held that an order directing a bankrupt to submit to an examination before a referee under section 21-a should not be granted, where no emergency calling for immediate action is established and an involuntary petition with demurrer and answer thereto has been pending for

nearly eighteen months without a hearing. The case of *Skubinsky v. Bodek* (C. C. A., 3d Cir.), *supra*, was cited, but the court based its determination upon the lack of an emergency requiring the examination.

23. *In re Gilbert*, Fed. Cas. 5,410; *Ex parte Lee*, Fed. Cas. 8,178; *In re Salkey*, Fed. Cas. 12,252.

24. *Cameron v. United States*, 231 U. S. 710, 31 Am. B. R. 604, 58 L. Ed. 448, sustaining the Circuit Court of Appeals (27 Am. B. R. 657, 113 C. C. A. 20, 192 Fed. 548), as to this question, but reversing on other grounds.

25. Even a trustee in an insolvency proceeding more than four months before the bankruptcy. *In re Pursell* (D. C., Conn.), 8 Am. B. R. 96, 114 Fed. 371. See also *People's Bank v. Brown* (C. C. A., 3d Cir.), 7 Am. B. R. 475, 112 Fed. 652. See cases digested Am. B. R. Dig. §§ 44-46.

26. *In re Cliffe* (D. C., Pa.), 3 Am. B. R. 257, 97 Fed. 540.

27. *In re Alphin & Lake Cotton Co.* (D. C., Ark.), 12 Am. B. R. 653, 131 Fed. 824; *In re Horgan & Slattery* (C. C. A., 2d Cir.), 3 Am. B. R. 253, 98 Fed. 414.

Corporation books.—Where the inquiry is concerning an alleged fraud between a corporation and the bankrupt's estate, an order may be made directing the production of a book of the corporation, containing required information concerning the question under investigation, and counsel for the parties will be permitted to examine the same. *In re United States Graphite Co.* (D. C., Pa.), 20 Am. B. R. 280, 161 Fed. 583.

holder or officer may bear thereto.²⁸ But it has been held that a creditor who seeks to vacate or set aside an adjudication of a bankrupt corporation, on the ground that it was not insolvent at the time of the filing of the involuntary petition, should not be compelled to submit to an examination as to certain facts which might be of use on the trial of the issue of solvency. It would be a perversion of the purpose of section 21-a to exercise the power conferred thereby in obtaining evidence to establish the existence of a jurisdictional fact essential to the validity of the adjudication.²⁹

(2) AMENDMENTS OF 1903.—The broad terms of the original law have been made even broader by the amendatory act of 1903. Formerly, a witness not competent "under the laws of the State in which the proceedings are pending" could not be compelled to testify in the court of bankruptcy. This limitation has been stricken out;³⁰ but the change is important only in those States where a wife is not a compellable witness for or against her husband.

(3) WIFE OF THE BANKRUPT AS A WITNESS.—The change just referred to in effect restores the rule under the law of 1867, which made the wife of a bankrupt a compellable witness in all States;³¹ but with a proviso which limits such an examination to "business transactions." This limitation is probably operative even in States where a wife may be a witness for or against her husband. Thus while there is no statutory limitation on the examination of the husband of a bankrupt wife, where the former is the bankrupt, the latter can be forced to testify only as to business transactions with the husband, or to determine the fact whether she has been a party to such transactions.³² In many cases, the wife is the only witness, the bankrupt being protected by his privilege, who can shed light on the whereabouts of secreted assets. Yet, in some States, as the law was, she, too, could claim a privilege.³³ This is no longer so. Congress has added the words "and his wife" after "bankrupt" in this clause, and supplemented them with the proviso clause above referred to. Thus, most of the cases cited just *supra* are no longer in point. Whether a creditor³⁴ or not, the wife of the bankrupt may now be asked any questions as to business transactions with her husband which might be put to any other third party witness, and, on refusal, is liable to the same penalties. A certain degree of latitude in the wife's examination will be allowed so that the court may be sure

28. In re Fixen & Co. (D. C., Cal.), 2 Am. B. R. 822, 96 Fed. 748; In re Horgan & Slatery (C. C. A., 2d Cir.), 3 Am. B. R. 253, 98 Fed. 414.

An officer of a corporation in which a bankrupt owns stock cannot be compelled, by subpoena, to give evidence as to the value of such stock and to produce in support thereof the records relating to the financial condition of the corporation, as such evidence is a matter of expert opinion, and for the further reason that the evidence sought is beyond the purview of section 21-a of the bankruptcy act. Matter of Seligman (D. C., N. Y.), 26 Am. B. R. 664, 192 Fed. 750.

29. Abbott v. Wauchula Mfg. & Timber (C. C. A., 5th Cir.), 36 Am. B. R. 310, 229 Fed. 677.

30. The exact words dropped out after the words "including the bankrupt" are indicated in foot-note to the section.

31. Act of 1867, § 26, R. S., § 5,088. See In re Campbell, Fed. Cas. 2,348; In re Craig, Fed. Cas. 3,323; In re Anderson, 23 Fed. 482.

32. In re Worrell (D. C., Pa.), 10 Am. B. R. 744, 125 Fed. 159, holding that the wife cannot be examined generally, but that her examination must be confined within the terms prescribed in the proviso. See cases digested Am. B. R. Dig. § 45.

Competency of wife to testify against husband.—Under section 21-a of the Bankruptcy Act, section 858 of the U. S. Revised Statutes, as amended by Act of June 29, 1906, and section 5 of Pennsylvania Act of May 23, 1887, a wife is incompetent to testify against her husband in a civil proceeding under the Bankruptcy Act. Matter of Kessler (D. C., Pa.), 35 Am. B. R. 30, 225, Fed. 394.

33. In re Fowler (D. C., Wis.), 1 Am. B. R. 555, 93 Fed. 417; In re Jefferson (D. C., Wis.), 3 Am. B. R. 174, 96 Fed. 826; In re Mayer (D. C., Wis.), 3 Am. B. R. 222, 97 Fed. 328; In re Cohn (D. C., Mo.), 5 Am. B. R. 16, 104 Fed. 328.

34. Compare In re Richards, Fed. Cas. 11,770. And see In re Post, 1 N. B. N. 527.

that she is not, and has not been transacting business as a mere cover for the bankrupt, or in aid of a scheme to injure his creditors.³⁵

f. Right to counsel.—It has been uniformly held under both statutes that the examination referred to here is not of such a character as to entitle a witness, not a bankrupt, to counsel as a matter of right.³⁶ But the attendance and assistance of counsel will not usually be refused, especially where it appears that the examination tends to show the commission of a crime.³⁷ Yet, even if in attendance, the right of the witness' counsel to cross-examine seems in the discretion of the court.³⁸

g. Scope and conduct of examination.—The subsection authorizes examination "concerning the acts, conduct or property of a bankrupt." This indicates the scope of the examination and generally speaking the examination should be limited to the matters specified. Yet as a rule, large latitude will be permitted, especially where the witness is known to have been closely connected with the bankrupt in his business dealings.³⁹ The field of inquiry is broad; within the limitation prescribed any question is permissible which seeks to ascertain facts concerning the bankrupt's property and affairs.⁴⁰ But, when a witness has clearly indicated that the matter inquired into has nothing to do with the bankrupt's acts, conduct, or property, his examination on that matter should be stopped.⁴¹ For although the bankruptcy act gives latitude in the examination of the bankrupt, it does not otherwise abrogate the orderly method of procedure which prevails in the Federal courts.⁴² The purpose of examining a bankrupt, under this section, is to develop the whereabouts of assets of the estate for the purpose of aiding its administration, and not to

35. *In re Worrell* (D. C., Pa.), 10 Am. B. R. 744, 125 Fed. 159, holding that where the day after an adjudication, the wife bought the lease of a theatre and employed her husband as manager, she may be examined to discover what she paid for the lease and where the money came from and may be asked any other question tending to show whether the enterprise is hers or carried on by the bankrupt in her name.

36. *In re Cobb* (Ref., Mass.), 7 Am. B. R. 104; *In re Howard* (D. C., Cal.), 2 Am. B. R. 582, 95 Fed. 415; *In re Comstock*, Fed. Cas. 3,080; *In re Fredenberg*, Fed. Cas. 5,075; *Matter of Abbey Press* (C. C. A., 2d Cir.), 13 Am. B. R. 11, 134 Fed. 51.

37. *In re Hark Bros.* (D. C., Pa.), 14 Am. B. R. 624, 136 Fed. 986, in which the court held that it was to be assumed that the referee will allow a bankrupt representation by counsel at any hearings that may take place.

Counsel for the bankrupt has no absolute right to be present at hearings before a referee conducting an examination of witnesses other than the bankrupt under the provisions of section 21-a. *Matter of Adler* (Ref., La.), 21 Am. B. R. 362.

38. *In re Cobb* (Ref., Mass.), 7 Am. B. R. 104, and the cases cited.

39. *In re Foerst* (D. C., N. Y.), 1 Am. B. R. 259, 93 Fed. 190; *Matter of Horgan & Slattery* (C. C. A., 2d Cir.), 3 Am. B. R. 253, 98 Fed. 414; *In re Pittner*, 2 N. B. N. Rep. 915.

Latitude of inquiry.—Although bankruptcy inquiries are to be conducted only to enable creditors to discover whether the bankrupt is entitled to a discharge and inform the trustee whether any assets exist which should be collected, large latitude of inquiry should be allowed in the examination of persons closely connected with the bankrupt in business dealings. *Matter of Lathrop, Hastings & Co.* (D. C., N. Y.), 24 Am. B. R. 611, 184 Fed. 534.

40. *U. S. v. Wechsler* (D. C., N. Y.), 16 Am. B. R. 1, 5; *In re Carley* (D. C., Ky.), 15 Am. B. R. 554, 106 Fed. 862, in which the court held that the witness should fully disclose all his knowledge relative either to the acts, the conduct or the property of the bankrupt; *In re Williams* (D. C., Tenn.), 10 Am. B. R. 538, 123 Fed. 321.

The words "concerning the property of a bankrupt," as found in section 21-a of the bankruptcy act, which provides for the examination of witnesses in such matters, must be taken to mean the discovery of the existence, whereabouts or disposition of property, and cannot be extended so as to draw from unwilling outsiders evidence as to the value of what the bankrupt admittedly has in his possession. *Matter of Seligman* (D. C., N. Y.), 26 Am. B. R. 664, 192 Fed. 750.

41. *In re Carley* (D. C., Ky.), 5 Am. B. R. 554, 106 Fed. 862.

42. *Matter of Kinnane Co.* (D. C., Ohio), 33 Am. B. R. 243, 217 Fed. 468.

enable the petitioning creditors to elucidate evidence to assist them in establishing the insolvency of the bankrupt or the act or acts of bankruptcy relied upon by them.⁴³ If the questions are not relevant to such matters the witness is justified in refusing to answer them.⁴⁴ Useless repetition should not be permitted,⁴⁵ nor should the examination be needlessly prolonged at the expense of the estate.⁴⁶ A difficult problem often arises when the questions seem directed to the private affairs or individual property of a third party witness. No rigid rule can be stated. If the acts inquired of are interwoven with those of the bankrupt in such a way as to cause a reasonable suspicion that the witness has been preferred or is colluding with the debtor to secrete property, the witness will be required to answer and even to produce his own books.⁴⁷ If, on the other hand, the examination does not develop facts warranting these inferences or seems without sufficient foundation, questions concerning the property or conduct of the witness will be ruled out.⁴⁸ There is no backward limit as to the time of the acts or the ownership of property under investigation;⁴⁹ the further back the questioner goes, however, the narrower should be the limits of the examination. The date the petition was filed is usually the forward limit; what a bankrupt does or earns or has after that date is not the concern of his creditors, so long as the doing, earning, or having is consistent with honest dealing prior to the bankruptcy.⁵⁰

h. Production of books and papers.—The right to the examination of a third person concerning the acts, conduct or property of the bankrupt includes the examination of books, papers and documents in his possession or under his control.⁵¹ The president of a bank may be compelled to produce his private memo-

43. *Rawlins v. Hall-Epps Clothing Co.* (C. C. A., 5th Cir.), 33 Am. B. R. 237, 217 Fed. 884; *Abbott v. Wauchula Mfg. & Timber Co.* (C. C. A., 5th Cir.), 36 Am. B. R. 310, 229 Fed. 677.

44. *In re Howard* (D. C., Cal.), 2 Am. B. R. 582, 95 Fed. 415; *In re Hayden* (D. C., N. Y.), 1 Am. B. R. 670, 96 Fed. 199.

45. *In re Romine* (D. C., W. Va.), 14 Am. B. R. 785, 789, 138 Fed. 837.

46. *In re Stark* (D. C., N. Y.), 18 Am. B. R. 467, 155 Fed. 695.

47. *In re Fixen* (D. C., Cal.), 2 Am. B. R. 822, 96 Fed. 748; *People's Bank v. Brown* (C. C. A., 3d Cir.), 7 Am. B. R. 475, 112 Fed. 652.

48. *In re Hayden* (D. C., N. Y.), 1 Am. B. R. 670, 96 Fed. 199; *In re Salkey*, Fed. Cas. 12,252.

49. *In re Brundage* (D. C., Iowa), 4 Am. B. R. 47, 100 Fed. 613; *In re Pursell* (D. C., Ct.), 8 Am. B. R. 96, 114 Fed. 371.

Four months' period.—When a bankrupt submits to an examination on behalf of creditors, it is competent to inquire as to the disposition of his property, in order to ascertain whether there exists any property right in which the bankrupt has an interest, and the inquiry is not necessarily confined to transactions which have occurred within four months prior to the filing of the petition. *In re Brundage* (D. C., 613 Pa.), 4 Am. B. R. 46, 100 Fed.

50. See *In re Walton*, 1 N. B. N. 533.

51. *In re Fixen* (D. C., Cal.), 2 Am. B. R.

822, 96 Fed. 748; *In re Hess* (D. C., Pa.), 14 Am. B. R. 826, 136 Fed. 988; *In re United States Graphite Co.* (D. C., Pa.), 20 Am. B. R. 280, 161 Fed. 583.

Order for production of books and papers.

—An order granted under section 21-a of the Bankruptcy Act requiring the bankrupts to produce "all of the books of account * * * and other writings and memoranda, from which may be ascertained any of the matters and things, hereinbefore mentioned, and to be covered in said examination," is too broad and uncertain, especially where the bankrupt lives distant from the place of examination and has been in business many years. *Rawlins v. Hall-Epps Clothing Co.* (C. C. A., 5th Cir.), 33 Am. B. R. 237, 217 Fed. 884.

Minute book of corporation.—Where a referee is engaged in making inquiry as to an alleged fraud between a corporation and the bankrupt's estate, and the corporation is also interested in having an order made for the security of rent, an order for the production of its minute book, containing the truthful information concerning the questions under investigation, will be granted, and counsel for the parties permitted an examination thereof. *In re United States Graphite Co.* (D. C., Pa.), 20 Am. B. R. 280, 161 Fed. 583.

Jurisdiction to compel delivery of books to receiver by state district attorney.—Where a private banker has surrendered his books to the state superintendent of banks, who

randum book containing data in respect to the dealings of the bankrupt with the bank.⁵² An order directing a person to appear before the referee and testify, bringing with him certain books and papers, does not authorize the receiver of the bankrupt at whose instance the order was issued, to take possession of such books and papers.⁵³ The books of a corporation may be subpoenaed for examination before a special master, in proceedings to ascertain whether the property interests of the bankrupt and such corporation were identical,⁵⁴ and possession of the books by the proper officers will be presumed.⁵⁵

i. Privileged communications.—The statute is silent in respect to privileged communications. There is no indication, however, that it is intended that the rule in respect to such communications should be disregarded in bankruptcy proceedings. Where by State statute communications between persons occupying certain relations are privileged, they will be recognized as privileged by the bankruptcy courts in that State.⁵⁶ The rule that communications between attorney and client are privileged will be upheld,⁵⁷ although the witness may be questioned by the court to enable it to determine for itself whether communication is a privileged one.⁵⁸ An attorney may not refuse to identify papers signed by him on the ground of privilege, and is bound to testify as to any facts which came to his knowledge in any other way than through confidential communications from his client.⁵⁹ The elimination of the words "who is a competent witness under the laws of the State in which the proceedings are pending," from subsection *a* of this section by the amendatory act of 1903 has not affected the privilege in respect to such communications of any witness other than the bankrupt's wife. Prior to the amendment the competency of witnesses before a court of bankruptcy was determinable by the law of the State in which the case was pending.⁶⁰ As the law now stands this question of competency may be determined by the Federal statutes if any exist which are

after taking possession under the state law, was appointed receiver in bankruptcy, and has not suggested any limitation in their use for eight months, the bankruptcy court will not compel the state district attorney to deliver to the bankrupt's receiver books and papers which he is about to use in the trial of an indictment in the state court. *Matter of Mandel* (D. C., N. Y.), 35 Am. B. R. 386, 224 Fed. 642.

52. *Matter of Wheeler & Co.* (C. C. A., 2d Cir.), 19 Am. B. R. 461, 158 Fed. 603, revg. 18 Am. B. R. 421.

53. *In re Davis Tailoring Co.* (D. C., N. J.), 16 Am. B. R. 486, 144 Fed. 285.

54. *Matter of Iron Clad Mfg. Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 566, 201 Fed. 66.

55. **Presumption of possession of books by corporation.**—Where in a bankruptcy proceeding against a corporation another corporation is ordered to produce its books before the special master for examination, there is a presumption that the corporation is in the possession and control of its own books, which cannot be rebutted by the mere statement of some officer that he does not know where they are. *Matter of Iron Clad Mfg. Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 566, 201 Fed. 66.

56. *Matter of Reid* (D. C., Mich.), 17 Am.

B. R. 477, 155 Fed. 933; holding that a sworn statement delivered by a bankrupt to a city assessor is not admissible in evidence against the bankrupt, where the statute requiring such statement provides that it shall not be used for any other purpose than the making of an assessment of taxes.

57. *People's Bank v. Brown* (C. C. A., 3d Cir.), 7 Am. B. R. 475, 112 Fed. 652.

58. *People's Bank v. Brown* (C. C. A., 3d Cir.), 7 Am. B. R. 475, 112 Fed. 652, wherein the court said: "There is no presumption of privilege, and though its allowance may, in a clear case, be founded upon the voluntary statement of the attorney that his knowledge of the fact to which he is asked to testify was acquired in professional confidence, yet, wherever, as in this case the circumstances suggest that the sufficiency of the grounds of that statement should be considered, it is the right of the opposing party to demand that the proponent of the privilege shall be submitted to such interrogation as may be necessary to test its validity."

59. *In re Ruos* (D. C., Pa.), 20 Am. B. R. 281, 159 Fed. 252.

60. *In re Josephson* (D. C., Ga.), 9 Am. B. R. 345, 349, 121 Fed. 142.

applicable to the case.⁶¹ Otherwise the State statute will control. Whatever may be the rule in respect to competency of witnesses the State statute in respect to privileged communications will be observed.⁶²

j. Criminating questions.—It is provided in § 7-a (9) that "no testimony given by him (the bankrupt) shall be offered in evidence against him in any criminal proceeding."⁶³ Early in the administration of the law, it was thought that a bankrupt waived his constitutional privilege by filing a voluntary petition, and that the opposite was the rule where the petition was involuntary.⁶⁴ As has already been stated this doctrine is now rejected.⁶⁵ Notwithstanding the immunity afforded a bankrupt by the statute he may refuse to answer a question on the ground that it will tend to incriminate him.⁶⁶ It is not in any sense essential that a transaction should be pending against the bankrupt to entitle him to claim this constitutional privilege.⁶⁷ If the privilege be thus accorded to a bankrupt, a third party witness is much more entitled to it; the law does not even attempt to give such a witness immunity from punishment. He may therefore refuse to testify on this ground.⁶⁸ The privilege may be claimed in respect to the examination of books, papers and records containing incriminating evidence.⁶⁹ The plea of the privilege should not be permitted to excuse the production of the books, papers and records. They should be produced and if found by the court to contain incriminating evidence, an order may be made to protect the witness from the discovery of the evidence and if possible otherwise direct in respect to the competency of the necessary information.⁷⁰ For instance, an order requiring the bankrupt

61. *Smith v. Township of Au Gres* (C. C. A., 6th Cir.), 17 Am. B. R. 745, 150 Fed. 257, holding that the competency of a witness to testify in a court of bankruptcy as to a transaction between himself and the deceased person is to be tested by § 858 of the United States Rev. Stats., and not by the State statute.

62. *In re Aspinwall*, Fed. Cas. 591; *In re Bellis*, 38 How Pr. (N. Y.) 79.

63. See discussion under Bankr. Act, § 7-a (9) on p. 269, *ante*.

64. Compare *In re Sapiro* (D. C., Wis.), 1 Am. B. R. 296, 92 Fed. 340. *Contra*: *In re Hathorn* (Ref., La.), 2 Am. B. R. 298, and *In re Scott* (D. C., Pa.), 1 Am. B. R. 49, 95 Fed. 815.

65. See p. 270, *ante*, and cases cited.

66. *In re Kanter & Cohen* (D. C., N. Y.), 9 Am. B. R. 104, 117 Fed. 356; *U. S. v. Goldstein* (D. C., Va.), 12 Am. B. R. 755, 132 Fed. 789; *In re Henschel* (Ref., N. Y.), 7 Am. B. R. 207; *Matter of Smith* (D. C., N. Y.), 7 Am. B. R. 213, 112 Fed. 509; *In re Shera* (D. C., N. Y.), 7 Am. B. R. 552, 114 Fed. 207; *In re Feldstein* (D. C., N. Y.), 4 Am. B. R. 321, 103 Fed. 269; *In re Scott* (D. C., Pa.), 1 Am. B. R. 49, 95 Fed. 815; *In re Nachman* (D. C., S. Car.), 8 Am. B. R. 180, 114 Fed. 995; *In re Rosser* (D. C., Mo.), 2 Am. B. R. 755, 96 Fed. 305. *Contra*: *In re Franklin Syndicate* (D. C., N. Y.), 4 Am. B. R. 511, 114 Fed. 205; *Mackel v. Rochester* (C. C. A., 9th Cir.), 4 Am. B. R. 1, 102 Fed. 314; *United States v. Rhodes* (D. C., Ala.), 32 Am. B. R. 528, 212 Fed. 513.

67. *In re Hess* (D. C., Pa.), 14 Am. B. R. 559, 134 Fed. 109.

68. *Matter of Hooks Smelting Co.* (D. C., Pa.), 15 Am. B. R. 83, 138 Fed. 954, where it was held that an officer of a bankrupt corporation who had been indicted for embezzling its funds may refuse to testify whether he had taken any part of the bankrupt's property upon the ground that his answer might incriminate him.

Trustee protected.—In the case of *Matter of Smith* (D. C., N. Y.), 7 Am. B. R. 213, 112 Fed. 509, it was held that a trustee in bankruptcy cannot be compelled to give testimony which may tend to show that he has misappropriated the funds of the bankrupt estate; *In re Feldstein* (D. C., N. Y.), 4 Am. B. R. 321, 103 Fed. 269.

69. *Matter of Hark Bros.* (D. C., Pa.), 14 Am. B. R. 624, 136 Fed. 986; *In re Hess* (D. C., Pa.), 14 Am. B. R. 559, 134 Fed. 109; *In re Kanter & Cohen* (D. C., N. Y.), 9 Am. B. R. 104, 117 Fed. 356; *United States v. Rhodes* (D. C., Ala.), 32 Am. B. R. 528, 212 Fed. 513.

70. *Matter of Hark Bros.* (D. C., Pa.), 14 Am. B. R. 624, 136 Fed. 986.

Production of books excused.—In the case of *In re Rosenblatt* (D. C., Pa.), 16 Am. B. R. 306, 143 Fed. 663, it was held that unless the court is satisfied that the bankrupt's claim that the books contain incriminating evidence has some foundation in fact, an order may be issued directing the delivery of the books to the receiver; *In re Hess* (D. C., Pa.), 14 Am. B. R. 559, 134 Fed. 109.

to deposit books of account in the office of the receiver, there to remain in the custody of the bankrupt, for the inspection of the receiver in the administration of the estate, but not for any criminal prosecution, provision being made to give the bankrupt an opportunity to assert his constitutional privilege in case of process for their production, is not an infringement of the bankrupt's constitutional rights.⁷¹ But where the books are in the possession of the trustee, property belonging to him, as the custodian of the bankrupt's property, they may be used against the bankrupt on the trial of an indictment for concealment.⁷² The Supreme Court distinguishes between the compulsory production of books of the bankrupt as evidence against him in a criminal proceeding, and the production by the trustee who succeeds by law to their possession upon the adjudication of the bankrupt. The numerous cases construing the Fifth Amendment will be found valuable precedents.⁷³

k. The use of examination in proceedings in other courts.—Whether the examination may be used in proceedings in other courts is a mooted question. Such examinations may, of course, be used for the purpose of impeachment. If admitted for any other purpose, it should be proven by calling the stenographer or by offering a certified copy of the record.⁷⁴ The examination is so nearly like an *ex parte* inquisition, however, that it will often be ruled out, and, if allowed, should be accompanied with permission to the other party to cross-examine. It seems that the examination of third party witnesses cannot be introduced on the objections to the bankrupt's discharge, though his examination may be,⁷⁵ and testimony taken upon such an examination is inadmissible in

Delivery of books; order protecting witness.—Where a bankrupt declines to deliver his books of account to the receiver on the ground that they contain entries which would tend to criminate him, he must produce the books before the court or referee in order to have the question determined whether they do in fact tend to incriminate him; and if it appears that they do contain incriminating evidence, the court will by order protect the bankrupt from the use of such evidence for any criminal proceeding and at the same time will enable the trustee to make such use of the books as may be necessary to administer the estate. If the books are delivered to such trustee, or to a receiver, the order must provide that the bankrupt be notified of any subpoena or other process to secure possession of the books so that he may have an opportunity to assert his constitutional privilege. In *re Harris* (D. C., N. Y.), 20 Am. B. R. 911, 164 Fed. 292, *affd.* 221 U. S. 274, 26 Am. B. R. 302, 55 L. Ed. 732.

71. *Matter of Harris*, 221 U. S. 274, 26 Am. B. R. 302, 303, 55 L. Ed. 732, in which Mr. Justice Holmes says: "If the order of the bankrupt, standing alone, infringed his constitutional rights, it might be true that the provisions intended to save them would be inadequate, and that nothing short of statutory immunity would suffice. But no constitutional rights are touched. The question is not of testimony but of surrender—not of compelling the bankrupt to be a witness against himself in a criminal case, present or future, but of compelling him to yield possession of property that he no longer is

entitled to keep. If a trustee had been appointed, the title to the books would have vested in him by the express terms of section 70, and the bankrupt could not have withheld possession of what he no longer owned, on the ground that otherwise he might be punished. That is one of the misfortunes of bankruptcy if it follows crime. The right not to be compelled to be a witness against oneself is not a right to appropriate property that may tell one's story. As the bankruptcy court could have enforced title in favor of the trustee, it could enforce possession *ad interim* in favor of the receiver. Section 2. In the properly careful provision to protect him from use of the books in aid of prosecution, the bankrupt got all that he could ask."

72. *Johnson v. United States*, 228 U. S. 457, 30 Am. B. R. 14, 57 L. Ed. 919, distinguishing *Matter of Harris*, *supra*; *Ensign v. Commonwealth of Pa.*, 227 U. S. 592, 30 Am. B. R. 408, 57 L. Ed. 658.

73. For instance *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. Ed. 1110, and *Brown v. Walker*, 161 U. S. 591, 40 L. Ed. 819, and the cases there cited.

74. See discussion under this section, subtitle, "*Certified Copies as Evidence*," *post*; In *re Wiesen Bros.* (D. C., Pa.), 14 Am. B. R. 347, 135 Fed. 442.

75. In *re Wilcox* (C. C. A., 2d Cir.), 6 Am. B. R. 362, 109 Fed. 628; in effect *revg.* In *re Cooke* (D. C., N. Y.), 5 Am. B. R. 434, 109 Fed. 631. Consult, as to the bankrupt's examination being used, cases cited on pp. 268-271, *ante*.

a proceeding to compel the payment of money alleged to belong to the bankrupt estate,⁷⁶ or in a proceeding to compel the bankrupt to turn over alleged exempt property; and this is so notwithstanding the fact that the witnesses were cross examined.⁷⁷ Upon a proceeding before the referee for the distribution of the fund derived from the sale of bankrupt's assets free from liens, testimony of the former president of the bankrupt company, taken on a general examination under this section, and not directed to any defined issue, is inadmissible in support of a claim.⁷⁸

l. Refusal to appear and testify; contempts.—Refusal to appear, under the former statute, made the recusant witness liable in contempt.⁷⁹ The present act does not particularize as to contempts of this character, but a court has power to enforce its commands in the usual way.⁸⁰ Where an order for the examination of a party contains a clause ordering him to produce thereon certain books and papers, and he does not produce them upon the examination, the court may punish him as for contempt.⁸¹ A witness may not be compelled to testify without the payment of his lawful fees.⁸² The application to submit to an examination involves the duty of answering truthfully, and as intelligently and fully as mental equipment will permit, all material questions, and a failure to perform such duty is punishable as a contempt.⁸³

m. Practice.—The usual practice upon the examination of a bankrupt has already been considered under § 7-a (9). The practice on third party examinations is not essentially different from that on examinations of the bankrupt at first meetings. The application may either be a formal written petition or be a formal motion. No particular form for the application is prescribed. Grounds for the order, though not absolutely essential, will usually be required.⁸⁴ If the case is pending before a referee, the application should be made to him; he has the same power as the judge to require a designated person to appear and testify.⁸⁵ The court may appoint special masters or

Evidence of partners.—Evidence given by the members of a bankrupt partnership on a general examination before the referee as to the property of the firm is admissible, on an application for a discharge, against each of the members respectively; but the evidence of each member is not admissible against each of the other members. *Matter of Malschick* (D. C., Pa.), 33 Am. B. R. 214, 217 Fed. 492.

76. *In re Alphin & Lake Cotton Co.* (D. C., Ark.), 12 Am. B. R. 653, 131 Fed. 824; *Beckons v. Snyder*, 211 Pa. St. 176, 15 Am. B. R. 112, 60 Atl. 575.

Proof of claim.—Where a trustee takes issue upon the right of a creditor to prove a claim against the estate, testimony taken before the referee upon other issues to which the claimant was in fact not a party, and when he was absent, is inadmissible; the witnesses, including the bankrupt, must be recalled unless the claimant consents to the use of the testimony as it appears in the proceedings. *In re Keller* (D. C., Iowa), 6 Am. B. R. 334, 109 Fed. 118.

77. *Matter of Siskind* (D. C., Penn., Ref.), 32 Am. B. R. 69.

78. *Matter of National Boat & Engine Co.*

(D. C., Me.), 33 Am. B. R. 154, 216 Fed. 208.

79. Act of 1867, § 7.

80. Bankr. Act, §§ 1 (13) (16), 41-b.

81. *Matter of Alper* (D. C., N. Y.), 19 Am. B. R. 612, 162 Fed. 207.

82. *In re Marcus* (D. C., Vt.), 20 Am. B. R. 397, 160 Fed. 229.

83. *In re Fellerman* (D. C., N. Y.), 17 Am. B. R. 785, 149 Fed. 244; *Matter of Lathrop, Haskins & Co.* (D. C., N. Y.), 24 Am. B. R. 911, 184 Fed. 534.

Evasive answers.—Where the referee is convinced that the bankrupt is giving evasive testimony the proper practice is to give him notice that he must answer and to enter of record a formal finding that the answer is an evasion and to require a real answer. *Matter of Blitz* (D. C., Pa.), 36 Am. B. R. 863, 232 Fed. 276.

84. *In re Howard* (D. C., Cal.), 2 Am. B. R. 582, 95 Fed. 415; *In re Earle*, Fed. Cas. 4,244; *In re Mendenhall*, Fed. Cas. 9,424; *In re Lanier*, Fed. Cas. 8,070.

85. Bankr. Act, § 38(2) (4); *Matter of Abbey Press* (C. C. A., 2d Cir.), 13 Am. B. R. 11, 134 Fed. 51. See also Form No. 28.

commissioners to conduct the examination and report thereon.⁸⁶ The person to be examined is not entitled to notice of the application.⁸⁷ Creditors are entitled to at least ten days' notice by mail of all examinations of the bankrupt.⁸⁸ But if the examination be of a third party notice to the bankrupt or creditors is not required.⁸⁹ It will be frequently advisable, indeed, to have the examination in the absence of the bankrupt and the general creditors.⁹⁰ If the witness is present, he may be ordered to testify; if not present, he should be brought in on a subpoena,⁹¹ and, if books or documents are desired, a subpoena *duces tecum* can be issued; or, it seems, the witness can be brought in on a simple order.⁹² The practice on the taking of testimony is regulated by General Order XXII.⁹³

II. DEPOSITIONS.

a. In general.—Subsection *b* conforms the practice in respect to the taking of depositions in bankruptcy proceedings to that of United States courts generally. It is apparent from subdivision *b* of this section that it was the intention of Congress to confer upon courts of bankruptcy the same jurisdiction and power relating to the taking of depositions as are enjoyed by Federal courts in civil actions.⁹⁴ While a subpoena may, within certain territorial limits, be effective outside the district in issue,⁹⁵ depositions are the usual means of securing testimony at a distance greater than one hundred miles.⁹⁶ It is customary, and will usually be found desirable, to have the deposition taken before the referee of the domicile of the witness. The method of

^{86.} *Matter of Stark* (D. C., N. Y.), 18 Am. B. R. 467, 155 Fed. 694; *In re Herskovitz* (D. C., N. Y.), 18 Am. B. R. 247, 152 Fed. 316; *In re Fleischer* (D. C., N. Y.), 18 Am. B. R. 194, 151 Fed. 81.

Order for delivery of assets.—Upon an application for an order directing a bankrupt to turn over certain specified assets, the matter may be referred to a special master to take the testimony and report thereon. *In re Herskovitz* (D. C., N. Y.), 18 Am. B. R. 247, 152 Fed. 316.

^{87.} *Matter of Abbey Press* (C. C. A., 2d Cir.), 13 Am. B. R. 11, 134 Fed. 51, 67 C. C. A. 161.

^{88.} Bankr. Act, § 58-a(1).

^{89.} *In re Cobb* (Ref., Mass.), 1, 7 Am. B. R. 104. Compare *In re Macintire*, Fed. Cas. 8,821.

^{90.} *Matter of Adler* (Ref., La.), 21 Am. B. R. 302.

^{91.} As to the territorial effect of a subpoena, see *In re Hemstreet* (D. C., Iowa), 8 Am. B. R. 760, 117 Fed. 568.

^{92.} For form of order, see Form No. 28, and for subpoena, see Form No. 30. It is customary for referees to keep subpoenas signed by the clerk on hand. By analogy to Equity Rule XV, such subpoenas should be served either by the marshal, or by some person designated by the referee. The witness fee is \$1.50 and eight cents a mile one way. Proof of service is made by a return, if service is by the marshal; by affidavit (Form 30), if by a designated person.

^{93.} See also Form No. 29.

^{94.} *Matter of Washington Steel & Bolt Co.* (D. C., Wash.), 32 Am. B. R. 153, 210 Fed. 984.

^{95.} See R. S., § 876; *In re Woodward*, Fed. Cas. 18,000.

^{96.} See R. S., §§ 858-879; *Ex parte Fisk*, 113 U. S. 713; *In re Hemstreet* (D. C., Iowa), 8 Am. B. R. 760, 117 Fed. 568; *In re Cole* (D. C., Me.), 13 Am. B. R. 300, 133 Fed. 414.

Outside of State.—Under section 41 of the bankrupt act, a person cannot be compelled to leave the State wherein he resides in order that he may be a witness in a hearing before a referee; if the testimony of such witness is desired, it must be procured under the provisions of section 21. *In re Cole* (D. C., Me.), 13 Am. B. R. 300, 133 Fed. 414.

Witness in another district.—Where the witness whose testimony is sought resides in another district, his testimony may be taken by deposition under section 21-b; if the applicant wishes to have him personally appear before a referee in bankruptcy, the application must be made to a court in the district in which the proposed witness resides. *In re Robinson* (D. C., Minn.), 24 Am. B. R. 617, 179 Fed. 724.

Writ of habeas corpus.—Where a person while confined in a State hospital for the criminal insane is adjudicated a bankrupt in another State, a writ of habeas corpus under section 753 of the U. S. Revised Statutes, to produce him for examination, will be quashed, as his deposition may be taken under this section. *In re Thaw* (D. C., Pa.), 22 Am. B. R. 687, 166 Fed. 71.

deposition does not, of course, exclude the more formal method of a commission to take testimony with or without interrogatories, as regulated by Equity Rule LXVII. Cases construing both the Revised Statutes and the Equity Rules in other courts than courts of bankruptcy will be found in point.

b. Notice to adverse party.—Subsection *c* requires, if the evidence is to be taken by deposition, that notice be filed with the referee. If depositions are to be taken in opposition to the allowance of a claim, notice is also to be served upon the claimant, and when in opposition to a discharge, notice should also be served upon the bankrupt. In the absence of any statutory regulation to the contrary it is therefore provided that no notice need be given the opposing party, unless the evidence is to be offered in opposition to a creditor's claim to the bankrupt's discharge.

c. Practice.—The practice on the taking of depositions is controlled by the general law. The practice on depositions in admiralty will be found a safe guide.⁹⁷

III. CERTIFIED COPIES AS EVIDENCE.

a. In general.—Subsection *d* authorizes certified copies of the proceedings before a referee, or the papers when issued by the clerk or referee, to be admitted as evidence with like force and effect as certified copies of the records of the district court. The manifest purpose of this subsection, and also of *e*, *f*, and *g*, is to give to the records of referees when offered in evidence the force of records of the district court proper. It is thought that the clause "when issued by the clerk or referee" refers to the word "papers" and not to prior words of the clause; the clerk often acts in the absence of the district judge. The certificate may be signed either by the clerk or the referee; but the safer practice is to secure the signature of the former, which carries with it the seal of the court. In important districts, the referee usually has a clerk, but the latter is not an officer recognized by the law, and a certificate by him would be unavailing.⁹⁸

b. Order approving bond of trustee.—Under the former law, the register, as soon as the assignee was appointed, by an instrument in writing equivalent to both a deed and a bill of sale, transferred all the assets of the bankrupt to the assignee;⁹⁹ this assignment was recorded in the district court clerk's office,¹⁰⁰ and a certified copy could then be recorded in the record office of the State. Under the present law, there is no such instrument, but a certified copy of the order approving the trustee's bond, when recorded in the proper clerk's or register's office, becomes constructive notice, and operates as would a deed and bill of sale by a bankrupt. It is also made conclusive evidence of the vesting of the title in the trustee. It is wise, therefore, to record such a certified copy in the proper record office where any property of the bankrupt may be situated. Though the trustee is now required to record a certified copy of the adjudication of bankruptcy in each case, its effect as public notice is not fixed. Safe practice will suggest the recording of both instruments. As title passes to the bankrupt's property at the date of the adjudication as of the date the petition is filed,¹⁰¹ the order approving the bond should show these

97. See Benedict's Admiralty, and observe the various district court rules. See also R. S., § 863 *et seq.*

98. Compare Bankr. Act, § 1(5).

99. Act of 1867, § 14; R. S., §§ 5,044, 5,054.

100. In re Neale, Fed. Cas. 10,066.

101. See Bankr. Act, § 70-a; In re Youngstrom (C. C. A., 8th Cir.), 18 Am. B. R. 572, 575, 153 Fed. 98.

dates, to the end that, when the certified copy is recorded, searchers and title companies may ascertain therefrom the time of devolution of title and what property passed; though this is not so necessary since § 47-c was added by the amendatory act of 1903. This may be accomplished by inserting in Form No. 26, after the word "bankrupt," the words: "who was so adjudged by this court on the day of, 190., on a petition filed on the day of, 190..¹⁰²

c. Order on discharge or composition.—Subsection *f* makes a certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made. The fact of these certified copies is thus clearly defined. This subsection was enacted in contemplation of the fact that the bankrupt might thereafter be sued on debts existing at the date of the filing of the petition in bankruptcy; and was intended to relieve him of the necessity of introducing a copy of the entire proceedings, so that he might obtain the benefit of his discharge by the mere production of a certified copy of the order.¹⁰³

d. Confirming composition as evidence of revesting of bankrupt's property.—Subsection *g* makes a certified copy of an order confirming a composition, evidence of the revesting of the title of his property in the bankrupt. When recorded it imparts the same notice that a deed from the trustee to the bankrupt, if recorded, would impart.

¹⁰² See form for order approving bond in "Supplementary Forms," *post*.

¹⁰³ Kreitlein v. Fenger, 238 U. S. 31, 34

Am. B. R. 862, 59 L. Ed. 1184, revg. 52 Ind. App. 199, 28 Am. B. R. 908.

SECTION TWENTY-TWO.

REFERENCE OF CASES AFTER ADJUDICATION

§ 22. **Reference of Cases after Adjudication.**—*a* After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or (2) to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district.

b The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another.

Analogous provisions: In U. S.: As to one referee acting in the place of another, Act of 1867, § 4, R. S., § 5007.

In Eng.: None.

Cross-references: To the law: Confirmation or rejection of rulings or orders of referees, § 2(10).

Process, pleadings and adjudications, § 18.

Jurisdiction of referees, generally, § 38.

Duties of referees, § 39.

Appointment of trustees, § 44.

And see generally all sections of the law regulating the administration of a bankrupt's estate.

To the General Orders: Duties of referee as to administration of estate, XII.

Approval by referee of appointment of trustee by creditors, XIII.

Notice to trustee of his appointment, XVI.

Hearing exceptions to trustee's report, XVII.

And all other General Orders relating to the administration of the bankrupt's estate.

To the Forms: Order of reference, No. 14.

Order of reference in judge's absence, No. 15.

Oath of office and bond of referee, Nos. 16, 17.

Appointment of trustee by creditors, or by referee, Nos. 22, 23, and other Official Forms having to do with the administration of the bankrupt's estate.

See also Supplementary Forms; Hagar and Alexander's Bankruptcy Forms.

SYNOPSIS OF SECTION.

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I. REFERENCES AFTER ADJUDICATION.

a. Administration without a reference.—By the terms of this section a bankrupt's estate may be administered under the direct supervision of the judge, and without an order of reference. In such a case, a meeting of the creditors would first be called, the clerk giving the notices and, after the election of the trustee, the case would proceed in the usual way. There is, however, no record of a case where the judge has kept an administration in his own control.

b. General references.—These are the references familiar to the bar and the courts. They are accomplished by the entry of an order, substantially in the words of Form 14. The portion of the order which requires the bankrupt to attend before the referee on a day certain follows General Order XII (1), and is in accord with the practice under the former law.¹ Before reference as authorized by this section it is doubtful whether the referee is a court within the definition.²

c. Limited references.—These are not the same as the familiar references to the referees as special masters. It is somewhat difficult to conceive of a case where a limited reference would be ordered.

d. To any referee of the jurisdiction.—The judge is not bound to refer the case to the referee whose district includes the bankrupt's domicile. Thus, cases often arise where a majority of creditors reside in one referee district and the bankrupt in another. It would then be clearly "for the convenience of parties in interest" to refer the case to the referee where the creditors reside. So, also, when a referee is disqualified,³ as by being the attorney for the bankrupt or by relationship, the reference will be ordered elsewhere "for cause." Likewise, if, in the words of the statute, "the bankrupt does not do business, reside or have his domicile in the district." The only real limitations as to the personnel of the referee then seem to be that he must be (a) a duly appointed referee in bankruptcy, and (b) of the same jurisdiction as the court.⁴ But a district court judge cannot refer a case to a referee appointed for and residing in another district.⁵

II. TRANSFER OF CASES FROM ONE REFEREE TO ANOTHER.

Transfers are often necessary. The reasons prescribed are (a) for the convenience of parties, and (b) for cause. The death or resignation of the referee would be sufficient cause; so would the appointment of another in his stead; so also would be official misconduct on his part.⁶ The power to transfer a case from one referee to another is absolute and discretionary. If exercised, the referee is entitled to a part only of his fees and commissions, the proportion to be fixed by the judge.⁷

1. See General Order IV, Act of 1867. As to power of referee to whom was referred a petition to set aside a composition, as special master, to report the facts, see *Matter of Sonnabend* (Ref., Mass.), 18 Am. B. R. 117.

2. In *re Back Bay Automobile Co.* (D. C., Mass.), 19 Am. B. R. 835, 158 Fed. 679.

3. See "Supplementary Forms" for form of certificate of disqualification.

4. Text quoted with approval in *In re Western Investment Co.* (D. C., Okla.), 21 Am. B. R. 367, 370, 170 Fed. 677.

5. In *re Schenectady Eng. & Const. Co.* (D. C., N. Y.), 17 Am. B. R. 279, 147 Fed. 868.

6. See *In re Smith*, Fed. Cas. 12,971.

7. Bankr. Act, § 40-b.

SECTION TWENTY-THREE.

JURISDICTION OF UNITED STATES AND STATE COURTS.

§ 23. **Jurisdiction of United States and State Courts.**—*a* The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

b Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, *except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e,* and section seventy, subdivision e.†*

c The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act.

Analogous provisions: In U. S.: Act of 1867, §§ 1 and 2 (as amended by Act of June 24, 1874), R. S., §§ 4972, 4979; Act of 1841, § 8.

In Eng.: None.

Cross-references: To the law: Courts, term defined, § 1(7).

Courts of bankruptcy, term defined, § 1(8).

Jurisdiction of bankruptcy courts, § 2.

Bond on application to take custody of property, § 3-e.

Suits by and against bankrupt; stay; intervention, § 11.

Process, pleadings and adjudications; appearances, etc., § 18.

Jury trials, when granted, § 19.

Examination of witnesses; depositions; certified copies of records, etc., § 21.

Actions to recover preferences, § 60-b.

Recovery of property fraudulently conveyed, § 67-e.

Actions by trustees to recover property belonging to estate, § 70-e.

* Amendments of 1903 in italics.

† Amendment of 1910 added the words "and section seventy, subdivision e."

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I. SCOPE AND GENERAL EFFECT OF SECTION.

a. *In general*.—Ever since *Ex parte Christy*¹ the questions suggested by this section have led to discussions in Congress and confusion in the courts. There is, of course, no analogous section in the English law; the anomalous co-ordinate national and State courts there being impossible. The books are filled with opinions construing the corresponding sections of the law of 1867.² So many cases have already been decided under the law of 1898, and they are often so antagonistic, that the task of the commentator would be hopeless, had not Supreme Court illumined the situation with a few decisions of great importance. Some are, since the amendatory act of 1903, no longer the law; but even these are at least suggestive of other doctrines as to those provisional and summary remedies which are vital to a due and orderly administration in bankruptcy. The section, other than its last subsection, has to do only with suits at law or in equity outside the bankruptcy proceeding proper;³ subsection *b* only with suits by, not against, the trustee.⁴ Practice under § 23 is, therefore, regulated, not by the General Orders and Forms, but, if in equity, by

1. 3 How. (U. S.) 314.

2. See Cent. Dig., Vol. 6, "Bankruptcy," §§ 410-417; but observe that many of the cases cited are not now in point.

3. See *Bardes v. Bank*, 178 U. S. 524, 4 Am. B. R. 163, 44 L. Ed. 1,175.

4. In *re McCallum* (D. C., Pa.), 7 Am. B. R. 596, 113 Fed. 393.

the Equity Rules, if in law, by the State procedure as supplemented or modified by Federal rules applicable to such cases.

b. **Comparative legislation and decisions.**—The history of the development of this section has been elaborately considered by Mr. Justice Gray in *Bardes v. Bank*.⁵ The former law gave concurrent jurisdiction to the circuit and district courts of both law and equity actions, as distinguished from proceedings in bankruptcy *per se*, where the assignee (trustee) was plaintiff or defendant.⁶ It was also in the end settled that the statute meant that, when the holding of a third party against the assignee (trustee) was adverse, a summary remedy within the bankruptcy proceeding was not proper, but resort must be had to a plenary suit.⁷ The law of 1898, as originally enacted, evidenced an intention to transfer all controversies, other than those strictly within the bankruptcy procedure (as, for instance, a contest on a proof of debt), to the State tribunals. Such was the purpose as indicated by the debates in Congress accompanying its passage,⁸ and such seems the literal meaning of the words. The amendatory act of 1903 has, however, re-enacted the doctrine of concurrent jurisdiction, at least as to all suits by the trustee to recover property fraudulently or preferentially transferred or incumbered within the four months' period.⁹

II. JURISDICTION OF DISTRICT COURTS UNDER JUDICIAL CODE.

a. **Circuit courts abolished.**—The circuit courts of the United States are abolished by the judicial code, taking effect January 1, 1912.¹⁰ It is provided

5. 178. U. S. 524, 4 Am. B. R. 163, 44 L. Ed. 1,175.

An interesting discussion of the development of this section is found in the case of *In re Hammond* (D. C., Mass.), 3 Am. B. R. 466, 98 Fed. 845.

6. *Lathrop v. Drake*, 91 U. S. 516, 23 L. Ed. 414; *Clafin v. Houseman*, 93 U. S. 130, 23 L. Ed. 833; *Olney v. Tanner*, 10 Fed. 101. So also under the law of 1841. *McLean v. Lafayette Bank*, Fed. Cas. 8,885; *Hallack v. Tritch*, Fed. Cas. 5,956; *Brown v. White*, 16 Fed. 900.

7. *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403; *Glenny v. Langdon*, 98 U. S. 20, 25 L. Ed. 43; *Moyer v. Dewey*, 103 U. S. 301, 26 L. Ed. 394.

8. See, however, interesting historical matter, pointing to the opposite conclusion, in *In re Murphy* (Ref., Mass.), 3 Am. B. R. 499.

9. Cited with approval in *In re Carlile* (D. C., N. Car.), 29 Am. B. R. 373, 376, 199 Fed. 612.

Jurisdiction of State court.—In the case of *Bush v. Elliott*, 202 U. S. 477, 15 Am. B. R. 656, 658, 50 L. Ed. 1114, Mr. Justice Day said: "The Bankruptcy Act of 1898, in respect to the matters now under consideration, was a radical departure from the Act of 1867, in the evident purpose of Congress to limit the jurisdiction of the United States courts in respect to controversies which did not come simply within the jurisdiction of the federal courts as bankruptcy courts, and to preserve, to a greater extent

than the former act, the jurisdiction of the State courts over actions which were not distinctly matters and proceedings in bankruptcy."

10. The Judicial Code, § 289, provides that: "The circuit courts of the United States, upon the taking effect of this Act shall be and hereby are abolished; and thereupon, on said date, the clerks of said courts shall deliver to the clerks of the district courts of the United States for their respective districts all the journals, dockets, books, files, records, and other books and papers of or belonging to or in any manner connected with said circuit court; and shall also on said date deliver to the clerks of said district courts all moneys from whatever source received, then remaining in the hands or under their control as clerks of said circuit courts, or received by them by virtue of their said offices. The journals, dockets, books, files, records and other books and papers so delivered to the clerks of the several district courts shall be and remain a part of the official records of said district courts and copies thereof, when certified under the hand and seal of the clerk of the district court, shall be received as evidence equally with the originals thereof, and the clerks of the several district courts shall have the same authority to exercise all the powers and to perform all the duties with respect thereto as the clerks of the several circuit courts had prior to the taking effect of this act."

therein that "All suits and proceedings pending in said circuit courts on the date of the taking effect of this act, whether originally brought therein or certified thereto from the district courts, shall thereupon and thereafter be proceeded with and disposed of in the district courts in the same manner and with the same effect as if originally begun therein, the record thereof being entered in the records of the circuit courts so transferred as above provided."¹¹

b. Powers and duties of circuit courts conferred upon district courts.—The judicial code further provides that "Wherever, in any law not embraced within this act, any reference is made to, or any power or duty is conferred or imposed upon the circuit courts, such reference shall, upon the taking effect of this act, be deemed and held to refer to, and to confer such powers and impose such duty upon, the district courts."¹² The evident purpose of this provision is to extend the original jurisdiction formerly possessed and exercised by the circuit courts to the district courts. This purpose is further evidenced by the section of the law, prescribing the jurisdiction of district courts.¹³

c. Effect upon jurisdiction of district courts as to matters in bankruptcy.—The effect of the above quoted provisions of the judicial code is to confer upon district courts the jurisdiction formerly possessed by circuit courts under subsection *a* of section 23. As a result, district courts have jurisdiction of all controversies at law and in equity, as distinct from proceedings in bankruptcy, between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only, as though bankruptcy proceedings had not been instituted and such controversies had been between bankrupts and such adverse claimants. Subsection *a* relates only to controversies between trustees and adverse claimants, relative to property acquired or claimed by the trustees.¹⁴ Notwithstanding the transfer of the jurisdiction of the circuit courts to the district courts, the distinction between controversies arising between trustees and adverse claimants and proceedings in bankruptcy is to be retained; in the former cases the jurisdiction of the district courts as to such controversies remains unaffected by the proceedings in bankruptcy, while in the latter case the jurisdiction of district courts is that of courts of bankruptcy under the bankruptcy act.¹⁵ Suits at law or in equity between a trustee and an adverse claim-

11. Judicial Code, § 290.

12. Judicial Code, § 291.

13. Judicial Code, § 24.

14. *Viquesney v. Allen* (C. C. A., 4th Cir.), 12 Am. B. R. 402, 131 Fed. 21, in which it was held that a circuit court could not entertain a bill in equity, in aid of bankruptcy proceedings against an alleged fraudulent grantor, to set aside a conveyance and for the appointment of a receiver; *Goodier v. Barnes* (C. C., N. Y.), 2 Am. B. R. 328, 94 Fed. 798. As to distinction between "proceedings in bankruptcy" and "controversies at law and in equity," see *In re Knopf* (D. C., S. Car.), 16 Am. B. R. 432, 442, 144 Fed. 245; *Chattanooga Nat. Bank v. Rome Iron Works* (C. C., Ga.), 3 Am. B. R. 582, 99 Fed. 82, holding that the circuit court had jurisdiction in a suit against a trustee to determine the validity of a pledge given by the bankrupt where the pledgee, the plaintiff, resides

in one State and the bankrupt resided in another.

15. *In re Rochford* (C. C. A., 8th Cir.), 10 Am. B. R. 608, 124 Fed. 82.

Distinction between proceedings in bankruptcy and controversies at law and in equity.—In the case of *Bardes v. Hawarden Bank*, 178 U. S. 524, 531, 4 Am. B. R. 163, 44 L. Ed. 1175, the purpose and intent of subsection (a) of section 23, was under consideration. Mr. Justice Gray speaking for the court said: "The first clause provides that 'The United States Circuit Court shall have jurisdiction of all controversies at law and in equity as distinguished from proceedings in bankruptcy,' (this clearly recognizes the essential difference between proceedings in bankruptcy on the one hand and suits at law or in equity on the other). 'Between trustees as such and adverse claimants concerning the property acquired or claimed by

ant, which might have been prosecuted between the bankrupt and such claimant had bankruptcy not intervened, are within the original jurisdiction of district courts, subject to such limitations and conditions as are prescribed by the act.¹⁶ Where such a suit is instituted there must be the same requirements as to diverse citizenship and amount in dispute, as in the case of a similar suit, either by or against the bankrupt, prior to bankruptcy.¹⁷ The section of the code which confers original jurisdiction upon district courts provides that such courts shall have jurisdiction "of all matters and proceedings in bankruptcy." The distinction thus seems to be made between suits at law or in equity between citizens of different States, and such controversies as may arise in bankruptcy.¹⁸ If the suit is one which may be brought by the trustee under subsection *b*, there of course is no limitation as to diversity of citizenship or amount in dispute. If the suit is other than one falling within subsection *b*, the requirements as to diversity of citizenship and amount in controversy must be complied with; that is there must be diverse citizenship as between the bankrupt and the opposing party, and the requisite amount must be involved, or the cause of action must arise under the constitution and laws of the United States.¹⁹ In respect to such suits the trustee may be either plaintiff or defend-

the trustees,' restricting jurisdiction, however, by the further words 'in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimant.' This clause, while relating to the circuit courts only and not to the district courts of the United States, indicates the intention of Congress, that the ascertainment as between the trustees in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustees, does or does not form part of the estate to be administered in bankruptcy, shall not be brought within the jurisdiction of the national courts solely because the rights of the bankrupt and of the creditors have been transferred to the trustee in bankruptcy."

16. Judicial Code, § 24.

17. *Bush v. Elliott*, 202 U. S. 477, 15 Am. B. R. 656, 50 L. Ed. 1,114; *Hatch v. Curtin* (D. C., Mass.), 16 Am. B. R. 629, 146 Fed. 200, holding that where a circuit court had no jurisdiction of a suit by an adverse claimant against a bankrupt it would not have jurisdiction in a suit against the trustees.

Jurisdiction as to suits at law or in equity.—The district courts have original jurisdiction as follows: First. "Of all suits of a civil nature at common law or in equity, brought by the United States or by any officer thereof authorized by law to sue, or between citizens of the same state claiming lands under grants from different states; or where the matter in controversy exceeds, exclusive of interest and costs the sum or value of \$3,000 and (a) arises under the constitution or laws of the United States or treaties made or which shall be made under their authority, or (b), is between citizens of different states, or (c), is between citizens of a

state and foreign states, citizens or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action, in favor of any assignee or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made; provided, however, that the foregoing provisions as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in succeeding paragraphs of this section." Judicial Code, § 24, paragraph 1.

18. Judicial Code, § 24, paragraph 19.

19. *Tate v. Brinser* (D. C., Pa.), 34 Am. B. R. 660, 226 Fed. 878, in which case it was held that in a plenary suit in equity by a trustee in bankruptcy of a partner against another member of the firm, who has not been adjudged a bankrupt, for an accounting relating to an equitable interest in property which had been assigned to the defendant as collateral to secure an indebtedness to the bankrupt, the defendant must be regarded as an adverse claimant, and the suit cannot be maintained against him, unless the bankrupt could have sustained it.

Jurisdiction in controversies at law and in equity.—In the case of *Lovell v. Newman*, 227 U. S. 412, 29 Am. B. R. 482, 57 L. Ed. 577, the court said: "That section 23, subdivisions (a) and (b) gives jurisdiction to the Circuit Courts of the United States of controversies at law or in equity, as distinguished from bankruptcy proceedings, between the trustee and adverse claimants in the same manner and to the same extent as though bankruptcy proceedings had not been instituted. It is also provided that suits by

ant; while like the adverse claimant, he has the option, if such requisites exist, of proceeding either in the State courts or in the district courts.²⁰ A suit against the trustee arising from a transaction not connected with the bankruptcy, and in respect to which the suit could have been brought against the bankrupt if bankruptcy had not intervened, may not be brought in the district court, unless diversity of citizenship and the other essentials to jurisdiction exist.²¹ The diversity of citizenship which gives jurisdiction to the district courts in respect to such suits is that of the bankrupt and not that of the trustee.²² If the suit could have been brought by the bankrupt prior to his bankruptcy, because of diverse citizenship it may be brought in that court by his trustee, although as between the trustee and the defendant there is no such diversity.²³ To summarize the effect of abolishing circuit courts, it may be stated that as to suits, controversies and proceedings falling within the jurisdiction of district courts as courts of bankruptcy, such jurisdiction remains unaffected; as to suits and controversies not falling properly within the jurisdiction conferred expressly by the bankruptcy act the jurisdiction of such courts is limited by the restrictions imposed upon similar suits and controversies, as between the bankrupt and adverse claimants had bankruptcy proceedings not intervened.

d. Removal of suits to district courts.—A suit either by or against a trustee or receiver in bankruptcy cannot be removed from the State court into the district court, unless the amount involved exceeds \$3,000.²⁴ The procedure for the removal of cases from State to district courts is prescribed in chapter 3 of the judicial code. If a suit be transferred from a State court into the district court on the ground of diversity of citizenship, it is placed there as if it had been originally commenced in that court on the ground of jurisdiction, and not as if it had been commenced there by consent of the defendant

the trustee can only be brought in courts where the bankrupt might have brought them, if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant. Later, when Congress enlarged the jurisdiction of the District Court by the Act of February 5, 1903, exception was made in favor of certain suits for the recovery of property in fraud of the Act, but this did not affect suits of the present character. The cases in this court which have considered this section have determined that it was not intended to increase the jurisdiction of the United States Circuit Courts in bankruptcy matters, but rather to limit it to such suits and controversies as are within the jurisdiction given such courts by the acts creating them; that is, controversies in law and in equity with adverse claimants, where the amount involved is in excess of \$2,000, where diverse citizenship exists (the citizenship test being, because of the Bankruptcy Act, that of the bankrupt, and not that of the trustee), or there is a cause of action arising under the constitution or laws of the United States. *Bush v. Elliott*, 202 U. S. 477, 15 Am. B. R. 656, 50 L. Ed. 1114, 26 Sup. Ct. Rep. 668."

²⁰ Judicial Code, § 24.

²¹ *Bennette v. Lewis* (Tex. Ct. of App.),

34 Am. B. R. 714, 176 S. W. 660, holding that the provisions of subsection *a* of § 23, limiting the jurisdiction of the bankruptcy court in contests between third parties and the trustee over property rights to cases of which said court would have had jurisdiction if the suit had been brought against the bankrupt, deprive said court of jurisdiction of a suit by an alleged owner of land purchased for the bankrupt against the trustee to test the validity of the contract, and a temporary injunction may be granted by the State court to restrain the trustee from entering upon plaintiff's land and cutting and removing timber therefrom pending the determination of the validity of the contract.

²² Judicial Code, § 24.

²³ *Bush v. Elliott*, 202 U. S. 477, 15 Am. B. R. 656, 50 L. Ed. 1114, in which it was held that the jurisdiction of the circuit court to entertain a suit to recover money alleged to be due the bankrupt at and prior to his adjudication, was not affected by the fact that one of the trustees was a resident of the same State as the bankrupt, it appearing that the bankrupt was a citizen of another State.

²⁴ Judicial Code, § 24, paragraph 1, and § 28.

under this section; the judgment of the Circuit Court of Appeals reversing the judgment of the district court would therefore be final.²⁵

III. JURISDICTION OF DISTRICT COURTS AS TO SUITS BY TRUSTEES.

a. **In general.**—Subsection *b* of § 23 relates to the jurisdiction of district courts as to suits by the trustee respecting the estate which is being administered by him. It is this subsection which has been the cause of the conflict which has arisen among the authorities relative to suits for the recovery of property claimed either by the trustee or a third party. As will be seen hereafter much of the difficulty attending the interpretation and application of this subsection has been removed by the amendment of 1903. Many of the cases which were in point prior to the amendment are now obsolete and it will only be necessary to refer to them when they bear upon the jurisdiction of the district court irrespective of the result of the amendment.

b. **Comparative legislation.**—The district courts have, since the act of 1800,²⁶ always had exclusive jurisdiction of "proceedings in bankruptcy." Under the act of 1867, their jurisdiction, while not exclusive, also extended "to the marshaling of . . . assets,"²⁷ and also to "all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest, or owing any debt to such bankrupt, or by any such person against an assignee, touching any property or rights of the bankrupt."²⁸ The same general jurisdiction to "cause the estate of bankrupts to be collected . . . and determine controversies in relation thereto" is conferred on the district court by the present law.²⁹ But with this difference: it is qualified by the words, "except as herein otherwise provided." There being no other grant of ordinary jurisdiction to the district court in the statute, the subsection under discussion seems, and has been authoritatively held, a limitation on that power.³⁰ Hence, the animated controversy over its meaning and the necessity of amendment. The district court is charged with the administration of the law; yet, as the law was before the amendments, it was often impotent and usually forced to order its officers to resort to other tribunals for relief, and this though, from its position as a bankruptcy court, it was naturally more convenient to litigants and more conversant with the law.

c. **Jurisdiction prior to amendment of 1903; case of *Bardes v. Bank*.**—Early in the history of the present statute there was great confusion as to proper forum for suits by or against the trustee. Not until January, 1900, was there an authoritative decision in the leading case of *Bardes v. Bank*.³¹ In this case it was held that the district courts as such had no jurisdiction over a suit brought by the trustee to recover property from a stranger to the bankruptcy proceedings, unless by the latter's consent.³² The court said: "Congress, by the second clause of § 23 of the present bankruptcy act, appears to this court to have clearly manifested its intention that controversies, not

25. *Spencer v. Duplan Silk Co.*, 191 U. S. 526, 11 Am. B. R. 563, 48 L. Ed. 287.

26. Note also Act of February 3, 1801.

27. Act of 1867, § 1, R. S., § 4972. *Consult Cook v. Whipple*, 55 N. Y. 150; *Kelly v. Smith*, Fed. Cas. 7,675.

28. Act of 1867, § 2, R. S., § 4,979; *Main v. Glen*, Fed. Cas. 8,973; *In re Sabin*, Fed. Cas. 12,195.

29. Bankr. Act, § 2(7).

30. *Bardes v. Bank*, 178 U. S. 524, 4 Am. B. R. 163, 44 L. Ed. 1175.

31. 178 U. S. 524, 4 Am. B. R. 163, 44 L. Ed. 1,175.

32. The converse was of course true where the adverse party had consented; for instance, in the cases of *In re Durham* (D. C., Md.), 8 Am. B. R. 115, 114 Fed. 750; *Philips v. Turner* (C. C. A., 5th Cir.), 8 Am. B. R. 171, 114 Fed. 726.

strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against the strangers to those proceedings, should not come within the jurisdiction of the district courts of the United States, unless by consent of the proposed defendant." On the same day this decision was rendered other cases declaring the same doctrine but on different facts were also announced.³³ Later, in *Wall v. Cox*, the doctrine was reaffirmed.³⁴ Subsequently the broad principle was somewhat modified, when applied to other facts. But, prior to the amendments of 1903, the law remained that, provided always the holding of the proposed defendants was adverse, such a suit could be brought only in the State court, or in the circuit court if the usual facts showing Federal jurisdiction appeared.³⁵

d. Purpose of amendments of 1903 and 1910.—The direct results of the case of *Bardes v. Bank* was, as we have seen, to deprive the district court of jurisdiction of a suit brought by the trustee for the recovery of property in the hands of an adverse claimant. It had an appreciable effect upon analogous provisional and summary remedies.³⁶ The amendment of 1903 added to section 70-e a clause conferring upon the court of bankruptcy jurisdiction of a suit to recover property which had been transferred in fraud of creditors, and which any creditor might have avoided.³⁷ Amendments restoring concurrent jurisdiction, at least as to suits to recover property, became imperatively necessary and were very generally demanded. This demand was met by the changes made in this subsection and in §§ 60-b, 67-e, and 70-e by the act of 1903. But the amendatory act failed to include in clause b of this section, suits for the recovery of property under section 70-e. This was evidently a defect. It at once raised a doubt whether a suit to recover property transferred more than four months before the bankruptcy could be instituted other than in a State court.³⁸ The failure to include suits for the recovery of property

33. *Mitchell v. McClure*, 178 U. S. 539, 44 L. Ed. 1182, affg. s. c., 91 Fed. 621; *Hicks v. Knost*, 178 U. S. 541, 44 L. Ed. 1183, affg. 2 Am. B. R. 153, 94 Fed. 625.

34. 181 U. S. 244, 5 Am. B. R. 727, 45 L. Ed. 845; s. c. below, 4 Am. B. R. 659, 101 Fed. 403.

35. Ruling held applicable to circuit court. *Bush v. Elliott*, 202 U. S. 477, 15 Am. B. R. 656, 50 L. Ed. 1,114.

36. Compare *In re Ward* (D. C., Mass.), 5 Am. B. R. 215, 104 Fed. 985, and *Mueller v. Nugent* (C. C. A., 6th Cir.), 5 Am. B. R. 176, 105 Fed. 581; s. c., subsequently reversed, 184 U. S. 1, 7 Am. B. R. 224, 46 L. Ed. 405; *Hull v. Storage House*, 166 N. Y. App. Div. 739, 34 Am. B. R. 375, 152 N. Y. Supp. 363. And see discussion under this section, subtitle "Auxiliary Remedies," *post*.

37. Bankr. Act, § 70-e.

38. See § 70.

The failure to amend sub-section b of this section by the act of 1903 so as to include within the exception suits brought under § 70-e has been commented upon in a number of cases. Nearly all of these cases are in favor of the proposition that the failure to include a reference to § 70-e leaves the jurisdiction of the bankruptcy court in respect to suits to set aside fraudulent conveyances

made prior to the four months' period, the same as it was before the amendatory act. *Gregory v. Atkinson* (D. C., Mo.), 11 Am. B. R. 495, 127 Fed. 183; *Hull v. Burr* (C. C. A., 5th Cir.), 18 Am. B. R. 541, 153 Fed. 945; *Skewis v. Barthell* (D. C., Iowa), 18 Am. B. R. 429, 152 Fed. 534. *Contra: Hurley v. Devlin* (D. C., Kan.), 17 Am. B. R. 793, 149 Fed. 268.

In the case of *In re Hutchinson & Wilmoth* (C. C. A., 6th Cir.), 19 Am. B. R. 313, 158 Fed. 74, the court said: "A court of bankruptcy has no jurisdiction of a suit at law or in equity brought by a trustee to recover property or collect debts, or to set aside transfers of property alleged to be fraudulent, except by consent of the defendant. By the amendment of 1903, such court was given jurisdiction of suits for the recovery of property under §§ 60-b, 67-e and 70-e." The court evidently did not intend by this statement to hold that a suit under § 70-e could be maintained in a bankruptcy court without the consent of the defendant.

The Supreme Court in the case of *Harris v. First National Bank* 216 U. S. 382, 23 Am. B. R. 632, 54 L. Ed. 528, took notice of the fact that in section 23 specifying the cases wherein the Federal courts have jurisdiction, section 70-e is not mentioned. The court,

under section 70-e was obviously an inadvertence. It was at least recognized as such by Congress in enacting the amendment of 1910, which included a reference to suits brought under section 70-e and, as the law now stands, suits for the recovery of property transferred in fraud of creditors prior to the four months' period may be brought in district courts.³⁹ The method adopted by the revisers, of adding the limiting words to the subsection under discussion, makes its phrasing somewhat awkward. There can, however, be no doubt about their intention or the intention of Congress, and little less doubt as to the ultimate construction put on the new words by the courts. The amendment to this section has not affected the jurisdiction of a district court to re-examine a transfer to an attorney in contemplation of the filing of a petition against a bankrupt, as conferred by § 60-d.⁴⁰

e. Jurisdiction as to bankruptcy proceedings.—We have already considered under § 2, *ante*, the jurisdiction of a district court as a court of bankruptcy in proceedings generally pertaining to bankruptcy. What it may do and what it may not do in respect to the person and property of the bankrupt subject to its jurisdiction has been considered in a variety of phases under that section. If a proceeding pertains to a matter of administration, not affecting the title to the bankrupt estate, the jurisdiction of the bankruptcy court is exclusive and it may not surrender such jurisdiction to any other court.⁴¹ After the bankruptcy petition has been filed, the property of the bankrupt, not in the possession of adverse claimants, is in the legal custody and under the exclusive control of

however, did not deem it necessary in that case to determine whether an action for the recovery of property transferred prior to the four months' period could be brought in the bankruptcy court without the consent of the defendant. The great weight of authority was doubtless in favor of the proposition that the failure to include a reference to section 70-e deprived the court of jurisdiction in actions brought therein. *Sheppard v. Lincoln* (D. C., N. Y.), 25 Am. B. R. 804, 184 Fed. 182; *Palmer v. Roginsky* (D. C., N. Y.), 23 Am. B. R. 358, 175 Fed. 883.

In the case of *Wood v. Wilbert's Sons Shingle & Lumber Co.* (U. S. Sup. Ct.), 226 U. S. 384, 29 Am. B. R. 220, 57 L. Ed. 264, which arose prior to the amendment of 1910, the Supreme Court sustained the doctrine declared in the case of *Hull v. Burr* (C. C. A., 5th Cir.), 18 Am. B. R. 541, 153 Fed. 945, 83 C. C. A. 61, and held that notwithstanding the amendment of 1903, the consent of the proposed defendant was required in order to confer jurisdiction upon the District Court of an action by the trustee to set aside a conveyance of lands by bankrupt, which conveyance was neither a preference nor made within the four months' period, so as to come within the terms of section 60b or section 67-e.

39. The act of 1903 as introduced and passed by the House of Representatives, contained the words: "And section 70, subsection e," which were inserted in the amendment of 1910. The Senate Judiciary committee, for some reason which does not ap-

pear, struck these words out of section 23-b but failed to strike out the corresponding clause conferring jurisdiction which the House bill had added to section 70-e. See *Newcomb v. Biwer* (D. C., So. Dak.), 29 Am. B. R. 15, 199 Fed. 529.

The amendment of 1910 to section 23-b, a trustee in bankruptcy, appointed by the district court of the State in which both he and the bankrupt reside, may, without the consent of the proposed defendant, maintain a suit to avoid a fraudulent transfer under section 70-e in the bankruptcy court of another State wherein the defendant resides. *Parker v. Sherman* (D. C., Vt.), 28 Am. B. R. 379, 195 Fed. 648.

40. In *re Wood & Henderson*, 210 U. S. 246, 20 Am. B. R. 1, 52 L. Ed. 1046.

41. *Matter of Sage* (D. C., Mo.), 35 Am. B. R. 436, 224 Fed. 525.

When jurisdiction exclusive.—The jurisdiction of the bankruptcy court in all "proceedings in bankruptcy" is exclusive of all other courts; and, as such proceedings include all matters of administration, a suit by the surety of bankrupt, a United States contractor, against his trustee in the Circuit Court, the purpose of which is to control the distribution of a fund in the trustee's possession, which admittedly belongs to the bankrupt's estate, and to determine to what extent and in what order the several creditors shall participate therein, cannot be maintained. *United States Fidelity & Guaranty Co. v. Bray*, 225 U. S. 205, 28 Am. B. R. 202; 56 L. Ed. 1055.

the court of bankruptcy, and no other court may by order or decree deprive such court of its control over the administration of the bankrupt's estate.⁴²

IV. JURISDICTION AS TO PLENARY SUITS; ADVERSE CLAIMANTS.

a. Suits in respect to bankrupt estate.—Section 23-b requires suits by the trustee in the administration of the bankrupt estate to be brought in those courts where they would have been brought if proceedings in bankruptcy had not been instituted. The suits here referred to are plenary suits to recover assets or enforce rights belonging to the estate, against persons who claim adversely to the bankrupt in respect to such assets or rights. Bankruptcy courts have no jurisdiction to entertain such suits "unless by consent of the proposed defendant" or "except suits for the recovery of property under section 60, subdivision *b*, and section 67, subdivision *c*, and section 70, subdivision *e*." Bankruptcy courts have jurisdiction of suits for the recovery of property under the sections referred to, without the consent of the proposed defendants.

b. Plenary suits by trustees.—Subsection *b* requires suits by the trustee to be "brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them, if proceedings in bankruptcy had not been instituted." The district court in the exercise of its jurisdiction as the successor of the circuit court may, under this provision, entertain jurisdiction of a plenary suit by a trustee against an adverse claimant to recover a debt due the estate, if the bankrupt might have proceeded in such court if bankruptcy had not intervened.⁴³ A suit for the recovery of a debt does not fall within the exceptions contained in this subsection; and if it could not have been brought by the bankrupt prior to bankruptcy in a district court, it may not be brought therein by his trustee. Thus it will be necessary to show diversity of citizenship, the requisite amount in controversy and the other jurisdictional essentials, to establish the jurisdiction of the court.⁴⁴ In the absence of such jurisdictional essentials the consent of the defendant to the exercise of jurisdiction will not be effectual.⁴⁵

c. Adverse claimants.—(1) IN GENERAL.—The term "adverse claimants" is only used in subsection *a* of this section, which determines the jurisdiction of circuit courts as to controversies between trustees and adverse claimants.

⁴² *Lazarus v. Prentice*, 234 U. S. 263, 32 Am. B. R. 559, 58 L. Ed. 1305; *Acme Harvester Co. v. Beekman*, 222 U. S. 300, 27 Am. B. R. 262, 56 L. Ed. 208; *State Bank v. Cox* (C. C. A., 7th Cir.), 16 Am. B. R. 32, 143 Fed. 91.

The jurisdiction of a court of bankruptcy attaches from the time of the filing of the petition in bankruptcy, and the effect of the filing of the petition is to place all of the property of the bankrupt, not in the possession of adverse claimants, in the legal custody and under the exclusive control of the court of bankruptcy. After the petition has been filed no other court can make an order, or decree, which will deprive the court of bankruptcy of its exclusive control over the administration of the bankrupt's property.

Matter of Sage (D. C., Mo.), 35 Am. B. R. 436, 224 Fed. 525.

⁴³ *Bush v. Elliott*, 202 U. S. 477, 15 Am. B. R. 656, 50 L. Ed. 1114; *Lovell v. Newman*, 227 U. S. 412, 29 Am. B. R. 482, 57 L. Ed. 577. The jurisdiction of a plenary suit to recover a debt due to the bankrupt estate is unaffected by the amendments of 1903 and 1910, *Harris v. First Nat. Bank*, 216 U. S. 382, 23 Am. B. R. 632, 54 L. Ed. 528; *De Friece v. Bryant* (D. C., Ky.), 37 Am. B. R. 275, 232 Fed. 233.

⁴⁴ *De Friece v. Bryant* (D. C., Ky.), 37 Am. B. R. 275, 232 Fed. 233.

⁴⁵ *Lovell v. Newman*, 227 U. S. 412, 426, 29 Am. B. R. 482, 57 L. Ed. 577; *De Friece v. Bryant* (D. C., Ky.), 37 Am. B. R. 275, 232 Fed. 233.

The term has become of general use, however, in respect to all controversies in bankruptcy as to estates which are being administered in bankruptcy. It will be important to ascertain whether or not a person to be proceeded against is an "adverse claimant" in determining whether a bankruptcy court has jurisdiction of the claim which is the subject of the proceeding. If a bankrupt shall have given a preference within the meaning of § 60 the person receiving it is an adverse claimant; so also if the bankrupt shall have fraudulently transferred any of his property or shall have created an incumbrance thereon in fraud of his creditors, the transferee or incumbrancer is an adverse claimant. This follows as a natural effect of the amendment of subdivision *b* of this section. Suits for the recovery of property so preferentially disposed of or fraudulently transferred are within the jurisdiction of district courts. The question as to whether a person is an adverse claimant also becomes important in determining the jurisdiction of the court to proceed summarily against him. If the person proceeded against is in any sense an adverse claimant he is entitled to have the validity of his claim determined by the court in a plenary suit brought for that purpose.⁴⁶

(2) WHO ARE ADVERSE CLAIMANTS.—(I) *In general*.—It is impossible to declare a general rule which will determine in every case whether a person claiming a right or interest as against the trustee is an adverse claimant. It is not essential that the person should claim to be the absolute owner of property in his possession to constitute him an adverse claimant. For instance, where a bankrupt within the four months' period deposited with sureties on a bail bond given by him upon his arrest in a civil action for deceit a sum of money as security against liability on a bond, it was held that the sureties were adverse claimants.⁴⁷ Cases construing the mean-

46. Right to determination by plenary suit.—In the case of *In re Rathman* (C. C. A., 8th Cir.), 25 Am. B. R. 246, 183 Fed. 913, the court said: "The question in this case is whether the controversies between the contestants are controversies at law and in equity, between the trustee and an adverse claimant, as distinguished from controversies arising in proceedings in bankruptcy within the meaning of § 23 of the Bankruptcy Law. If they are the former, the bankruptcy court may not and if they are the latter, it may adjudicate them summarily, without subpoena, summons, pleadings and evidence, according to the principles, rules and practice in actions at law and in equity."

47. In re Horgan (C. C. A., 1st Cir.), 19 Am. B. R. 857, 158 Fed. 774; *In re Horgan* (C. C. A., 1st Cir.), 21 Am. B. R. 31, 164 Fed. 415.

Sureties on bail bond as adverse claimants.—In the case of *Jacquith v. Rowley*, 188 U. S. 620, 9 Am. B. R. 525, 23 Sup. Ct. 369, 47 L. Ed. 620, the Supreme Court held that a surety in whose hands money was deposited to indemnify him for his liability on a bail bond was an adverse claimant within the meaning of section 23. Mr. Justice Peckam speaking for the court said: "The proceeding was a summary application to the court in bankruptcy, to grant an order in a matter, the result of the granting of which would be

to immediately take from the surety moneys which had been deposited with him before the commencement of the proceedings in bankruptcy, and thus compel him to come into the bankruptcy court for the litigation of questions as to his right to retain the money claimed by him. . . . The surety into whose hands the money was deposited to indemnify him for his liability on the bail bond was an adverse claimant within the meaning of that section of the act, and could not be proceeded against in the bankruptcy court, unless by his consent as provided for therein. It is not necessary in order to be an adverse claimant that the surety should claim to be the absolute owner of the property in his possession. It is sufficient if, as in the present case, the money was deposited with him to indemnify him for his liability upon the bail bond and that liability had not been determined and satisfied. If the trustee desires to test the question of the right of the surety to retain the money, he must do so in accordance with the provisions of the section of the bankruptcy law above referred to. . . . The surety claims the right to hold the money as against everybody until his liability on the bail bond is satisfied, and that claim is adverse to any claim that the trustee may make upon him for the money which is to indemnify him as stated."

ing of the words "adverse claimant" will also be found in the footnote.⁴⁸

(II) *Possession of property controlling element.*—The possession of the property by the person claiming it is a controlling element in determining the adverse character of his claim.⁴⁹ If the possession antedates the bankruptcy and is under a substantial claim of right asserted by the holder, the claimant is entitled to a determination of his claim in a plenary suit.⁵⁰ Where the property, or the proceeds thereof, sought to be recovered by the trustee were in the possession or under the control of a person prior to bankruptcy under some claim of title, his claim thereto is adverse.⁵¹ The converse of

48. In re Waukesha Water Co. (D. C., Wis.), 8 Am. B. R. 715, 116 Fed. 1,009; In re Macon Sash & Door Co. (D. C., Ga.), 7 Am. B. R. 66, 112 Fed. 323, *revd.* as Carling v. Seymour Lumber Co. (C. C. A., 5th Cir.), 8 Am. B. R. 29, 113 Fed. 483; In re Young (C. C. A., 8th Cir.), 7 Am. B. R. 14, 111 Fed. 158; In re Green (D. C., Pa.), 6 Am. B. R. 270, 108 Fed. 616; Blumberg v. Byran (C. C. A., 5th Cir.), 6 Am. B. R. 20, 107 Fed. 673; In re Silberhorn (D. C., Ill.), 5 Am. B. R. 568, 105 Fed. 809; In re Sheinbaum (D. C., N. Y.), 5 Am. B. R. 187, 107 Fed. 247; McFarlan Carriage Co. v. Solanas (C. C. A., 5th Cir.), 5 Am. B. R. 442, 106 Fed. 145; In re Adams (D. C., R. I.), 12 Am. B. R. 367, 130 Fed. 788; In re Waterloo Organ Co. (D. C., N. Y.), 9 Am. B. R. 427, 118 Fed. 904; In re Howard (D. C., N. Y.), 10 Am. B. R. 601, 123 Fed. 991; In re Flynn & Co. (D. C., N. Car.), 11 Am. B. R. 318, 126 Fed. 492.

49. In re Rathman (C. C. A., 8th Cir.), 25 Am. B. R. 246, 183 Fed. 913; Shea v. Lewis (C. C. A., 8th Cir.), 30 Am. B. R. 436, 206 Fed. 877; Chicago Title & Trust Co. v. National Storage Co. (Ill. Sup. Ct.), 260 Ill. 485, 31 Am. B. R. 310, 103 N. E. 227; Tube City Mining & Milling Co. v. Otterson (Ariz. Sup. Ct.), 16 Ariz. 305, 35 Am. B. R. 500, 146 Pac. 203; Dreyer v. Perkins (C. C. A., 5th Cir.), 33 Am. B. R. 232, 217 Fed. 889.

Possession to control.—The jurisdiction of the Bankruptcy Court to determine in a summary proceeding adverse claims, created before the filing of the bankruptcy petition, to liens upon and titles to property claimed by the trustee as that of the bankrupt, is conditioned and limited by its actual possession thereof, the test of summary jurisdiction being that the Bankruptcy Court, through its officers, has taken possession of the *res* as the property of the bankrupt; and where one holds substantial claims, antedating bankruptcy, a plenary suit must be brought by the trustee either in law or in equity, in which the adverse title can be tried and adjudicated. Shea v. Lewis (C. C. A., 8th Cir.), 30 Am. B. R. 436, 206 Fed. 877.

50. Babbitt v. Dutcher, 216 U. S. 102, 23 Am. B. R. 519, 54 L. Ed. 402; Matter of Goldstein & Moseson (C. C. A., 7th Cir.), 32 Am. B. R. 802, 216 Fed. 889.

Possession under land contract.—A bankruptcy court has no jurisdiction to summarily adjudicate the rights of the trustee and an adverse claimant to lands in possession of the latter under an agreement for a conveyance. Dreyer v. Perkins (C. C. A., 5th Cir.), 33 Am. B. R. 232, 217 Fed. 889.

Title under tax certificate.—One claiming title and legal right to possession of land under a certificate of purchase from the State, is entitled to have a controversy with the trustee in bankruptcy as to the claim determined by a plenary suit as distinguished from a summary proceeding. (See Am. B. R. Digest, § 648.) Peters v. Bowers (Colo. Sup. Ct.), 37 Am. B. R. 485, 158 Pac. 1101.

51. Matter of Andre (C. C. A., 2d Cir.), 13 Am. B. R. 132, 145 Fed. 736; In re Squier (D. C., N. Y.), 21 Am. B. R. 346, 165 Fed. 515; In re Bigcabama Coal Co. (D. C., Ala.), 26 Am. B. R. 910, 190 Fed. 900. In the case of In re Mound Mines Co. (C. C. A., 8th Cir.), 23 Am. B. R. 242, 173 Fed. 882, 97 C. C. A. 394, the court said: "The law is now settled that the interest of a third party in property claimed to belong to the bankrupt estate, which, at the time of the institution of the proceedings in bankruptcy, is in possession of such third person claiming an interest therein can only be determined by an original suit brought for that purpose."

A mortgagee in possession of chattels, at the time of adjudication, under a chattel mortgage, may not be summarily ordered to surrender the chattels to a trustee in bankruptcy of the mortgagor upon the allegation of the trustee that the mortgagee's interest is merely colorable. In re Tarbox (D. C., Mass.), 26 Am. B. R. 432, 185 Fed. 985.

The decisions of the Supreme Court justify the assertion of the rule that a court of bankruptcy may not summarily determine the merits of issues presented as to property which is in the possession of a claimant and in respect of which the claimant has an actual, substantial, *bona fide* claim. In re Rathman (C. C. A., 8th Cir.), 25 Am. B. R. 246, 183 Fed. 913, citing Harris v. First National Bank, 216 U. S. 382, 23 Am. B. R. 632, 54 L. Ed. 528; Babbitt v. Dutcher, 216 U. S. 102, 23 Am. B. R. 519, 54 L. Ed. 402; Hiscock v. Varick Bank of New York, 206 U. S. 28, 18 Am. B. R. 1, 51 L. Ed. 945; Frank v. Vollkommer, 205 U. S. 521, 17 Am.

this proposition that property and the proceeds coming into possession of a party subsequent to the bankruptcy does not make such party an adverse claimant, is also true.⁵²

(III) *Possession by lienor.*—If the property is in the possession of the claimant, his claim is adverse whether he claims to hold an absolute title to such property, or only asserts a lien upon it.⁵³ For instance an alleged lien against a sum on deposit in a bank is an adverse claim,⁵⁴ and when moneys are paid to a judgment creditor under an execution against the bankrupt's property levied prior to the filing of the petition against the bankrupt, no injunction, process or notice having issued from a bankruptcy court against such creditor or the sheriff, such creditor is an adverse claimant.⁵⁵

(IV) *Possession by third person in behalf of bankrupt.*—Where a bankrupt, after the filing of the bankruptcy petition, sells and delivers to a third

B. R. 806, 51 L. Ed. 911; *Bush v. Elliott*, 202 U. S. 477, 15 Am. B. R. 656; 50 L. Ed. 1114; *Louisville Trust Co. v. Cominger*, 184 U. S. 18, 7 Am. B. R. 421, 46 L. Ed. 413; *Jacquith v. Rowley*, 188 U. S. 620, 9 Am. B. R. 525, 23 Sup. Ct. 369, 47 L. Ed. 620; *Bardes v. Hawarden Bank*, 178 U. S. 524, 4 Am. B. R. 163, 44 L. Ed. 1175; *Haffenberg v. Chicago Title & Trust Co.* (C. C. A., 7th Cir.), 27 Am. B. R. 708, 192 Fed. 874.

52. Test of jurisdiction to proceed in a summary manner.—The test of jurisdiction to proceed in a summary way, or by summary proceedings, to determine controversies in regard to real or personal property, is possession of such property in or by the bankrupt at the time of the filing of the petition and adjudication, in circumstances which show that the bankrupt was the true owner, and that he held as owner; and jurisdiction to so proceed is not defeated by a claim of ownership made by a third person, asserted for the first time after the petition is filed, even though the ground work for such a claim has been prepared beforehand. *In re Logan* (D. C., N. Y.), 28 Am. B. R. 543, 196 Fed. 678.

53. Claim of lien on property.—In the case of *First National Bank v. Title and Trust Co.*, 198 U. S. 280, 40 L. Ed. 1051, 14 Am. B. R. 102, the Supreme Court said that the distinction between controversies at law and in equity and controversies arising in a proceeding in bankruptcy "existed under the bankruptcy law, and the then decisions in respect of a proceeding in bankruptcy and an independent suit are applicable. It was settled that the bankruptcy court was without jurisdiction to determine adverse claims to property, not in possession of the assignee in bankruptcy by summary proceedings, whether absolute title or only a lien was asserted. The present act was plainly framed in recognition of the principle of these cases." Citing *Smith v. Mason*, 14 Wall. 419, 20 L. Ed. 748; *Marshall v. Knox*, 16 Wall. 551, 21 L. Ed. 481; *In re Bonesteel*, 170 Blatch. 175; *Knight v. Cheney*, 14 Fed. 760; *In re Ballou*, 4 Ben. 135; *In re Marter*, 16 Fed. Cas. 857.

The proposition that a holder of a substantial claim to a lien created by a bankrupt upon his property is as much an adverse claimant as a claimant of absolute title is sustained by the following authorities: *Frank v. Vollkommer*, 205 U. S. 521, 17 Am. B. R. 806, 51 L. Ed. 911; *Harris v. First National Bank*, 216 U. S. 382, 23 Am. B. R. 632, 54 L. Ed. 528; *Jacquith v. Rowley*, 188 U. S. 620, 9 Am. B. R. 525, 23 Sup. Ct. 369, 47 L. Ed. 620; *In re McMahon* (C. C. A., 6th Cir.), 17 Am. B. R. 530, 147 Fed. 684, 77 C. C. A. 668; *Carling v. Seymour Lumber Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 29, 113 Fed. 483; *Skilton v. Codington*, 185 N. Y. 80, 15 Am. B. R. 810, 77 N. E. 790; *In re Silberhorn* (D. C., Ill.), 5 Am. B. R. 568, 105 Fed. 899; *Matter of Cotton* (D. C., Cal.), 31 Am. B. R. 568, 209 Fed. 124.

Possession under distress warrant.—Whether a distress warrant secured in Illinois within four months of bankruptcy is one of the "other liens obtained through legal proceedings" which are rendered invalid by section 67-f of the Bankruptcy Act constitutes a substantial controversy. Hence the right to the possession of property taken under such a warrant cannot be determined in a summary proceeding, although the facts are undisputed. *Matter of Luken* (C. C. A., 7th Cir.), 32 Am. B. R. 805, 216 Fed. 890.

54. Matter of Radley Construction Co. (D. C., N. Y.), 32 Am. B. R. 514, 212 Fed. 462; *First Nat. Bank of Chicago v. Chicago Title & Trust Co.*, 198 U. S. 280, 14 Am. B. R. 102, 49 L. Ed. 1051; *In re Farrell* (C. C. A.), 29 Am. B. R. 19, 201 Fed. 338.

Possession by bank.—Where it appears that a bank holds money belonging to a bankrupt received prior to the adjudication, and claims a set-off upon the theory that the bankrupt converted property belonging to the bank, a case of an adverse claim is presented which must be prosecuted by a plenary suit and not by a summary order. *In re Boston-Cerrillos Mines Corporation* (D. C., N. Mex.), 30 Am. B. R. 739, 206 Fed. 794.

55. Stone Ordean Wells Co. v. Mark (C. C. A., 8th Cir.), 35 Am. B. R. 663, 227 Fed. 975.

person property which was in bankrupt's possession, through his bailee, when bankruptcy intervened, the district court has jurisdiction in a summary proceeding to decree the restoration to the trustee of such property or its proceeds.⁵⁶ If the person in possession holds the property as a bailee, his claim as to the property must be in behalf of the bankrupt and he is therefore not an adverse claimant.⁵⁷ The possession of property of a bankrupt corporation by its officers and agents will be deemed the possession of the bankrupt, and they are not adverse claimants.⁵⁸ Where the possession is that of a third person who asserts no claim to the property but holds it subject to the claims of the parties interested therein, including the bankrupt, such claims are adverse.⁵⁹

(V) *Possession by wife of bankrupt.*—If a wife of a bankrupt holds property merely as his agent, and not under a *bona fide* claim of ownership, her possession is that of the bankrupt, and she is not an adverse claimant; but if her possession and claim of ownership are in good faith, her claim of title must be adjudicated in a plenary suit.⁶⁰ A wife, in possession of and beneficiary under an insurance policy on the life of her husband, having a cash surrender value, and reserving to the husband the right to change the beneficiary, is an adverse claimant.⁶¹

(VI) *Possession of assignee or receiver.*—If the property claimed is in the hands of a third party; who claims under an assignment of such property

56. In re Denson (D. C., Ala.), 28 Am. B. R. 158, 195 Fed. 854.

57. In re Muncie Pulp Co. (C. C. A., 2d Cir.), 14 Am. B. R. 70, 139 Fed. 546, 71 C. C. A. 530; Johnston v. Spencer (C. C. A., 8th Cir.), 27 Am. B. R. 800, 195 Fed. 215.

58. See also In re Royce Dry Goods Co. (D. C., Mo.), 13 Am. B. R. 257, 133 Fed. 100; In re Muncie Pulp Co. (C. C. A., 2d Cir.), 14 Am. B. R. 70, 139 Fed. 546; In re Holbrook Shoe & Leather Co. (D. C., Mont.), 21 Am. B. R. 511, 165 Fed. 973; In re Alphin & Lake Cotton Co. (D. C., Ark.), 12 Am. B. R. 653, 131 Fed. 824; In re White (C. C. A., 7th Cir.), 24 Am. B. R. 197, 177 Fed. 194.

Possession by officers of corporation.—In the case of In re Kornit Mfg. Co. (D. C., N. J.), 27 Am. B. R. 244, 258, 192 Fed. 392, the court said: "The bankrupt corporation was the conception of the respondents and they exercised a complete unbroken dominancy over it from its birth to the filing of the petition in bankruptcy. This dominancy was as complete before as after they became its officers, and what was done by the incorporators and first board of directors is as much their acts as what was done by the respondents after they became the executive officers and numerically controlled the board of directors. These incorporators and first board of directors were but the tools of the respondents. On the paper they were free and independent, but in fact only dummies responsive to the beck and call of respondents. In such circumstances respondents, with respect to property obtained by them through the action of such dummy directors,

are not adverse claimants. They were its mind, hands and pockets, and will be treated in the bankruptcy court as if they were the bankrupt, and amenable to its jurisdiction with reference to such property."

59. Matter of InterOcean Transp. Co. (D. C., N. Y.), 36 Am. B. R. 651, 232 Fed. 408, citing as directly in point First National Bank v. Chicago Title & Trust Co., 198 U. S. 280, 14 Am. B. R. 102, 49 L. Ed. 1051, in which case the bankrupt had seed in storage with a warehouseman, whose receipts he had pledged; the warehouseman had possession but no claim on the seeds: it was held that the district court had no jurisdiction to determine the validity of the pledgees' claims.

60. Matter of Shea (D. C., Ky.), 31 Am. B. R. 697, 211 Fed. 365, holding that where a wife, more than a year prior to her husband's bankruptcy, purchased stock in her own name with moneys saved from an allowance given her by her husband for expenses, she may have a *bona fide* claim to such stock as against the trustee in bankruptcy of her husband.

61. Matter of Flanigan (D. C., Pa.), 35 Am. B. R. 807, 228 Fed. 339.

Possession in wife's name.—Where, by the uncontradicted testimony a motor truck claimed by the wife of a bankrupt is in a garage in her name, she is entitled to retain such possession until it is determined in a plenary action that she is not entitled thereto. Her claim is not merely colorable. Matter of Markel (D. C., Cal.), 35 Am. B. R. 318, 228 Fed. 926.

from the bankrupt, he is an adverse claimant.⁶² Where a bankrupt has, prior to bankruptcy, made an assignment for the benefit of creditors, the assignee is an agent of the bankrupt and is therefore not an adverse claimant; the possession by the assignee, pending the determination of the jurisdiction of the bankruptcy court, will be deemed to be that of the bankrupt.⁶³ The assignee may only be regarded as an adverse claimant as to payments or dispositions of property made by him in good faith, before the institution of bankruptcy proceedings, and as to liens in his favor which accrued prior to that time.⁶⁴ If the assignee has sold property assigned to him prior to the bankruptcy of the assignor the purchaser is an adverse claimant.⁶⁵ And while the assignee may be compelled to account in bankruptcy court for the property of the bankrupt remaining in his possession, he is an adverse claimant to the extent of his claim for disbursements and expenditures lawfully made by him prior to bankruptcy.⁶⁶ The possession by a temporary receiver in bankruptcy of proceeds of the sale of mortgaged chattels, pending the determination as to the title to such chattels, does not deprive the claim of its character as adverse.⁶⁷ A receiver appointed by a State court in an action, brought more than four months prior to bankruptcy, to set aside a fraudulent conveyance may not be compelled to submit his claim in the bankruptcy proceedings; his claim must be treated as adverse.⁶⁸

(VII) *Possession under attachment.*—Where the claim of possession as against the trustee's right of possession is based solely on an attachment lien,

62. *Copeland v. Martin* (C. C. A., 5th Cir.), 25 Am. B. R. 268, 182 Fed. 805, in which case it was held that a person, who has no claim against the bankrupt's estate and asks nothing from the bankruptcy court but claims, under an assignment from the bankrupt, the right and title to wages in the hands of a third party, earned by the bankrupt prior to adjudication, is an adverse claimant; *Matter of McCrum* (C. C. A., 2d Cir.), 32 Am. B. R. 604, 214 Fed. 207.

63. *Bryan v. Bernheimer*, 5 Am. B. R. 623, 181 U. S. 188; *In re Carver* (D. C., N. C.), 7 Am. B. R. 539, 113 Fed. 138; *In re Thompson* (C. C. A., 2d Cir.), 11 Am. B. R. 719, 128 Fed. 575; *Matter of McCrum* (C. C. A., 2d Cir.), 32 Am. B. R. 604, 214 Fed. 207.

64. *Matter of Karp* (D. C., Mass.), 36 Am. B. R. 414, 228 Fed. 798, citing *Randolph v. Scruggs*, 190 U. S. 533, 10 Am. B. R. 1, 47 L. Ed. 1165; *In re Chase* (C. C. A., 1st Cir.), 10 Am. B. R. 677, 124 Fed. 753; *In re Thompson* (C. C. A., 2d Cir.), 11 Am. B. R. 719, 128 Fed. 575.

65. *In re Findlay Bros.* (D. C., N. Y.), 4 Am. B. R. 745, 104 Fed. 675.

66. *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 7 Am. B. R. 421, 46 L. Ed. 413; *In re Manning* (D. C., S. Car.), 10 Am. B. R. 497, 123 Fed. 180.

67. *Frank v. Vollkommer*, 205 U. S. 521, 17 Am. B. R. 806, 51 L. Ed. 911. Compare *In re Briskman* (D. C., N. Y.), 13 Am. B. R. 57, 132 Fed. 201, holding that where the property was taken from the possession of the bankrupt after the appointment of a receiver in bankruptcy the claim of the replevying creditor is not adverse.

68. *In re United Wireless Tel. Co.* (D. C., N. J.), 27 Am. B. R. 1, 192 Fed. 238.

Summary proceeding to take possession of property in the hands of assignees and receivers.—In the case of *In re Rathman* (C. C. A., 8th Cir.), 25 Am. B. R. 246, 183 Fed. 913, it was held that the bankruptcy court has jurisdiction by summary proceeding to take from assignees and receivers for general creditors in insolvency or winding up proceedings, appointed after the four months prior to the filing of petitions in bankruptcy, from officers of courts attaching or replevying within that time, and from others holding for the bankrupt, property claimed to be that of the bankrupt, and then by virtue of the possession thus taken to determine adverse claims to it by a like proceeding. But the bankrupt court may not take this possession from a receiver appointed by another court in a suit to enforce a lien antedating the filing of the petition in bankruptcy, or thereby draw to itself jurisdiction summarily to determine the validity of such a lien.

Effect of order directing receiver of State court to turn over property.—Where a bankruptcy court has as a matter of comity required the trustee to apply to the State court for an order directing its receiver to turn over property to him, and the order has been granted as asked, but has been rendered ineffectual by an appeal, the bankruptcy court may order the delivery of the property, and is not bound to await the determination of the appeal. *Matter of Sage* (D. C., Mo.), 35 Am. B. R. 436, 224 Fed. 525.

which is annulled by the adjudication in bankruptcy, the person or officer in possession holds as bailee for the trustee; he is not an adverse claimant and his mere refusal to surrender the property does not make him such.⁶⁹ This principle only applies where the lien by attachment is nullified by the adjudication of the debtor as a bankrupt. If the attaching officer is in receipt of the proceeds of the sale of the property attached, and has turned the same over to the attaching creditor, such creditor is an adverse claimant.⁷⁰ If the proceeds of the sale remain in the hands of the officer at the time of the adjudication in bankruptcy, such proceeds become the property of the trustee and the officer or the creditor represented by him are not adverse claimants.⁷¹

(VIII) *Surrender of possession.*—If the court, through its referee, voluntarily delivers property to a claimant, the possession of the court is lost, and the claim of the claimant becomes adverse, precluding the court from summarily determining the claimant's right to the property without his consent.⁷² But if the surrender of the property is unauthorized, the court's jurisdiction is not affected and it may determine all controversies, either by plenary suit or summary action as though such surrender had not been made.⁷³

(3) INQUIRY AS TO BASIS OF CLAIM.—(I) *In general.*—The determination of the jurisdiction of the bankruptcy court to summarily dispose of the question of title to the property to which a claim is asserted against that of the bankrupt, will depend upon the nature and validity of such claim. If the property belongs unquestionably to the bankrupt's estate the court may summarily take possession of it. If there is substantial basis for the adverse claim and such claim is not merely colorable, the claimant must be permitted to adjudicate his claim in a plenary suit. It becomes essential for the court to determine as to the substantiality of the adverse claim, prior to assuming summary possession of the property, and for this reason the court may make inquiry into the basis of such claim. If the claimant pleads an adverse claim it may not be summarily determined by the court, without an inquiry as to the basis of the claim; some investigation must be made with a view to ascertaining whether the claim is based on a substantial foundation.⁷⁴

69. *Staunton v. Wooden* (C. C. A., 9th Cir.), 24 Am. B. R. 736, 179 Fed. 61; *In re Walsh Bros.* (D. C., Iowa.), 20 Am. B. R. 472, 159 Fed. 560; *In re Grassler* (C. C. A., 9th Cir.), 18 Am. B. R. 694, 154 Fed. 478, 83 C. C. A. 304; *In re Breslauer* (D. C., N. Y.), 10 Am. B. R. 33, 121 Fed. 910.

70. *In re Knickerbocker* (D. C., N. Y.), 10 Am. B. R. 381, 121 Fed. 1004.

71. *Clark v. Larremore*, 188 U. S. 486, 9 Am. B. R. 476; *In re Cone* (Ref., Cal.), 18 Am. B. R. 786; *In re Grassler* (C. C. A., 9th Cir.), 18 Am. B. R. 694, 154 Fed. 478, 83 C. C. A. 304.

72. *Hinds v. Moore* (C. C. A., 6th Cir.), 14 Am. B. R. 1, 134 Fed. 221.

73. *Whitney v. Wenman*, 198 U. S. 539, 14 Am. B. R. 45, 49 L. Ed. 1157; *In re Schermerhorn* (C. C. A., 8th Cir.), 16 Am. B. R. 507, 145 Fed. 341.

Unauthorized sale by trustee.—Where a trustee sells property at private sale, without appraisal, and without the order of the

court, the purchaser acquires no title. In such a case, the court of bankrupt has jurisdiction of proceedings, both in the nature of summary and plenary actions, to try title to property of the bankrupt, once in the possession of the court, and sold by the trustee without authority. *Matter of Monsarrat* (D. C., Hawaii), 25 Am. B. R. 815.

74. In the case of *In re Pickens* (D. C., Ga.), 26 Am. B. R. 6, 84 Fed. 954, the court cited the case of *In re Tune* (D. C., Ga.), 8 Am. B. R. 285, 115 Fed. 906, where it was held that summary jurisdiction is ousted if the determination of the validity of an adverse claim involves a decision of matters of fact and the weighing of conflicting evidence which, when presented, leave room for fair doubt as to the invalidity of the claim, since such claim is not merely colorable.

Summary order without investigation unwarranted.—In the case of *In re Gill* (C. C. A., 8th Cir.), 26 Am. B. R. 883, 190 Fed. 706, it appeared that a bank, in response to an

(II) *Jurisdiction of court.*—The bankruptcy court has jurisdiction to inquire into the facts for the purpose of determining whether any basis exists for the adverse claim of title,⁷⁵ and according to the conclusion reached the

order of a referee to show cause why it should not pay over to the trustee an amount deposited with the bank by the bankrupt, three days before the filing of the petition in bankruptcy, stated that the money was deposited without solicitation or agreement, in a long standing general deposit account which the bankrupt had with the bank subject to check, and that at the time of the deposit the bankrupt owed the bank on an overdraft and on past-due notes, an amount nearly equal to the amount deposited. It was held that the bank had stated an adverse claim which constituted a good plea to the jurisdiction of the court, and that an order overruling such plea in the absence of a denial of any of its allegations and without investigation as to whether the claim pleaded is substantial, was unwarranted.

75. *Matter of Yorkville Coal Co.* (C. C. A., 2d Cir.), 33 Am. B. R. 633, 211 Fed. 619; *Matter of Goldstein & Moseson* (C. C. A., 7th Cir.), 32 Am. B. R. 802, 216 Fed. 887; *Matter of Radley Construction Co.* (D. C., N. Y.), 32 Am. B. R. 514, 212 Fed. 462; *Matter of Kramer and Muchnick* (D. C. Pa.), 33 Am. B. R. 223, 218 Fed. 138.

Inquiry as to basis of claim.—The bankruptcy court has power to ascertain if an adverse claim be made by a third person in possession of property of the bankrupt, whether such claim is in fact well founded, or is fictitious or colorable. In *re Norris* (D. C., N. Y.), 24 Am. B. R. 444, 177 Fed. 598. In the case of *In re Rathman* (C. C. A., 8th Cir.), 25 Am. B. R. 246, 183 Fed. 913, the court held that the bankruptcy court may proceed by order to show cause and ascertain whether the claimant had the actual possession of the property in controversy, and whether the claimant had a substantial, or only a frivolous and baseless adverse claim. In the case of *In re Tarbox* (D. C., Mass.), 26 Am. B. R. 432, 185 Fed. 985, the court held that a referee has jurisdiction under a summary petition to inquire and decide whether or not the claim under which property is held adversely to the trustee is merely colorable; but unless he can find it merely colorable he has no jurisdiction to proceed further; he cannot hear and determine its merits under a summary petition if there is a real controversy as to the merits; In *re Hayden* (D. C., Mass.), 22 Am. B. R. 764, 172 Fed. 623; In *re Ellis Bros. Printing Co.* (D. C., N. Y.), 19 Am. B. R. 472, 156 Fed. 430, holding that the mere assertion of an adverse claim of title will not preclude the bankruptcy court from exercising its jurisdiction to proceed summarily; *Linstroth Wagon Co. v. Ballew* (C. C. A., 5th Cir.), 18 Am. B. R. 23, 32, 149 Fed. 960, in which the court said: "The district court has power to ascertain in a particular case pre-

sented whether the claim asserted is an adverse claim, within the meaning of the provision of the bankruptcy law, existing at the time the petition was filed, and in accordance to the conclusion reached, that court will retain jurisdiction to decline to adjudicate the merits;" *Mueller v. Nugent*, 184 U. S. 17, 7 Am. B. R. 224, 46 L. Ed. 405, in which the Supreme Court held that the district court has power to ascertain whether in the particular instance the claim asserted is an adverse claim existing at the time the petition was filed; *Louisville Trust Co. v. Cominger*, 184 U. S. 26, 7 Am. B. R. 421, 46 L. Ed. 413. Where property, alleged to be part of the bankrupt's estate, is found in the possession of third parties who assert right to possession by reason of a claim adverse to the bankrupt, the bankruptcy court has power to ascertain whether any basis for such claim actually existed at the time of the filing of the petition. The court is bound to enter upon that inquiry, and, in doing so, acts within its jurisdiction, while its conclusion may be that an adverse claim, not merely colorable, but real, even though fraudulent and voidable, exists in fact, so that it must decline to finally adjudicate on the merits. If it errs in its ruling either way, its action is subject to review. *Matter of Friedman* (C. C. A., 2d Cir.), 20 Am. B. R. 37, 161 Fed. 260; *Johnston v. Spencer* (C. C. A., 8th Cir.), 27 Am. B. R. 800, 195 Fed. 219.

Determining character of claim.—The bankruptcy court has jurisdiction under an order to show cause to investigate and determine whether or not it had at any time actual possession of the property involved in the order, and whether those asserting liens or title thereto have a substantial, or only a frivolous and baseless, adverse claim; but where no such possession is found, and the claim asserted is actual and substantial, as distinguished from one merely colorable and fictitious, it may proceed no further, but should decline to adjudicate on the merits without consent. *Shea v. Lewis* (C. C. A., 8th Cir.), 30 Am. B. R. 436, 206 Fed. 877.

The term "colorable," as used with reference to adverse claims, means merely that if a claimant sets up as facts, and not as conclusions of law, matters which if true, would constitute a statement of an adverse claim, then the claim would be adverse, and not colorable, and not within the jurisdiction of the referee. In *re Blum* (C. C. A., 7th Cir.), 29 Am. B. R. 332, 202 Fed. 883.

Colorable claim.—A claim is open to the objection of being colorable when it is merely asserted; there being no foundation upon which it rests. A colorable claim is one which is a mere pretext and without reality. *Matter of McCrum* (C. C. A., 2d Cir.), 32 Am. B. R. 604, 214 Fed. 207.

court will retain jurisdiction or decline to adjudicate the merits.⁷⁶ The inquiry may be made by a referee, and he has jurisdiction to determine upon conflicting testimony whether property claimed by the trustee is in the possession of an adverse claimant under claim of title.⁷⁷

(III) *Test to be applied.*—The test, as stated in one case, is, that where a party in possession sets out in his answer facts which, if true, would constitute an adverse title, the court may not in a summary proceeding, and against his protest, dispose of his rights in the property.⁷⁸ A claim is adverse if the evidence offered as a basis is sufficient, if uncontroverted, to establish the validity of the claim.⁷⁹

(IV) *Effect of inquiry.*—If it be ascertained by proper inquiry that a real adverse claim existed—no matter how ill-supported it might appear to be—the court cannot summarily decide as to the validity of the claim.⁸⁰ If it is decided that the claim is without actual merit or legal foundation, the court may order the surrender of the property.⁸¹ If the property claimed is real property in the possession of the trustee, the court may summarily order its surrender, and in a proper case where the record title is in a third person may order a deed to be executed to the trustee.⁸²

d. *When consent of adverse claimant required.*—(1) *IN GENERAL.*—Subsection *b* of this section confines the trustee in maintaining suits in respect to the estate of the bankrupt to those courts where the bankrupt himself might have appeared to prosecute them if proceedings in bankruptcy had not been instituted against him, unless the proposed defendant shall consent to the bringing of such suits in the bankruptcy court, “except suits for the recovery of property” under § 60-b, § 67-e, or § 70-e. The result is that if the suit is not one for the recovery of property either preferentially or fraudulently transferred or incumbered, it must be brought in a court other than

76. *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 7 Am. B. R. 421, 46 L. Ed. 413; *In re Davis* (D. C., Tex.), 9 Am. B. R. 670, 119 Fed. 950; *In re Scherber* (D. C., Mass.), 12 Am. B. R. 616, 131 Fed. 121; *Matter of Andre* (C. C. A., 2d Cir.), 13 Am. B. R. 132, 68 C. C. A. 374, 135 Fed. 736; *In re New York Wheel Works* (D. C., N. Y.), 13 Am. B. R. 61, 132 Fed. 203; *In re Baird* (D. C., Pa.), 8 Am. B. R. 649, 116 Fed. 765.

77. *Matter of Kramer & Muchnick* (D. C., Pa.), 33 Am. B. R. 223, 218 Fed. 138; *In re Tarbox* (D. C., Mass.), 26 Am. B. R. 432, 185 Fed. 985.

78. *In re Blum* (C. C. A., 7th Cir.), 29 Am. B. R. 332, 202 Fed. 883. See *Matter of Mansen* (Ref., Mass.), 36 Am. B. R. 57.

79. *Matter of Kramer & Muchnick* (D. C., Pa.), 33 Am. B. R. 223, 218 Fed. 138; *Matter of Goldstein & Moseson* (C. C. A., 7th Cir.), 32 Am. B. R. 802, 216 Fed. 887.

80. *In re Teschmacher v. Mrazay* (D. C., Pa.), 11 Am. B. R. 547, 127 Fed. 728; *In re Davis* (D. C., Tex.), 9 Am. B. R. 670, 119 Fed. 950; *In re Kane* (D. C., N. Y.), 12 Am. B. R. 444, 131 Fed. 386; *In re Kessler & Co.* (D. C., N. Y.), 21 Am. B. R. 583, 165 Fed. 508; *In re Hayden* (D. C., Mass.), 22 Am. B. R. 764, 172 Fed. 623; *In re Peacock* (D. C., N. Car.), 24 Am. B. R. 159, 178 Fed. 851; *In re Green* (D. C., Pa.), 30

Am. B. R. 464, 207 Fed. 693. But see opinion of Judge Lowell in the case of *In re Scherber* (D. C., Mass.), 12 Am. B. R. 616, 131 Fed. 121, where the case of *In re Steuer* (D. C., Mass.), 5 Am. B. R. 209, 104 Fed. 976, was distinguished, in that jurisdiction of the referee in proceedings to recover a preference on a summary petition was not objected to; the judge in effect held that in such a case if objection was duly made to the form of the proceeding the court was without jurisdiction, except by plenary suit. It was held that the amendatory act of 1903 gave jurisdiction to the district court over such a controversy, but had done nothing to provide that such jurisdiction should be exercised by summary proceedings on a petition. See *In re Auerbach* (C. C. A., 2d Cir.), 29 Am. B. R. 791, 202 Fed. 192; *Matter of Yorkville Coal Co.* (C. C. A., 2d Cir.), 33 Am. B. R. 633, 211 Fed. 619.

81. *In re Holbrook Shoe & Leather Co.* (D. C., Mont.), 21 Am. B. R. 511, 165 Fed. 973.

82. *In re Logan* (D. C., N. Y.), 28 Am. B. R. 543, 196 Fed. 678, in which Judge Ray writes an exhaustive opinion reviewing all the leading cases as to the exercise of summary jurisdiction where the property claimed is in either actual or constructive possession of the court.

the bankruptcy court unless the defendant shall express his consent to the exercise of jurisdiction by that court.⁸³ The consent here required was not intended to affect the jurisdiction of the district courts as successors of the circuit courts, abolished by the Judicial Code of 1912. Such jurisdiction may be exercised without the consent of the defendant if the essential jurisdictional facts exist, such as diversity of citizenship and the requisite amount in controversy.⁸⁴ If once the consent to the jurisdiction of the bankruptcy court appears, the jurisdiction will be retained for the determination of all the claims of the parties and for the enforcement of all their rights against each other.⁸⁵ If the adverse claimant voluntarily submits the question of his claim to the bankruptcy court, it constitutes the required consent and the trustee's objection to the jurisdiction will not be sustained.⁸⁶ The consent having been given, the claimant may not upon the appeal from a decision that the title to the property was in the trustee, raise the question of want of jurisdiction to decide the claim.⁸⁷ The term "consent" refers to consent to the tribunal in which the controversy is to be carried on, and not to the mode of

83. Consent of parties.—In the case of *In re Blake* (C. C. A., 8th Cir.), 17 Am. B. R. 668, 151 Fed. 279, it was held that a court of bankruptcy may acquire by consent of all the parties in interest jurisdiction to determine a controversy between the trustee and an adverse claimant concerning an indebtedness of a third party and the lawful power to adjudicate all the claims of the parties thereto and to enforce their rights against each other by decree and execution. In *re Rosenberg* (D. C., Pa.), 8 Am. B. R. 624, 116 Fed. 402; *Bryan v. Bernheimer*, 5 Am. B. R. 623, 181 U. S. 188, holding that where a claimant does not protest against the jurisdiction of the court of bankruptcy, but submits his claim to that court and asks for such orders as may be necessary for his protection, the court has jurisdiction of the subject-matter. In *re Hadden Rodee Co.* (D. C., Wis.), 13 Am. B. R. 604, 130 Fed. 977; *Harris v. First Nat. Bank*, 216 U. S. 382, 23 Am. B. R. 632, 54 L. Ed. 528; *Babbitt v. Dutcher* (Sup. Ct.), 216 U. S. 102, 23 Am. B. R. 519, 54 L. Ed. 402; *In re White* (C. C. A., 7th Cir.), 24 Am. B. R. 197, 177 Fed. 194.

Enforcing payment of stock subscriptions; consent of parties.—The enforcement of an assessment, directed by the bankruptcy court to be levied upon the unpaid capital stock of a bankrupt corporation, against stockholders alleged to be liable thereto, is plenary in its nature, and, except with their consent cannot be made in the bankruptcy court; and in a suit to collect such assessment, the defendant is entitled to make all defenses that relate to him in his individual as distinguished from his corporate capacity, such as that he is not a stockholder, or that he has fully paid for the stock taken. In *re Newfoundland Syndicate* (D. C., N. J.), 28 Am. B. R. 119, 196 Fed. 443.

84. *Lovell v. Newman*, 227 U. S. 412, 29 Am. B. R. 482, 57 L. Ed. 577, holding that the consent provided for in section 23b of the

bankruptcy act, was not intended to enlarge the jurisdiction of the U. S. Circuit Courts (now district courts), so as to give them a jurisdiction which they would not have because of diverse citizenship and a requisite amount in controversy, or by reason of a cause of action arising under the Constitution or laws of the United States; *Tate v. Brinsler* (D. C., Pa.), 34 Am. B. R. 660, 226 Fed. 878.

85. In *re Blake* (C. C. A., 8th Cir.), 17 Am. B. R. 668, 150 Fed. 279, holding that a court of equity which has acquired jurisdiction of the subject-matter and of the parties to a controversy may, and it should, grant complete relief, to the end that litigation over it may cease, and a multiplicity of suits may be avoided.

Jurisdiction to determine as to alleged preferential transfer.—Where a petition is filed in involuntary bankruptcy, upon the ground of an alleged preferential transfer of property to one of the bankrupt's creditors, within the four months' period, and the record shows that the creditor entered into the litigation in the bankruptcy court as to the good faith of the transfer and all other material facts, he cannot be heard to deny the jurisdiction of the court to make an order directing him to render an account to the referee of all property received from the bankrupt and to deliver such property to the trustee. *Phillips v. Turner* (C. C. A., 5th Cir.), 8 Am. B. R. 171, 114 Fed. 726.

86. In *re Hadden Rodee Co.* (D. C., Wis.), 13 Am. B. R. 604, 135 Fed. 886; *Wright v. Harris* (D. C., Ga.), 34 Am. B. R. 574, 221 Fed. 736, in which the court says: "It is settled that where an adverse claimant seeks to recover property in the bankruptcy court, he consents to the jurisdiction." Citing *Le Master v. Spencer* (C. C. A., 8th Cir.), 29 Am. B. R. 264, 203 Fed. 210.

87. In *re Bacon* (C. C. A., 2d Cir.), 20 Am. B. R. 107, 159 Fed. 424.

procedure, which is regulated by general principles of law unless other provision is made.⁸⁸

(2) **EFFECT OF VOLUNTARY SURRENDER.**—It is a general principle governing jurisdiction of all courts that where a court has in its possession a fund in respect to which there is a dispute such court may determine the rights of parties asserted in such fund.⁸⁹ The voluntary surrender of the property in controversy to the court or its officers is equivalent to a consent and the bankruptcy court may then have jurisdiction of claims in respect to such property.⁹⁰ The possession of the property thus acquired by the court may be protected by it in the exercise of its general jurisdiction,⁹¹ rather than the jurisdiction conferred by this subdivision. Where an officer of the State court voluntarily surrenders to a receiver in bankruptcy property in his possession the State court is divested of jurisdiction.⁹² Where the property is surrendered in pursuance of a stipulation between the claimant and the bankrupt's receiver in bankruptcy, the court acquires jurisdiction and the trustee who is subsequently appointed is bound by the terms of the stipulation.⁹³ Once the property has been yielded to the jurisdiction of the court the court retains possession thereof for the purpose of settling all controversies which may arise in respect thereto.

(3) **HOW CONSENT MAY BE SHOWN.**—(1) *In general.*—The consent may be shown by any act indicating a willingness on the part of the defendant that his claim or his rights thereunder should be adjudicated by the court.

88. *Haffenbery v. Chicago Title & Trust Co.* (C. C. A., 7th Cir.), 27 Am. B. R. 709, 192 Fed. 874; *Sinsheimer v. Simonson* (C. C. A., 6th Cir.), 5 Am. B. R. 537, 107 Fed. 898, 47 C. C. A. 51.

89. *In re Antigo Screen Door Co.* (C. C. A., 7th Cir.), 10 Am. B. R. 359, 123 Fed. 249, in which it was held that where a mortgagee takes possession of certain property of the bankrupt just prior to the filing of the petition in bankruptcy, claiming under a chattel mortgage thereon, and by agreement the property is turned over to the trustee in bankruptcy for sale, the proceeds to be paid into the bankruptcy court, the right of property to follow the fund with like effect as if the mortgagee had retained and sold the property under his mortgage, the court has, by virtue of its inherent powers, jurisdiction to determine the respective rights of the parties to the fund.

Jurisdiction in respect to fund in possession of the court.—In the case of *Havens & Geddes Co. v. Pierek* (C. C. A., 7th Cir.), 9 Am. B. R. 569, 120 Fed. 244, the court said in speaking of an agreement between the trustee and the assignee of certain proceeds of a fire insurance policy belonging to the bankrupt, that such proceeds should be paid to the trustee, subject to the order of the district court: "The effect of the agreement under which the moneys were received was to transfer them to the custody of the district court, so that that court might adjudicate the rights of the respective parties thereto. The fund being in the registry of the court, or in the hands of its officers or

appointees, the court, whether one of equity, common law, admiralty or bankruptcy, could determine informally and by summary intervening petition." See also *In re McCallum* (D. C., Pa.), 7 Am. B. R. 596, 113 Fed. 393; *In re Kellogg* (D. C., N. Y.), 7 Am. B. R. 623, 113 Fed. 120; *In re Riker* (C. C. A., 2d Cir.), 5 Am. B. R. 720, 107 Fed. 96.

90. **Validity of chattel mortgagee; consent of claimant.**—The question as to the validity of a chattel mortgagee as between the mortgagee and trustee in bankruptcy of the mortgagor should generally be determined in a plenary action. But where the mortgagee allows the bankruptcy court to take possession of the mortgaged property and convert the same into money, provided it preserves the mortgagee's rights, whatever they may be, in the money instead of the property, itself, and fails to appeal from the orders of the bankruptcy court or question the jurisdiction until the proceeds of the sale of the property are in process of administration, it will be deemed to have voluntarily submitted the question as to the validity of the mortgage to the bankruptcy court. *Wells & Co. v. Sharp* (C. C. A., 8th Cir.), 31 Am. B. R. 344, 208 Fed. 393.

91. See cases cited under § 2(7).

92. *In re Hymes Buggy & Implement Co.* (D. C., Mo.), 12 Am. B. R. 477, 130 Fed. 977. See *Wright v. Harris* (D. C., Ga.), 34 Am. B. R. 574, 221 Fed. 736.

93. *Bryant v. Swofford Bros. Dry Goods Co.*, 214 U. S. 279, 22 Am. B. R. 111, 53 L. Ed. 997.

If a mortgagee petitions for the payment of his mortgage debt he thereby consents to the jurisdiction of the court.⁹⁴ If the evidence is conflicting as to the consent of the exercise of jurisdiction, the determination of the district court will not ordinarily be disturbed on appeal.⁹⁵

(II) *By appearance and pleading.*—The general rule is that the defendant by appearing generally and demurring or answering on grounds going to the merits of the controversy as well as to the jurisdiction of the court, waives the objection that the court is without jurisdiction of the person.⁹⁶ If the adverse claimants proceed to a hearing upon the merits, without objection to the jurisdiction, they will be deemed to have consented to the jurisdiction.⁹⁷ Where proceedings are instituted in respect to property in possession of an adverse

94. *In re Platteville Foundry & Machine Co.* (D. C., Wis.), 17 Am. B. R. 291, 149 Fed. 828; *In re Durham* (D. C., Md.), 8 Am. B. R. 115, 114 Fed. 750, holding that where a receiver is appointed upon the petition of a chattel mortgage creditor by a bankruptcy court jurisdiction is thus conferred by consent to determine controversies which may arise in respect to the mortgaged property; if the defendant voluntarily appear and proceed to a hearing upon the merits without objection, he consents to the jurisdiction of the court; *Rytenberg v. Schefer* (D. C., N. Y.), 11 Am. B. R. 652, 131 Fed. 313; *Chauncey v. Dyke Bros.* (C. C. A., 8th Cir.), 9 Am. B. R. 444, 119 Fed. 1; *In re Steuer* (D. C., Mass.), 5 Am. B. R. 209, 104 Fed. 976; *Reeve v. Kernan* (Ct. of Errors and Appeals, N. J.), 85 N. J. Law, 641, 32 Am. B. R. 278, 90 Atl. 285.

95. *In re Kolin* (C. C. A., 7th Cir.), 13 Am. B. R. 531, 134 Fed. 557.

96. *Sheppard v. Lincoln* (D. C., N. Y.), 25 Am. B. R. 804, 184 Fed. 182; *Rytenberg v. Schefer* (D. C., N. Y.), 11 Am. B. R. 652, 131 Fed. 313; *Phillips v. Turner* (C. C. A., 5th Cir.), 8 Am. B. R. 171, 114 Fed. 726; *Wright v. Harris* (D. C., Ga.), 34 Am. B. R. 574, 221 Fed. 736; *McEldowney v. Card* (D. C., Tenn.), 27 Am. B. R. 937, 193 Fed. 475; *In re Kornit Mfg. Co.* (D. C., N. J.), 27 Am. B. R. 244, 192 Fed. 392; *In re MacDougall* (D. C., N. Y.), 23 Am. B. R. 762, 175 Fed. 400; *In re Hadden Rodee Co.* (D. C., Wis.), 13 Am. B. R. 604, 135 Fed. 886.

The general appearance and pleading to the merits, without objection to jurisdiction, in a plenary suit brought by a trustee in bankruptcy in the district court which had jurisdiction of the subject-matter; constitutes a consent to the jurisdiction of such court; and a challenge to the jurisdiction made by the defendant, after it had taken some testimony under the issues joined, comes too late. *Detroit Trust Co. v. Pontiac Sav. Bank* (C. C. A., 6th Cir.), 27 Am. B. R. 821, 196 Fed. 29.

Filing demurrer and answering.—Where an adverse claimant in possession of property alleged to have been transferred by the bankrupt by way of preference and fraudulent conveyance, in answer to the prayer of the trustee's petition that such conveyance

be declared null and void, files a paper in which he sets up want of jurisdiction to grant relief, and also files an answer on the merits, denying that the conveyance was without consideration or fraudulent as to creditors, and contends on review of an adverse finding that the referee had no jurisdiction in the matter, the adverse claimant cannot be deemed to have consented to the jurisdiction of the bankruptcy court. *In re Michie* (D. C., Mass.), 8 Am. B. R. 734, 116 Fed. 749.

The general appearance of defendants who are adverse parties to the trustee to a rule to show cause issued upon his application and their failure to set up their right to be sued in the State court until after the filing of the second amended petition, when for the first time a case was made out upon which relief could be obtained against them, does not constitute consent. *In re Henby-Hutchinson Pub. Co.* (D. C., Ill.), 5 Am. B. R. 569, 105 Fed. 909.

Appearance and submission of rights.—Although a landlord has the right to insist that title to property placed upon leased premises and claimed by bankrupt's trustee as trade fixtures should be determined in a plenary suit, such right may be waived; and where the landlord appears without objection and submits her rights to the special master and the bankruptcy court, she cannot, after a finding has been made against her as to part of her claim, urge the objection of lack of jurisdiction. *In re Howard Laundry Co.* (C. C. A., 2d Cir.), 30 Am. B. R. 167, 203 Fed. 445.

97. *In re Steuer* (D. C., Mass.), 5 Am. B. R. 209, 104 Fed. 976; *In re Porterfield* (D. C., W. Va.), 15 Am. B. R. 11, 138 Fed. 192, in which case it appeared that all the interested parties, including the holder of the legal title to the land in controversy, came into the bankruptcy proceedings and submitted to a sale of the land free and clear of all liens and the proceeds of the sale were paid into court for distribution, and it was held that the parties had submitted to the jurisdiction of the bankruptcy court; *Kilgore v. Barr* (Sup. Ct., Va.), 114 Va. 70, 28 Am. B. R. 860, 75 S. E. 762; *Wells & Co. v. Sharp* (C. C. A., 8th Cir.), 31 Am. B. R. 344, 208 Fed. 393.

claimant, and he is made a party and by answer interposes a defense upon the merits, he thereby consents to the jurisdiction.⁹⁸ The fact that a claimant "without waiver," proved a judgment secured in a State court in a suit to set aside a trust deed of property does not amount to a consent to the exercise of jurisdiction by the district court in respect to such property.⁹⁹ And where in a summary proceeding instituted by a trustee, a claimant filed a statement of his claim and produced evidence in support thereof, at the same time objecting to the jurisdiction of the court to determine such claim, he has not consented to such jurisdiction.¹⁰⁰ On the other hand if a creditor files his claim, and requests final disposition thereof, without objection to the jurisdiction, he will be deemed to have consented to such jurisdiction and will be controlled by the court's determination.¹⁰¹

(III) *Effect of objection to jurisdiction.*—Where objection is made to the jurisdiction of the court before proceeding to a hearing on the merits, and where before a final decision specific objection is made to the jurisdiction of the court, the appearance is not voluntary and is not sufficient to constitute a consent.¹⁰² If the defendants do not object to the jurisdiction of the court at any stage of the proceedings, it is too late to urge the objection on appeal.¹⁰³

98. *Fairbanks Steam Shovel Co. v. Wills*, 240 U. S. 642, 36 Am. B. R. 754, 60 L. Ed. 841, affg. *Matter of Federal Contracting Co.* (C. C. A., 7th Cir.), 32 Am. B. R. 381, 212 Fed. 688; *Haffenberg v. Chicago Title & Trust Co.* (C. C. A., 7th Cir.), 27 Am. B. R. 708, 192 Fed. 874.

99. *Proving claim not consent to jurisdiction.*—The fact that an adverse claimant in a suit, "without waiving her preference," proved her judgment as a preferred debt, did not deprive the State court of jurisdiction, nor amount to a consent to the exercise of jurisdiction by the court of bankruptcy. *Pickens v. Dent*, 187 U. S. 177, 9 Am. B. R. 47, 47 L. Ed. 128. The bankruptcy court upon finding that a claim was secured, has no jurisdiction to enter a decree against a creditor, an adverse claimant, for the excess value of his security over his debt without the consent of such claimant. *Fitch v. Richardson* (C. C. A., 1st Cir.), 16 Am. B. R. 735, 147 Fed. 197; *Tate v. Brinser* (D. C., Pa.), 34 Am. B. R. 660, 226 Fed. 878, holding that proof of claims against a bankrupt and the voting or attempting to vote them does not amount to a consent to the jurisdiction of the bankruptcy court, within the meaning of section 23b of the Bankruptcy Act; such section refers to consent relative to the institution of actions at law or in equity in the district court.

100. *Matter of Bacon* (C. C. A., 2d Cir.), 31 Am. B. R. 777, 210 Fed. 129.

101. *In re White* (C. C. A., 7th Cir.), 24 Am. B. R. 197, 177 Fed. 194.

102. *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 7 Am. B. R. 421, 46 L. Ed. 413.

Objections to jurisdiction.—In the case of *First Nat. Bank of Chicago v. Chicago Title & Trust Co.*, 198 U. S. 280, 14 Am. B. R. 102, 49 L. Ed. 1051, the court said: "Petitioners asserted this express statutory limitation on

jurisdiction and objected that the district court could not proceed, but their objections were overruled. That they then did not abandon their claims did not amount to a waiver of their objections or to a consent to an exercise of jurisdiction against which they protested." *In re Horgan* (C. C. A., 1st Cir.), 19 Am. B. R. 857, 158 Fed. 774, holding that where the sureties on the return of a citation served upon them objected to the power of the court to order them to turn over the amount of a deposit for their security, and prior to the entry of the final decree specifically objected to the jurisdiction of the court to proceed summarily, it is sufficiently shown that they did not consent to the jurisdiction of the court. And see *In re Hayden* (D. C., Mass.), 22 Am. B. R. 764, 172 Fed. 623, holding that though a claimant appeared generally and took part in a hearing upon the merits, after his motion to dismiss for want of jurisdiction had been denied, he did not consent to the exercise of jurisdiction.

103. *Booneville Nat. Bank v. Blakey* (C. C. A., 7th Cir.), 6 Am. B. R. 13, 107 Fed. 891.

Objection first raised on appeal.—In the case of *In re Connolly* (D. C., Pa.), 3 Am. B. R. 842, 100 Fed. 620, it was held that the appearance of the respondent on a petition of a trustee for an order compelling the delivery of property and proceeding upon the hearing before the referee without objection to the jurisdiction, implies consent and precludes the respondent from raising the point on lack of jurisdiction for the first time upon exception to an adverse report. *In re Emerick* (D. C., Pa.), 4 Am. B. R. 89, 101 Fed. 231, holding that while the court has jurisdiction of the subject-matter a party submitting thereto cannot for the first time complain of the lack of jurisdiction when the decision is adverse.

e. Suits for recovery of property.—(1) **IN GENERAL.**—The exceptions added to subsection *b* by the amendments of 1903 and 1910 result directly in the clothing of a district court with full jurisdiction to entertain a suit brought by a trustee to recover property preferentially transferred within the meaning of § 60-b or fraudulently transferred or incumbered within the meaning of § 67-e, or § 70-e.¹⁰⁴ The jurisdiction of the bankruptcy court may only be sustained by bringing the allegations of the bill within the provisions of § 60-b, § 67-e or § 70-e of the act.¹⁰⁵ Such a suit may be laid either in the proper State court or in a district court even without the consent of the proposed defendant.¹⁰⁶ If brought in a State court, a Federal question is presented, which may be certified to the United States Supreme Court.¹⁰⁷ If in the district court, it need not be in the district where the bankruptcy proceeding is pending.¹⁰⁸ Such a suit could formerly be brought, under certain circumstances, in the circuit court (now district court), as has already been shown.¹⁰⁹

(2) **WHO MAY BRING SUIT.**—The extension of jurisdiction resulting from the amendment of this subsection was probably intended only for the benefit of the trustee. The adverse claimant certainly cannot sue under § 23-b in

104. If preferentially transferred, it must have been within four months of the bankruptcy (§ 60-b); if fraudulently, the State statute of limitations controls (§ 70-e). See *Gregory v. Atkinson* (D. C., Mo.), 11 Am. B. R. 495, 127 Fed. 183, holding that except as to conveyances or preferences made within the four months' period the law remains as it was before the amendment. To a similar effect is the case of *Harris v. First Nat. Bank* (Sup. Ct.), 216 U. S. 382, 23 Am. B. R. 631, 54 L. Ed. 528; *Palmer v. Roginsky* (D. C., N. Y.), 23 Am. B. R. 358, 175 Fed. 883; *Newcomb v. Bievin* (D. C., So. Dak.), 29 Am. B. R. 15, 199 Fed. 529. So far as these cases deny the jurisdiction of the district court to entertain suits by the trustee for the recovery of property fraudulently conveyed under § 70-e, they have been nullified by the amendment of 1910. As to jurisdiction to entertain a bill in equity by a trustee to set aside a mortgage as preferential and fraudulent, see *Hawkins v. Dannenberg Co.* (D. C., Ga.), 37 Am. B. R. 262, 234 Fed. 752.

Recovery of property.—In the case of *Linstroth Wagon Co. v. Ballew* (C. C. A., 5th Cir.), 18 Am. B. R. 23, 32, 149 Fed. 960, Judge McCormick said: "The amendatory act of 1903 gave concurrent jurisdiction to the courts of bankruptcy and any State court which would have had jurisdiction if bankruptcy had not intervened, if suits by a trustee for the purpose of such recoveries as are authorized by § 60, subd. *b*, and § 67, subd. *e*, in addition to those which could be entertained by the consent of the proposed defendant." *Milkman v. Arthe* (C. C. A., 2d Cir.), 34 Am. B. R. 536, 223 Fed. 507 (revg. 32 Am. B. R. 519, 213 Fed. 642), holding that section 23 *b* as amended by the act of 1910 gives the district court as a court of bankruptcy jurisdiction of a suit by the trustee

to trace certain funds of the bankrupt into the purchase of property; *Loganville Banking Co. v. Forrester* (Ga. Ct. of App.), 36 Am. B. R. 279 87 S. E. 694 (quoting text).

Recovery of preferences under § 66 of New York Stock Corporation Law, see *Grandison v. Robertson* (C. C. A., 2d Cir.), 36 Am. B. R. 432, 220 Fed. 985, mod. 34 Am. B. R. 609, 220 Fed. 985; *Cardozo v. Brooklyn Trust Co.* (C. C. A., 2d Cir.), 36 Am. B. R. 351, 228 Fed. 333.

105. *Waite v. Gottstein* (D. C., Wash.), 35 Am. B. R. 353, 224 Fed. 281, holding that the bankruptcy court has no jurisdiction, under section 23b of the Bankruptcy Act, over a suit by a trustee to recover property of the bankrupt forcibly seized by a creditor against the will and without the collusion of the bankrupt, and wrongfully held by such creditors without consent.

106. *Lawrence v. Lowrie* (D. C., Pa.), 13 Am. B. R. 297, 133 Fed. 995; *Horne-Gaylord Co. v. Miller* (D. C., W. Va.), 17 Am. B. R. 257, 147 Fed. 295; *Drew v. Myers*, 81 Nebr. 750, 22 Am. B. R. 656, 116 N. W. 781; *Blick v. Nimmo* (Md. Ct. of App.), 121 Md. 139, 30 Am. B. R. 770, 772, 88 Atl. 116, citing text.

107. *Rector v. City Deposit Bank Co.*, 200 U. S. 405, 15 Am. B. R. 336, 50 L. Ed. 527, where the court holds that where an action was brought by a trustee to recover what is asserted to be an asset of the bankrupt estate, a Federal question is presented, and the denial of the asserted right was a denial of a right or title specially claimed under a law of the United States.

108. See *Lathrop v. Drake*, 91 U. S. 516, 23 L. Ed. 416. And compare *Sherman v. Bingham*, Fed. Cas. 12,762, with *Shearman v. Bingham*, Fed. Cas. 12,733.

109. See p. 517, *ante*; *Bush v. Elliott*, 202 U. S. 477, 15 Am. B. R. 656, 50 L. Ed. 1114.

the district court,¹¹⁰ nor can he by consent confer summary jurisdiction upon the court to determine the merits of a real adverse claim in property alleged to belong to the bankrupt but in the claimant's possession.¹¹¹ The right to sue in a court of bankruptcy, to recover property preferentially or fraudulently transferred, belongs exclusively to the trustee;¹¹² such right is not assignable.¹¹³ But if no trustee has yet been chosen, creditors may sue to recover such property in the State or Federal courts, on behalf of themselves and all other creditors.¹¹⁴ Receivers in bankruptcy have no legal right or capacity to recover a fraudulent or preferential transfer made by a bankrupt; this seems to be established by a majority of the cases and is based upon the correct principle.¹¹⁵

(3) WHEN SUITS MAY BE BROUGHT.—A district court has by subsection *b* of this section full jurisdiction to entertain a plenary suit to set aside a preference or a fraudulent conveyance made within the four months prior to bankruptcy, or any transfer by the bankrupt, which any creditor of such bankrupt might have avoided, and to recover the property so transferred or its value. "To recover property" undoubtedly includes a suit, the real purpose of which is to annul an incumbrance, other than through legal proceedings.¹¹⁶ Thus, practically all suits to set aside preferences or fraudulent transfers,¹¹⁷

110. *Viquesney v. Allen* (C. C. A., 4th Cir.), 12 Am. B. R. 402, 131 Fed. 21, in which the court says: "The original act, § 23-a, relates only to controversies between the trustee in bankruptcy and adverse claimants to property acquired or claimed by the trustee. So also § 23-b relates only to suits brought by trustees in bankruptcy, and the amendments, if applicable here, likewise only apply to suits by trustees in bankruptcy."

111. *In re Teschmacher & Mrazay* (D. C., Pa.), 11 Am. B. R. 547, 127 Fed. 728.

112. *Frost v. Latham & Co.* (D. C., Ala.), 25 Am. B. R. 313, 181 Fed. 866; *Lovell v. Latham & Co.* (D. C., Ala.), 32 Am. B. R. 191, 211 Fed. 374; *Viquesney v. Allen* (C. C. A., 4th Cir.), 12 Am. B. R. 402, 131 Fed. 21. The restrictive effect of this subsection has no application to the right of a receiver to maintain or defend his possession of goods seized as those of the bankrupt. *In re Lipman* (D. C., N. J.), 29 Am. B. R. 139, 201 Fed. 169. See also discussion under § 60, "*Recovery of preference*," *post*.

In an ancillary suit by a trustee in bankruptcy to set aside an alleged preferential transfer of property by the bankrupt, other claimants will not be allowed to intervene, but must proceed in the court of original jurisdiction. *Knauth, Nachod & Kuhne v. Latham & Co.* (C. C. A., 5th Cir.), 33 Am. B. R. 631, 219 Fed. 721.

113. *Belding-Hall Mfg. Co. v. Mercer & Ferdon Lumber Co.* (C. C. A., 6th Cir.), 23 Am. B. R. 595, 175 Fed. 335.

114. *Guarantee Title & Trust Co. v. Pearlman* (D. C., Pa.), 16 Am. B. R. 461, 144 Fed. 550; *In re Schrom* (D. C., Iowa), 3 Am. B. R. 352, 97 Fed. 760.

Right of creditors to sue.—A trustee in bankruptcy represents all persons interested in the estate of the bankrupt. He is the

representative of the creditors of the bankrupt, and if he in any given case would have a right as their representative to institute a suit to set aside a fraudulent or preferential transfer, it seems to follow as a necessary consequence that such creditors are entitled to do so also, in the absence of a trustee, and to maintain the same until such trustee shall have been chosen when he would be entitled to become a party plaintiff in the suit. *In re Frost v. Latham & Co.* (D. C., Ala.), 25 Am. B. R. 313, 181 Fed. 866.

115. *Frost v. Latham & Co.* (D. C., Ala.), 25 Am. B. R. 313, 181 Fed. 866; *Booneville National Bank v. Blakey* (C. C. A., 7th Cir.), 6 Am. B. R. 13, 107 Fed. 891; *Beach v. Macon Grocery Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 751, 116 Fed. 143. *Contra*: *In re Fixen & Co.* (D. C., Cal.), 2 Am. B. R. 822, 96 Fed. 748; *In re McClellum* (D. C., Pa.), 7 Am. B. R. 596, 113 Fed. 393. See discussion under § 2 (3), *Powers of receivers, ante*.

116. As indicating this, note the use of the word "incumbrance" in § 67-e. And compare *Chapman v. Brewer*, 114 U. S. 158, 29 L. Ed. 83. For an interesting case where jurisdiction was declined see *Real Estate Trust Co. v. Thompson* (D. C., Pa.), 7 Am. B. R. 520, 112 Fed. 945.

117. See *Gregory v. Atkinson* (D. C., Mo.), 11 Am. B. R. 495, 127 Fed. 183; *Lynch v. Bronson* (D. C., Conn.), 20 Am. B. R. 409, 160 Fed. 139, holding that, where an insolvent within the four months' period purchased merchandise on credit and, with intent to defraud the seller, transferred the same for an inadequate price, the trustee of the insolvent buyer may recover the value of the property.

As depending on amount involved or citizenship.—If a cause of action is stated

and to avoid liens other than those through legal proceedings, may be laid in the district court; with, it is thought, in most instances, a reference by consent to one of the referees in bankruptcy, as special master, to hear and report on the facts as special master. Where the litigants are at a distance from the stated sittings of the district court, resort may still be had to the then more accessible State tribunals. In whichever court the suit is laid, it at once becomes subject to the rules and practice there followed. It has been held that a district court may not entertain a plenary suit in equity to annul a cancellation of a mortgage, made by the bankrupt to himself as executor under a will, brought by beneficiaries, where the general creditors of the bankrupt have no interest.¹¹⁸ Where neither of the parties was a party to the bankruptcy proceeding, this section confers no jurisdiction.¹¹⁹ If the property in controversy is not a part of the bankrupt estate and may not be distributed in the proceeding, the controversy cannot be determined therein.¹²⁰ Irrespective of the amendment of 1903, a district court has jurisdiction to determine in a plenary suit, the rights of parties in respect to property which has been surrendered by a receiver without authority.¹²¹ Where property has passed into the actual or constructive possession of the trustee, it has been held that the district court may entertain a plenary suit brought against the trustee to

under the bankruptcy act over which the United States District Court has jurisdiction, that jurisdiction will not be ousted by failure to plead or show that the amount involved was more than \$3,000, or that the residence of all parties was within the same district. *Milkman v. Arthe* (D. C., N. Y.), 32 Am. B. R. 519, 213 Fed. 642.

118. *Brumley v. Jones* (C. C. A., 5th Cir.), 15 Am. B. R. 578, 141 Fed. 318, 72 C. C. A. 466. Compare *Horner-Gaylord Co. v. Miller* (D. C., W. Va.), 17 Am. B. R. 257, 147 Fed. 295.

119. *Henrie v. Henderson* (C. C. A., 4th Cir.), 16 Am. B. R. 617, 145 Fed. 316.

120. *Matter of Girard Glazed Kid Co.* (2) (D. C., Pa.), 14 Am. B. R. 485, 136 Fed. 511.

Recovery of damages for conspiracy.—A suit by a trustee in which the complaint states a cause of action to recover damages for a conspiracy with the bankrupt, whereby the bankrupt, known by the defendants to be insolvent, purchased goods on credit and turned them over to the defendants for less than their value, is not a suit to set aside a fraudulent transfer within the provisions of section 67-e, and the bankruptcy court has no jurisdiction thereof under section 23-b. *Lynch v. Bronson* (D. C., Conn.), 24 Am. B. R. 513, 177 Fed. 605.

Recovery of property held under secret trust.—The bankruptcy court has no jurisdiction of an action by a trustee in bankruptcy, wherein no question of preference is involved, to recover real property which has never been in the possession of bankrupt or the trustee, but which is alleged to be held by bankrupt's wife, who received title thereto long prior to the four months' period, as trustee, in secret trust for the bankrupt, the record title being in her but the real ownership of the property being in bankrupt, since

in such case, no "transfer" of the property is shown. *Newcomb v. Biwer* (D. C., S. Dak.), 29 Am. B. R. 15, 199 Fed. 529.

Property held in trust for wife.—Although a transfer by some third person for the benefit of the bankrupt cannot be avoided by a creditor under section 70-e of the Bankruptcy Act, still when it is alleged in a suit by the trustee that money of the bankrupt was by agreement used by his brother in creating a trust for his wife, and that the entire transaction was an attempt to conceal the money of the bankrupt by transferring it in the form of stock, relief may be granted if the facts are substantiated. *Milkman v. Arthe* (D. C., N. Y.), 32 Am. B. R. 519, 213 Fed. 642.

Property not belonging to bankrupt estate.—The bankruptcy court has no jurisdiction of a suit by the trustee in bankruptcy of a contractor, under an agreement to construct a building for a nonresident owner at the date of the bankruptcy, against the owner and nonresident subcontractors to determine the validity of orders given by the bankrupt to the subcontractors or the owner. This because the court is not in possession of the *res*. Under such circumstances the court has no jurisdiction of resident claimants holding no property belonging to the bankrupt estate. *Matter of Smith Construction Co.* (D. C., Ga.), 35 Am. B. R. 227, 224 Fed. 228.

121. *Whitney v. Wenman*, 198 U. S. 539, 14 Am. B. R. 45, 49 L. Ed. 1157. In which it appeared that a temporary receiver in bankruptcy had turned over to third parties warehouse receipts belonging to the bankrupt, and it was held that such surrender being unauthorized suit might be brought by the trustee in a district court to recover such property.

determine the validity of liens claimed against such property,¹²² but in both instances jurisdiction exists under § 2 (7) of the act which vests district court with original jurisdiction to determine controversies with relation to estates of bankrupts, rather than under subsection *b* of § 23.¹²³ A suit, either at law or in equity, may be brought in the district court to recover a voidable preference;¹²⁴ it will become important in determining the question of jurisdiction to ascertain whether the transfer was in fact preferential, and the cases cited under § 60-a-b will be helpful. Where property in the possession of the adverse claimant was sold to him, title thereto may not be tried in a suit brought by the trustee in the district court.¹²⁵ A plenary suit by the trustee of a bankrupt corporation to recover unpaid subscriptions is not for the recovery of property under this subsection and may not be brought in a court of bankruptcy without the consent of the proposed defendants.¹²⁶ Suits against wrongdoers, who have wrongfully appropriated or misapplied funds belonging to the bankrupt estate, without the consent of the bankrupt do not fall within the meaning of the subsection as amended,¹²⁷ nor do suits for the recovery of ordinary contract debts.¹²⁸ The performance by a third person of a contract with the bankrupt cannot be enforced in summary proceedings.¹²⁹

f. Summary jurisdiction.—(1) **IN GENERAL.**—The amendments have not, it is thought, changed the effect of present precedents against the exercise of jurisdiction summarily. If the party proceeded against is “an adverse claimant,” in the broad sense of the words, he should not, under the present law, be asked to respond to a petition, order to show cause, or motion, any more than he was under the law of 1867, as it was interpreted in *Eyster v. Gaff*.¹³⁰ If the party is in possession of the property adversely claimed by

122. *Goodnough Mercantile & Stock Co. v. Galloway* (D. C., Or.), 19 Am. B. R. 244, 156 Fed. 504.

123. See cases cited under § 2(7), *ante*.

124. *Bowman v. Alpha Farms* (D. C., N. Y.), 18 Am. B. R. 700, 153 Fed. 380; *Parker v. Black* (D. C., N. Y.), 16 Am. B. R. 202, 143 Fed. 560; *Parker v. Sherman* (C. C. A., 2d Cir.), 32 Am. B. R. 393, 212 Fed. 917.

125. *In re Flynn* (D. C., N. Car.), 11 Am. B. R. 318, 126 Fed. 422.

126. *In re Hutchinson & Wilmoth* (C. C. A., 6th Cir.), 19 Am. B. R. 313, 158 Fed. 74, holding that a suit for the recovery of unpaid stock subscriptions is not a suit for the recovery of property under § 60-b, § 67-c, or § 70-e. Compare *Skillin v. Magnus* (D. C., N. Y.), 19 Am. B. R. 397, 162 Fed. 689; *Thrall v. Union Made Tobacco Co.*, 22 Am. B. R. 287, 54 Ohio Law Bull. 732; *In re Eureka Furniture Co.* (D. C., Pa.), 22 Am. B. R. 395, 170 Fed. 485.

127. **Recovery of funds withdrawn by officers of bankrupt corporation.**—Where the bill in a suit by a trustee in bankruptcy against the directors of the bankrupt to recover funds formerly belonging to the bankrupt, imports not that the bankrupt corporation has done anything, but that certain of its officers, by false pretenses, have withdrawn its funds, the suit is not to avoid a transfer by the bankrupt of its property, but a suit against wrongdoers, who have appropriated it without the bankrupt's assent,

and is, therefore, not within sections 23-b and 70-e of the Bankruptcy Act. *Park v. Cameron & Bolton*, 237 U. S. 616, 34 Am. B. R. 849, 59 L. Ed. 1147.

128. *Bush v. Elliott*, 202 U. S. 477, 15 Am. B. R. 565, 50 L. Ed. 1114; *Hinds v. Moore* (C. C. A., 6th Cir.), 14 Am. B. R. 1, 134 Fed. 221; *Matter of Ballou* (D. C., Ky.), 33 Am. B. R. 21, 215 Fed. 810.

129. *Matter of Ballou* (D. C., Ky.), 33 Am. B. R. 21, 215 Fed. 810, holding that a referee in bankruptcy has no jurisdiction of a summary proceeding to compel the issuance of stock by a corporation to a trustee in bankruptcy under an agreement by the promoters of the corporation to issue stock to the bankrupt in payment of services,

130. 91 U. S. 521, 23 L. Ed. 403. Compare *Burbank v. Bigelow*, 92 U. S. 179, 23 L. Ed. 542; *Smith v. Mason*, 81 U. S. 419, Marshall v. Knox, 83 U. S. 551, 21 L. Ed. 481; also *In re Rockwood* (D. C., Iowa), 1 Am. B. R. 272, 91 Fed. 363; *In re Kelly* (D. C., Tenn.), 1 Am. B. R. 306, 91 Fed. 504; *In re Franks* (D. C., Ala.), 2 Am. B. R. 634, 95 Fed. 635; *In re Baudouine* (C. C. A., 2d Cir.), 3 Am. B. R. 651, 101 Fed. 547; *In re Cohn* (D. C., N. Y.), 3 Am. B. R. 421, 98 Fed. 75; *Matter of Lummus* (D. C., Ga.), 32 Am. B. R. 740, 214 Fed. 891. When the claimant also is a bankrupt, summary jurisdiction exists; *In re Rosenberg* (D. C., Pa.), 8 Am. B. R. 624, 116 Fed. 402. See also cases decided by the Supreme Court under the present law

the bankrupt or his trustee he cannot be deprived of the right to litigate the disputed right to possession or ownership in a plenary suit brought either in a district court or the proper State court.¹³¹ An undisputed debt due the bankrupt cannot be collected by a summary proceeding. It can only be collected by an independent suit brought by the trustee against the debtor in a court of competent jurisdiction.¹³² A claimant may not be directed summarily to surrender property in his possession to the trustee, upon the mere allegation of the trustee that the claimant's interest is not in good faith, and that he intends to attack the claim on the ground that it is fraudulent.¹³³ Where the claimant has submitted to the jurisdiction of the court, he cannot complain of the summary disposition of his claim.¹³⁴

(2) INVESTIGATION AS TO NATURE OF CLAIM.—If it is ascertained upon investigation that the claim is adverse, the court will refuse to issue a summary order against third persons, requiring them to turn over property alleged to have been transferred by the bankrupt after adjudication.¹³⁵ The referee

referred to in the next paragraph. The case of *In re Tune* (D. C., Ala.), 8 Am. B. R. 285, 115 Fed. 906, is a valuable addition to the discussion and points out clearly when summary jurisdiction should be assumed and when not.

131. *In re Knickerbocker* (D. C., N. Y.), 10 Am. B. R. 381, 121 Fed. 1004; *In re Rochford* (C. C. A., 8th Cir.), 10 Am. B. R. 608, 124 Fed. 182; *Matter of Andre* (C. C. A., 2d Cir.), 13 Am. B. R. 132, 58 C. C. A. 374, 135 Fed. 736; *Matter of Lummus* (D. C., Ga.), 32 Am. B. R. 740, 214 Fed. 891; *Matter of Kramer & Muchnick* (D. C., Pa.), 33 Am. B. R. 223, 218 Fed. 138; *Matter of McCrum* (C. C. A., 2d Cir.), 32 Am. B. R. 604, 214 Fed. 207.

If a person claims property in his possession, in good faith, the referee cannot by summary order direct that it be surrendered to the bankrupt's trustee. *In re Walsh Bros.* (D. C., Iowa), 21 Am. B. R. 14, 163 Fed. 352.

The legitimate object of summary proceedings by a trustee in bankruptcy is accomplished when it appears that the property sought to be recovered is in the possession of a third person and held under an adverse claim, which existed at the time the petition in bankruptcy was filed, and which, is supported by uncontradicted testimony, would sustain a judgment in favor of the claimant—even though the claim might in the end prove to be fraudulent and voidable; but a merely frivolous claim, such as that of an agent or bailee holding in the interest of the bankrupt, will not be allowed to defeat summary process. *Courtney v. Shea* (C. C. A., 6th Cir.), 34 Am. B. R. 753, 225 Fed. 358.

Evidence of ownership.—Where by the uncontradicted testimony a motor truck claimed by the wife of a bankrupt is in a garage in her name, she is entitled to retain such possession until it is determined in a plenary action that she is not entitled thereto. Her claim is not merely colorable. *Matter of Markel* (D. C., Col.), 35 Am. B. R. 318, 228 Fed. 926.

132. *Matter of Ballou* (D. C., Ky.), 33 Am. B. R. 21, 215 Fed. 810.

133. **Claim alleged to be fraudulent.**—In the case of *In re Tarbox* (D. C., Mass.), 26 Am. B. R. 432, 185 Fed. 985, the court said: "The referee has jurisdiction under a summary petition to inquire and decide whether or not the claim under which property is held adversely to the trustee is merely colorable. But unless he can find it merely colorable he has no jurisdiction to proceed further. He cannot hear and determine its merits under a summary petition, if there is a real controversy as to the merits. Plainly the trustee cannot enlarge the referee's jurisdiction merely by alleging that the claim under which the property is held has no merits or is fraudulent, or by calling it "merely colorable" when no other reasons appear for so describing it than its alleged want of merit or its fraudulent character."

In the case of *In re Franklin Suit & Skirt Co.* (D. C., Pa.), 28 Am. B. R. 278, 197 Fed. 591, the court said: "If as the result of such an inquiry, it should appear that the goods in question are held under a real adverse title, even if such title be founded upon what may seem to be a fraud, it would, no doubt, be necessary to fight that controversy out in a plenary suit; but if there should be no real claim of title, either fraudulent or bona fide, and if the goods should be merely held by a person who is the bankrupt himself in disguise, the court would unquestionably have power to take the goods into its own custody as the property of the bankrupt, and proceed to administer them according to law."

134. *Matter of Traunstein v. White*, (D. C., Mass.), 34 Am. B. R. 482, 225 Fed. 317.

135. *In re Hayden* (D. C., Mass.), 22 Am. B. R. 764, 172 Fed. 622; *Matter of Lummus* (D. C., Ga.), 32 Am. B. R. 740, 214 Fed. 891. As to inquiry into basis of adverse claim see discussion under "*Inquiry as to basis of claim.*"

may pursue the investigation and for such purpose may cite the creditor to show cause, but if the creditor asserts a claim which is substantial, and objects to the jurisdiction of the court, the trustee should be directed to recover by plenary suit.¹³⁶ As a matter of right, the claimant should have his day in court in the regular way, *i. e.*, by pleadings, trial, and judgment. On the other hand, if his claim is not strictly adverse, summary process is permissible, even that of contempt.¹³⁷

(3) EFFECT OF AMENDMENT OF 1903.—The act of 1903 having made *Bardes v. Bank* no longer the law, it has been suggested that resort may now be had to summary remedies in many cases where it was denied before.¹³⁸ But the only change accomplished by the amendment is to give jurisdiction of suits at law and in equity to recover property to the district courts, as well as to the courts of the State.

(4) JURISDICTION AS DEPENDENT UPON POSSESSION.—(I) *General rule.*—The power of the district court to proceed summarily will depend largely upon whether the subject-matter is in its possession, either actually or constructively; where such possession is shown the court may proceed summarily to determine controversies in respect to the property, and the extent and character of liens thereon or rights therein.¹³⁹ Once acquiring possession, the

136. *Matter of Vallozza* (D. C., N. J.), 34 Am. B. R. 409, 225 Fed. 334, citing text.

137. *In re Davis* (D. C., Tex.), 9 Am. B. R. 670, 119 Fed. 950.

138. *Lawrence v. Lowrie* (D. C., Pa.), 13 Am. B. R. 297, 133 Fed. 995.

139. *Whitney v. Wenman*, 198 U. S. 553, 14 Am. B. R. 45, 49, 49 L. Ed. 1161; *First Nat. Bank of Chicago v. Chicago Title & Trust Co.*, 198 U. S. 280, 14 Am. B. R. 102, 49 L. Ed. 1051, where the court states that the rule in force under the act of 1867 that the bankruptcy court was without jurisdiction to determine adverse claims in property not in possession of the assignee in bankruptcy by summary proceedings, whether absolute title or only a lien was asserted, is equally applicable under the present law; *O'Dell v. Boyden* (C. C. A., 6th Cir.), 17 Am. B. R. 751, 756, 150 Fed. 731; *In re Baudouine* (C. C. A., 2d Cir.), 3 Am. B. R. 651, 101 Fed. 574; *In re Lemmon & Gale* (C. C. A., 6th Cir.), 7 Am. B. R. 291, 112 Fed. 296; *Cleminshaw v. International Shirt & Collar Co.* (D. C., N. Y.), 21 Am. B. R. 616, 165 Fed. 797; *Galbraith v. Grocery Co.* (C. C. A., 8th Cir.), 32 Am. B. R. 752, 216 Fed. 842.

The possession of the *res* draws to the court jurisdiction of all questions in respect to title or lien. *In re McMahon* (C. C. A., 6th Cir.), 17 Am. B. R. 530, 147 Fed. 684. Where the property is in possession of the trustee, the bankruptcy court may, upon notice to claimants, determine the conflicting claims of the parties interested in the property. *In re Noel* (D. C., Md.), 14 Am. B. R. 715, 137 Fed. 694. The bare possession of the property by the court through its officers, is sufficient to give the court jurisdiction to determine to whom the property belongs. *In re Leeds Woolen Mills*

(D. C., Tenn.), 12 Am. B. R. 136, 129 Fed. 922. The summary jurisdiction of the bankruptcy court can be sustained only when said court, through the acts of its officers, such as referees, receivers, or trustees, has taken possession of the *res* as the property of the bankrupt. *Matter of Schmieck Handle & Lumber Co.* (D. C., Me.), 37 Am. B. R. 494, 233 Fed. 446.

Summary proceedings in respect to property in possession of trustee.—In the case of *In re Rathman* (C. C. A., 8th Cir.), 25 Am. B. R. 246, 183 Fed. 913, the court said: "The bankruptcy court has jurisdiction to draw to itself, and to determine by summary proceedings after reasonable notice to claimants, the merits of controversies between the trustee and such claimants over liens upon and the title to property claimed by the trustee as that of the bankrupt which has been lawfully reduced to the actual possession of the trustee or of some other officer of the bankruptcy court as the property of the bankrupt." Citing *Murphy v. John Hoffman Company*, 211 U. S. 562, 569, 570, 21 Am. B. R. 487, 29 Sup. Ct. 154, 53 L. Ed. 327; *White v. Schloerb*, 178 U. S. 542, 545, 546, 548, 4 Am. B. R. 178, 20 Sup. Ct. 1007, 44 L. Ed. 1183; *In re Epstein* (C. C. A., 8th Cir.), 19 Am. B. R. 89, 156 Fed. 42, 84 C. C. A. 208, 17 L. R. A. (N. S.) 465; *Thomas v. Woods* (C. C. A., 8th Cir.), 23 Am. B. R. 132, 173 Fed. 585, 587, 590, 97 C. C. A. 535, 537, 540, 26 L. R. A. (N. S.) 1180; *Mound Mines Company v. Hawthorne* (C. C. A., 8th Cir.), 23 Am. B. R. 242, 173 Fed. 882, 886, 97 C. C. A. 394, 398; *Goodnough Mercantile & Stock Co. v. Galloway* (D. C., Ore.), 19 Am. B. R. 244, 156 Fed. 504, 509; *In re McMahon* (C. C. A., 6th Cir.), 17 Am. B. R. 530, 77 C. C. A. 668, 669, 671, 147 Fed. 684, 685, 687; *Whitney v. Wenman*, 198

jurisdiction to determine by plenary suit or summary proceedings all conflicting claims will remain in the court, and there can be no interference with such possession upon the part of any other court, except by way of review or appeal.¹⁴⁰ Summary jurisdiction may not be exercised to determine adverse claims to property not in the possession of the trustee, whether the adverse claimant asserts absolute title or merely a lien.¹⁴¹ It has been held that where

U. S. 539, 549, 553, 14 Am. B. R. 45, 25 Sup. Ct. 778, 49 L. Ed. 1157.

Cases where summary jurisdiction may be exercised.—The district court sitting in bankruptcy has jurisdiction to draw to itself and to determine by summary proceedings after reasonable notice to the claimants, all controversies between the trustee and adverse claimants over liens upon, and the title and possession of (1) property in the possession of the bankrupt when the petition in bankruptcy is filed, (2) property held by third parties for him, (3) property lawfully seized by the marshal as the bankrupt's under clause 3 of section 2 of the bankruptcy law, and (4) property claimed by the trustee which has been lawfully reduced to actual possession by the officers of the court. *Darrough v. First National Bank of Claremore* (Okla. Sup. Ct.), 37 Am. B. R. 75, 156 Pac. 191.

140. *Matter of Barker Piano Co.* (C. C. A., 2d Cir.), 37 Am. B. R. 271, 233 Fed. 522; *Williams v. Noyes & Nutter Mfg. Co.* (Sup. Ct., Me.), 112 Me. 408; 33 Am. B. R. 865, 92 Atl. 482; *Meek v. Eggerman* (Okla. Sup. Ct.), 36 Am. B. R. 488, 155 Pac. 522; *Matter of Ballou* (D. C., Ky.), 33 Am. B. R. 21, 215 Fed. 810; *Mound Mines Co. v. Hawthorne* (C. C. A., 8th Cir.), 23 Am. B. R. 242, 173 Fed. 882; *In re Schermerhorn* (C. C. A., 8th Cir.), 16 Am. B. R. 507, 145 Fed. 341; *In re Moody* (D. C., Iowa), 12 Am. B. R. 718, 724, 131 Fed. 525; *In re Rochford* (C. C. A., 8th Cir.), 10 Am. B. R. 608, 124 Fed. 187; *Crosby v. Spear*, 98 Me. 542, 11 Am. B. R. 613; *Chauncey v. Dyke Bros.* (C. C. A., 8th Cir.), 9 Am. B. R. 444, 119 Fed. 1, holding that where the bankruptcy court in the exercise of its customary jurisdiction obtains the lawful custody of property to which liens attach, it has the jurisdiction to determine the relative priorities of conflicting claims to the fund realized from the sale of the property; *In re Reynolds* (D. C., Mont.), 11 Am. B. R. 758, 127 Fed. 760; *In re Kellogg* (C. C. A., 2d Cir.), 10 Am. B. R. 7, 121 Fed. 333; *In re McCallum* (D. C., Pa.), 7 Am. B. R. 596, 113 Fed. 393; *In re Whitener* (C. C. A., 5th Cir.), 5 Am. B. R. 198, 105 Fed. 180; *Keegan v. King* (D. C., Ind.), 3 Am. B. R. 79, 96 Fed. 758. See also cases cited under § 2(7), *ante*.

Court acquiring possession.—In the case of *Murphy v. John Hoffman Co.*, 211 U. S. 562, 21 Am. B. R. 487, 53 L. Ed. 327, affg. 187 N. Y. 548, 80 N. E. 1104, the court said: "But where the property in dispute is in the actual possession of the court of bank-

ruptcy there comes into play another principle, not peculiar to courts of bankruptcy, but applicable to all courts, federal or state. Where a court of competent jurisdiction has taken property into its possession through its officers the property is thereby withdrawn from the jurisdiction of all other courts. The court having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. The jurisdiction in such cases arises out of the possession of the property and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them. Accordingly, where property was in the possession of the bankrupt at the time of the appointment of a receiver, it was held that the bankruptcy court had jurisdiction to determine the title to it, as against an adverse claimant, and that the receiver had no right to deliver it to him without the order of the court." In this case the court held that the seizure of goods in the possession of a receiver appointed in the bankruptcy court could not be interfered with on a writ of replevin from another court.

Exclusive jurisdiction.—Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court, having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting title, possession, or control of the property. The jurisdiction in such cases arises out of the possession of the property, and is exclusive of the jurisdiction of all other courts. *Wright v. Harris* (D. C., Ga.), 34 Am. B. R. 574, 221 Fed. 736, citing *Murphy v. John Hoffman Co.*, 211 U. S. 562, 21 Am. B. R. 487, 53 L. Ed. 327; *Whitney v. Wenman*, 198 U. S. 553, 14 Am. B. R. 45, 49 L. Ed. 1157.

141. *First National Bank v. Chicago Title & Trust Co.*, 198 U. S. 280, 14 Am. B. R. 102, 49 L. Ed. 1051; *Morning Telegraph Pub. Co. v. Hutchinson* (Sup. Ct., Mich.), 146 Mich. 38, 17 Am. B. R. 425, 109 N. W. 42; *Cooney v. Collins* (C. C. A., 9th Cir.), 23 Am. B. R. 840, 176 Fed. 189.

Property held under writ of replevin prior to bankruptcy.—Where the sheriff, in an action pending in a State court, holds property in replevin taken by him prior to bankruptcy proceedings under claim of owner-

property in the possession of the trustee is claimed by a person who was not a party to the bankruptcy proceedings, or any other controversy as to distribution of the estate, the court or referee has no jurisdiction to summarily determine the ownership of such property. The claimant is at least entitled to a determination of the claim, in judicial proceedings in which he has had an opportunity to appear.¹⁴²

(II). *Claim of interest in property in possession of court.*—Where a third person claims an interest in property in the possession of the bankrupt adjudication and which thereupon passed into the possession of the trustee, the referee may, by summary proceedings, require the claimant to appear in the bankruptcy court, and may adjudicate the rights of the parties in respect to such property.¹⁴³ This includes the power to determine by any valid mode or procedure the validity of the lien of a mortgage¹⁴⁴ or of a mechanic's lien on property which is in the possession of the bankruptcy court.¹⁴⁵ When the property of the bankrupt, or the fund resulting from the sale thereof, is in the custody of the court's officers, the court may summarily determine the validity of all subsisting liens thereon.¹⁴⁶

ship, the bankruptcy court has not jurisdiction, by summary order, to compel the sheriff to deliver the property to a receiver in bankruptcy. *Matter of Rudnick & Co.* (C. C. A., 2d Cir.), 20 Am. B. R. 33, 160 Fed. 903.

Possession of assignee or receiver for creditors.—The bankruptcy court has jurisdiction, by summary proceeding, to take from assignees and receivers for general creditors in insolvency or winding up proceedings, appointed within four months prior to the filing of the petitions in bankruptcy, from officers of courts attaching or replevying within that time, and from others holding for the bankrupt, property claimed to belong to the bankrupt, and then by virtue of the possession thus taken, to determine adverse claims to such property by a like summary proceeding. But the bankruptcy court may not thus take possession from a receiver appointed by another court, in a suit to enforce a lien antedating the filing of the petition in bankruptcy, or thereby draw to itself jurisdiction summarily to determine the validity of such a lien. *In re Rathman* (C. C. A., 8th Cir.), 25 Am. B. R. 246, 183 Fed. 913.

142. Matter of Petronio (C. C. A., 7th Cir.), 34 Am. B. R. 470, 220 Fed. 269.

143. Claim to property in possession of bankrupt which passes to trustee.—*In Mound Mines Co. v. Hawthorne* (C. C. A., 8th Cir.), 23 Am. B. R. 242, 173 Fed. 882, the court says: "The law is now settled that the interest of a third party in property claimed to belong to the bankrupt estate which, at the time of the institution of the proceedings in bankruptcy, is in the possession of such third person claiming an interest therein, can only be determined by an original suit brought for that purpose. Where, however, property which is in the possession of a bankrupt at the time of the

bankruptcy proceedings and passes as a part of his estate into the possession of the trustee in bankruptcy, and a third party claims an interest therein, the referee may, by a summary proceeding, require such third party to appear in the bankruptcy court, present his claim, and the referee may adjudicate the rights of the parties in respect thereof." *In re Epstein* (C. C. A., 8th Cir.), 19 Am. B. R. 89, 156 Fed. 42, in which it was held that a court of bankruptcy may, by summary process, require those who assert title to, or an interest in property, which has rightfully come into its possession and control as part of the bankrupt estate, to present their claims to that court, and the notice being reasonable, may proceed to adjudicate the merits of such claims.

144. Galbraith v. Grocery Co. (C. C. A., 8th Cir.), 32 Am. B. R. 752, 216 Fed. 842.

145. Mechanic's lien.—The bankruptcy court has jurisdiction to pass upon the validity of mechanics' liens on property of the bankrupt which has come into the possession of the court. *Matter of Kligerman* (D. C., Pa.), 33 Am. B. R. 608, 219 Fed. 758.

146. Liens on fund.—Where a claimant of logs also claimed by the receiver in bankruptcy agrees to remove and sell the logs, advance expenses and value of liens and after deducting said amount and proper compensation pay the balance to the receiver or their successors, and also agrees to submit the question of ownership to the court having jurisdiction, the bankruptcy court has jurisdiction of the fund and may summarily determine the ownership. (See Am. B. R. Digest, § 657.) *Matter of Schmiek Handle & Lumber Co.* (D. C., Me.), 37 Am. B. R. 494, 233 Fed. 446.

Determination as to liens.—After property of a bankrupt which is in his possession at the time of his bankruptcy has come within

(III) *Constructive possession*.—The rule which gives the bankruptcy court exclusive jurisdiction to determine claims to property in its custody is not limited to actual possession, but extends to constructive possession as well, including property held not only by but for the bankrupt.¹⁴⁷ Where property is not capable of tangible or actual physical custody, constructive possession will suffice to confer summary jurisdiction upon the bankruptcy court in respect to such property, as for instance where the bankrupt was possessed of a seat in a stock exchange and according to the rules of which proceedings must be taken to complete a transfer thereof; in such a case the seat passed to the bankruptcy court subject to the required transfer and the court may summarily direct the necessary action to be taken to complete the transfer.¹⁴⁸ And also in the case of grain or other property stored in a warehouse or in the possession of a bailee.¹⁴⁹ If the property claimed was in the possession of an agent of the bankrupt, it will be deemed to have been transferred to the possession of the trustee and the bankruptcy court may exercise summary jurisdiction over it.¹⁵⁰ And property in the hands of an officer of a bankrupt corpora-

the jurisdiction and custody of the bankruptcy court by virtue of the filing of the petition in bankruptcy and his subsequent adjudication, a creditor holding a lien or security deed cannot thereafter acquire title to the property or the possession thereof so as thereby to become an adverse claimant, so that his rights if any so acquired may not be inquired into and determined by a summary proceeding. *Cohen v. Nixon & Wright* (D. C., Ga.), 37 Am. B. R. 646.

147. *Orinoco Iron Co. v. Metzel* (C. C. A., 6th Cir.), 36 Am. B. R. 247, 230 Fed. 40, citing *Mueller v. Nugent*, 184 U. S. 1, 14, 17, 7 Am. B. R. 224, 46 L. Ed. 405; *Whitney v. Wenman*, 198 U. S. 539, 14 Am. B. R. 45; *Lazarus v. Prentice*, 234 U. S. 263, 266, 32 Am. B. R. 559; *Thomas v. Woods* (C. C. A., 8th Cir.), 23 Am. B. R. 132, 173 Fed. 585, 590; *Clay v. Waters* (C. C. A., 8th Cir.), 24 Am. B. R. 293, 178 Fed. 385, 392; *In re Schermerhorn* (C. C. A., 8th Cir.), 16 Am. B. R. 507, 145 Fed. 341-2; *O'Dell v. Boyden* (C. C. A., 6th Cir.), 17 Am. B. R. 751, 150 Fed. 731, 737.

Constructive possession insufficient.—In the case of *In re Rathman* (C. C. A., 8th Cir.), 25 Am. B. R. 246, 183 Fed. 913, the court said: "If the commencement of bankruptcy proceedings without more, without any act of the bankruptcy court, or any of its officers, to give notice to adverse claimants, or to reduce the property claimed to belong to the bankrupt to the possession of the officers of that court as his property gives it constructive possession, and hence a legal custody that enables it to determine by summary proceedings the merits of adverse claims to liens and titles to such property in the actual possession of others, then no case could ever arise in which any other court could have jurisdiction by plenary suit to determine the merits of such claims, for in every case a bankruptcy proceeding is commenced and the only ground on which the jurisdiction to determine summarily the

merits of such claims is sustained, is that the bankruptcy court's legal custody of the property excludes the jurisdiction of every other court and gives it the power to determine summarily all claims to liens upon, or interests in, the property in such custody. But this theory flies in the face of the settled rule repeatedly announced by the Supreme Court that the actual possession by the bankruptcy court is the indispensable condition of its exclusive and of its summary jurisdiction here."

148. *O'Dell v. Boyden* (C. C. A., 6th Cir.), 17 Am. B. R. 751, 150 Fed. 731; *Page v. Edmunds*, 187 U. S. 596, 9 Am. B. R. 277, 47 L. Ed. 318. See also *Sparhawk v. Yerkes*, 142 U. S. 1, 35 L. Ed. 915; *Hyde v. Woods*, 94 U. S. 523, 24 L. Ed. 264; *In re Ketchum*, 1 Fed. 840.

149. *Herbert v. Crawford*, 228 U. S. 204, 57 L. Ed. 800; *Babbitt v. Dutcher*, 216 U. S. 102, 23 Am. B. R. 519, 54 L. Ed. 402; *Matter of Wegman Piano Co.* (D. C., N. Y.), 36 Am. B. R. 210, 228 Fed. 60.

150. *Possession of agent*.—*Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224, 46 L. Ed. 405, where it appeared that the property of the bankrupt was in the hands of the third person before the filing of the petition in bankruptcy, as an agent of the bankrupt, and in respect to which he asserted no adverse claim; it was held that the bankruptcy court had power, by summary proceeding, to compel the surrender of the property to the trustee.

Where a third party does not admit that he is entitled to the possession of property and makes no claim to title thereto, he may not object to the exercise of summary jurisdiction by a court of bankruptcy in attempting to trace into his hands property of the bankrupt, where such property or its proceeds are traced through the hands of the bankrupt into the possession of the agent. The trustee may demand that the agent be compelled to make good or account for the

tion which belongs to the corporation may be summarily seized by an officer of the court, and thereupon comes into the possession of the court so as to authorize the exercise of summary jurisdiction by the court.¹⁵¹

(IV) *Unauthorized surrender of possession.*—The jurisdiction to proceed summarily is not lost by the unauthorized surrender of possession by officers of the court or by seizure of the property by an adverse claimant.¹⁵² If property of the bankrupt, once in the possession of the court, has been sold by the trustee without authority the court may summarily direct the return of such property.¹⁵³

(V) *Possession under attachment annulled by adjudication.*—Where the claim of possession as against the trustee's right of possession is based solely on an attachment lien which is annulled by the adjudication in bankruptcy, the person or officer so in possession holds as bailee for the trustee, and may be required to deliver the property by summary order issued from the bankruptcy court.¹⁵⁴

(VI) *Property wrongfully retained; fraudulent transfers.*—If property of the bankrupt is wrongfully withheld or is fraudulently and illegally

bankrupt's property. In re Fogelman (D. C., N. Y.), 26 Am. B. R. 742, 188 Fed. 755.

Officer of bankrupt corporation.—The district court has jurisdiction to order an officer of a bankrupt corporation to turn over property of such corporation, which he holds without himself making any adverse claim to it. In re Brockton Ideal Shoe Co. (C. C. A., 2d Cir.), 29 Am. B. R. 846, 202 Fed. 199.

Insurance policy in possession of bankrupt's wife.—Where it appears that bankrupt's wife had in her possession a policy of insurance taken out by bankrupt on his life and that she had paid premiums on said policy with money which she herself had earned, the bankrupt should not be required by summary order to surrender such policy, but he should only be required to assign to his trustee in writing his rights thereunder. In re Loveland (C. C. A., 1st Cir.), 29 Am. B. R. 560, 200 Fed. 136.

151. *Le Master v. Spencer* (C. C. A., 8th Cir.), 29 Am. B. R. 284, 203 Fed. 210, in which case it was held that where upon the arrest of the secretary, treasurer and general manager of a corporation upon a criminal charge, a large sum of money, valuable jewelry and other property was found upon his person, and the marshal, acting under a special warrant issued upon the application of creditors petitioning for the corporation's adjudication in bankruptcy, seized such property in the custody of the sheriff as assets of the alleged bankrupt, the district court had jurisdiction to determine the claim of the accused to such property.

152. In re Schermerhorn (C. C. A., 8th Cir.), 16 Am. B. R. 507, 145 Fed. 341. See also *Whitney v. Wenman*, 198 U. S. 539, 14 Am. B. R. 45, 49 L. Ed. 1157; *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224, 46 L. Ed. 405; *White v. Schloerb*, 178 U. S. 542, 4 Am. B. R. 178, 44 L. Ed. 1183; *Chauncey v. Dyke Bros.* (C. C. A., 8th Cir.), 9

Am. B. R. 444, 110 Fed. 1; In re Corbett (D. C., Wis.), 5 Am. B. R. 224, 104 Fed. 872; In re Rose Shoe Mfg. Co. (C. C. A., 2d Cir.), 21 Am. B. R. 725, 168 Fed. 39, holding that where, under a claim of ownership, there is taken from the possession of a receiver property held by him as part of the bankrupt's estate, the court of bankruptcy has jurisdiction to compel its return by summary order, and may adjudicate all claims relating thereto.

Fraudulent transfer of assets to corporation, formed by alleged bankrupt, during the four months' period, for purpose of avoiding administration in bankruptcy does not affect summary jurisdiction. *Matter of Berkowitz* (Ref., N. J.), 22 Am. B. R. 227.

153. *Matter of Monsarrat* (D. C., Hawaii), 25 Am. B. R. 815.

Unauthorized surrender by receiver.—Where the court had possession of the property, and jurisdiction to hear and determine the interests of those claiming a lien thereon, or ownership thereof, such jurisdiction cannot be ousted by a surrender of the property without the authority of the court. *Whitney v. Wenman*, 198 U. S. 539, 553, 14 Am. B. R. 45, 49 L. Ed. 1157; In re Baudouine (C. C. A., 2d Cir.), 3 Am. B. R. 651, 655, 101 Fed. 574.

154. *Staunton v. Wooden* (C. C. A., 9th Cir.), 24 Am. B. R. 736, 179 Fed. 61; In re Grassler (C. C. A., 9th Cir.), 18 Am. B. R. 694, 154 Fed. 478.

Possession of property attached.—An attachment upon property is discharged by the debtor's adjudication as a bankrupt. The adjudication operates as a seizure to the attached property which is *in custodia legis* from that time, and the title thereto passes to the trustee. The possession of the sheriff under the attachment is that of the bankruptcy court. In re Walsh Bros. (D. C., Ia.), 20 Am. B. R. 472, 159 Fed. 560.

retained by a third party, he may be compelled summarily to surrender it to the trustee.¹⁵⁵ If it be asserted that a third person is in fraudulent possession of property belonging to the bankrupt, it should be clearly shown that such property may be sufficiently identified to enable the proper officer to take it into his possession.¹⁵⁶ If property fraudulently transferred by the bankrupt subsequent to the adjudication, is sold or mingled with the vendee's property so as not to be capable of identification, the court may direct the vendee to restore the value of the goods.¹⁵⁷ It does not follow that a bankrupt or a third party may be summarily ordered to deliver property to the trustee, because such property was conveyed within the four months' period, with alleged intent to defraud creditors; it may be that the transferee has a valid claim to such property, notwithstanding such transfer; it should appear that the possession and control of the property is in the bankrupt or in one who holds for him or in his right.¹⁵⁸ Even though the possession of the adverse claimant is merely colorable and founded upon a preposterous claim, the trustee may not proceed summarily, but the party claiming possession should be heard in defense of such possession.¹⁵⁹ Property in the possession of a third person cannot be recovered summarily on the mere suspicion raised by the haste with which the property was sold and delivered immediately preceding bankruptcy.¹⁶⁰

155. *In re Famous Clothing Co.* (D. C., N. Y.), 24 Am. B. R. 780, 179 Fed. 1,015; *American Trust Co. of Pittsburgh v. Wallis* (C. C. A., 3d Cir.), 11 Am. B. R. 360, 126 Fed. 464; *In re Friedman* (D. C., N. Y.), 18 Am. B. R. 712, 153 Fed. 939.

Summary proceedings to recover goods held for bankrupt's benefit.—The bankruptcy court has jurisdiction to summarily determine whether certain specified goods are the property of an alleged bankrupt and are being withheld from his receiver by a person who is merely the bankrupt under another name, and for that purpose may issue process and call before it the necessary parties and witnesses. *In re Franklin Suit & Skirt Co.* (D. C., Pa.), 28 Am. B. R. 278, 177 Fed. 591.

Gift of balance of earnings to wife after payment of family expenses.—In a summary proceeding by a trustee in bankruptcy to recover moneys deposited in bank and invested in shares of stock of building associations it appeared that the bankrupt had an agreement with his wife under which he placed most of his earnings in her possession and gave her the balance after she paid the family expenses. Held, that an order compelling payment to the trustee of a portion of the moneys deposited in the name of the wife should be affirmed. *Courtney v. Shea* (C. C. A., 6th Cir.), 34 Am. B. R. 753, 225 Fed. 358.

156. *In re Jackier* (D. C., Pa.), 24 Am. B. R. 790, 179 Fed. 720.

157. *In re Denson* (D. C., Ala.), 28 Am. B. R. 158, 195 Fed. 854.

158. *In re Nisenson* (D. C., N. J.), 24 Am. B. R. 915, 182 Fed. 912.

Corporate stock issued in exchange for

property of bankrupt.—Where more than four months prior to the filing of a petition against him, a bankrupt had transferred his property to a corporation in exchange for stock, a portion of which was issued to others, such stockholders should not be proceeded against summarily to have their stock turned over to the trustee in bankruptcy as the property of the bankrupt's estate, on the theory that the original transfer by the bankrupt of his property to the corporation in exchange for stock was fraudulent, but the issue should be determined in a plenary suit by the trustee, even if objection to the jurisdiction of the bankruptcy court be deemed waived by answering to the merits, it appearing that various other transactions, involving the rights of an infant, required determination in passing upon the validity of the stockholders' claim of title. *In re Mills* (D. C., N. Y.), 25 Am. B. R. 278, 179 Fed. 409.

159. *Matter of Vyse* (D. C., N. Y.), 34 Am. B. R. 378, 220 Fed. 727; *In re Friedman* (C. C. A., 2d Cir.), 20 Am. B. R. 37, 161 Fed. 260; *In re Siegel* (D. C., N. Y.), 21 Am. B. R. 154, 164 Fed. 559. If a claim of title is fairly interposed, then a plenary suit is necessary. *In re Bacon* (C. C. A., 2d Cir.), 31 Am. B. R. 777, 210 Fed. 129.

160. *Matter of Lummus* (D. C., Ga.), 32 Am. B. R. 740, 214 Fed. 891, in which the court held that where a creditor purchases property from a bankrupt on the day before the filing of the petition in bankruptcy, with the intention of applying it on his account, and takes possession thereof, he is an adverse claimant, and the bankruptcy court has no jurisdiction to summarily determine his rights on an application by the

(VII) *What constitutes possession of court.*—Property is in possession of the court when an officer of the court is in possession, whether such officer be a trustee, a receiver, or any other judicial representative.¹⁶¹ The test of the summary jurisdiction is that the court of bankruptcy, through the act of its officers, such as referees, receivers or trustees, has taken possession of the *res* as the property of the bankrupt.¹⁶²

(VIII) *When possession takes effect; filing petition as notice.*—Upon the filing of a petition in bankruptcy, followed by adjudication, the property in the possession of the bankrupt of which he claims the ownership passes at once into the custody of the court of bankruptcy and becomes subject to its jurisdiction.¹⁶³ It has been expressly stated in a number of cases that the property of the bankrupt, after the filing of the petition against him and before adjudication thereon, is in *custodia legis*; that from that time it becomes subject to the prehensory power of the court and the bankrupt or his creditors cannot take any action in respect to it.¹⁶⁴ This principle is based upon the often-repeated statement that the filing of a petition is a *caveat* to all the world, and is in fact an injunction and attachment.¹⁶⁵ But it applies only to parties who have no substantial claim to a lien upon or title to the property of the bank-

receivers of the bankrupt for an order to compel the creditor to deliver the property to them.

161. In re Franklin Lumber Co. (D. C., N. J.), 17 Am. B. R. 443, 446, 147 Fed. 852; In re Renda (D. C., Pa.), 17 Am. B. R. 521, 523, 149 Fed. 614; Crosby v. Spear, 98 Me. 542, 11 Am. B. R. 613, 57 Atl. 881; McFarland Carriage Co. v. Solanas (D. C., La.), 6 Am. B. R. 221, 106 Fed. 145, holding that a thing is in *custodia legis* when it is shown that it has been and is subject to the official custody of a judicial executive officer in pursuance of his execution of a legal writ.

Where bankrupt's receiver actually obtained possession of goods at the very inception of a controversy concerning the title thereto and they remained in his possession and that of the trustee until sold by order of the court and consent of all parties, since which time the trustee held the proceeds, the bankruptcy court had jurisdiction to determine the title to the goods in summary proceedings. Salsburg v. Blackford (C. C. A., 4th Cir.), 29 Am. B. R. 320, 204 Fed. 438, affg. 27 Am. B. R. 64, 190 Fed. 53.

162. Test of summary jurisdiction.—In the case of In re Rathman (C. C. A., 8th Cir.), 25 Am. B. R. 246, 183 Fed. 913, the court cited the cases of Murphy v. John Hoffman Co., 211 U. S. 562, 21 Am. B. R. 487, 53 L. Ed. 327; Whitney v. Wenman, 198 U. S. 539, 14 Am. B. R. 45, 49 L. Ed. 1157; White v. Schloerb, 178 U. S. 542, 4 Am. B. R. 178, 44 L. Ed. 1183, and said: "It is the taking possession of the property as the property of the bankrupt, by the act of some officer of the bankruptcy court, such as a referee, a receiver or a trustee. This is the touchstone of its summary jurisdiction, unless indeed the declaration of the Supreme Court in Babbitt v. Dutcher, 216

U. S. 102, 23 Am. B. R. 519, 54 L. Ed. 402, deprives it of the power to acquire this summary jurisdiction to determine adverse claims to liens upon and titles to property of the bankrupt, created by mortgages and conveyances made prior to the filing of the petition in bankruptcy, and even by acquiring possession of the property."

163. In re Gutman & Wenk (D. C., N. Y.), 8 Am. B. R. 252, 114 Fed. 1,009; In re Granite City Bank (C. C. A., 8th Cir.), 14 Am. B. R. 404, 137 Fed. 818; In re Hobbs (D. C., W. Va.), 16 Am. B. R. 544, 145 Fed. 211; In re Schermerhorn (C. C. A., 8th Cir.), 16 Am. B. R. 507, 145 Fed. 341, where the court said: "Upon the filing of a petition in bankruptcy, followed by an adjudication, all property in the possession of the bankrupt of which he claims the ownership passes at once into the custody of the court of bankruptcy, and becomes subject to its jurisdiction to determine, by plenary action or summary proceeding, as the nature of the case demands, all adverse or conflicting claims thereto, whether of title or of lien; and that court may, by the process of injunction, protect its jurisdiction against interference." De Friece v. Bryant (D. C.; Ky.), 37 Am. B. R. 276, 232 Fed. 233.

164. In re Duncan (D. C., S. Car.), 17 Am. B. R. 283, 288, 148 Fed. 464; In re Granite City Bank (C. C. A., 8th Cir.), 14 Am. B. R. 404, 137 Fed. 818. See also Matter of Leigh (D. C., Ill.), 31 Am. B. R. 379, 208 Fed. 486; Williams v. Noyes & Nutter Mfg. Co. (Sup. Ct., Me.), 112 Me. 408, 33 Am. B. R. 865, 92 Atl. 482.

165. Mueller v. Nugent, 184 U. S. 1, 7 Am. B. R. 224, 46 L. Ed. 405. This declaration has been repeated in a great number of cases with the same effect and purpose; these cases are too numerous to cite. See cases cited in note under section 18.

rupt; as against those who have such claims the filing of the petition is neither a *caveat* nor an attachment. Until the bankruptcy court takes actual possession of the property by some act of one of its officers, or makes such claimants parties to the proceeding by some order or process, or notice of the proceeding comes to them, their liens, titles and remedies are unaffected thereby and they are strangers to the proceeding.¹⁶⁶ A bank may not be required by summary order to turn over to the trustee in bankruptcy of a depositor, the amount paid by it on checks subsequent to the filing of a bankruptcy petition against such depositor, of which it had no actual notice.¹⁶⁷ The principle above declared was never intended to prevent the consummation of legitimate business transactions which were being conducted at the time a petition was filed against one or the other of the parties to such transaction.¹⁶⁸ But where a bankrupt, after the filing of a petition against him, but before the court had come into actual possession of the estate, pays a bona fide debt out of the assets, to a creditor who had no notice of such filing, the court may entertain

166. In re Rathman (C. C. A., 8th Cir.), 25 Am. B. R. 246, 183 Fed. 913, citing Jacquith v. Rowley, 188 U. S. 620, 625, 9 Am. B. R. 525, 47 L. Ed. 620; York Mfg. Co. v. Cassell, 201 U. S. 344, 352, 15 Am. B. R. 633, 50 L. Ed. 782; Hiscock v. Varick Bank of New York, 206 U. S. 28, 18 Am. B. R. 1, 51 L. Ed. 945.

Effect of proceedings; lienors not parties.—Bankruptcy proceedings do not of themselves operate as an attachment or sequestration in the sense of a judgment or the conferring of a lien, but there is a mere passing by operation of law of the title of the bankrupt to the trustee. Liens and encumbrances against the property not avoided by the bankruptcy act remain unaffected by the proceedings except to the extent to which the remedy of enforcement is limited by the property having passed into the custody of the court. Until such lien creditors or other third persons with rights in the property of the bankrupt come into the bankruptcy court to enforce their rights or are brought in to have the rights of the trustees asserted as against them, they are in no proper sense parties to the bankruptcy proceedings. Matter of Reading Hat Mfg. Co. (D. C., Pa.), 34 Am. B. R. 884, 224 Fed. 786.

167. Application of principle where bank pays check drawn by bankrupt.—In the case of Matter of Zotti (C. C. A., 2d Cir.), 26 Am. B. R. 234, 186 Fed. 84, the court said: "Of course the trustee can after adjudication, and the receiver before, compel the surrender of assets in the possession of the bankrupt, or of the alleged bankrupt, or of any one for him. As to such persons, the filing of the petition may be a caveat, attachment and injunction. Mueller v. Nugent, 184 U. S. 1, 7 Am. B. R. 224, 46 L. Ed. 405, was just such a case. The bankrupt had presented to his son the proceeds of substantially all his property immediately before the petition was filed. In summary proceedings, before the referee, to make the son surrender these moneys, he merely denied jurisdiction that

he had received them before the petition was filed." (The court then quoted at length from the opinion of Chief Justice Fuller in such case): "... We think this language was never intended to be applied to a bank which has honestly paid checks to the depositors without notice that any petition in bankruptcy has been filed against him and who may never be adjudicated a bankrupt at all."

168. Legitimate business transactions.—In the case of Matter of Murtens (C. C. A., 2d Cir.), 15 Am. B. R. 362, 142 Fed. 445, 75 C. C. A. 548, the court said: "Under the former act there were many decisions, that a lien previously acquired could not be enforced subsequent to the commencement of the proceeding, except with the permission of the bankruptcy court. The Supreme Court, however, refused to sanction these decisions, and held that the lienor was entitled to perfect his title and enforce his rights as though no proceeding had been commenced. Eyster v. Gaff, 91 U. S. 521, 23 L. Ed. 403; Jerome v. McCarter, 94 U. S. 734, 24 L. Ed. 136. The change in the present act, by which the trustee's title is that only which exists at the date of the adjudication, removes any uncertainty which arose under the act of 1867. It was intended, we think, to permit all legitimate business transactions between a debtor and those dealing with him to be carried out and consummated as freely until he has been adjudicated a bankrupt as though no proceedings were pending. In many cases the proceeding against an alleged bankrupt is unfounded, and for this and other reasons never culminates in an adjudication. While the filing of a petition in bankruptcy is a caveat to all the world, the notice ought not to have the effect of paralyzing all business dealings with the debtor, or to prevent lienors or pledgees from enforcing their contracts. This is its practical effect if the rights and remedies of all concerned are in suspense until it can be ascertained whether an adjudication is or is not to follow the commencement of the proceeding."

summary proceedings to recover such payment.¹⁶⁹ In any event whether the property vests at the time of the filing of the petition or upon the adjudication the possession of the bankrupt becomes that of the court and from either of such times the court may proceed summarily in respect to the property of the bankrupt.¹⁷⁰

(IX) *Claim against bank deposits or securities pledged.*—The claim of a bank to ordinary deposits made by a bankrupt, based on an alleged right to offset notes of the bankrupt, will generally be held to be adverse, and the bank is entitled to a determination of the claim in a plenary suit.¹⁷¹ Where securities are pledged for the payment of a debt owing by the bankrupt, and are in the possession of the pledgee at the time of the adjudication and other parties assert a claim to such securities the claim is adverse, and the referee may not summarily determine the right of the trustee to the possession of the securities. The claimants are entitled to the benefit of a plenary suit.¹⁷²

(X) *Extent of jurisdiction.*—The jurisdiction pertains to the hearing and determination of all adverse claims involving title and possession or control of property which is in possession of the trustee as assets of the estate.¹⁷³ Wherever a receiver in bankruptcy is directed by the court to sell assets in his possession, the parties concerned in the sale are subject to the summary jurisdiction of the court, and the court may direct the manner of the completion of the contract.¹⁷⁴

(4) EXERCISE OF SUMMARY JURISDICTION.—If the property proceeded against be not held adversely, that is, if it be either actually or constructively¹⁷⁵ in the possession of the court, summary process may issue in the exercise of the court's lawful jurisdiction in respect thereto. It will thus be noticed that the

169. *Matter of R. & W. Skirt Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 353, 222 Fed. 256.

170. *In re Kleinhans* (D. C., N. Y.), 7 Am. B. R. 605, 113 Fed. 107; *Bryan v. Bernheimer*, 181 U. S. 188, 5 Am. B. R. 623, 45 L. Ed. 814; *In re Davis Tailoring Co.* (D. C., N. J.), 16 Am. B. R. 486, 144 Fed. 285, where it appeared that four days prior to the filing of a petition against the bankrupt property was purchased from him and it was held that the question as to the title of the property could not be adjudicated summarily by the district court.

Recovery from third person.—A summary proceeding to recover alleged assets from the possession of a third person cannot be transformed by the bankruptcy court into a suit to set aside several transactions, either as preferences or as fraudulent agreements, and where such alleged assets are in the actual and exclusive possession of such third person, under a claim of title that is supported by a good deal of evidence the sole remedy of the receiver or trustee in bankruptcy is a plenary suit; *In re Glenn* (D. C., Pa.), 35 Am. B. R. 806, 185 Fed. 554.

171. *First National Bank of Thomasville v. Hopkins* (C. C. A., 5th Cir.), 29 Am. B. R. 434, 199 Fed. 873.

172. *In re Bacon* (D. C., N. Y.), 28 Am. B. R. 565, 196 Fed. 986, holding that where the evidence in a proceeding brought by the trustee to redeem certain stock, claimed by a bank under a pledge as collateral security

subject to the rights of a prior pledgee who, since the stock was pledged, has had physical possession thereof, as well as the litigation had between the trustee and the bank, disclosed the existence of an adverse claim, the bank was entitled to the benefit of a plenary suit; and the bank which challenged the jurisdiction of the referee upon its appearance, did not waive such objection, nor confer jurisdiction upon the referee by pleading to the merits.

173. *Bear Gulch Placer Mining Co. v. Walsh* (D. C., Mont.), 28 Am. B. R. 724, 198 Fed. 351, holding that a suit in equity seeking to quiet title to an electric power and light plant, erected without consent by bankrupt upon land of the complainant, to the land covered thereby, and also to a water ditch, all of which are in the possession of bankrupt's trustee as assets, will not be treated as independent and original, but as merely ancillary to the bankruptcy proceedings and the bill as merely a petition therein, asserting and seeking determination of a claim to property in the custody of the court; and in such proceedings the bankruptcy court has full jurisdiction to render a final judgment or decree binding the parties.

174. *Mason v. Wolkowich* (C. C. A., 1st Cir.), 17 Am. B. R. 709, 150 Fed. 699.

175. See cases cited under preceding heading "(III) Constructive possession."

question also hinges upon the nature of the claim as adverse and this in turn is controlled by the determination as to where the possession lies. The case of *Bardes v. Bank*¹⁷⁶ effectually limited the exercise of jurisdiction by the district court over plenary suits for the recovery of property adversely held. The amendment of 1903 eliminated this limitation. As we have seen the only change accomplished by this amendment is to give jurisdiction of suits at law and in equity to recover property to the district courts. Beginning with *White v. Schloerb*,¹⁷⁷ where the property was taken in replevin from the custody of the court after an adjudication, and continuing through *Bryan v. Bernheimer*,¹⁷⁸ which held the vendee of a general assignee within four months of the bankruptcy, and with knowledge of its existence, amenable to summary process, to *Mueller v. Nugent*,¹⁷⁹ which declared the bankrupt's son, to whom, just prior to bankruptcy, he had delivered a large amount of property which he refused to restore to the trustee, not an adverse claimant, the Supreme Court has already supplied a chain of precedents which limit its broad doctrine in *Bardes v. Bank*. The case of *Louisville Trust Co. v. Cominger*¹⁸⁰ stands by itself, and, while seeming to limit *Bryan v. Bernheimer*, when carefully read, reaffirms it; the holding of the general assignee there being not strictly as assignee, in other words, as agent for the bankrupt, but rather as an individual having acquired title lawfully and without notice, and thus constructively, if not actually, adverse. Each of these decisions turns on whether the defendant is "an adverse claimant." *Bardes v. Bank* was a lightning flash, like *Eyster v. Gaff* under the other law, and cleared the atmosphere on this puzzling question of summary jurisdiction; but it was not necessary to any of the many recent decisions against summary process, though usually assigned as the reason for the ruling.¹⁸¹ The jurisdiction to proceed summarily doubtless exists as much now as it did before *Bryan v. Bernheimer* was decided. It is not a question of jurisdiction, but rather of comity and discretion.¹⁸² In facts like those in *White v. Schloerb*, *Bryan v. Bernheimer*, and *Mueller v. Nugent*, it should be exercised. In other facts, amounting to an adverse holding under a legal title before the bankruptcy, it usually will not; as where transfers were made by the bankrupt two years prior to filing the petition in bankruptcy, the court has no jurisdiction of an action to set them aside on the ground of fraud against creditors, without the consent of the proposed defendants.¹⁸³ Having now clearly the right to try controversies by plenary suit, the district court will be more apt to assume and retain jurisdiction which rests only on

176. 178 U. S. 524, 4 Am. B. R. 163, 44 L. Ed. 1175.

177. 178 U. S. 542, 4 Am. B. R. 178, 44 L. Ed. 1175.

178. 181 U. S. 188, 5 Am. B. R. 623, 45 L. Ed. 814. Compare *Smith v. Belford* (C. C. A., 6th Cir.), 5 Am. B. R. 291, 106 Fed. 658.

179. 184 U. S. 1, 7 Am. B. R. 224, 46 L. Ed. 405, revg. s. c. below (C. C. A., 6th Cir.), 5 Am. B. R. 176, 105 Fed. 581, which revd. *In re Nugent* (D. C., Ky.), 4 Am. B. R. 747, 104 Fed. 530. For referee's decision in same case, see N. B. N. Rep. 714.

180. 184 U. S. 18, 7 Am. B. R. 421, 46 L. Ed. 413, affg. *Sinsheimer v. Simonson* (C. C. A., 6th Cir.), 5 Am. B. R. 537, 107 Fed. 898. As to right of bankruptcy court to require assignee to account for property coming into

his hands under an assignment made within four months of the assignor's bankruptcy, see *Matter of Thompson* (D. C., N. Y.), 10 Am. B. R. 242, 122 Fed. 174; affd. 11 Am. B. R. 719, 128 Fed. 575.

181. See *In re San Gabriel Sanatorium Co.* (C. C. A., 9th Cir.), 7 Am. B. R. 206, 111 Fed. 892; also *In re Sheinbaum* (D. C., N. Y.), 5 Am. B. R. 187, 107 Fed. 247; *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224, 46 L. Ed. 405.

182. See *In re Tune* (D. C., Ala.), 8 Am. B. R. 285, 115 Fed. 906.

183. *Gregory v. Atkinson* (D. C., Mo.), 11 Am. B. R. 495, 127 Fed. 183; *In re Davis Tailoring Co.* (D. C., N. J.), 16 Am. B. R. 486, 144 Fed. 285.

petition or order to show cause and appearances,¹⁸⁴ and, where possible, consider it as a suit between the parties so in court. But the phrasing of any rule generally applicable is impossible.

g. Ancillary jurisdiction.—A district court has only such jurisdiction as is conferred by the act; this section only confers jurisdiction to the extent that suits might have been brought by the bankrupt if proceedings in bankruptcy had not been instituted, and contains no provision for auxiliary or ancillary proceedings in another court of bankruptcy in aid of the bankruptcy court that made the adjudication and has charge of the bankrupt's estate.¹⁸⁵ This question has been already discussed under § 2, *ante*, and it will there be noticed that the weight of authority, prior to the amendment of 1910, favored the exercise of such ancillary jurisdiction in special cases, when necessary to carry into effect the full purpose of the bankruptcy act.¹⁸⁶ The amendment of 1910 expressly authorizes courts of bankruptcy to exercise ancillary jurisdiction over persons or property within their respective territorial limits, in aid of the receiver or trustee appointed in any bankruptcy proceeding pending in any other court of bankruptcy. This amendment effectively disposes of any

184. *In re Steuer* (D. C., Mass.), 5 Am. B. R. 209, 104 Fed. 976. See *In re Mundle* (D. C., N. Y.), 14 Am. B. R. 680, 139 Fed. 691.

185. *Hull v. Burr* (C. C. A., 5th Cir.), 18 Am. B. R. 541, 153 Fed. 945; *In re Von Hartz* (C. C. A., 2d Cir.), 15 Am. B. R. 747, 142 Fed. 726.

A bankruptcy court in a district other than that in which the bankruptcy proceedings are pending has no jurisdiction to appoint a receiver of the property of the alleged bankrupt, except upon motion in open court upon such notice to the persons in the actual possession of property so located, and to those otherwise interested as will in the circumstances constitute due process of law as required by the Constitution. *Ross-Meeham Foundry Co. v. Southern Car & Foundry Co.* (D. C., Tenn.), 10 Am. B. R. 624, 124 Fed. 403. In the case of *In re Williams* (D. C., Tenn.), 10 Am. B. R. 538, 123 Fed. 321, it was held that a bankruptcy court in a district other than that in which the bankruptcy proceedings are pending may not grant an application for an order for an examination before a referee of persons concerning the acts, conduct and property of the bankrupt of which it is alleged that such persons have knowledge; such an order should be made by the court of bankruptcy having charge of the administration of the estate.

186. See *ante*, p. 32; *In re Nelson & Co.* (D. C., N. Y.), 13 Am. B. R. 66, 149 Fed. 590; *Babbitt v. Dutcher* (Sup. Ct.), 216 U. S. 102, 23 Am. B. R. 519, 54 L. Ed. 402. The amendment of § 2 by the act of 1910 makes clear the right to exercise ancillary jurisdiction.

Inherent ancillary jurisdiction.—In the case of *In re Swofford Bros. Dry Goods Co.* (D. C., Mo.), 25 Am. B. R. 282, 287, 180 Fed. 549, the court said: "The jurisdiction of this court would undoubtedly be sustained

upon still broader grounds. We have seen that a proceeding in bankruptcy is a proceeding in equity and that for the purposes of enforcing and protecting its jurisdiction a court of bankruptcy has all the inherent powers of a court of equity. This being the case it may be appealed to by supplemental and ancillary bill to enforce its orders, sustain its jurisdiction and protect parties before it in the enjoyment of rights secured through and under it. This is always true where jurisdiction is reserved or still retained, and even afterwards where the result would be a relitigation of the same subject matter between the same parties. An appeal addressed to this power of the court is essentially supplemental and ancillary in its nature, and inheres in the general equity jurisdiction of the court."

In the case of *Staunton v. Wooden*, 24 Am. B. R. 736, 179 Fed. 61, it was held that the court in which a petition in bankruptcy is filed has plenary jurisdiction in bankruptcy co-extensive with the United States to order and control the disposition of the bankrupt's estate and is vested with jurisdiction to determine all liens thereon and all interest affecting it, but it may not by summary order direct a nonresident to deliver to the trustee property in the possession of such nonresident outside the district. And in the case of *In re Heintz* (C. C. A., 6th Cir.), 29 Am. B. R. 19, 201 Fed. 338, it was held that a summary proceeding to collect property belonging to the estate of a bankrupt, which is in the possession of a stranger residing outside of the territorial limits of the court of the original adjudication, must be determined by the court within whose jurisdiction the property is located and the respondent resides. And see, also, *In re Rathfon Bros.* (D. C., Mich.), 29 Am. B. R. 22, 200 Fed. 108.

conflict which may have arisen in respect to the exercise of ancillary jurisdiction. It makes clear the power of the bankruptcy court in one district, to aid by its process the administration of bankrupt estates, where the proceedings were instituted in another district. The cases cited in the note denying this jurisdiction are nullified. Under the scheme of the bankrupt act the district court of the domicile of the bankrupt takes jurisdiction of the bankrupt and his property wherever situated, to administer it and distribute the proceeds among the creditors according to their respective rights and priorities. It thus happens that there is usually no necessity for the exercise of ancillary jurisdiction by a bankruptcy court.¹⁸⁷

h. Auxiliary remedies.—A bankruptcy court, as a court of equity, is competent to grant final and auxiliary reliefs adapted to the circumstances of any case, however peculiar, and, by the bankrupt act, it is charged with the duty to devise such orders and judgments as may be necessary for the enforcement thereof.¹⁸⁸ The amendment of 1903 has not affected the jurisdiction of the court in respect to the different auxiliary remedies. Where the right to stay should have been exercised before *Bardes v. Bank* it should be exercised now,¹⁸⁹ the amendments having accomplished no change here.¹⁹⁰ So also of orders to show cause resulting in contempt.¹⁹¹ The question is not one of jurisdiction, but of comity, of propriety. The court can, but often should not.¹⁹² If the bankrupt had the title at the time of the bankruptcy, it has the jurisdiction and may assert it. If the court, through its officers, had acquired peaceable possession of the property, under such conditions as to place it and the proceeds thereof *in custodia legis*, it may determine the ownership of such property and proceeds,¹⁹³ and the relative priorities of conflicting claims thereto.¹⁹⁴ Likewise, too, of that much mooted question whether a district court can summarily bring in a stranger who has a lien on the bankrupt's property and determine its validity, against his protest.¹⁹⁵ If the bankrupt had not the title,

187. In *re Granite City Bank* (C. C. A., 8th Cir.), 14 Am. B. R. 404, 137 Fed. 818; *Hartman v. Swiger* (D. C., W. Va.), 33 Am. B. R. 369, 215 Fed. 986, citing *Collier on Bankruptcy* (10th Ed.), 498, 499.

188. In *re Coffey* (Ref., N. Y.), 19 Am. B. R. 148.

189. See In *re Currier* (Ref., N. Y.), 5 Am. B. R. 639. And compare, for an extreme and, since *Bryan v. Bernheimer*, doubtful authority, In *re Seebold* (C. C. A., 5th Cir.), 5 Am. B. R. 358, 105 Fed. 910.

190. As to stays generally, see discussion under Sections Two and Eleven of this work.

191. See discussion under Sections Two and Forty-one of this work.

192. Thus, compare In *re Young* (C. C. A., 8th Cir.), 7 Am. B. R. 14, 111 Fed. 158, reviewing and affg. In *re Bender* (D. C., Ark.), 5 Am. B. R. 632, 106 Fed. 873; also, In *re Green* (D. C., Pa.), 6 Am. B. R. 270, 108 Fed. 616; In *re Scheinbaum* (D. C., N. Y.), 5 Am. B. R. 187, 107 Fed. 247; In *re Moore* (D. C., W. Va.), 5 Am. B. R. 151, 104 Fed. 869; In *re Macon Sash, etc., Co.* (D. C., Ga.), 7 Am. B. R. 66, 112 Fed. 323, *revd.* 8 Am. B. R. 29, 113 Fed. 483; *Beach v. Macon Grocery Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 751, 116 Fed. 143, suggests a way

to assert a provisional remedy against an adverse claimant indirectly.

193. In *re Rogers* (C. C. A., 7th Cir.), 11 Am. B. R. 79, 125 Fed. 169; *Havens & Geddes Co. v. Pierck* (C. C. A., 7th Cir.), 9 Am. B. R. 569, 120 Fed. 244; In *re Antigo Screen Door Co.* (C. C. A., 7th Cir.), 10 Am. B. R. 359, 123 Fed. 249; *Crosby v. Spear*, 98 Me. 542, 11 Am. B. R. 613, 57 Atl. 881; In *re Leeds Woolen Mills* (D. C., Tenn.), 12 Am. B. R. 136, 129 Fed. 922, holding that the possession once being obtained, the court's authority and control accompanies the property whenever it is, without its consent, taken into the possession of another; In *re Kellogg* (C. C. A., 2d Cir.), 10 Am. B. R. 7, 121 Fed. 332; In *re Rochford* (C. C. A., 8th Cir.), 10 Am. B. R. 608, 124 Fed. 182.

194. *Chauncey v. Dyke Bros.* (C. C. A., 8th Cir.), 9 Am. B. R. 444, 119 Fed. 1.

195. For one of the earliest and most vigorous cases in favor of asserting such jurisdiction, see *Carter v. Hobbs* (D. C., Ind.), 1 Am. B. R. 215, 92 Fed. 594; also, a chain of cases holding the same way, but on differing facts; for one of the best reasoned, see In *re Kellogg* (D. C., N. Y.), 7 Am. B. R. 623, 113 Fed. 120, *affg.* 6 Am. B. R. 389; as to right to determine contro-

as in the case of chattel mortgages in New York,¹⁹⁶ its jurisdiction is doubtful; and surely not if both title were vested in, and *res* were in the possession of, the mortgagee. Further, if the court has such jurisdiction, the referee has also.¹⁹⁷ Cases will arise where it should be exercised. But, in the long run, unless it is absolutely essential to preserve assets or carry out the purposes of the act, a summary disposition of such controversies in the proceeding, and not by suit, should not be asked.¹⁹⁸ Even a lienor having a lien on property vested in, and in the possession of, the trustee is generally an adverse claimant.¹⁹⁹ The analogies of the statute seem to entitle him, if he desires, to a plenary suit; and the district court will be slow to take it from him. This view is strengthened by the fact that this law, unlike its predecessor,²⁰⁰ contains no clause authorizing the trustee to sell incumbered property free from existing liens. The true test here is the same as that which applies where a stay or order to show cause which may result in contempt is asked; a test sufficiently indicated in the preceding paragraphs. Of course, what goes before does not in any way limit the right of the court to take possession summarily of the property of an alleged bankrupt which is found in his possession or that of his agent.²⁰¹ This section does not authorize a Federal court to entertain a bill in equity at the instance of a simple contract creditor to set aside an alleged fraudulent conveyance.²⁰² But the court may entertain a suit by the trustee to set aside a mortgage on lands in his possession because given within four months prior to bankruptcy.²⁰³ Auxiliary proceedings for the protection of the assets of the bankrupt should be brought in the district court of the district in which the proceedings are pending.²⁰⁴

V. JURISDICTION OF STATE COURTS.

By subsection *b* of this section suit by the trustee must be brought in the courts where the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by the consent of the proposed defendants, except such suits for the recovery of property as are within the provisions of §§ 60-b, 67-e and 70-e. This provision requires in certain instances suits to be brought by the trustee in respect to the bankrupt's property in a State court and in other instances confers concurrent jurisdiction upon

versies between lienors holding mechanics' liens, see *In re Hobbs* (D. C., W. Va.), 16 Am. B. R. 544, 145 Fed. 211.

196. *Bank v. Jones*, 4 N. Y. 497; *Blake v. Corbett*, 120 N. Y. 327, 24 N. E. 477.

197. See § 38-a(4) and *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224, 46 L. Ed. 405; *In re Drayton* (D. C., Wis.), 13 Am. B. R. 602, 135 Fed. 883; *In re Platteville Foundry & Machine Co.* (D. C., Wis.), 17 Am. B. R. 291, 147 Fed. 828.

198. *In re Rochford* (C. C. A., 8th Cir.), 10 Am. B. R. 608, 124 Fed. 182; *In re Moody* (D. C., Iowa), 12 Am. B. R. 718, 131 Fed. 525.

199. *In re Rochford* (C. C. A., 8th Cir.), 10 Am. B. R. 608, 124 Fed. 182. Compare *Marshall v. Knox*, 83 U. S. 551, 121 L. Ed. 481. See also *Burbank v. Bigelow*, 92 U. S. 179, 23 L. Ed. 542.

200. R. S., § 5075.

201. Compare under §§ 3 and 69.

202. *Viquesney v. Allen* (C. C. A., 4th Cir.), 12 Am. B. R. 402, 131 Fed. 21.

203. *In re McMahon* (C. C. A., 6th Cir.), 17 Am. B. R. 530, 147 Fed. 685.

204. *In re Williams* (D. C., Ark.), 9 Am. B. R. 741, 120 Fed. 38; *Ross-Meeham Foundry Co. v. Southern Car & F. Co.* (D. C., Tenn.), 10 Am. B. R. 624, 124 Fed. 403. In the case of *Henderson v. Denious*, (C. C. A., 8th Cir.), 26 Am. B. R. 226, 186 Fed. 100, it was held that where the jurisdiction of the district court in respect to a proceeding in bankruptcy had been duly established, the parties therein are concluded by an order made by the court, as to all questions properly considered in such court; that such order possesses all the attributes of finality accorded to domestic judgment, emanating from courts of general, original jurisdiction.

such courts. It has been held that "any State court which would have had jurisdiction had not bankruptcy intervened" now has concurrent jurisdiction²⁰⁵ of any suit which can be brought by the trustee in the district court.²⁰⁶ Thus, such a court has jurisdiction, not only to set aside a preference, to annul a lien other than through legal proceedings, and to recover back property fraudulently transferred,²⁰⁷ by the specific words of the act, but it also has, to the same end, such jurisdiction as may be conferred on it by the State law. The jurisdiction conferred upon a State court is limited to that conferred upon such court by State statutes; reference must be had to such statutes and the cases thereunder to determine such jurisdiction.²⁰⁸ State courts have jurisdiction in suits between a trustee in bankruptcy and third parties asserting rights in property claimed by the trustee as belonging to the estate of the bankrupt.²⁰⁹ It has been held that a State court has jurisdiction of a plenary suit by an adverse claimant to establish a lien on property in the trustee's possession.²¹⁰ If, at the time of the bankruptcy, a suit or proceeding is pending in the State court, of which the Federal court might otherwise have jurisdiction, the adjudication does not oust the State court of jurisdiction.²¹¹ The State court can proceed unless stayed. This is peculiarly true of actions *in rem*. In respect to such actions the court which first takes the property into its custody

205. This has been doubted. See *Lyon v. Clark*, 2 N. B. N. Rep. 792. But consult *French v. Smith* (Sup. Ct., Minn.), 81 Minn. 341, 4 Am. B. R. 785, 84 N. W. 44; *Bindseil v. Smith* (Ch. N. J.), 61 N. J. Eq. 654, 5 Am. B. R. 40, 47 Atl. 456; *Des Moines Sav. Bank v. Morgan Jewelry Co.*, 123 Iowa 432, 12 Am. B. R. 781; *Breckons v. Snyder*, 211 Pa. St. 176, 15 Am. B. R. 112, 60 Atl. 575; *Linstroth Wagon Co. v. Ballew* (C. C. A., 5th Cir.), 18 Am. B. R. 23, 32, 149 Fed. 960; *Union Banking Co. v. Truscott Boat Mfg. Co.* (Mich. Sup. Ct.), 36 Am. B. R. 175, 155 N. W. 717.

206. Under §§ 60-b, 67-e and 70-e. See *Drew v. Myers*, 81 Neb. 750, 22 Am. B. R. 656, 116 N. W. 781.

207. *Robinson v. White* (D. C., Ind.), 3 Am. B. R. 88, 97 Fed. 33.

208. Section 818 of the Georgia Code (1896) while authorizing a bill in chancery to subject to the payment of his debts property fraudulently conveyed by a debtor, does not authorize the setting aside of a conveyance which operates only as a preference under the bankruptcy act of 1898, and the remedy given by said act authorizing the trustee to pursue property conveyed as a preference in any State court having jurisdiction, in the absence of bankruptcy, affords relief in the State court against those conveyances only, which would be invalid under the laws of the State. *Reed v. Wallace*, 145 Ala. 209, 21 Am. B. R. 839, 40 So. 407.

209. *Lytle v. National Surety Co.* (Ct. of App., D. C.), 43 D. C. App. 136, 33 Am. B. R. 750; *Gray v. Arnot* (N. Dak. Sup. Ct.), 31 N. Dak. 461, 35 Am. B. R. 704, 154 N. W. 268.

210. *Skilton v. Codington*, 185 N. Y. 80,

15 Am. B. R. 810, 77 N. E. 790; *Crosby v. Miller* (Ct. App., Col.), 27 App. D. C., 481, 16 Am. B. R. 805, 34 W. L. R. 320.

As to jurisdiction of State court to entertain action to set aside alleged voidable transfer, notwithstanding adjudication of bankruptcy. *Bryan v. Madden*, 109 N. Y. App. Div. 876, 15 Am. B. R. 388, 96 N. Y. Supp. 465.

Controversy between third party and trustee.—The title to real property, claimed in good faith by a third party and also by the trustee in bankruptcy of one holding the mere naked possession, but never actually taken possession of by the bankruptcy court, may be determined by a plenary suit in the State court by such third party. *Peters v. Bowers* (Colo. Sup. Ct.), 37 Am. B. R. 485, 158 Pac. 1101.

211. *In re Girdes* (D. C., Ohio), 4 Am. B. R. 346, 102 Fed. 318; *In re English* (C. C. A., 2d Cir.), 11 Am. B. R. 674, 127 Fed. 940; *Matter of Bay City Irrigation Co.* (D. C., Tex.), 14 Am. B. R. 370, 135 Fed. 850; *Pietri v. Wells* (La. Sup. Ct.), 137 La. 1087, 36 Am. B. R. 105, 69 So. 847; *McLoughlin v. Knop* (D. C., La.), 32 Am. B. R. 582, 214 Fed. 260; *Matter of Wilkinsburg, etc., District* (Sup. Ct., Pa.), 234 Pa. St. 373, 32 Am. B. R. 856, 83 Atl. 410.

Proceeding for enforcement of liens.—A suit in a State court to foreclose a mortgage or to enforce liens against specific property, commenced before a petition in bankruptcy is filed against the mortgagor, may be presented by the State court without interference from the court of bankruptcy. *Tube City Mining & Milling Co. v. Otterson* (Ariz. Sup. Ct.), 16 Ariz. 305, 35 Am. B. R. 500, 146 Pac. 203.

retains it.²¹² The rule is that "considering the peculiar character of our government and keeping in view the forbearance which courts of co-ordinant jurisdiction exercise towards each other, it follows that the court which first obtains the lawful jurisdiction over the subject matter of a controversy must by the other courts be permitted to proceed therein to final judgment."²¹³ Where the property in controversy is rightfully in possession of a State court or its officers prior to a period of four months before a petition is filed, the adjudication of bankruptcy does not deprive the State court of a right to continue in possession of such property, or of its jurisdiction to determine the

²¹² In re Russell (C. C. A., 2d Cir.), 3 Am. B. R. 658, 101 Fed. 248; In re Chambers (D. C., R. I.), 3 Am. B. R. 537, 98 Fed. 865; Southern Loan & Trust Co. v. Benbow (D. C., N. Car.), 3 Am. B. R. 9, 96 Fed. 514; Keegan v. King (D. C., Ind.), 3 Am. B. R. 79, 96 Fed. 758; In re Lemmon (C. C. A., 6th Cir.), 7 Am. B. R. 291, 112 Fed. 296; Crosby v. Spear, 98 Me. 542, 11 Am. B. R. 613, 57 Atl. 881, holding that an action of replevin cannot be commenced and maintained against a trustee to recover property in the possession of the bankrupt at the time of the adjudication; Pietri v. Wells (La. Sup. Ct.), 137 La. 1087, 36 Am. B. R. 105, 69 So. 847; Union Banking Co. v. Truscott Mfg. Co. (Mich. Sup. Ct.), 36 Am. B. R. 176, 155 N. W. 717.

Where a suit is pending in a State court at the time of bankruptcy, to secure possession of certain goods, and the trustee is substituted as a party plaintiff for the bankrupt, the State court should not order a sale of the goods under the direction of the bankruptcy court, but if the claim of the trustee is established he is entitled to the goods. Earl v. Jacobs (Mich. Sup. Ct.), 177 Mich. 163, 31 Am. B. R. 90, 142 N. W. 1079.

Recognition of jurisdiction by trustee by intervention.—Where a trustee in bankruptcy intervenes in a foreclosure proceeding pending in a State court, he thereby recognizes the jurisdiction of that court. O'Reilly v. Pietri (Sup. Ct., La.), 135 La. 1, 32 Am. B. R. 274, 64 So. 922.

²¹³ Pickens v. Dent (C. C. A., 4th Cir.), 5 Am. B. R. 644, 106 Fed. 653, affd. 187 U. S. 177, 9 Am. B. R. 47, 47 L. Ed. 128; Metcalf v. Barker, 187 U. S. 165, 9 Am. B. R. 36, 47 L. Ed. 122; Matter of Cameron Currie Co. (Ref., Mich.), 20 Am. B. R. 790; In re English (C. C. A., 2d Cir.), 11 Am. B. R. 674, 127 Fed. 940, in which the court said: "We know of no provision of the bankrupt act, and our attention is called to no authority, which will sustain the proposition that, when a year afterwards one of the parties to an action is adjudicated a bankrupt, the State court is shorn of its jurisdiction to determine the controversy, and must turn over the property to the bankruptcy court." In re Seebold (C. C. A., 5th Cir.), 5 Am. B. R. 358, 105 Fed. 910; In re Tune (D. C., Ala.),

8 Am. B. R. 285, 115 Fed. 906; In re Wells (D. C., Mo.), 8 Am. B. R. 75, 114 Fed. 222; Des Moines Savings Bank v. Morgan Jewelry Co., 123 Iowa 432, 12 Am. B. R. 781, 99 N. W. 121, holding that a trustee in bankruptcy, by intervening in an action to enforce a specific lien pending in a State court, cannot thereby oust the court of jurisdiction; In re Gerdes (D. C., Ohio), 4 Am. B. R. 346, 102 Fed. 318; In re Price (D. C., N. Y.), 1 Am. B. R. 606, 92 Fed. 987; Bank of Andrews v. Gudger (C. C. A., 4th Cir.), 32 Am. B. R. 11, 212 Fed. 49; Matter of Wilkinsburg, etc., District (Sup. Ct., Pa.), 234 Pa. St. 273, 32 Am. B. R. 856, 83 Atl. 410; McLoughlin v. Knopp (D. C., La.), 32 Am. B. R. 582, 214 Fed. 260; Luxury Fruit Co. v. Harris (Sup. Ct., Ga.), 142 Ga. 866, 33 Am. B. R. 711, 83 S. E. 1093; Matthews & Sons v. Webre Co. (D. C., La.), 32 Am. B. R. 180, 213 Fed. 396, in which the court said: "In the exercise of that comity that is always observed by courts it is not likely that the jurisdiction of the State court would be disturbed in the matter of the foreclosure of a mortgage if it had in fact attached first, for the trustee is not bound to take possession of mortgaged property, unless it is for the benefit of all the creditors, and it makes little difference which court shall sell it and administer the proceeds."

Review in bankruptcy court of proceedings in State courts.—The owner of certain property having become insolvent, the contractor erecting buildings for such owner began proceedings in the State court to foreclose a mechanic's lien. After bankruptcy of the owner the trustee was permitted to intervene in the Supreme Court of the State. A judgment in favor of the contractor was therein affirmed. It was held that the proceedings in bankruptcy would not render void the proceedings then pending in the State court, though the bankruptcy court might exercise revisory powers over them; but that in the exercise of such powers the bankruptcy court would not review the judgment of the State courts as to minor amounts involved, or questions whether certain minor portions of the property were or were not parts of the parcel to which the lien attached. Hobbs v. Head & Dowst Co. (C. C. A., 1st Cir.), 26 Am. B. R. 63, 184 Fed. 409.

controversy.²¹⁴ A State court has no jurisdiction to foreclose a mortgage on a bankrupt's property after bankruptcy has intervened, without leave of the bankruptcy court and making the trustee a party.²¹⁵ State courts have jurisdiction against marshals, referees and trustees in bankruptcy, to recover damages for wrongful acts entirely beyond the legitimate scope and performance of official duties.²¹⁶ This jurisdiction will not be exercised unless it appears that such officers were in wrongful possession of the property in controversy.²¹⁷ When the possession of a State court amounts to a fraud on the law, as through a general assignment or a preference or an attachment, within the four months' period, the State court, while not, strictly speaking, ousted, in effect ceases to exercise jurisdiction, the assignee, or sheriff, or parties being permanently restrained.²¹⁸ The adjudication vests in the trustee or temporary receiver the

214. *In re English* (C. C. A., 2d Cir.), 11 Am. B. R. 674, 127 Fed. 940; *In re Heckman* (C. C. A., 9th Cir.), 15 Am. B. R. 500, 140 Fed. 859, 72 C. C. A. 8.

Where a vendor of chattels, upon electing to rescind the sale for fraud, brought an action in a State court to recover the property and immediately seized it under a writ of sequestration, the jurisdiction of the State court is in no way affected because thereafter the buyer was adjudicated bankrupt and his trustee took possession of the property. *Linstroth Wagon Co. v. Ballew* (C. C. A., 5th Cir.), 18 Am. B. R. 23, 149 Fed. 960.

Suit in State court to establish lien.—Where at the adjudication of a corporation there is pending a suit to establish a lien upon its property, the question of the validity of the asserted liens may be left to the determination of the State court, but the bankruptcy court has power to direct the trustee in bankruptcy to appear in the action and present his case and make all reasonable effort to have the issues in the action brought to a judgment. *In re New England Breeders' Club* (D. C., N. H.), 23 Am. B. R. 689, 175 Fed. 501.

Suit in State court by stockholders to protect rights.—The pendency in a State court of a suit instituted against a corporation by its stockholders for the protection of their rights, and the possession of corporate property by a receiver appointed in such suit, although such possession was acquired more than four months prior to the adjudication in bankruptcy, will not deprive the bankruptcy courts of jurisdiction to compel the State receiver to turn over the property of such bankrupt to the receiver in bankruptcy. *Bank of Andrews v. Gudger* (C. C. A., 4th Cir.), 32 Am. B. R. 11, 212 Fed. 49.

215. *McLoughlin v. Knopp* (D. C., La.), 32 Am. B. R. 582, 214 Fed. 260.

216. *Berman v. Smith* (D. C., Ga.), 22 Am. B. R. 662, 171 Fed. 735; *Smith v. Berman* (Ct. of App., Ga.), 8 Ga. App. 262, 24 Am. B. R. 849, 68 S. E. 1014.

217. *Smith v. Berman* (Ct. of App., Ga.), 8 Ga. App. 262, 24 Am. B. R. 849, 68 S. E. 1014.

218. See p. 292, *ante*. See *Matter of Horn-*

stein (D. C., N. Y.), 10 Am. B. R. 308, 122 Fed. 266.

Attachment in State court.—In the case of *Tennessee Producer Marble Co. v. Grant* (C. C. A., 3d Cir.), 14 Am. B. R. 288, 135 Fed. 322, it was held that where, prior to the filing of a petition against an involuntary bankrupt, to enforce an asserted right *in rem*, under the State law, the bankruptcy court is without jurisdiction to stay such suit after the court has acquired jurisdiction of the *res*. This case was followed in the case of *In re Kane* (D. C., Pa.), 18 Am. B. R. 654, 152 Fed. 587, where it was held that if, prior to the filing of a petition in bankruptcy, a fund claimed by the bankrupt and others had been attached in a State court by garnishment, that court is the proper tribunal to settle the controversy, unless all parties in interest submit to the jurisdiction of the bankruptcy court.

Neither of these cases properly consider the effect of § 67-f of the bankruptcy act, nullifying liens obtained by judgment, attachment or otherwise within the four months' period. Where a lien is created by attachment or levy within four months prior to the filing of the petition in bankruptcy, it becomes null and void on the adjudication of bankruptcy. This being the case, the jurisdiction of the State court in respect to the property subject to the lien is terminated. See *Lehman Stern Co. v. Martin & Co.* (La. Sup. Ct.), 132 La. 231, 32 Am. B. R. 681, 61 So. 212. In the case of *In re Oxley & White* (D. C., Wash.), 25 Am. B. R. 656, 182 Fed. 1019, the court quotes and approves this statement as to the effect of the preceding cases and says: "Ordinarily, the superior court would have jurisdiction to enforce the original lien of the mortgage in a suit brought before the initiation of bankruptcy proceedings, and this court should not interfere unless it be necessary so to do in order to protect some right arising from the bankruptcy statute. It is admitted here that the goods upon which the lien was impressed by confession of judgment are so intermingled with those upon which the mortgage lien really existed that the two classes of goods cannot be distinguished. This ren-

title of the bankrupt's property, and stays all seizures made within four months; it has the force and effect of an attachment and an injunction, and is a *caveat* to all the world. After such adjudication a State court has no jurisdiction to determine any rights affecting the bankrupt's estate, and is powerless to enforce any of its judgments as to such estate.²¹⁹ But this does not prevent a State court from exercising such jurisdiction as may be necessary to preserve the property which has been taken into its possession.²²⁰ Where an action is brought by a trustee in a State court to recover an alleged preference, such court cannot determine the validity of their claims against the bankrupt and whether other creditors have not received voidable preference; to hold otherwise would be to transfer in a large measure the administration of the bankrupt's estate from the bankruptcy court to the State court.²²¹ The possession by the bankrupt court of the proceeds of the sale of mortgaged chattels does not deprive the State court of its conceded jurisdiction to set aside the mortgage as fraudulent.²²² If an assignment or receivership or trusteeship is made or created under a State law for the benefit of creditors within four months prior to the filing of a petition in bankruptcy, and a State court in the exercise of its jurisdiction under such law assumes possession of the property; it may not retain such possession and proceed to a distribution of the property among the creditors, but upon the adjudication the bankruptcy court supersedes the State court and becomes possessed of the property for the purpose of administration.²²³ Where a lien on the bankrupt's property antedates the filing of the

ders it necessary that the entire sale be enjoined as otherwise the confession of judgment made by the insolvent debtors within four months before the filing of the petition, and resulting in the creation of a lien made void by the bankruptcy statute, would stand unassailable. The peculiar nature of the bankruptcy proceedings is such that in no court except a court of bankruptcy can the appropriate remedy be applied. If an adjudication of bankruptcy takes place in this matter the lien of the mortgage will be upheld here to whatever extent it is valid, and such steps will be taken as will fully recognize the respect due to the superior court and its officers, with proper regard to the harmonious relations which have ever existed between the two courts."

219. *In re Muskoya Lumber Co.* (D. C., N. Y.), 11 Am. B. R. 761, 127 Fed. 760; *In re Knight* (D. C., Ky.), 11 Am. B. R. 1, 125 Fed. 35; *In re Kaplan* (D. C., Ga.), 16 Am. B. R. 267, 144 Fed. 159; *Smith v. Berman* (Ct. of App., Ga.), 8 Ga. App. 262, 24 Am. B. R. 849, 68 S. E. 1014, where it was held that an action would not lie in a State court against a trustee for conversion of personal property claimed by the wife of the bankrupt, where it appears that the court of bankruptcy had possession of the property through its trustee; in such a case, the bankruptcy court has exclusive jurisdiction to hear and determine all questions relating to the right of possession and to the title of the property it is custody; *Pugh v. Loisel* (C. C. A., 5th Cir.), 33 Am. B. R. 580, 219 Fed. 417.

220. *Jones v. Springer*, 226 U. S. 148, 29 Am. B. R. 204, 57 L. Ed. 161, in which case

the court said: "It is true that the estate is regarded as in *custodia legis* from the date of the petition. (Citing *Acme Harvesting Co. v. Beekman Lumber Co.*, 222 U. S. 300, 306, 27 Am. B. R. 262, 56 L. Ed. 208.) But in a case like the present, where, under an attachment levied before the petition was filed, the property had been put into the hands of a receiver, without notice of the petition, it is not true that all power and jurisdiction of the local court were ended before notice of the bankruptcy proceedings."

221. *Eau Claire Nat'l Bank v. Jackman*, 204 U. S. 522, 17 Am. B. R. 675, 51 L. Ed. 596.

222. *Frank v. Vollkommer*, 205 U. S. 521, 17 Am. B. R. 806, 51 L. Ed. 911. In the case of *Skilton v. Codington*, 185 N. Y. 80, 15 Am. B. R. 810, 77 N. E. 790, it was held that where a trustee in bankruptcy retains out of the proceeds of the sale of the bankrupt's property a certain sum for the benefit of any liens or claims that might be established against the debtor, the State court has jurisdiction to hear and determine an action against the trustee to enforce a chattel mortgage executed by the bankrupt.

223. *Randolph v. Scruggs*, 190 U. S. 533, 10 Am. B. R. 1, 47 L. Ed. 1165; *Hooks v. Aldridge* (C. C. A., 5th Cir.), 16 Am. B. R. 658, 145 Fed. 865; *In re Knight* (D. C., Ky.), 11 Am. B. R. 1, 125 Fed. 35; *In re Watts*, 190 U. S. 1, 10 Am. B. R. 113, 47 L. Ed. 933; *Davis v. Bohle* (C. C. A., 8th Cir.), 1 Am. B. R. 412, 92 Fed. 325. As to effect of bankruptcy upon assignments for the benefit of creditors under State insolvency acts, see *post*.

petition in bankruptcy, a receiver appointed by a State court in a suit to enforce such lien may not be deprived of possession of the property by the bankruptcy court, thus drawing to such court jurisdiction to determine summarily the validity of such lien.²²⁴ The right of a State court, through receivers appointed by it, to administer property of one subsequently adjudged bankrupt, brought within its grasp under its process more than four months prior to the filing of the petition in bankruptcy, is not terminated by an adju-

A general assignment for the benefit of creditors made within four months prior to the filing of the petition is void as against the trustee in bankruptcy, so far as it interferes with the administration of the bankrupt estate. *Randolph v. Scruggs*, 190 U. S. 533, 10 Am. B. R. 1, 47 L. Ed. 1165. In such case the jurisdiction of the State court in respect to the property assigned is superseded by that of the bankruptcy court. In *re Thompson* (C. C. A., 2d Cir.), 11 Am. B. R. 719, 128 Fed. 575; In *re Knight* (D. C., Ky.), 11 Am. B. R. 6, 125 Fed. 35; In *re Gray*, 47 N. Y. App. Div. 554, 3 Am. B. R. 647, 62 N. Y. Supp. 618; In *re Fellerath* (D. C., Ohio), 2 Am. B. R. 40, 95 Fed. 121; In *re Gutwillig* (C. C. A., 2d Cir.), 1 Am. B. R. 388, 92 Fed. 337; *Davis v. Bohle* (C. C. A., 8th Cir.), 1 Am. B. R. 412, 92 Fed. 325; In *re Sievers* (D. C., N. Y.), 1 Am. B. R. 117, 91 Fed. 366.

State receivership.—Ordinarily where a State court has obtained jurisdiction over property this jurisdiction is not disturbed by proceedings in bankruptcy, but the exception to the rule is, where the property is in the hands of a receiver, held for the benefit of creditors, and a receivership is created within four months prior to adjudication. In *re Cameron Currie Co.* (Ref., Mich.), 20 Am. B. R. 790. Where a receiver is appointed in behalf of creditors in a proceeding in a State court, based on the debtor's insolvency, within the four months' period, the subsequent adjudication in a bankruptcy court supersedes the jurisdiction of the State court. In *re Watts*, 190 U. S. 1, 10 Am. B. R. 113, 47 L. Ed. 933.

Action by trustee on bond of assignee.—Where the assignee under a general assignment for the benefit of creditors, made within the four months' period, gave a bond to duly account for all moneys received by him as such assignee and voluntarily accounted in the bankruptcy court but failed to comply with its order to turn over the amount in his hands to the trustee, the latter by leave of the State court may maintain an action against the surety upon the assignee's bond to recover the amount which the assignee failed to turn over to the trustee. *Cohen v. American Surety Co.*, 192 N. Y. 227, 20 Am. B. R. 65, 84 N. E. 947.

General assignment.—The bankruptcy court has jurisdiction by summary proceeding to take from assignees and receivers for general creditors in insolvency or winding up pro-

ceedings appointed after four months prior to the filing of petitions in bankruptcy, from officers of courts attaching or replevying within that time, and from others holding for the bankrupt, property claimed to be that of the bankrupt, and then by virtue of the possession thus taken to determine adverse claims to it by a like proceeding. In *re Rathman* (C. C. A., 8th Cir.), 25 Am. B. R. 246, 183 Fed. 913.

State receivership.—Where the receiver of a corporation appointed by a State court, has notice of an order of the bankruptcy court appointing a receiver in bankruptcy proceedings against such corporation, it is his duty to turn over at once to the receiver in bankruptcy, all property of the corporation which is in his possession. In *re Ziegler Co.* (D. C., Conn.), 26 Am. B. R. 761, 189 Fed. 259.

The fact that a receiver of a private banker was appointed by a State court in a suit instituted after the filing of a petition in bankruptcy, and that the property of the bankrupt was previously in charge of an agent of the State bank commissioner, does not render the receiver an adverse claimant, so as to prevent the bankruptcy court from issuing a summary order directing the delivery of the property to the trustee. *Matter of Sage* (D. C., Mo.), 35 Am. B. R. 436, 224 Fed. 525, in which case the court said: "It is well settled that, where a trustee in bankruptcy is entitled to the possession of property in the possession of a receiver appointed by a State court, the court of bankruptcy will, if necessary, by its own order direct and compel such receiver to deliver such property to the trustee. Such an order can be properly made, notwithstanding that the State court has previously denied an application of the trustee in bankruptcy addressed direct to it."

A receiver appointed *pendente lite* to continue the business of the bankrupt, during a suit instituted by the trustee to set aside fraudulent conveyances by the bankrupt, when a judgment is entered in favor of such trustee, should surrender the property to the trustee upon demand and take a receipt therefor. If the receiver has expended a large sum or involved himself in future liabilities, the court may secure him before directing delivery of possession. *Hull v. Storage House*, 166 N. Y. App. Div. 739, 34 Am. B. R. 375, 152 N. Y. Supp. 363.

²²⁴ In *re Rathman* (C. C. A., 8th Cir.), 25 Am. B. R. 246, 183 Fed. 913.

cation in bankruptcy.²²⁵ If the controversy arose prior to bankruptcy and concerns property which has passed to the trustee, and is of such a nature that it might have been litigated by a suit at law or in equity in a State court, had bankruptcy not intervened, the State court has jurisdiction of a suit brought by an adverse claimant in respect to such property.²²⁶ If proceedings are brought in a State court for the dissolution and winding up of affairs of an insolvent corporation and subsequently and within four months thereafter a petition in bankruptcy against such corporation is filed, the jurisdiction of the State court in respect to the property of the corporation terminates upon adjudication, and the bankruptcy court will thereupon supersede the State court.²²⁷ But a creditor's suit in equity to liquidate the affairs of a corporation, instituted more than six months prior to a voluntary bankruptcy by the corporation, is not necessarily affected thereby.²²⁸ Where a receiver in proceedings in a State court against an insolvent corporation has been directed by order of such court to deliver the assets of such corporation to a receiver or trustee in bankruptcy, such assets may be retained notwithstanding the reversal of such order on appeal, and the bankruptcy court should determine all questions relative to such assets.²²⁹ While the jurisdiction of the Federal courts is essentially exclusive when properly invoked, a State court is not necessarily deprived of jurisdiction to dissolve a corporation on the ground of insolvency; and where the creditors of such a corporation fail to institute bankruptcy proceedings within four months after the appointment of a receiver in the State court upon the ground of insolvency, the jurisdiction of the State court becomes fixed and not subject to interference.²³⁰ It has been held that the refusal of a receiver appointed in a State court upon notice of the appointment of a receiver by the bankruptcy court to turn over property of the bankrupt to the receiver in bankruptcy, upon advice of counsel, will not be treated as a personal disrespect to the bankruptcy court, so as to warrant his punishment as for a contempt.²³¹ The above doctrines are all that can be safely stated. "The

225. *Blair v. Brailey* (C. C. A., 5th Cir.), 34 Am. B. R. 12, 221 Fed. 1.

226. *George v. Gans* (Pa. Com. Pleas.), 63 Pittsburgh L. J. 37, 34 Am. B. R. 629.

Title to property transferred prior to bankruptcy.—In the case of *Babbitt v. Dutcher*, 216 U. S. 102, 23 Am. B. R. 519, 54 L. Ed. 402, the court said: "There are two classes of cases arising under the Act of 1898, and controlled by different principles. The first class is where there is a claim of adverse title to the property of the bankrupt, based upon a transfer antedating the bankruptcy. The other class is where there is no claim of adverse title based on any transfer prior to the bankruptcy, but where the property is in the physical possession of a third party, or of an agent of the bankrupt, or of an officer of a bankrupt corporation, who refuses to deliver it to the trustee in bankruptcy. In the former class of cases a plenary action must be brought either at law or in equity, by the trustee, in which the adverse claim of title can be tried and adjudicated. In the latter class it is not necessary to bring a plenary suit, but the bankruptcy court may act summarily, and may make an order in a summary proceeding for the delivery of the property to the trustee, without the form-

ality of a formal litigation. The former class falls within the ruling which holds that such a suit may be brought only in a court which would have had jurisdiction of a suit by the bankrupt against the adverse claimant, except where the defendant consents to be sued elsewhere."

227. *Cresson & Clearfield Coal & Coke Co. v. Stauffer* (C. C. A., 3d Cir.), 17 Am. B. R. 573, 148 Fed. 981; *In re Storck Lumber Co.* (D. C., Md.), 8 Am. B. R. 86, 114 Fed. 860; *In re Kersten* (D. C., Wis.), 6 Am. B. R. 519, 110 Fed. 929; *Carling v. Seymour Lumber Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 29, 113 Fed. 483; *Mauran v. Crown Carpet Lining Co.*, 23 R. I. 324, 6 Am. B. R. 734, 50 Atl. 331; *In re Salmon & Salmon* (D. C., Mo.), 16 Am. B. R. 132, 143 Fed. 395; *Lyon v. Russell* (Ct. of App., D. C.), 41 D. C. App. 554, 32 Am. B. R. 101.

228. *Yargan Naval Stores Co. v. Borchardt Co.* (C. C. A., 5th Cir.), 33 Am. B. R. 429, 217 Fed. 758.

229. *Wright v. Harris* (D. C., Ga.), 34 Am. B. R. 574, 221 Fed. 736.

230. *Lyon v. Russell* (Ct. of App., D. C.), 41 D. C. App. 554, 32 Am. B. R. 101.

231. *In re Zeigler Co.* (D. C., Conn.), 26 Am. B. R. 761, 189 Fed. 259.

whole subject is hopelessly befogged by the fact that each class of courts unconsciously strains for jurisdiction in close cases. Some of the more reliable decisions will be found in the foot-note.²³²

VI. CONCURRENT JURISDICTION OF CIRCUIT COURTS OVER OFFENSES.

Subsection *c* of this section provides that the United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy of the offenses enumerated in the act. As already noticed in a previous paragraph under this section the circuit courts have been abolished, and the jurisdiction of such courts is conferred upon the district courts.²³³ This subsection is therefore made of no effect, since the district courts as courts of bankruptcy are given jurisdiction to arraign, try and punish those who commit any of the offenses enumerated in the act.²³⁴ The jurisdiction of district courts as to bankruptcy offenses is now exclusive. The trial of offenses enumerated in section 29 will be moved like other criminal offenses at a stated term of the district court.

232. *In re Russell* (C. C. A., 2d Cir.), 3 Am. B. R. 658, 101 Fed. 248; *In re Woodbury* (D. C., N. Dak.), 3 Am. B. R. 457, 98 Fed. 833; *Robinson v. White* (D. C., Ind.), 3 Am. B. R. 88, 97 Fed. 33; *In re Sievers* (D. C., Mo.), 1 Am. B. R. 117, 91 Fed. 366; *In re Emslie* (C. C. A., 2d Cir.), 4 Am. B. R. 126, 102 Fed. 290; *In re Pittlekow*

(D. C., Wis.), 1 Am. B. R. 472, 92 Fed. 91; *Heath v. Shaffer* (D. C., Iowa), 2 Am. B. R. 98, 93 Fed. 647; *Small v. Muller*, 67 N. Y. App. Div. 143, 8 Am. B. R. 448, 73 N. Y. Supp. 667; *In re Spitzer* (C. C. A., 2d Cir.), 12 Am. B. R. 346, 130 Fed. 879.

233. See Judicial Code, §§ 289, 291.

234. Bankr. Act, § 2(4).

SECTION TWENTY-FOUR.

JURISDICTION OF APPELLATE COURTS

§ 24. **Jurisdiction of Appellate Courts.**—*a* The Supreme Court of the United States, the Circuit Courts of Appeals of the United States, and the Supreme Courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the Supreme Court of the District of Columbia.

b The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved.

Analogous provisions: In U. S.: As to appellate jurisdiction, Act of 1867, §§ 9, 24, R. S., §§ 4980, 4981, 4982, 4983, 4984, 4985, 4989; Act of 1841, § 4; As to supervisory jurisdiction, Act of 1867, § 2, R. S., §§ 4986, 4987, 4988; Act of 1841, § 6.

In Eng.: Act of 1883, § 104; General Rules 129-134-a.

Cross-references: To the law: Appellate courts defined, § 1(3); States include Territories, § 1(24).

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III. Appeals to Supreme Court from Higher Court of State, 568.**IV. Supervisory Jurisdiction, 570.****I. APPELLATE JURISDICTION IN GENERAL.**

a. **Appeals under law of 1867.**—The former law was as simple in respect to appeals as the present, at first glance, seems complicated. Appeals as in equity cases and writs of error in those at law were heard in the circuit courts wherever the amount in controversy exceeded \$500; the circuit court had supervisory jurisdiction of all cases and questions arising in a court of bankruptcy within its jurisdiction; appeals and writs of error could be heard in the Supreme Court only when the matter in dispute exceeded \$5,000.¹ There was also the usual review by writ of error in the latter court of certain judgments of the highest courts of the States. Since that law was repealed, the Circuit Courts of Appeals have been vested with the appellate jurisdiction of the circuit court; while, that their calendars might not be congested with a multitude of petty questions, the appellate courts no longer “sit at the elbow”² of the court of bankruptcy, but appeals involving questions of fact are limited to important and vital matters, and superintendence may be asked only of questions of law.³ Thus, the entire system has been radically changed, and the cases under the former law are of little value. Further differences between the old and new system are discussed in detail later under this section and under section twenty-five, *post*.

b. **Scope and meaning of section.**—As explained later, this § 24 is here treated as if its subsection *b* were a part of § 25. It is clear from the caption that the section has to do only with the jurisdiction of appellate courts. Subsection *a* is general in its terms, and makes applicable the general law so far as it confers appellate jurisdiction of controversies in the district court, by giving the courts named a general appellate jurisdiction over questions arising in that court while sitting in bankruptcy.⁴ This subsection has no reference to appeals to the Supreme Court from the Circuit Court of Appeals. Except as expressly specified therein the jurisdiction of the Supreme Court is not broadened in any way.⁵ Manifestly the jurisdiction conferred by this subsection is, so far

1. See “Analogous Provisions,” *ante*.

2. *In re Adler* (D. C., Tenn.), 4 Am. B. R. 583, 590, 103 Fed. 444.

3. See Bankr. Act, § 25, and read § 24-b.

4. Thus; see *In re Columbia Real Estate Co.* (C. C. A., 7th Cir.), 7 Am. B. R. 441,

112 Fed. 643; *Stelling v. Jones Lumber Co.* (C. C. A. 7th Cir.), 8 Am. B. R. 521, 116 Fed. 261; *Scott & Co. v. Wilson* (C. C. A., 7th Cir.), 8 Am. B. R. 349, 115 Fed. 284.

5. *Hutchinson v. Otis* (C. C. A., 1st Cir.), 10 Am. B. R. 275, 123 Fed. 14.

as applicable, that conferred on Circuit Courts of Appeal by the Evarts act, subsequently revised and re-enacted in the Judicial Code.⁶ This act and the limitations suggested by what follows under this section and section twenty-five, should be consulted for an understanding of the broad scope, yet accurate boundaries, of appeals in bankruptcy.

c. Controversies arising in bankruptcy proceedings.—(1) IN GENERAL.—This section is limited to controversies arising in bankruptcy proceedings in the exercise by bankruptcy courts of the jurisdiction vested in them to settle the estates of bankrupts and to determine controversies in relation thereto.⁷

(2) CONTROVERSIES ARISING IN BANKRUPTCY PROCEEDINGS.—The words “controversies in bankruptcy proceedings” in subsection *a* of this section, and the words “in bankruptcy proceedings” in the next section refer to different classes of cases; the former referring only to controversies outside of the bankruptcy proceeding proper, as suits between the trustee and adverse claimants.⁸ Nothing can be regarded as a “controversy arising in bankruptcy proceedings” within the purview of subsection *a* where the subject-matter and object of the proceedings are within the power to make a summary order; certainly this is true where plenary action is not sought.⁹ As stated by the Supreme Court: “Section 25-a relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respect to which special provision thereof was required, while § 24-a relates to controversies arising in bankruptcy proceedings in the exercise of the jurisdiction vested in them at law and in equity by § 2, to settle the estates of bankrupts, and to determine controversies in relation thereto.”¹⁰ Controversies arising in the course of bankruptcy proceed-

6. Judicial Code, §§ 128-a, 129, revised from Act of March 3, 1891, § 6. Compare, also, *Duncan v. Landis* (C. C. A., 3d Cir.), 5 Am. B. R. 649, 106 Fed. 839; *Steele v. Buel* (C. C. A., 8th Cir.), 5 Am. B. R. 165, 104 Fed. 968; *In re Columbia Real Estate Co.* (C. C. A., 7th Cir.), 7 Am. B. R. 441, 112 Fed. 643; *Stelling v. Jones Lumber Co.* (C. C. A., 7th Cir.), 8 Am. B. R. 521, 116 Fed. 261.

7. *Hutchinson v. Otis*, 190 U. S. 552, 10 Am. B. R. 135, 47 L. Ed. 1179; *Hewitt v. Berlin Machine Works*, 194 U. S. 300, 11 Am. B. R. 709, 48 L. Ed. 986; *In re First National Bank of Canton* (C. C. A., 6th Cir.), 14 Am. B. R. 180, 135 Fed. 62, holding that an order disallowing the lien of a chattel mortgage is in a controversy arising out of the settlement of the bankrupt estate and is appealable; *Security Warehousing Co. v. Hand* (C. C. A., 7th Cir.), 16 Am. B. R. 49, 143 Fed. 32, holding likewise as to a petition to establish and enforce an alleged warehouse lien. See also *Smith v. Evans* (C. C. A., 7th Cir.), 17 Am. B. R. 433, 148 Fed. 89.

8. *In re Adler* (D. C., Tenn.), 4 Am. B. R. 583, 103 Fed. 444; *Burleigh v. Foreman* (C. C. A., 1st Cir.), 11 Am. B. R. 74, 125 Fed. 217; *Liddon v. Smith* (C. C. A., 5th Cir.), 14 Am. B. R. 204, 135 Fed. 43; *Thomas v. Woods* (C. C. A., 8th Cir.), 23 Am. B. R. 132, 173 Fed. 585; *Matter of Breyer Printing Co.* (C. C. A., 7th Cir.), 32 Am. B. R. 796, 216 Fed. 878.

9. *In re Farrell* (C. C. A., 6th Cir.), 23 Am. B. R. 826, 176 Fed. 505.

10. **Controversies arising in bankruptcy proceedings.**—*Hewitt v. Berlin Machine Co.*, 194 U. S. 296, 11 Am. B. R. 709, 48 L. Ed. 986, in which case it was held that where title was asserted to property in the possession of the trustee by an intervention raising a distinct and separate issue, the controversy may be treated as one of those “controversies arising in bankruptcy proceedings,” over which the Circuit Court of Appeals could, under section 24-a, exercise appellate jurisdiction as in other cases. See also *In re National Bank of Canton* (C. C. A., 6th Cir.), 14 Am. B. R. 180, 135 Fed. 62; *Dodge v. Norlin* (C. C. A., 8th Cir.), 13 Am. B. R. 176, 133 Fed. 363; *In re McMahon* (C. C. A., 6th Cir.), 17 Am. B. R. 530, 147 Fed. 685; *Dolle v. Cassell* (C. C. A., 6th Cir.), 14 Am. B. R. 52, 135 Fed. 52; *Mason v. Wolkowich* (C. C. A., 1st Cir.), 17 Am. B. R. 709, 150 Fed. 699; *O'Dell v. Boyden* (C. C. A., 6th Cir.), 17 Am. B. R. 751, 150 Fed. 731; *McCarty v. Coffin* (C. C. A., 5th Cir.), 18 Am. B. R. 148, 150 Fed. 307; *Thompson v. Mauzy* (C. C. A., 4th Cir.), 23 Am. B. R. 489, 174 Fed. 611; *Morehouse v. Pacific Hardware, etc., Co.* (C. C. A., 9th Cir.), 24 Am. B. R. 178, 177 Fed. 337; *Baker Ice Machine Co. v. Bailey* (C. C. A., 8th Cir.), 31 Am. B. R. 513, 209 Fed. 844, holding that where a conditional vendor intervenes in a bankruptcy proceeding, asserting title to and asking possession of property sold the bankrupt, it is a controversy arising in bankruptcy proceedings. *Affd.* 239 U. S. 268, 35 Am. B. R. 814. See Am. Bankr. Dig. § 1218.

ings involve questions between the receiver or trustee representing the bankrupt and his general creditors, as such, on the one hand, and adverse claimants on the other, concerning property in the possession of the trustee or receiver, or of the claimants, to be litigated in appropriate plenary suits, and not affecting directly administrative orders and judgments, but only the extent of the estate to be distributed ultimately among general creditors.¹¹ As where a controversy arises in respect to the claim of an adverse claimant in respect to a fund in the hands of the trustee as a result of a suit in a State court to recover property conveyed by the bankrupt in fraud of his creditors, it is a controversy arising in bankruptcy and is appealable under subsection *a* of this section.¹² Such orders and decrees as are in the nature of independent suits and controversies, arising in the course of bankruptcy proceedings are reviewable on appeal or writ of error, as the case may be, under subsection *a* of this section.¹³

(3) **PROCEEDINGS IN BANKRUPTCY.**—Subsection *b* relates to proceedings in bankruptcy only, as distinguished from controversies arising in bankruptcy

Priority of liens.—Where a trustee in bankruptcy files a petition asking that the lands of the bankrupt be sold free of all encumbrances and that the liens be marshalled and transferred to the proceeds, and a mortgagee files an answer which is in effect an intervening petition in which it asks relief against the trustee and other lien holders, and the real question is as between the lien holders as to the priority of their respective liens, it is a controversy under section 24a and appeal from the decree of the District Court is the proper remedy. *Century Savings Bank v. Moody* (C. C. A., 8th Cir.), 31 Am. B. R. 586, 209 Fed. 775.

A petition to revise is the equivalent of an appeal for the purposes of the Act of February 13, 1911, abolishing the supervision fee on appeal to the Circuit Court of Appeals. *Matter of Burr Mfg. Co.* (C. C. A., 2d Cir.), 33 Am. B. R. 61, 215 Fed. 898.

Proceedings to establish liens.—Where labor claimants orally call the attention of the district court, acting as an ancillary tribunal, to services rendered to the bankrupt, and to their rights in a fund, held by the ancillary receiver from a State receiver and not derived through direct operation of the adjudication; and a special master is appointed to take testimony, the action by the claimants constitutes an intervention in bankruptcy proceedings, giving rise to a "controversy," within the meaning of section 24a of the bankruptcy act. *Emerson v. Castor* (C. C. A., 6th Cir.), 37 Am. B. R. 719, 236 Fed. 29.

11. *Matter of Breyer Printing Co.* (C. C. A., 7th Cir.), 32 Am. B. R. 796, 216 Fed. 878, citing *Matter of Loving*, 224 U. S. 183, 27 Am. B. R. 852, 56 L. Ed. 725; *United States Fidelity Co. v. Bray*, 225 U. S. 205, 217, 28 Am. B. R. 207, 56 L. Ed. 1055; see *In re Mueller* (C. C. A., Ky.), 14 Am. B. R. 256, 135 Fed. 711, in which the court says: "By 'controversies arising in bankruptcy proceedings' is meant those independent of plenary suits which concern the bankrupt's

estate, and arising by intervention or otherwise between the trustee representing the bankrupt's estate and claimants asserting some right or interest adverse to the bankrupt or his general creditors." See *Kirkpatrick v. Harnesberger* (C. C. A., 5th Cir.), 29 Am. B. R. 439, 199 Fed. 886.

Wherever a third person intervenes in the bankruptcy court and asserts a superior title to property held by the trustee, he institutes a controversy in a bankruptcy proceeding, whether he intervenes by an original petition, or is brought into court upon the application of the trustee, and his remedy to review a judgment of that court is by an appeal under section 24a. *Gibbons v. Goldsmith* (C. C. A., 9th Cir.), 35 Am. B. R. 40, 222 Fed. 826.

Review of order vacating temporary injunction.—The review of an order of the district court, vacating a prior order of the same court directing that an interlocutory injunction issue restraining third parties from proceeding in an action in a State court against the bankrupt, may be had under § 24a, as the question at issue is a controversy arising in bankruptcy proceedings. *Bothwell v. Fitzgerald* (C. C. A., 9th Cir.), 34 Am. B. R. 261, 219 Fed. 408.

12. *Globe Bank & Trust Co. v. Martin*, 236 U. S. 288, 34 Am. B. R. 162, 59 L. Ed. 583.

13. *In re Mueller* (C. C. A., 6th Cir.), 14 Am. B. R. 256, 135 Fed. 711; *Dickas v. Barnes* (C. C. A., 6th Cir.), 15 Am. B. R. 566, 140 Fed. 849; *In re McKenzie* (C. C. A., 8th Cir.), 15 Am. B. R. 679, 142 Fed. 383; *In re Friend* (C. C. A., 7th Cir.), 13 Am. B. R. 595, 134 Fed. 778; *Smith v. Evans* (C. C. A., 7th Cir.), 17 Am. B. R. 433, 148 Fed. 89; *In re Doran* (C. C. A., 6th Cir.), 18 Am. B. R. 760, 154 Fed. 467; *Loeser v. Savings Deposit Bank & Trust Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 845, 163 Fed. 212; *Coder v. Arts* (Sup. Ct.), 213 U. S. 223, 22 Am. B. R. 1, 53 L. Ed. 772; *In re Streator Metal Stamping Co.* (C. C. A., 7th Cir.), 30 Am. B. R. 55, 205 Fed. 280.

and from plenary suits.¹⁴ If the proceeding is summary in its character and object, it is a proceeding in bankruptcy, renewable under § 24-b.¹⁵ The object of subsection *b* is to give a review as to matters of law, where facts are not in controversy, of orders of courts of bankruptcy in the ordinary administration of the bankrupt's estate.¹⁶

(4) **DISTINCTION BETWEEN CONTROVERSIES ARISING IN BANKRUPTCY PROCEEDINGS AND BANKRUPTCY PROCEEDINGS.**—There is a clear distinction between such controversies and "proceedings in bankruptcy" within the meaning of section 25-a; the latter, broadly speaking, covering questions between the alleged bankrupt and his creditors as such, commencing with the filing of the petition, ending with the discharge and including matters of administration generally, such as appointments of receivers and trustees, sales, exemptions, proof and allowance of claims, and other similar matters to be disposed of summarily, all of which naturally occur in the settlement of the estate.¹⁷ The

14. *United States v. Ruggles* (C. C. A., 6th Cir.), 34 Am. B. R. 91, 221 Fed. 256.

15. *Courtney v. Shea* (C. C. A., 6th Cir.), 34 Am. B. R. 753, 225 Fed. 358, and cases cited.

16. *Matter of Loving*, 224 U. S. 183, 27 Am. B. R. 852, 56 L. Ed. 725; *Thomas Co. v. Beharrell* (C. C. A., 9th Cir.), 36 Am. B. R. 688, 229 Fed. 691; *Barton Lumber & Brick Co. v. Prewitt* (C. C. A., 8th Cir.), 36 Am. B. R. 718, 231 Fed. 919.

The proceedings reviewable under § 24b are those administrative orders and decrees in the ordinary course of a bankruptcy between the filing of the petition and the final settlement of the estate, which are not made specially appealable under § 25a. In *re Mueller* (C. C. A., 6th Cir.), 14 Am. B. R. 256, 135 Fed. 711.

17. Distinction between "Controversies arising in bankruptcy proceedings" and "Proceedings in bankruptcy."—In the case of *in re Friend* (C. C. A., 7th Cir.), 13 Am. B. R. 595, 134 Fed. 778, the court said: "Section 23 established a clear distinction between 'proceedings in bankruptcy' and 'controversies at law and in equity arising in the course of bankruptcy proceedings'; the former, broadly speaking, covering questions between the alleged bankrupt and his creditors, as such, commencing with the petition for adjudication, ending with the discharge, and including matters of administration generally, such as appointments of receivers and trustees, sales, exemptions, allowances and the like, to be disposed of summarily, all of which naturally occur in the settlement of the estate; and the latter, broadly speaking, involving questions between the trustee, representing the bankrupt and his creditors, on the one side and adverse claimants on the other, concerning property in the possession of the trustee or of the claimants, to be litigated in appropriate plenary suits and not affecting directly, the administrative orders and judgments but only the question of the extent of the estate."

Judge Keller has summarized the conclusions of the several cases involving such dis-

inction in the following language: "That there is a clear distinction between 'controversies arising in bankruptcy proceedings,' as mentioned in section 24-a, and 'the proceedings in bankruptcy,' which, by section 24-b, the Circuit Courts of Appeal are given jurisdiction to superintend and revise 'in matter of law;' the former being generally held to embrace questions between the trustee, representing the bankrupt and his creditors, on the one side, and adverse claimants, on the other, and not directly affecting those administrative orders and judgments ordinarily known as 'proceedings in bankruptcy,' and the latter being confined to those questions arising between the bankrupt and his creditors which are the very subject of such administrative orders and judgments, from the petition for adjudication to the discharge, and including the intermediate administrative steps, and such controversies as arise between parties to the bankruptcy proceedings as are involved in the allowance of claims, fixing their priorities, sales, allowances, and other matters to be disposed of summarily." *Thompson v. Mauzy* (C. C. A., 4th Cir.), 23 Am. B. R. 489, 174 Fed. 611. See also *Snow v. Dalton* (C. C. A., 4th Cir.), 29 Am. B. R. 240, 203 Fed. 843.

In the case of *Thomas v. Woods* (C. C. A., 8th Cir.), 23 Am. B. R. 132, 173 Fed. 585, the court in discussing these phrases as used in section 24, said: "In section 24-b, however, the term 'proceedings in bankruptcy,' as construed by the courts, has been given a narrower meaning and has been set over against 'controversies arising in bankruptcy proceedings,' as used in section 24-a. Here it has been thought to mean any of the administrative acts intervening between the filing of the petition and the granting of the discharge, as distinguished from those 'controversies arising in bankruptcy proceedings' on petition, which would have been the subject of plenary suits if the estate had not been in the custody of a court of bankruptcy." In the case of *Morehouse v. Pacific Hardware & Steel Co.* (C. C. A., 9th Cir.), 24 Am. B. R. 178, 177 Fed. 337, the court

great number of authorities upon this branch of bankruptcy practice and the conflict between them has given rise to endless confusion, and it is sometimes difficult to determine within which class a particular order of the bankruptcy court may fall. Each case will necessarily be determined by its own facts, and in each, the important consideration is the object and character of the proceeding sought to be reviewed.¹⁸

(5) IMPORTANCE OF DISTINCTION.—If the controversy is one “arising in bankruptcy proceedings,” appellate courts exercise their jurisdiction as in other cases under subsection *a* of this section. If the controversy pertains to the proceedings in bankruptcy, relating to the adjudication and the subsequent steps in bankruptcy, it is one which may be revised in matter of law, upon due notice and petition by any party aggrieved, by a circuit court of appeals. The distinction between a controversy “arising” in bankruptcy proceedings and a decision or order in the bankruptcy proceedings proper, is for the sole purpose of determining whether the review by the appellate court shall be by appeal or by petition to revise in matter of law.¹⁹ It has been deemed advis-

said: “It is conceivable that the line of demarcation between ‘proceedings in bankruptcy,’ and ‘controversies at law and in equity arising in the course of bankruptcy proceedings,’ may in some cases be obscure; but generally speaking, the former include all questions arising in the administration of the bankrupt’s estate, such as the appointment of receivers and trustees, orders requiring the bankrupt to surrender property of the estate in bankruptcy, orders requiring the bankrupt’s voluntary assignee to surrender property of the estate, orders giving priority to the claims of creditors, orders directing a set-off of mutual debts, and orders confirming a composition. These are questions, which, with a view to the prompt administration and distribution of the assets of the bankrupt, the law permits to be summarily disposed of by revision. The latter include all controversies and questions arising between the trustee and adverse claimants of property, as property of the estate, whether the property be in his possession or theirs.” See also *Barnes v. Pampel* (C. C. A., 6th Cir.), 27 Am. B. R. 192, 192 Fed. 525; *Matter of Breyer Printing Co.* (C. C. A., 7th Cir.), 32 Am. B. R. 796, 216 Fed. 878; *Ogden & Jamison v. Gilt Edge Mines Co.* (C. C. A., 8th Cir.), 34 Am. B. R. 893, 225 Fed. 723.

18. In *re Jungman* (C. C. A., 2d Cir.), 26 Am. B. R. 401, 186 Fed. 302, holding that in a case where substantially the only question raised is whether a contract for the purchase of certain property of the bankrupt’s estate has been made between the receiver of the bankrupt and a third party, a “controversy arising in bankruptcy proceedings” exists, and a decision requiring such third party to carry out the terms of the judicial sale which had been ordered in accordance with such alleged contract, is reviewable by appeal.

19. The importance of the distinction is clearly indicated in the case of *Moody & Son*

v. Century Saving Bank, 239 U. S. 374, 36 Am. B. R. 95, 60 L. Ed. 336, in which the court said: “Whether the Circuit Court of Appeals rightly sustained this jurisdiction turns upon whether this is one of those ‘controversies arising in bankruptcy proceedings’ over which the Circuit Courts of Appeals are invested, by § 24a of the Bankruptcy Act, with the same appellate jurisdiction that they possess in other cases under the Judicial Code, § 128, or is a mere step in bankruptcy proceedings, the appellate review of which is regulated by other provisions of the bankruptcy act. If it is a controversy arising in bankruptcy proceedings, the jurisdiction of that court was properly invoked, as is also that of this court. We entertain no doubt that it is such a controversy. It has every attribute of a suit in equity for the marshaling of assets, the sale of the encumbered property, and the application of the proceeds to the liens in the order and mode ultimately fixed by the decree. True, it was begun by the trustees, and not by an adverse claimant, but this is immaterial, for the mortgagees, who claimed adversely to the trustees, not only appeared in response to notice of the trustees’ petition, but asserted their mortgage liens and sought to have them enforced against the proceeds of the property conformably to the contentions before stated. This was equivalent of an affirmative intervention, and, when taken in connection with the trustees’ petition, brought into the bankruptcy proceedings a controversy which was quite apart from the ordinary steps in such proceedings, and well within the letter and spirit of § 24a.” Citing *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 300, 11 Am. B. R. 709, 48 L. Ed. 986, 987; *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545, 553, 24 Am. B. R. 761, 54 L. Ed. 610, 613; *Teft, W. & Co. v. Mun-suri*, 222 U. S. 114, 118, 27 Am. B. R. 338, 56 L. Ed. 118, 119; *Houghton v. Burden*, 228 U. S. 161, 165, 30 Am. B. R. 16, 57 L.

able to consider under section 25 whether the review should be by appeal or petition to revise. It is therefore not essential in this connection to consider the nature and object of particular controversies for the purposes of determining as to the method of review.

II. APPEALS TO CIRCUIT COURT OF APPEALS AND SUPREME COURT.

a. In general.—Subsection *a* of this section vests the Supreme Court and the circuit court of appeals with appellate jurisdiction of controversies arising in bankruptcy proceedings in the courts of bankruptcy from which they have appellate jurisdiction in other cases. The only matters which can be reviewed are "controversies arising in bankruptcy proceedings." We have already considered the distinction to be made between such controversies and appeals in bankruptcy proceedings generally as authorized by the next section. The only court which may be appealed from is the court of bankruptcy, which phrase, as here used, does not include the referee.²⁰ The only courts which can hear such an appeal are the several courts mentioned. So, also, appeals can be taken only to the proper court in whose territorial jurisdiction the court of bankruptcy appealed from is located.²¹ The appellate courts are given juris-

Ed. 780, 782; *Globe Bank & Trust Co. v. Martin*, 236 U. S. 288, 295, 34 Am. B. R. 162, 59 L. Ed. 583, 587.

20. Appeal to Supreme Court in "controversies arising in bankruptcy proceedings." In the case of *Tefft, Weller & Co. v. Mansuri*, 222 U. S. 114, 27 Am. B. R. 338, 341, 56 L. Ed. 118, Mr. Justice White says: "But the entire argument rests upon a misconception of the words 'controversies in bankruptcy proceedings,' as used in the section, since it disregards the authoritative construction affixed, to those words, *Coder v. Arts*, 213 U. S. 234, 22 Am. B. R. 1, 53 L. Ed. 777, 29 Sup. Ct. Rep. 436, 16 A. & E. Ann. Cas. 1008; *Hewitt v. Berlin Mach. Works*, 194 U. S. 296, 300, 11 Am. B. R. 709, 48 L. Ed. 986, 987, 24 Sup. St. Rep. 690. Those cases expressly decide that controversies in bankrupt proceedings, as used in the section, do not include mere steps in proceedings in bankruptcy, but embrace controversies which are not of that inherent character, even though they may arise in the course of proceedings in bankruptcy. The cases referred to, moreover, by necessary implication, determine that the mere allowing or disallowing a claim in bankruptcy is a proceeding in bankruptcy, and not a controversy arising in bankruptcy, within the intentment of the section. Nor is there force in the contention that because the district court of Porto Rico is a court of bankruptcy 'not within an organized circuit of the United States,' therefore authority to review its action in a case like this is conferred on this court by the concluding sentences of section 24-a. This is true, because the proposition really rests upon the misconception of the section, already pointed out. That is to say, as the sentence relied upon only confers upon this court 'a like jurisdiction' to review the acts

of the particular courts of bankruptcy which the sentence designates to that conferred by the immediately preceding provisions of section 24-a, that is, to review controversies in bankruptcy, it follows that the sentence confers no powers to review a mere step in bankruptcy, taken by a bankruptcy court, even though such court be one of those referred to in the last sentence relied upon." And see *James v. Stone & Co.*, 227 U. S. 410, 29 Am. B. R. 476, 57 L. Ed. 573.

Appeals in controversies.—Section 24a of the Bankruptcy Act provides for appeals in controversies arising in bankruptcy proceedings and controls an appeal from the Circuit Court of Appeals in a proceeding by a trustee to restrain a landlord from prosecuting a suit for rent in the State court. *Mitchell Store Building Co. v. Carroll*, 232 U. S. 379, 35 Am. B. R. 197, 58 L. Ed. 650.

Appeal in summary proceedings.—An attempted intervention by attorneys in a summary proceeding in a court of ancillary jurisdiction, basing their claim on alleged assignments made to them after the filing of the petition in the original jurisdiction, does not give jurisdiction over a controversy in bankruptcy appealable under § 128 of the Judicial Code of the Circuit Court of Appeals, and thence to the Supreme Court. *Lazarus v. Prentice*, 234 U. S. 263, 32 Am. B. R. 559, 58 L. Ed. 1305.

From judgment on petition to revise.—The Supreme Court cannot entertain an appeal from a judgment of the Circuit Court of Appeals, upon a petition to revise under section 24b of the Bankruptcy Act. *Mitchell Store Building Co. v. Carroll*, 232 U. S. 379, 35 Am. B. R. 197, 58 L. Ed. 650.

21. In *re Seebold* (C. C. A., 5th Cir.), 5 Am. B. R. 358, 105 Fed. 910. Compare *In re Blair* (C. C. A., 8th Cir.), 5 Am. B. R. 793, 106 Fed. 662.

diction to sit "in vacation in chambers and during their respective terms;" which seems to mean that such courts are always in session for the sake of appeals. In conclusion it may be stated that circuit courts of appeals have jurisdiction to review the final decisions of courts of bankruptcy in controversies arising between the trustees in bankruptcy and third parties over the title to, or over liens upon the alleged property of the bankrupt or its proceeds, and that the general appellate jurisdiction vested by subsection *a* of § 24 is not affected or impaired by the grant of the power of revision and supervision in matter of law contained in subsection *b* of that section.²²

b. Appeals from district court to Supreme Court.—The appellate jurisdiction of the Supreme Court of controversies arising in bankruptcy proceedings from a district court not within any organized circuit of the United States is the same as that of the circuit court of appeals from district courts included in an organized circuit. As to when and how an appeal may be taken direct to the Supreme Court from a district court is discussed under the next section.²³

c. Appeals to circuit court of appeals.—The circuit court of appeals is clothed by subsection *a* of this section with general appellate jurisdiction of controversies arising in bankruptcy proceedings. Section 25-a provides for appeals in bankruptcy proceedings themselves in the specific cases stated. We will consider further the appellate jurisdiction of the circuit court of appeals exercisable as in equity cases, under the next section.²⁴ By subsection *b* of this section the several circuit courts of appeals have jurisdiction in equity either interlocutory or final, to supervise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. A petition to revise is the means by which this jurisdiction is to be exercised. Because of the close relation existing between this method of review and that by appeal it is deemed advisable to consider it in the general discussion of the appellate jurisdiction of Circuit Courts of Appeals under the next section.²⁵

III. APPEALS TO SUPREME COURT FROM HIGHER COURT OF STATE.

The bankruptcy law contains no provisions regulating appeals from the court of last resort in a State to the Supreme Court of the United States. Such law does not in any way affect the right to such appeal given by the Revised Statutes.²⁶ This method of review will be found valuable in proceed-

22. *Dodge v. Norlin* (C. C. A., 8th Cir.), 13 Am. B. R. 176, 133 Fed. 363; *Delta National Bank v. Easterbrook* (C. C. A., 5th Cir.), 13 Am. B. R. 338, 133 Fed. 521; *In re Mueller* (C. C. A., 6th Cir.), 14 Am. B. R. 256, 135 Fed. 711; *In re Friend* (C. C. A., 7th Cir.), 13 Am. B. R. 595, 134 Fed. 778; *Smith v. Evans* (C. C. A., 7th Cir.), 17 Am. B. R. 433, 148 Fed. 89; *In re McMahon* (C. C. A., 6th Cir.), 17 Am. B. R. 530, 147 Fed. 685; *In re New England Breeders' Club* (C. C. A., 1st Cir.), 22 Am. B. R. 124, 165 Fed. 217; *Franklin v. Stoughton Wagon Co.* (C. C. A., 8th Cir.), 22 Am. B. R. 63, 168 Fed. 857.

23. See *Bankr. Act*, § 25, *post*, p. 606. See "Review by Supreme Court."

24. See *post*, p. 591.

25. See *post*, pp. 591-606.

26. **Appeal to Supreme Court from State Court.**—Judicial Code, section 237, provides

as follows: "A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-

ings involving bankruptcy questions in the courts of the States, as, for instance, where a State court has erroneously interpreted a provision in the bankruptcy law,²⁷ or refused to recognize the validity of a discharge duly granted.²⁸ Where, in an action by a trustee to recover assets, the State court of last resort, in affirming a judgment for the plaintiff, construed some of the provisions of the bankruptcy law, its judgment presents a Federal question reviewable by the Supreme Court upon a writ of error.²⁹ The limitation of the Revised Statutes should always be borne in mind. The cases where a writ of error may be asked for may be summarized as follows:

First, where there has been a decision against the validity of any portion of the bankruptcy act; second, where a decision has been had by the State court sustaining a statute of the State claimed to be repugnant to the bankruptcy act; or, third, where the right, title, privilege or immunity of any person claimed under the bankruptcy statute has been denied by a State court.³⁰ So where a trustee in bankruptcy asserts a right in a State court arising under the bankruptcy law, a Federal question is presented which gives rise to the jurisdiction of the Supreme Court under the Revised Statutes.³¹ Where the only question determined in the State court was whether or not the bankrupt was entitled to an exemption under a State statute the judgment of the State court is not reviewable by the Supreme Court.³² The Federal question which is made the basis of review must have been raised in the State court,³³ even if passed on there, if the decision may be affirmed for other reasons, it will not be disturbed.³⁴ The amount in dispute makes no difference; but only questions

examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States.

"The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ."

27. *Hill v. Harding*, 107 U. S. 631, 27 L. Ed. 493; *Williams v. Heard*, 140 U. S. 529, 35 L. Ed. 550.

28. *Hennequin v. Clewes*, 111 U. S. 677, 28 L. Ed. 565; *Strang v. Bradner*, 114 U. S. 555, 29 L. Ed. 248; *Forsyth v. Vehmeyer*, 177 U. S. 177, 3 Am. B. R. 807, 44 L. Ed. 723.

29. *Hennequin v. Clewes*, 111 U. S. 677, 28 L. Ed. 565; *Eau Claire Nat'l Bank v. Jackman*, 204 U. S. 522, 17 Am. B. R. 675, 51 L. Ed. 596; See also *Nutt v. Knutt*, 200 U. S. 12, 50 L. Ed. 348, where the court said: "A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of § 709 (Judicial Code, § 237), to assert a right and under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary." Where defendant in an action against it in a State court sets up the issuing of an injunction by a court of bankruptcy, undertaking to stay proceedings in the State

Court, it thereby claims the benefit of a Federal right, so as to bring the case within section 709 (Judicial Code, § 237) of the U. S. Revised Statutes, and lays the foundation for a review in the United States Supreme Court. *Aeme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 27 Am. B. R. 262, 56 L. Ed. 208; *Rector v. City Deposit Bank Co.*, 200 U. S. 405, 15 Am. B. R. 336, 50 L. Ed. 527, in which it was held that a judgment of dismissal entered upon a verdict in an action brought by a trustee in bankruptcy in a State court to recover, as a voidable preference, a payment made to a bank within the four months period, presents a Federal question, which is reviewable by the Supreme Court upon a writ of error; *Miller v. New Orleans Acid & Fertilizer Co.* (Sup. Ct.), 211 U. S. 496, 21 Am. B. R. 416, 53 L. Ed. 300, affg. 117 La. 821, 42 S. E. 329.

30. *Collier on Bankruptcy* (3d ed.), p. 243.

31. *Rector v. City Deposit Bank*, 200 U. S. 405, 15 Am. B. R. 336, 50 L. Ed. 527.

32. *Smalley v. Laugenour*, 196 U. S. 93, 13 Am. B. R. 692, 49 L. Ed. 400.

33. *Columbia Water Power Co. v. Street Railway Co.*, 172 U. S. 475, 43 L. Ed. 521; *Pim v. St. Louis*, 165 U. S. 273, 41 L. Ed. 714.

34. *Bausman v. Dixon*, 173 U. S. 113, 43 L. Ed. 633. Compare also *Castillo v. McConnico*, 168 U. S. 674, 42 L. Ed. 622, and *Briggs v. Walker*, 171 U. S. 466, 43 L. Ed. 243.

at law will be reviewed.³⁵ Such a writ of error can be directed only to the highest court of the State in which a decision of the matter in controversy could be had.³⁶ Appeals of this character being outside of the bankruptcy law, the practice is identical with that on writs of error from the Supreme Court to such a State court in cases involving Federal questions other than those growing out of the bankruptcy law.³⁷ While the certification of a record by a State court to the Supreme Court may not import a Federal question into the record where otherwise such question does not arise, such certificate may serve to elucidate the determination as to whether a Federal question exists; if the certificate does show that rights under the bankruptcy law were passed upon by the State court the Supreme Court will review the judgment.³⁸ A number of other cases indicating the circumstances under which the appellate jurisdiction to review the judgment of a State court will be exercised are cited in the foot-note.³⁹

IV. SUPERVISORY JURISDICTION.

By subsection *b* of this section the several circuit courts of appeals are given jurisdiction to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power may be exercised on due notice and petition by any party aggrieved. When a petition to revise has been duly filed no further relief is necessary to protect the rights of the petitioner.⁴⁰ The power to revise and superintend should not be exercised to control the discretion of a court of bankruptcy in the matter of the appointment or removal of referees.⁴¹ This method of review of proceedings in courts of bankruptcy should not be separated from the exercise of appellate jurisdiction by Circuit Courts of Appeals under § 25. In so far as the subsection confers jurisdiction it is properly included in this section. But it also indicates the classes of questions which may be revised by petition and somewhat of the practice on revision. This question of jurisdiction should be considered and discussed in connection with the appellate jurisdiction conferred under § 25.⁴²

35. *Egan v. Hart*, 165 U. S. 188, 41 L. Ed. 680.

36. Judicial Code, § 237.

37. See *Foster's Federal Practice*, § 477 *et seq.* See also *Desty's Federal Procedure* (9th ed.), § 536, and Form No. 680.

38. *Rector v. City Deposit Bank Co.*, 200 U. S. 405, 15 Am. B. R. 336, 50 L. Ed. 527.

39. *Linton v. Stanton*, 12 How. 423; *Scott v. Kelly*, 23 Wall. 57; *Dimock v. Revere Copper Co.*, 117 U. S. 559, 29 L. Ed. 994; *McKenna v. Simpson*, 129 U. S. 506, 32 L. Ed. 771; *Backus v. Fort Street Co.*, 169 U. S. 557, 42 L. Ed. 853; *Bellingham Bay v. New Whatcom*, 172 U. S. 314, 43 L. Ed. 460; *McQuade v. Trenton*, 172 U. S. 636, 43 L. Ed. 581.

40. *Matter of Saratoga Gas, Electric Light & Power Co.* (C. C. A., 2d Cir.), 21 Am. B. R. 592.

Scope of review.—The review of an order of the district court, affirming an order of the referee, dismissing a petition charging the trustee with negligence, and also the review of the uncontroverted facts, to determine whether there is any substantial evidence to sustain the order, is a review as to a matter of law within the provisions of section 24b of the Bankruptcy Act. *Matter of Kuhn Bros.* (C. C. A., 7th Cir.), 37 Am. B. R. 97, 234 Fed. 277.

Jurisdiction to review a summary order in bankruptcy proceedings is by original petition under this subdivision. *Matter of Goldstein and Moseson* (C. C. A., 7th Cir.), 32 Am. B. R. 802, 216 Fed. 887.

41. *Birch v. Steele* (C. C. A., 5th Cir.), 21 Am. B. R. 539, 165 Fed. 577.

42. See under § 25, *post*, p. 575.

SECTION TWENTY-FIVE.

APPEALS AND WRITS OF ERROR.

§ 25. **Appeals and Writs of Error.**—*a* That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to wit, (1)* from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

b From any final decision of a court of appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

2. Where some justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States.

c Trustees shall not be required to give bond when they take appeals or sue out writs of error.

d Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of *certiorari* pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

Analogous provisions: In U. S.: As to appeals to the circuit courts, Act of 1867, §§ 8, 24, R. S., §§ 4980, 4981, 4982, 4983, 4984, 4985; Act of 1841, § 4; as to appeals to the Supreme Court, Act of 1867, § 9, R. S., § 4989; as to petitions for revision, Act of 1867, § 2, R. S., §§ 4986, 4987; Act of 1841, § 6.

In Eng.: Act of 1883, § 104; General Rules, 129-134A.

Cross-references: To the law: Appellate courts, definition, § 1(3); Courts of bankruptcy, definition, § 1(8).

Jurisdiction of appellate courts, § 24.

To the General Orders: Appeals to Circuit Court of Appeals allowed by judge of court appealed from, XXXVI(1).

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* Subsection b superseded in effect by Act of January 28, 1915, 38 Stat. L. 803, post, p. 606.
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I. APPEALS AND WRITS OF ERROR GENERALLY.

a. *Scope and meaning of section.*—The object of § 24-a is, as has already been indicated, to confer jurisdiction upon the Supreme Court and circuit courts of appeals as to controversies arising in bankruptcy proceedings. The distinction to be made between controversies arising in bankruptcy proceedings and the words “in bankruptcy proceedings” as used in § 25-a are commented upon under that section. It was there stated that if an appeal be brought in a suit independent of the proceedings proper or which arise in respect to a right asserted by an adverse claimant it must be under § 24-a

rather than under § 25-a. In other respects, however, § 25 both limits and explains the general appellate jurisdiction conferred upon the Supreme Court and the circuit courts of appeals by § 24-a. The jurisdiction to superintend and revise in matter of law the proceedings of bankruptcy courts is conferred by § 24-b; but it is so closely allied with the exercise of jurisdiction under this section that they are more properly treated in the same connection. In practically every case where any question has arisen relative to the review of any matter pertaining to bankruptcy by an appellate court, the court discusses or applies these two sections conjunctively. In any consideration of the subject the sections are necessarily treated in the same connection.

b. Methods of appeal in bankruptcy.—The practitioner in State courts, especially in the code states, usually finds the Federal system of appeals complex and difficult to understand. That he may have, as it were, a few landmarks to guide him, the following analysis of methods of appeal in bankruptcy, other than reviews of referees' decisions by the judge, may be found useful. It does not include reviews by the Supreme Court of bankruptcy decisions in the highest courts of the States.¹ The cases cited in the footnotes are referred to only for the purpose of calling attention to the cases in which the method specified has been employed under the present law. They are illustrative merely and are not referred to for the purpose of substantiating the statements made in the text.

(1) IN THE SUPREME COURT OF THE UNITED STATES:

- (a) *By appeal or writ of error*, from a district court not within any organized circuit, or the Supreme Court of the District of Columbia, by a party aggrieved by either of the judgments mentioned in § 25-a, but not otherwise.²
- (b) *By a writ of certiorari*, to a circuit court of appeals, if permitted by general law.³ Under Act of Congress, January 28, 1915, (38 Stat. at L. 804, chap. 22) judgments and decrees of circuit court of appeals in all proceedings under the bankruptcy act are final, save only that the Supreme Court may require that the proceeding be certified to it for review and determination.
- (c) *By certificate*, from either a circuit court of appeals or a district court direct, if permitted by general law.⁴

(2) IN A CIRCUIT COURT OF APPEALS:

- (a) *By appeal or writ of error*, from a district court in its circuit sitting in bankruptcy; if within the limitations of § 25-a, but not otherwise.
- (b) *By a petition to revise* in matters of law any order of a district court in its circuit sitting in bankruptcy.

1. This subject has been considered somewhat at length under the preceding section.

2. *Carson, Pirie, etc. v. Chicago Title & Trust Co.*, 182 U. S. 438, 45 L. Ed. 1171, 5 Am. B. R. 824; *White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178; *Audubon v. Schufeldt*, 181 U. S. 575, 45 L. Ed. 1009, 5 Am. B. R. 829.

3. *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 623; *Mueller v. Nu-*

gent, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421.

4. *Bardes v. Bank*, 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163; *Hicks v. Knost*, 178 U. S. 541, 44 L. Ed. 1183, 4 Am. B. R. 178; *Wall v. Cox*, 181 U. S. 244, 45 L. Ed. 845, 5 Am. B. R. 727; *Wilson v. Nelson*, 183 U. S. 191, 7 Am. B. R. 142, 46 L. Ed. 147.

(3) IN THE SUPREME COURT OF A TERRITORY:

- (a) *By appeal or writ of error*, from a district court of the territory sitting in bankruptcy; if within the limitations of § 25-a, but not otherwise.⁵

II. PETITIONS TO REVISE IN MATTER OF LAW.

a. *In general.*—Under § 24-b the several circuit courts of appeals have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. The revisory power here conferred, it will be noticed, extends (1) to matters of law and (2) to proceedings in bankruptcy. This power of revision as so conferred is contrasted with the appellate jurisdiction of the circuit court of appeals to be exercised under § 25-a in the three classes of cases therein specified. This appellate jurisdiction is also to be exercised “in bankruptcy proceedings.”

b. *Comparative legislation.*—The act of 1841 imperfectly granted this revisory power. It depended for its exercise on the order or certificate of the lower court.⁶ Under the act of 1867 it was often availed of and, because summary in its nature and simple in its application, was the usual method of reviewing questions of law.

c. *Distinction between petitions to revise and appeals.*—Petitions to revise in matter of law divides with appeals in equity cases the great majority of reviews heard by the circuit court of appeals. The petition differs from such appeals in two important particulars. (1) Petitions to revise bring up questions of law only; appeals both of law and of facts.⁷ (2) The former calls up any order or judgment or judicial action in bankruptcy proceedings; the latter three classes of final judgments only.⁸ The provisions as to revision in matter of law and appeals were framed and must be construed in view of the distinction between steps in bankruptcy proceedings proper and controversies arising out of the settlement of the estates of bankrupts.⁹ In other words, if the

5. Compare *In re Blair* (C. C. A., 8th Cir.), 5 Am. B. R. 793, 106 Fed. 662; *In re Stumpf* (Sup. Ct., Okla.), 9 Okla. 639, 4 Am. B. R. 267, 60 Pac. 96.

6. *Ex parte Christy*, 3 How. 292.

7. *Elliott v. Toeppner*, 187 U. S. 327, 9 Am. B. R. 50, 47 L. Ed. 200, in which case the court cited §§ 24-b and 25-a so far as they applied to the appellate jurisdiction of circuit courts of appeals and stated that the jurisdiction conferred by the former section was confined to questions of law and did not contemplate a review of the facts. The court said: “The distinction between a writ of error which brings up matters of law only, and an appeal, which, unless expressly restricted brings up both law and fact, has always been observed by this court and been recognized by the legislation of Congress from the foundation of the government.” *In re Blanchard Shingle Co.* (C. C. A., 9th Cir.), 21 Am. B. R. 142, 164 Fed. 311; *Ross v. Stroh* (C. C. A., 3d Cir.), 21 Am. B. R. 644, 165 Fed. 628.

8. In the case of *Duryea Power Co. v. Sternbergh*, 218 U. S. 299, 25 Am. B. R. 66, 54 L. Ed. 1047, the court said: “It is argued that an appeal to the circuit court of appeals

may be treated as a petition for revision (*Holden v. Stratton*, 191 U. S. 115, 10 Am. B. R. 786, 48 L. Ed. 115), and that conversely, a petition for revision may be turned into an appeal, or at least treated as one for the purpose of an appeal to this court, if only to establish that the circuit court of appeals exhausted its jurisdiction. There are two answers to this contention. In the first place the converse proposition does not hold. An appeal opens both fact and law and therefore might be regarded as intended to raise questions of law in any way that might be deemed proper. But a petition for revision opens only questions of law and when the foundation of its jurisdiction is thus narrowed, the action of the court cannot enlarge it so as to deal with the facts.”

9. *First Nat'l Bank of Chicago v. Chicago Title & Trust Co.*, 198 U. S. 280, 14 Am. B. R. 102, 49 L. Ed. 1051; *Holden v. Stratton*, 191 U. S. 115, 10 Am. B. R. 786, 48 L. Ed. 116; *Elliott v. Toeppner*, 187 U. S. 327, 9 Am. B. R. 50, 47 L. Ed. 200; *Denver First Nat'l Bank v. Klug*, 186 U. S. 202, 8 Am. B. R. 12, 46 L. Ed. 1127; *In re Hecox* (C. C. A., 8th Cir.), 21 Am. B. R. 314, 164 Fed. 823.

question arise in an independent suit to determine a claim necessary for the settlement of the estate, or if it arise in one of the cases specified in § 25-a, review may be had by appeal; if the question pertains to and arises in the bankruptcy proceedings and does not fall within either of the cases specified in § 25-a, review may be had by a petition to revise in matter of law.¹⁰ Confusion may be avoided by bearing in mind that under § 24-a a controversy arising between a trustee and a third party in respect to property either in possession of the trustee or a third party the review in the circuit court of appeals is had on appeal in the same manner as in other cases. In the case of such controversies the revisory power is not available. On the review of judgments in independent suits to recover assets or to determine controversies arising relative to the bankrupt's estate the remedy is by appeal.¹¹ This doctrine does not seem refutable. Whatever conflict there may be among the authorities on this subject pertains to the question as to whether, or not appeal as in equity cases taken in bankruptcy proceedings to the circuit court of appeals in the cases specified in § 25-a are exclusive of the right to review under § 24-b. These distinctions are now well settled by the court.¹²

d. Petition and appeal; exclusive or cumulative.—(1) **CONFLICT OF AUTHORITY.**—It has been held that the power to review by appeal conferred by § 25-a and that to supervise granted by § 24-b are cumulative; that the two grants of power are inconsistent and that in a proper case either may be invoked.¹³

10. *Snow v. Dalton* (C. C. A., 4th Cir.), 29 Am. B. R. 240, 203 Fed. 843; *Kinthead v. Bacon & Sons* (C. C. A., 6th Cir.), 36 Am. B. R. 390, 230 Fed. 362, in which the court held that the review of an order fixing the compensation of a referee, being in a "proceeding in bankruptcy" may only be had on a petition to revise under § 24b.

11. *In re Busch* (C. C. A., 7th Cir.), 8 Am. B. R. 518, 116 Fed. 270. See also *In re Jacobs* (C. C. A., 8th Cir.), 3 Am. B. R. 671, 96 Fed. 935; *In re Mertens* (C. C. A., 2d Cir.), 15 Am. B. R. 701, 142 Fed. 445.

12. *In re Rouse, Hazard & Co.* (C. C. A., 7th Cir.), 1 Am. B. R. 234, 91 Fed. 96; *In re Purvine* (C. C. A., 5th Cir.), 2 Am. B. R. 787, 96 Fed. 192; *In re Richards* (C. C. A., 7th Cir.), 3 Am. B. R. 145, 96 Fed. 935; *In re Jacobs* (C. C. A., 8th Cir.), 3 Am. B. R. 671, 99 Fed. 539; *Courier-Journal, etc. v. Brewing Co.* (C. C. A., 6th Cir.), 4 Am. B. R. 183, 101 Fed. 699; *In re Ives* (C. C. A., 6th Cir.), 7 Am. B. R. 692, 113 Fed. 911; *Hutchinson v. Le Roy* (C. C. A., 1st Cir.), 8 Am. B. R. 20, 113 Fed. 200; *In re Abraham* (C. C. A., 5th Cir.), 2 Am. B. R. 266, 93 Fed. 767 (in Supreme Court, *Bryan v. Bernheimer*, 181 U. S. 188, 5 Am. B. R. 623, 45 L. Ed. 814).

13. **Right to review by appeal or on petition not exclusive.**—In the case of *In re Lee* (C. C. A., 8th Cir.), 25 Am. B. R. 436, 182 Fed. 579, the court said: "Undoubtedly there is a controversy here arising in a bankruptcy proceeding, which is reviewable by appeal under section 24-a, but there is no prohibition in the bankruptcy law of the revision in matter of law of such a controversy under section 24-b, and if no controversy arising in bankruptcy proceedings

may be reviewed under the latter section, then nothing may be reviewed under it because where there is no controversy, there is nothing to review or to decide. The fact is that the grant of jurisdiction to the circuit court of appeals, to review by appeal the final decision of a controversy arising in bankruptcy proceedings of which that court would have had appellate jurisdiction if it had arisen in any other case in a federal court under section 24-a, and the grant of jurisdiction to revise and superintend in matter of law the proceedings of the inferior courts of bankruptcy under section 24-b are not exclusive of each other, but cumulative or concurrent grants, the former of jurisdiction to review questions of law and of fact, the latter of jurisdiction to review questions of law alone."

Dodge v. Norlin (C. C. A., 8th Cir.), 13 Am. B. R. 176, 133 Fed. 363, in which the court said: "Nor is there anything in the grant by § 24-b of the power to revise and superintend in matter of law the proceedings of the inferior courts of bankruptcy which in any way affects or limits the general appellate jurisdiction vested by the sections of the law which have been considered. The act of 1898 does not grant the appellate and the revisory jurisdiction in the alternative. It does not give to disappointed litigants the right of appeal or the right to revision in matters of law. It grants the right of appeal and the right of superintendence and revision in matters of law only. It gives both rights freely and without limitation. The two grants are not inconsistent, and on familiar principles both must stand, and in a proper case either may be invoked." The following cases are also to the effect that

There are a number of other cases in which it has been held that where an appeal might be brought under § 25 a review of petition under § 24-b was not available.¹⁴ In many of these cases a distinction is made between "proceedings in bankruptcy" under § 24-b and "controversies arising in bankruptcy proceedings" which are appealable under the general appellate jurisdiction of the court as conferred by § 24-a. Under the principles of these cases if the controversy is one arising in bankruptcy proceedings, review by appeal is exclusive.¹⁵ In view of this conflict of authority it is difficult to declare a rule which will be a safe guide in every case. As has been stated, this contrariety of decision has resulted in such confusion and uncertainty in the practice that

the right to a review by an appeal or upon a petition to revise may be sought at the option of the appellant. In *re Holmes* (C. C. A., 8th Cir.), 15 Am. B. R. 689, 142 Fed. 392; In *re McKenzie* (C. C. A., 8th Cir.), 15 Am. B. R. 679, 142 Fed. 383; *Taft Co. v. Century Savings Bank* (C. C. A., 8th Cir.), 15 Am. B. R. 594, 141 Fed. 369; In *re Plymouth Cordage Co.* (C. C. A., 8th Cir.), 13 Am. B. R. 665, 135 Fed. 1000; *Ross v. Stroh* (C. C. A., 3d Cir.), 21 Am. B. R. 644, 165 Fed. 628.

An order of dismissal of a petition in bankruptcy, on the ground that it does not state facts sufficient to constitute an act of bankruptcy is reviewable by petition to revise under § 24-b, although it is a "judgment refusing to adjudge the defendant a bankrupt" and appealable under § 25-a. *Stevens v. Nave-McCord Co.* (C. C. A., 8th Cir.), 17 Am. B. R. 609, 150 Fed. 71.

14. Remedies exclusive.—*Union Nat'l Bank v. Neill* (C. C. A., 5th Cir.), 17 Am. B. R. 853, 149 Fed. 720; *O'Dell v. Boyden* (C. C. A., 6th Cir.), 17 Am. B. R. 751, 150 Fed. 731, where the distinction seems to have been made between "a proceeding in bankruptcy" under § 24-b and "a controversy arising in bankruptcy proceedings" under § 24-a; *Mason v. Wolkowich* (C. C. A., 1st Cir.), 17 Am. B. R. 709, 150 Fed. 699, in which also the distinction is made between an order appealable as a controversy in bankruptcy and one reviewable by petition as in the proceeding itself; In *re McMahon* (C. C. A., 6th Cir.), 17 Am. B. R. 530, 147 Fed. 685; *Davidson & Co. v. Friedman* (C. C. A., 6th Cir.), 15 Am. B. R. 489, 140 Fed. 853, in which the court held that the remedies of appeal and petition for review are exclusive of each other and the court will not treat the one as the other to the confusion of pleading; In *re Mueller* (C. C. A., 6th Cir.), 14 Am. B. R. 256, 135 Fed. 711, holding that the supervisory jurisdiction conferred by § 24-b does not include orders or decrees which are appealable and that the provisions for appeal and for petition to revise are mutually exclusive. In *re Kuffler* (C. C. A., 2d Cir.), 11 Am. B. R. 469, 127 Fed. 125, holding that the provisions of § 24-b refer to cases not provided for by appeal so that if § 25-a applies, a petition to revise will not lie. *First Nat'l Bank of Miles City v. State Nat'l Bank* (C. C. A., 9th Cir.), 12 Am. B. R. 440, 131 Fed. 430, to the effect that

§ 25-a having provided a means to review by appeal three kinds of judgment, every other means is excluded. In *re Good* (C. C. A., 8th Cir.), 3 Am. B. R. 605, 99 Fed. 389, holding that a judgment adjudicating a person bankrupt could not be reviewed by petition. In *re Jungman* (C. C. A., 2d Cir.), 26 Am. B. R. 401, 186 Fed. 302, holding that a decision requiring a third party to carry out the terms of a contract for the purchase of certain property of the bankrupt's estate, is reviewable by appeal.

In the case of *Barnes v. Pampel* (C. C. A., 6th Cir.), 27 Am. B. R. 192, 192 Fed. 525, the court said: "The distinction between 'proceedings' in bankruptcy reviewable under section 24-b and the 'controversies arising in bankruptcy proceedings' appealable under section 24-a is clearly defined, the former including 'administrative orders and decrees in the ordinary course of bankruptcy between the filing of the petition and the final settlement of the estate,'—the latter including 'those independent or plenary suits which concern the bankrupt's estate and arise by intervention or otherwise between the trustees representing the bankrupt's estate and claimants representing some right or interest adverse to the bankrupt or his general creditors.' The remedies afforded by the two sub-sections referred to are mutually exclusive." Citing *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 11 Am. B. R. 709, 48 L. Ed. 986; *Coder v. Arts*, 213 U. S. 223, 233, 235, 22 Am. B. R. 1; *Tefft, Weller & Co. v. Munsuri*, 222 U. S. 114, 27 Am. B. R. 338, 50 L. Ed. 118; In *re Mueller* (C. C. A., 6th Cir.), 14 Am. B. R. 256, 135 Fed. 711, 713, 715; In *re Doran* (C. C. A., 6th Cir.), 18 Am. B. R. 760, 154 Fed. 467; *Brady v. Bernard & Kittinger* (C. C. A., 6th Cir.), 22 Am. B. R. 342, 170 Fed. 576.

15. In *re McMahon* (C. C. A., 6th Cir.), 17 Am. B. R. 530, 147 Fed. 685; *O'Dell v. Boyden* (C. C. A., 6th Cir.), 17 Am. B. R. 751, 150 Fed. 731; *Mason v. Wolkowich* (C. C. A., 1st Cir.), 17 Am. B. R. 709, 150 Fed. 699, holding that an order made upon the petition of a trustee for the payment to him of the proceeds of a sale of assets is appealable only to the circuit court of appeals under § 24-a; *Brady v. Bernard & Kittinger* (C. C. A., 6th Cir.), 22 Am. B. R. 342, 170 Fed. 576; In *re Streator Metal Stamping Co.* (C. C. A., 7th Cir.), 30 Am. B. R. 55, 205 Fed. 280.

lawyers have thought it necessary in many cases to take an appeal and file a petition for revision in the same case in order to be sure to obtain a review of the ruling challenged.¹⁶

(2) **PREVAILING RULE.**—The consensus of opinion seems clearly in favor of the principle that if the suit or proceeding is a controversy arising in bankruptcy proceedings it is appealable under § 25-a and not reviewable under § 24-b; the latter refers only to matters in the bankruptcy proceedings itself, that is, any judicial determination, which may be made by a bankruptcy court from the time of the filing of the petition until the estate is closed, pertaining exclusively to the bankruptcy. This distinction is clearly established.¹⁷ As between the power to revise under § 24-b and the exercise of appellate jurisdiction under § 25-a, both of which relate to the review of bankruptcy proceedings, the better rule is that in either of the three cases mentioned in § 25-a the review can only be by appeal;¹⁸ but in respect to any other matters in bankruptcy proceedings the view must be by a petition to revise.¹⁹ The Supreme Court

16. In re Holmes (C. C. A., 8th Cir.), 15 Am. B. R. 689, 142 Fed. 391; In re Hecox (C. C. A., 8th Cir.), 21 Am. B. R. 314, 164 Fed. 823.

17. Hewitt v. Berlin Machine Co., 194 U. S. 300, 11 Am. B. R. 709, 48 L. Ed. 986; In re Moore & Bridgman (C. C. A., 5th Cir.), 21 Am. B. R. 651, 166 Fed. 689; Matter of Beyer Printing Co. (C. C. A., 7th Cir.), 32 Am. B. R. 796, 216 Fed. 878; Bothwell v. Fitzgerald (C. C. A., 9th Cir.), 34 Am. B. R. 261, 219 Fed. 408.

Provisions for appeal and revision mutually exclusive.—In the case of Morehouse v. Pacific Hardware Co. (C. C. A., 9th Cir.), 24 Am. B. R. 178, 177 Fed. 337, the court said: "Section 24 of the bankruptcy act of 1898 establishes the appellate jurisdiction of circuit courts of appeals over 'controversies arising in bankruptcy proceedings' and their jurisdiction in equity, 'either interlocutory or final to revise in matter of law proceedings of the inferior courts of bankruptcy.' Section 25-a provides for appeals from judgments in three certain enumerated steps in bankruptcy proceedings; 'in respect to which special provision therefor was required.' (Holden v. Stratton, 191 U. S. 115, 10 Am. B. R. 786, 48 L. Ed. 115.) There is in the language of the act nothing to indicate that the revisory power so given to the circuit court of appeals is more extensive than that which was exercised by the circuit courts under the bankruptcy act of 1867. In Lathrop v. Drake, 91 U. S. 516, 23 L. Ed. 414, it was held that the appellate jurisdiction conferred on the circuit courts by the act of 1867 was of two classes of cases, one to be exercised under a petition for review, the other by the ordinary appeal or writ of error. The same distinction has been recognized in construing the bankruptcy act of 1898, and it has been held that the provisions for appeal and for review on petition are mutually exclusive, and that the revisory jurisdiction does not include any orders or decrees which are appealable or reviewable on writ of error." In this case the court cited First

Nat. Bank of Chicago v. Chicago Title & Trust Co., 198 U. S. 280, 14 Am. B. R. 102, 49 L. Ed. 1051; Hewitt v. Berlin Machine Works, 194 U. S. 296, 11 Am. B. R. 709, 48 L. Ed. 986; Odell v. Boyden (C. C. A., 6th Cir.), 17 Am. B. R. 751, 150 Fed. 731, 80 C. C. A. 397; In re Mueller (C. C. A., 6th Cir.), 14 Am. B. R. 256, 135 Fed. 712, 68 C. C. A. 349; In re Friend (C. C. A., 7th Cir.), 13 Am. B. R. 595, 134 Fed. 778, 67 C. C. A. 500; Scott & Co. v. Wilson (C. C. A., 7th Cir.), 8 Am. B. R. 349, 115 Fed. 284, 53 C. C. A. 76; In re Rusch (C. C. A., 7th Cir.), 8 Am. B. R. 518, 116 Fed. 270, 53 C. C. A. 631; Kirkpatrick v. Harnesberger (C. C. A., 5th Cir.), 29 Am. B. R. 439, 199 Fed. 886; Kirsner v. Taliaferro (C. C. A., 4th Cir.), 29 Am. B. R. 852, 202 Fed. 51.

The remedies of appeal and petition to revise are mutually exclusive, so that where an appeal is allowable a petition to revise will not lie. In re Martin (C. C. A., 6th Cir.), 29 Am. B. R. 935, 201 Fed. 31, *affd. sub nom.* Globe Bank & Trust Co. v. Martin, 236 U. S. 288, 34 Am. B. R. 162, 59 L. Ed. 583.

18. In re Good (C. C. A., 8th Cir.), 3 Am. B. R. 605, 99 Fed. 389; In re Friend (C. C. A., 7th Cir.), 13 Am. B. R. 595, 134 Fed. 778; In re Worcester County (C. C. A., 1st Cir.), 4 Am. B. R. 496, 102 Fed. 808; Smith v. Mason, 14 Wall. 419; Matter of Beyer Printing Co. (C. C. A., 7th Cir.), 32 Am. B. R. 796, 216 Fed. 878.

19. Except where an appeal may be had as provided in § 25-a the proper procedure in the Circuit Court of Appeals seems to be by petition to review. Ohio Valley Bank Co. v. Switzer (C. C. A., 6th Cir.), 18 Am. B. R. 689, 153 Fed. 632; Kinkead v. Bacon & Sons (C. C. A., 6th Cir.), 36 Am. B. R. 390, 230 Fed. 362.

In re Groetzinger (C. C. A., 3d Cir.), 11 Am. B. R. 467, 127 Fed. 124, in which case it was held that an order for the distribution of the proceeds of the sale by a trustee of real estate is reviewable only by petition for review; Davidson v. Friedman (C. C. A.,

has sustained this view by declaring that persons who are entitled to an appeal under § 25-a are not entitled to a petition to review under § 24-b.²⁰

(3) **UNITING REMEDIES.**—Where it is sought to combine the two remedies by uniting an appeal with a petition to review the two do not neutralize each other, but the court will proceed to adjudicate on the controversy in the proper proceedings.²¹ If the case is one which should be heard and decided as an appeal, the petition to revise should be dismissed.²²

(4) **APPEAL TREATED AS PETITION TO REVISE.**—So, also, it has been held that in proper cases an appeal may be treated as a petition to revise,²³ as where

6th Cir.), 15 Am. B. R. 489, 140 Fed. 853, 72 C. C. A. 553, where it was held that an order allowing trustee's expenses is subject to review, but is not appealable; *Brady v. Bernard & Kittinger* (C. C. A., 6th Cir.), 22 Am. B. R. 342, 170 Fed. 576; *Barnes v. Pampel* (C. C. A., 6th Cir.), 27 Am. B. R. 192, 192 Fed. 525.

20. **Remedy by appeal not inclusive of review by petition.**—In the case of *Matter of Loving*, 224 U. S. 183, 27 Am. B. R. 852, 855, 56 L. Ed. 725, Mr. Justice Day says: "The question now propounded is: Was the trustee also entitled to a review in the Circuit Court of Appeals, under section 24b, by petition for review? Under that section authority, either interlocutory or final, is given to the Circuit Court of Appeals to superintend and revise in matters of law the proceedings of the inferior courts of bankruptcy within their jurisdiction. We think this subdivision was not intended to give an additional remedy to those whose rights could be protected by an appeal under section 25 of the act. That section provides a short method by which rejected claims can be promptly reviewed by appeal in the Circuit Court of Appeals, and, in certain cases, in this court. The proceeding under section 24b, permitting a review of questions of law arising in bankruptcy proceedings, was not intended as a substitute for the right of appeal under section 25. Under section 24b a question of law only is taken to the Circuit Court of Appeals; under the appeal section, controversies of fact as well are taken to that court, with findings of fact to be made therein if the case is appealable to this court. We do not think it was intended to give to persons who could avail themselves of the remedy by appeal under section 25 a review by petition under section 24b. The object of section 24b is rather to give a review as to matters of law, where facts are not in controversy, of orders of courts of bankruptcy in the ordinary administration of the bankrupt's estate. In our judgment the rule was well stated in *In re Mueller* (C. C. A., 6th Cir.), 14 Am. B. R. 256, 135 Fed. 711, 68 C. C. A. 349, by Mr. Justice Lurton, then circuit judge: "The 'proceedings' reviewable [under § 24b] are those administrative orders and decrees in the ordinary course of a bankruptcy between the filing of the petition and the final settlement of the estate, which are not made specially appealable under [§] 25a. This would

include questions between the bankrupt and his creditors of an administrative character, and exclude such matters as are appealable under [§] 24a." This principle is further substantiated in the case of *Tefft, Weller & Co. v. Munsuri*, 222 U. S. 114, 27 Am. B. R. 338, 56 L. Ed. 118; *Kirsner v. Taliaferro* (C. C. A., 4th Cir.), 29 Am. B. R. 832, 202 Fed. 51; *Matter of Pindel* (C. C. A., 9th Cir.), 34 Am. B. R. 600, 221 Fed. 342.

21. *Fisher v. Cushman* (C. C. A., 1st Cir.), 4 Am. B. R. 646, 103 Fed. 860; *In re Worcester County* (C. C. A., 1st Cir.), 4 Am. B. R. 496, 102 Fed. 808; *Lockman v. Lang* (C. C. A., 8th Cir.), 12 Am. B. R. 497, 132 Fed. 1; *In re Schoenfeld* (C. C. A., 3d Cir.), 25 Am. B. R. 748, 183 Fed. 219, holding that where a review is sought both by a petition to revise under section 24-b and by appeal under section 25-a, and the errors complained of in the petition to revise and the assignment of error on the appeal are identical and present only questions of law, the court will not stop to consider which of the two methods of procedure is the correct one, or whether the two methods may be prosecuted together; *Knapp v. Milwaukee Trust Co.* (C. C. A., 7th Cir.), 20 Am. B. R. 671, 162 Fed. 675.

Uniting appeal and petition.—In the case of *Fisher v. Cushman* (C. C. A., 1st Cir.), 4 Am. B. R. 646, 103 Fed. 860, an appeal and a petition to revise were brought in the same proceeding, and the court said: "Both relate to the same subject matter. The appeal will not lie because the subject thereof is not within the three specifications of the matters of appeal found in section 25 of the bankrupt act. Nevertheless as was determined by us in the case of *In re Worcester County*, 4 Am. B. R. 496, 102 Fed. 808, the fact that an appeal was taken and a petition also filed, does not defeat the right of the party moving this court to have the merits of the controversy adjudicated by us. They do not neutralize each other and the only result is that the appeal must be dismissed, while the court must proceed to the adjudication of the merits in the matter of the petition, which petition on the record before us involves only a matter of law, as required by section 24-b of the bankrupt act."

22. *Merchants-Laclede Nat. Bank v. Schade* (C. C. A., 8th Cir.), 27 Am. B. R. 687, 195 Fed. 199; *Grainger & Co. v. Riley* (C. C. A., 6th Cir.), 29 Am. B. R. 114, 201 Fed. 902.

23. *In re Whitener* (C. C. A., 5th Cir.), 5 Am. B. R. 198, 108 Fed. 180; *In re Blanch-*

an appeal is taken from an order disallowing a claim which presents only a question of law.²⁴ This can only be done where questions of law alone are involved.²⁵ Where questions of fact and law are both involved in the appeal it may not be treated as a petition to revise.²⁶ And it has been held that a writ of error which aims to correct only errors of law arising on the common law or criminal law side of the court may be treated as a petition to revise.²⁷

(5) **OBJECTION TO EXERCISE OF JURISDICTION.**—In the absence of objection, the circuit court of appeals will not decline jurisdiction of a proceeding before it on petition to revise, although the matter should have come up on appeal.²⁸ If the question as to the propriety of the remedy is not raised by the respondent the court is not bound to consider it.²⁹

ard Shingle Co. (C. C. A., 9th Cir.), 21 Am. B. R. 142, 164 Fed. 31; *In re Heacock* (C. C. A., 8th Cir.), 21 Am. B. R. 314, 164 Fed. 923, in which case a petition for review and an appeal were taken from an order summarily directing a receiver of the State court to deliver property to the trustee in bankruptcy, and the petition for review was sustained and the appeal was dismissed; *Freed v. Central Trust Co.* (C. C. A., 7th Cir.), 33 Am. B. R. 64, 215 Fed. 873.

24. Appeal treated as petition to revise.—In the case of *In re Williams' Estate* (C. C. A., 9th Cir.), 19 Am. B. R. 389, 156 Fed. 934, the court said: "The appellant and petitioner, being uncertain in respect to the proper procedure, sought and are by the court below allowed an appeal from the ruling of that court complained of, and also filed therein a petition for the revision of the same order. The two proceedings were by this court consolidated and were heard and submitted on one record. If it be conceded that the petition for revision was filed in the wrong court, the appeal, involving as it does only a question of law, may be treated as a petition for revision." *Chesapeake Shoe Co. v. Seldner* (C. C. A., 4th Cir.), 10 Am. B. R. 466, 122 Fed. 593; *In re Blair* (C. C. A., 8th Cir.), 5 Am. B. R. 793, 106 Fed. 662; *In re Jacobs* (C. C. A., 8th Cir.), 3 Am. B. R. 671, 99 Fed. 539; *In re Abraham* (C. C. A., 5th Cir.), 2 Am. B. R. 266, 93 Fed. 767; *Rode & Horn v. Phipps* (C. C. A., 6th Cir.), 27 Am. B. R. 827, 195 Fed. 414.

25. In re Blanchard Shingle Co. (C. C. A., 9th Cir.), 21 Am. B. R. 142, 164 Fed. 311.

26. Francis v. McNeal (C. C. A., 3d Cir.), 22 Am. B. R. 337, 170 Fed. 445, where it appeared that the proceeding was not confined to matters of law but turned on questions of fact, and it was held that it could not be treated as a petition to revise but if entertained at all must be as an appeal; *Steiner v. Marshall* (C. C. A., 4th Cir.), 15 Am. B. R. 486, 140 Fed. 710; *In re Whitener* (C. C. A., 5th Cir.), 5 Am. B. R. 198, 105 Fed. 180.

Consideration of evidence.—Where upon review of a judgment determining priority of liens upon the land of a bankrupt, the court is asked to consider the evidence in the record, it will dismiss the petition for

review and hear the case upon the appeal. *Hendricks v. Webster* (C. C. A., 8th Cir.), 20 Am. B. R. 112, 159 Fed. 927; *Coder v. McPherson* (C. C. A., 8th Cir.), 18 Am. B. R. 523, 152 Fed. 951, in which the trustee challenged the decree of the court below by an appeal and by a petition to revise, and the court held that as the questions at issue involved the consideration of the facts disclosed by the evidence, the case should be to revise was dismissed; *In re Dunlop* (C. C. A., 8th Cir.), 19 Am. B. R. 361, 156 Fed. 545.

27. Writ of error treated as petition to revise.—In the case of *Freed v. Central Trust Co.* (C. C. A., 7th Cir.), 33 Am. B. R. 64, 215 Fed. 873, a writ of error issued for the review of an order adjudging a person in contempt for failing to turn over assets to the bankrupt's trustee; it was held that the order was not reviewable by writ of error or by appeal, but was reviewable by petition. The court said: "If then, an appeal which, as applied to bankruptcy proceedings, aims to correct errors both of law and of fact arising on the equity side of the bankruptcy court (Bankruptcy Act, § 25a), may be treated as a petition to revise which aims to correct only errors of law so arising (section 24b), a writ of error which aims to correct only errors of law arising on the common law or criminal law side of the court may, in our judgment, be similarly dealt with. While the writ and the petition differ in form, in substance they are similar; both begin new proceedings in this court to accomplish substantially the same end. Especially in contempt cases incident to bankruptcy proceedings should a liberal practice in this respect be adopted, in view of the uncertainty that so long prevailed in distinguishing between cases of civil contempt, properly reviewable in bankruptcy proceedings by petition to revise, and criminal contempt, reviewable only by writ of error. *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874. The motion to dismiss the writ will be denied, and the case will be dealt with as if the petition to revise had been filed when the writ of error issued."

28. In re Stroum (C. C. A., 1st Cir.), 27 Am. B. R. 721, 192 Fed. 762.

29. Gandia & Stubbe v. Caderno (C. C. A., 1st Cir.), 36 Am. B. R. 789, 233 Fed. 739.

e. Questions of law only considered.—The supervisory power to review only extends to questions of law. If the petition does not present a matter of law it will not be entertained.³⁰ If questions of fact are alone raised by the petition, the petition should be denied.³¹ As indicated above, an appeal which involves only a question of law may be treated as a petition for revision.³² It was intended by conferring this power of revision to provide a summary method for revising orders and decisions of courts of bankruptcy upon questions of law, and the section does not contemplate any review of facts,³³ except as may be necessary to ascertain whether the order is wholly unsupported by the evidence, is contrary to law, a clear mistake, or generally for any reason for which evidence may be reviewed on writ of error.³⁴ The decision of the court below, on disputed or conflicting facts, as for instance where a determination is made upon testimony presented as to the valuation of property that the sale of such property would be beneficial to the bankrupt estate, is not review-

30. In re Carley (C. C. A., 3d Cir.), 8 Am. B. R. 720, 117 Fed. 130; In re Rosser (C. C. A., 8th Cir.), 4 Am. B. R. 153, 101 Fed. 562; In re Lesser (C. C. A., 2d Cir.), 3 Am. B. R. 758, 99 Fed. 913; Mulford v. Fourth St. Nat'l Bank (C. C. A., 3d Cir.), 19 Am. B. R. 742, 157 Fed. 897, holding that a petition to review an order of a district judge refusing, in the exercise of judicial discretions to approve a certain agreement between the trustees and preferred creditors did not present a "matter of law," In re Blanchard Shingle Co. (C. C. A., 9th Cir.), 21 Am. B. R. 142, 164 Fed. 311; Lesaius v. Goodman (C. C. A., 3d Cir.), 21 Am. B. R. 446, 165 Fed. 889; In re Leech (C. C. A., 6th Cir.), 22 Am. B. R. 599, 171 Fed. 622; B-R Electric & Telephone Mfg. Co. v. Aetna Life Ins. Co. (C. C. A., 8th Cir.), 30 Am. B. R. 424, 208 Fed. 885; Kinkead v. Bacon & Sons (C. C. A., 6th Cir.), 36 Am. B. R. 390, 230 Fed. 362; Olmsted-Stevenson Co. v. Miller (C. C. A., 9th Cir.), 36 Am. B. R. 816, 231 Fed. 69; Whitla & Nelson v. Boyd (C. C. A., 9th Cir.), 32 Am. B. R. 469, 213 Fed. 587 (affg. 30 Am. B. R. 749); Matter of Martin (C. C. A., 3d Cir.), 32 Am. B. R. 29, 210 Fed. 620.

31. Hall v. Reynolds (C. C. A., 8th Cir.), 34 Am. B. R. 707, 224 Fed. 103, holding that where on a petition to revise an order of the District Court affirming an order of the referee making allowance to attorneys, the only questions involved are as to the reasonableness of the allowance, the petition should be denied.

32. In re Williams' Estate (C. C. A., 9th Cir.), 19 Am. B. R. 389, 156 Fed. 934.

33. In re Grassler (C. C. A., 9th Cir.), 18 Am. B. R. 694, 154 Fed. 478; In re Eggert (C. C. A., 7th Cir.), 4 Am. B. R. 449, 102 Fed. 735; Kenova Loan & Trust Co. v. Graham (C. C. A., 4th Cir.), 14 Am. B. R. 313, 135 Fed. 717; Good v. Kane (C. C. A., 8th Cir.), 32 Am. B. R. 19, 211 Fed. 956.

Questions of law.—In the case of In re Frank (C. C. A., 8th Cir.), 25 Am. B. R. 486, 182 Fed. 794, the court said: "A petition to revise under section 24-b can properly present for determination only questions of law, and not doubtful or disputed questions of fact. But when facts are agreed upon or are proven or admitted that leave nothing for determination but their legal import, such a determination of them by the court of bankruptcy may be reviewed upon a petition to revise. But the review of decisions which require the consideration of conflicting evidence or evidence though not conflicting from which different deductions or conclusions may reasonably be drawn, may not be reviewed upon a petition to revise but upon appeal only."

Matter of Hayes (C. C. A., 6th Cir.), 24 Am. B. R. 691, 179 Fed. 222, in which the court was asked to reverse findings of fact made by a referee, and affirmed by the district court, as to the right of an assignee for the benefit of creditors to an allowance for compensation and disbursements and the court said: "But in a proceeding to revise under section 24-b, this court is limited to a review in matters of law, and only questions of law arising out of the facts found or conceded can be considered. We cannot determine questions of fact involved in the finding or order sought to be reviewed." See also In re Taft (C. C. A., 6th Cir.), 13 Am. B. R. 417, 113 Fed. 511, 66 C. C. A. 385; In re Throckmorton (C. C. A., 6th Cir.), 17 Am. B. R. 856, 149 Fed. 145, 79 C. C. A. 15; In re Smith (C. C. A., 6th Cir.), 29 Am. B. R. 628, 203 Fed. 369.

34. Shea v. Lewis (C. C. A., 8th Cir.), 30 Am. B. R. 436, 206 Fed. 877; Good v. Kane (C. C. A., 8th Cir.), 32 Am. B. R. 19, 211 Fed. 956, holding that whether or not there was any substantial evidence to sustain a decision is a question of law, which may be considered upon a petition to revise.

able on a petition.³⁵ There is no exception to the rule that on petitions for revision, only legal questions may be determined.³⁶ Where the facts are not in dispute a petition for revision should be entertained, as the question remaining must be one of law.³⁷ If the facts are admitted or agreed upon, so that nothing is left for determination but their legal import, such a determination may be reviewed upon petition to revise.³⁸

f. What may be reviewed by petition.—(1) **IN GENERAL.**—Any final or interlocutory order in bankruptcy proceedings, in matter of law, may be reviewed by petition.³⁹ This method is that usually adopted when a party claims to be aggrieved because of an injunction⁴⁰ or summary order,⁴¹ or where an appeal will not lie under the terms of § 25-a. It will not be possible nor useful to cite all the precedents on this question; they are already so numerous and cover so wide a field as to make the formulation of any number

35. *Clark Hardware Co. v. Sauve* (C. C. A., 8th Cir.), 33 Am. B. R. 674, 220 Fed. 102; *Good v. Kane* (C. C. A., 8th Cir.), 32 Am. B. R. 19, 211 Fed. 956; *Kirsner v. Taliaferro* (C. C. A., 4th Cir.), 29 Am. B. R. 832, 202 Fed. 51; *Matter of Hays* (C. C. A., 6th Cir.), 24 Am. B. R. 691, 179 Fed. 222; *Schuler v. Hassinger* (C. C. A., 5th Cir.), 24 Am. B. R. 184, 177 Fed. 19; *Elliott v. Toepfner*, 187 U. S. 327, 9 Am. B. R. 5^c 47 L. Ed. 200.

36. *Samuel v. Dodd* (C. C. A., 5th Cir.), 16 Am. B. R. 163, 142 Fed. 68, and cases cited; *Kenova Loan & Trust Co. v. Graham* (C. C. A., 4th Cir.), 14 Am. B. R. 313, 135 Fed. 717; *Dickas v. Barnes* (C. C. A., 6th Cir.), 15 Am. B. R. 566, 140 Fed. 849; *Ryan v. Hendricks* (C. C. A., 7th Cir.), 21 Am. B. R. 570, 166 Fed. 94; *In re Leech* (C. C. A., 6th Cir.), 22 Am. B. R. 599, 171 Fed. 622; *Landry v. San Antonio Brewing Ass'n* (C. C. A., 5th Cir.), 20 Am. B. R. 226, 159 Fed. 700; *Lesaius v. Goodman* (C. C. A., 3d Cir.), 21 Am. B. R. 446, 165 Fed. 889; *Ross v. Stroh* (C. C. A., 3d Cir.), 21 Am. B. R. 644, 165 Fed. 628; *In re Leech* (C. C. A., 6th Cir.), 22 Am. B. R. 599, 171 Fed. 622; *In re Baum* (C. C. A., 8th Cir.), 22 Am. B. R. 295, 169 Fed. 410, holding that where the record upon a petition to revise an order that a bankrupt pay into a court a certain amount in cash, does not contain the evidence taken before the referee, it will be presumed that the facts were sufficient to sustain his finding and order, and only matters of law apparent upon the face of the record may be considered; *In re Irwin* (C. C. A., 3d Cir.), 23 Am. B. R. 487, 174 Fed. 642, holding that upon a petition to revise, only questions of law can be considered, and the findings of fact of the court below cannot be disturbed; *Matter of Hays* (C. C. A., 6th Cir.), 24 Am. B. R. 691, 179 Fed. 222; *In re Lee* (C. C. A., 8th Cir.), 25 Am. B. R. 436, 182 Fed. 579; *Williamson v. Richardson* (C. C. A., 9th Cir.), 30 Am. B. R. 559, 205 Fed. 245; *In re Witherbee* (C. C. A., 1st Cir.), 30 Am. B. R. 314, 202 Fed. 896; *In re Roger, Brown*

& Co. (C. C. A., 8th Cir.), 28 Am. B. R. 336, 196 Fed. 758; *In re Zinner* (C. C. A., 7th Cir.), 29 Am. B. R. 860, 201 Fed. 197; *In re Blum* (C. C. A., 8th Cir.), 29 Am. B. R. 332, 202 Fed. 883; *Stuart v. Reynolds* (C. C. A., 6th Cir.), 29 Am. B. R. 412, 204 Fed. 709; *In re Smith* (C. C. A., 6th Cir.), 29 Am. B. R. 628, 203 Fed. 369; *Hall v. Reynolds* (C. C. A., 8th Cir.), 34 Am. B. R. 707, 224 Fed. 103.

37. *Hutchinson v. LeRoy* (C. C. A., 1st Cir.), 8 Am. B. R. 20, 113 Fed. 209; *In re Witherbee* (C. C. A., 1st Cir.), 30 Am. B. R. 314, 202 Fed. 896; *In re Haring* (C. C. A., 6th Cir.), 29 Am. B. R. 387, 203 Fed. 229 (affg. 27 Am. B. R. 285, 193 Fed. 168), holding that upon a petition for revision, only questions of law can be determined; and such questions must arise out of the facts found by the court below or admitted by the parties.

38. *Matter of Sully & Co.* (C. C. A., 2d Cir.), 18 Am. B. R. 124, 152 Fed. 619; *In re Lee* (C. C. A., 8th Cir.), 25 Am. B. R. 436, 182 Fed. 579; *In re Franl.* (C. C. A., 8th Cir.), 25 Am. B. R. 486, 182 Fed. 794; *In re Judkins Co.* (C. C. A., 1st Cir.), 30 Am. B. R. 529, 205 Fed. 892; *In re Knosher & Co.* (C. C. A., 9th Cir.), 28 Am. B. R. 747, 197 Fed. 136; *In re Witherbee* (C. C. A., 1st Cir.), 30 Am. B. R. 314, 202 Fed. 896; *In re Haring* (C. C. A., 6th Cir.), 29 Am. B. R. 387, 203 Fed. 229.

39. *Scott & Co. v. Wilson* (C. C. A., 7th Cir.), 8 Am. B. R. 349, 115 Fed. 284; *Courier-Journal Printing Co. v. Schaefer-Meyer Brewing Co.* (C. C. A., 6th Cir.), 4 Am. B. R. 183, 101 Fed. 699.

40. *Davis v. Bohle* (C. C. A., 8th Cir.), 1 Am. B. R. 412, 92 Fed. 325; *In re Kenney* (D. C., N. Y.), 3 Am. B. R. 353, 97 Fed. 554.

41. *In re Abraham* (C. C. A., 5th Cir.), 2 Am. B. R. 266, 93 Fed. 767; *In re Purvine* (C. C. A., 5th Cir.), 2 Am. B. R. 787, 96 Fed. 192; *In re Francis Valentine Co.* (C. C. A., 9th Cir.), 2 Am. B. R. 522, 94 Fed. 793, 98 Fed. 414; *Fisher v. Cushman*

of safe rules impossible. The consensus of opinion is to the effect that the power of the appellate court to review by original petition the rulings of the bankruptcy court extends only to orders made in the bankruptcy proceedings proper and does not embrace proceedings in suits by the trustee in bankruptcy.⁴²

(2) OBJECT AND CHARACTER OF PROCEEDINGS.—In determining the question of remedy the appellate court is to be governed by the object and character of the proceeding.⁴³ It becomes essential therefore to determine in each individual case whether the order or decree sought to be reviewed is in the bankruptcy proceedings and not independent thereof, or is a controversy arising in such proceedings and entirely independent thereof. This distinction and its effect upon the power to review by petition has been frequently recognized,⁴⁴ and its bearing upon the nature of the remedy for a review of such order or decree has given rise to the numerous cases in which it has been discussed or commented upon.⁴⁵

(3) ORDERS OR DECREES IN BANKRUPTCY PROCEEDING.—(I) *In general*.—Bearing in mind the provisions of § 24-b which in effect confers jurisdiction upon circuit courts of appeal “to superintend and revise in matter of law the proceedings” of courts of bankruptcy, it becomes apparent that the exercise of the jurisdiction to revise on petition will depend on whether or not the order or decree was granted by the bankruptcy court in the bankruptcy proceeding. Under such subsection the jurisdiction may be either interlocutory or final; but the appellate court is not required to revise every interlocutory order in a bankruptcy proceeding regardless of its nature or scope; a certain degree of definiteness or finality may be insisted upon.⁴⁶ There must be a certain degree of finality to the orders sought to be reviewed; if every order were reviewable as of right, the proceedings could easily be so tied up and prolonged that the situation would become intolerable.⁴⁷ And if the order or decree is not prejudicial to the rights of the petitioners, it need not be revised, although erroneous.⁴⁸ Where the merits of any adverse claim are summarily adjudicated, the

(C. C. A., 1st Cir.), 4 Am. B. R. 646, 103 Fed. 860; *In re Seebold* (C. C. A., 5th Cir.), 5 Am. B. R. 358, 105 Fed. 910.

42. *In re Antigo Screen Door Co.* (C. C. A., 7th Cir.), 10 Am. B. R. 359, 123 Fed. 249; *First National Bank v. Chicago Title & Trust Co.*, 198 U. S. 280, 14 Am. B. R. 102, 49 L. Ed. 1051; *Thomas v. Wood* (C. C. A., 8th Cir.), 23 Am. B. R. 132, 173 Fed. 585; *Southern Cotton Oil Co. v. Elliotte* (C. C. A., 6th Cir.), 33 Am. B. R. 375, 218 Fed. 567.

By controversies arising in bankruptcy proceedings is meant those independent or plenary suits which concern the bankrupt's estate and arise by intervention or otherwise between the trustee representing the bankrupt's estate and claimants asserting some right or interest adverse to the bankrupt or his general creditors. *In re Mueller* (C. C. A., 6th Cir.), 14 Am. B. R. 256, 135 Fed. 711; *In re Farrell* (C. C. A., 6th Cir.), 23 Am. B. R. 826, 176 Fed. 505; *Morehouse v. Pacific Hardware, etc., Co.* (C. C. A., 9th Cir.), 24 Am. B. R. 178, 177 Fed. 337; *Matter of Loving*, 224 U. S. 183, 27 Am. B. R. 852, 56 L. Ed. 725; *In re Hamilton Automobile Co.* (C. C. A., 7th Cir.), 29 Am. B. R. 163, 198 Fed. 856.

43. *In re Farrell* (C. C. A., 6th Cir.), 23 Am. B. R. 826, 176 Fed. 505; *Coder v. Arts* (Sup. Ct.), 213 U. S. 223, 22 Am. B. R. 1, 53 L. Ed. 772; *Matter of Lane Lumber Co.* (C. C. A., 9th Cir.), 33 Am. B. R. 497, 217 Fed. 546.

44. *Holden v. Stratton*, 191 U. S. 115, 10 Am. B. R. 786, 48 L. Ed. 116; *Hutchinson v. Otis*, 190 U. S. 552, 10 Am. B. R. 135, 47 L. Ed. 1179; *First Nat'l Bank of Chicago v. Chicago Title & Trust Co.*, 198 U. S. 280, 14 Am. B. R. 102, 49 L. Ed. 1051, holding that a summary proceeding against one in possession of assets alleged to be a part of a bankrupt estate is a proceeding in bankruptcy and the jurisdiction of the Circuit Court of Appeals is confined to revision of the decree.

45. See cases cited under § 24, “*c. Controversies arising in bankruptcy proceedings*,” ante.

46. *Matter of Chatiner* (C. C. A., 3d Cir.), 33 Am. B. R. 288, 218 Fed. 813.

47. *Matter of Pechin* (C. C. A., 3d Cir.), 35 Am. B. R. 738, 227 Fed. 853.

48. *Lazarus, Michel & Lazarus v. Harding* (C. C. A., 5th Cir.), 35 Am. B. R. 271, 223 Fed. 50; *In re Boston Dry Goods Co.* (C.

order may be reviewed on petition.⁴⁹ A petition to review will not usually be allowed where the granting of the order was discretionary,⁵⁰ or where the rights of the petitioning party were not affected by the order complained of.⁵¹ An action upon a trustee's bond is not a proceeding in bankruptcy, but an ordinary action at law, and the action of the District Court in sustaining a demurrer to plaintiff's petition is not reviewable by petition to revise.⁵²

(II) *Claims as to funds in possession of court.*—Orders determining the rights of claimants to a fund in the possession of a bankruptcy court are being administered by it in the course of bankruptcy proceedings and are reviewable by petition.⁵³ If the proceedings pertain to the ownership of property in the possession of the trustee, claimed by a person not a party to the bankruptcy, and is summarily disposed of by the court or referee, it is reviewable on petition to revise.⁵⁴ The decision of a district court exercising ancillary jurisdiction in bankruptcy that it has no jurisdiction to determine whether the proceeds of goods it seizes and sells as the property of the bankrupt are the property of the bankrupt estate or the property of adverse claimants, is reviewable on petition.⁵⁵

(III) *Lien on bankrupt's property.*—Where a lien is asserted on property included in the bankrupt's estate, the order determining the right to such lien is subject to revision on petition;⁵⁶ and so also as to a decision as to the validity of a trust deed executed by the bankrupt within the four months' period,⁵⁷

C. A., 1st Cir.), 11 Am. B. R. 97, 25 Fed. 226.

49. *Shea v. Lewis* (C. C. A., 8th Cir.), 30 Am. B. R. 436, 206 Fed. 877.

50. *Mulford v. Fourth St. Nat'l Bank* (C. C. A., 3d Cir.), 19 Am. B. R. 742, 157 Fed. 897; *In re Lesser* (C. C. A., 2d Cir.), 3 Am. B. R. 758, 99 Fed. 913; *Ex parte Perkins*, Fed. Cas. 10,982. This is not so when the exercise of the discretion involves a substantial legal right. *In re Carley* (C. C. A., 3d Cir.), 8 Am. B. R. 720, 117 Fed. 130; *Clark Hardware Co. v. Sauve* (C. C. A., 8th Cir.), 33 Am. B. R. 674, 220 Fed. 102; *Matter of Chotiner* (C. C. A., 3d Cir.), 33 Am. B. R. 288, 218 Fed. 813.

51. *In re Madden* (C. C. A., 2d Cir.), 6 Am. B. R. 614, 110 Fed. 348; *Fisher v. Cushman* (C. C. A., 1st Cir.), 4 Am. B. R. 646, 103 Fed. 860; *In re Rosser* (C. C. A., 8th Cir.), 4 Am. B. R. 153, 101 Fed. 562.

52. *United States v. Ruggles* (C. C. A., 6th Cir.), 34 Am. B. R. 91, 221 Fed. 256.

53. *In re Antigo Screen Door Co.* (C. C. A., 7th Cir.), 10 Am. B. R. 359, 123 Fed. 249, and cases cited; *Samel v. Dodd* (C. C. A., 5th Cir.), 16 Am. B. R. 163, 142 Fed. 68. But see *Coder v. Arts*, 213 U. S. 223, 22 Am. B. R. 1, 53 L. Ed. 772, holding that where a creditor asserts a lien upon property in the possession of a trustee and asks that such lien be declared valid, the decision of the court is appealable; *Rode & Horn v. Phipps* (C. C. A., 6th Cir.), 27 Am. B. R. 827, 195 Fed. 414. See cases digested in Am. Bankr. Dig. § 1250.

Question of jurisdiction.—The question whether the District Court erroneously ex-

ercised jurisdiction to determine the merits of an adverse claim to property is a question of a bankruptcy proceeding, and is reviewable by a petition to revise. *Gibbons v. Goldsmith* (C. C. A., 9th Cir.), 35 Am. B. R. 40, 222 Fed. 826.

Claims to property in possession of receiver.—An order determining the right of various claimants to property in the hands of a receiver is reviewable by a petition to revise. *Matter of Pierson and Fell* (C. C. A., 2d Cir.), 37 Am. B. R. 10, 233 Fed. 519.

54. *Matter of Petronio* (C. C. A., 7th Cir.), 34 Am. B. R. 470, 220 Fed. 269; *In re Goldstein and Moseson* (C. C. A., 7th Cir.), 32 Am. B. R. 802, 216 Fed. 887.

55. *Fidelity Trust Co. v. Gaskell* (C. C. A., 8th Cir.), 28 Am. B. R. 4, 195 Fed. 865.

56. *Coder v. Arts*, 213 U. S. 223, 22 Am. B. R. 1, 53 L. Ed. 772, in which the court recognized the propriety of a resort to a petition to superintend and revise when claimant complains of the court's determination as to the validity of a lien asserted upon property in the hands of the bankrupt's trustee; *Radford Grocery Co. v. Powell* (C. C. A., 5th Cir.), 35 Am. B. R. 790, 227 Fed. 853; *Huttig Sash & Door Co. v. Stitt* (C. C. A., 5th Cir.), 33 Am. B. R. 251, 218 Fed. 1.

57. *Moore v. Green* (C. C. A., 4th Cir.), 16 Am. B. R. 648, 145 Fed. 480; *In re McMahon* (C. C. A., 6th Cir.), 17 Am. B. R. 530, 147 Fed. 684.

Decision as to validity of trust deed.—In the case of *Morgan v. First Nat. Bank* (C. C. A., 1st Cir.), 16 Am. B. R. 639, 145 Fed. 466, it was sought to review a decision of the bankruptcy court as to the valid-

and a decision involving a widow's right of dower in the estate of the bankrupt.⁵⁸ A decision involving the validity of the claim of a creditor to a lien upon the property of the bankrupt, or its proceeds,⁵⁹ under administration in possession of the court, is reviewable in matter of law upon a petition to revise.⁶⁰ Where the question is as to the validity of a chattel mortgage under which the mortgagee claims priority, there being no contest as to the facts, it is one of law and is properly reviewable on petition to revise.⁶¹

(IV) *Administrative orders.*—An order refusing to vacate an adjudication in bankruptcy is reviewable only on petition, as an administrative order.⁶² And so also is any interlocutory order pertaining to the rights of parties in the proceedings, relating to the several pleadings or granting or denying applications made in the due course of the proceedings;⁶³ and likewise an order granting or refusing to grant leave to a party to intervene for the purpose of contesting the grounds upon which an adjudication in an involuntary bankruptcy proceeding is sought.⁶⁴ An order directing the bankrupt to turn over to his trustee certain property and committing him to prison until he does so, is an order made in a proceeding in bankruptcy and is only reviewable by petition.⁶⁵

(V) *Sale and distribution of property.*—Orders or proceedings for the sale and disposition of the bankrupt's effects are regular steps or proceedings in

ity of a trust deed, executed by the bankrupt upon its property within the four months' period. The court said: "The deed is not disputed, and the point sought to be reviewed is one of law, arising upon a determination of the validity of a trust deed executed by the bankrupt company, within four months of the institution of bankruptcy proceedings, and hence belongs clearly to the class of cases made subject to review by this court, under its general power to 'superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy.'" See also *Ritchie County Bank v. McFarland* (C. C. A., 4th Cir.), 24 Am. B. R. 893, 183 Fed. 715, affg. 23 Am. B. R. 530, 174 Fed. 859.

58. *In re McKenzie* (C. C. A., 8th Cir.), 15 Am. B. R. 679, 142 Fed. 383.

59. Dispute as to right to participate in proceeds of security.—The phrase "controversy arising in bankruptcy proceedings" should be limited to cases where third parties claim not in and under the administration of a bankrupt's estate, but, on the contrary, assert some right hostile to the title of the trustee or going to the right of the court to administer the particular estate in the bankruptcy case. Hence, where there is a dispute between the holders of claims already proven in the bankruptcy proceeding proper, as to their respective rights to participate in the proceeds of an admittedly valid security, which are in the possession of the bankruptcy court for administration, so that the apportionment thereof is strictly and properly a part of the bankruptcy proceedings, the case comes within the category

of "proceedings in bankruptcy" and is not a "controversy arising in bankruptcy proceedings," and is reviewable by petition to revise. *Snow v. Dalton* (C. C. A., 4th Cir.), 29 Am. B. R. 240, 203 Fed. 843.

60. *In re Lee* (C. C. A., 8th Cir.), 25 Am. B. R. 436, 182 Fed. 579.

61. *In re Flatland* (C. C. A., 9th Cir.), 28 Am. B. R. 476, 196 Fed. 310.

62. *Brady v. Bernard & Kittenger* (C. C. A., 6th Cir.), 22 Am. B. R. 342, 170 Fed. 576; *B-R. Electric Co. v. Aetna Life Ins. Co.* (C. C. A., 8th Cir.), 30 Am. B. R. 424, 206 Fed. 885; *Mätter of Vanoscope Co.* (C. C. A., 2d Cir.), 36 Am. B. R. 778, 233 Fed. 53; *Hart-Parr Co. v. Barkley* (C. C. A., 8th Cir.), 36 Am. B. R. 540, 231 Fed. 913.

63. *Clark v. Pidcock* (C. C. A., 3d Cir.), 12 Arr. B. R. 309, 129 Fed. 745, holding that an order refusing an injunction restraining the further disposition of the bankrupt's assets is reviewable; *In re Groetzinger & Sons* (C. C. A., 3d Cir.), 11 Am. B. R. 467, 127 Fed. 124; *In re Ives* (C. C. A., 6th Cir.), 7 Am. B. R. 692, 113 Fed. 911, holding that an order sustaining a demurrer to a petition filed for the purpose of vacating an adjudication is reviewable on petition.

64. *Ogden & Jamison v. Gilt Edge Mines Co.* (C. C. A., 8th Cir.) 34 Am. B. R. 893, 225 Fed. 723.

65. *Kirsner v. Taliaferro* (C. C. A., 4th Cir.), 29 Am. B. R. 832, 202 Fed. 51; *Mätter of Shidlovsky* (C. C. A., 2d Cir.), 34 Am. B. R. 861, 224 Fed. 450; *Freed v. Central Trust Co.* (C. C. A., 7th Cir.), 33 Am. B. R. 64, 215 Fed. 873.

bankruptcy and are reviewable only on petition.⁶⁶ Such are orders summarily disposing of assets of the bankrupt.⁶⁷ But an order by a district judge reversing an order of a referee that confirmed a sale of the bankrupt's property, thus leaving the property still in the hands of the trustee, is not reviewable.⁶⁸ An order denying the right of partnership creditors to participate in the assets of an individual partner until his individual creditors had been first paid is reviewable upon a petition.⁶⁹

(VI) *Exemption claims.*—An order confirming an order of a referee granting or denying a claim to certain exemptions asserted by the bankrupt may be reviewed upon a petition to revise,⁷⁰ and such an order not being "a final decision, allowing or rejecting a claim," within the intent and meaning of subsection *a*, is not reviewable on appeal.⁷¹ If a determination by the court in respect to the bankrupt's claim of an exemption under a State statute is made in the course of the bankruptcy proceedings it is reviewable on petition.⁷²

(VII) *Claims of creditors generally.*—Ordinarily an order allowing a claim is not reviewable on petition. But where the petition in bankruptcy was because of the claim, and the proceedings are actually dependent upon the validity of such claim, the court may, in reviewing an order confirming the sale of a homestead, review the order allowing the claim.⁷³ An order setting aside the allowance of a secured claim, and requiring the creditor to surrender to the trustee a preferential payment is reviewable on petition.⁷⁴

(VIII) *Allowance of fees and expenses.*—An order confirming a referee's disallowance of a creditor's claim for attorney's fees and expenses incurred in contesting claims and in proceedings to recover assets is reviewable on petition.⁷⁵ An order making an allowance for counsel fees and other expenses incurred by the trustee in the realization of the assets of the estate, is within the supervisory jurisdiction of the circuit court of appeals.⁷⁶

66. *Schuler v. Hassinger* (C. C. A., 5th Cir.), 24 Am. B. R. 184, 177 Fed. 119. An order of the District Court affirming an order of a referee in bankruptcy, holding that a bidder at an auction sale of the assets obtained no legal rights thereby, constitutes an ordinary step in the bankruptcy proceeding, and no appeal lies therefrom. *Unteriner v. Camors* (C. C. A., 8th Cir.), 36 Am. B. R. 122, 228 Fed. 890.

67. *In re Farrell* (C. C. A., 6th Cir.), 23 Am. B. R. 826, 176 Fed. 505.

Order disposing of assets of bankrupt.—In the case of *Schweer v. Brown*, 195 U. S. 171, 12 Am. B. R. 673, 49 L. Ed. 144, it was held that the district court has jurisdiction to determine whether an adverse claim to money alleged to be part of the assets of a bankrupt's estate was asserted at the time the petition in bankruptcy was filed, and if the court errs in retaining jurisdiction on the merits, the remedy is by petition to the Circuit Court of Appeals, under § 24-b.

68. *Matter of Chatiner* (C. C. A., 3d Cir.), 33 Am. B. R. 288, 218 Fed. 813.

69. *Euclid Nat'l Bank v. Union Trust Co.* (C. C. A., 4th Cir.), 17 Am. B. R. 834, 149 Fed. 975; *In re Mertens* (C. C. A., 2d Cir.), 15 Am. B. R. 701, 142 Fed. 445, holding that an order adjudging that certain policies of insurance upon the life of a member

of a bankrupt firm passed to the trustee and directing that they be turned over as assets of the estate, is a mere step in the bankruptcy proceeding and reviewable only on petition to revise.

70. *In re Youngstrom* (C. C. A., 8th Cir.), 18 Am. B. R. 572, 153 Fed. 98; *Steiner v. Marshall* (C. C. A., 4th Cir.), 15 Am. B. R. 486, 140 Fed. 710.

71. *Holden v. Stratton*, 191 U. S. 115, 10 Am. B. R. 786, 48 L. Ed. 116.

72. *Ingram v. Wilson* (C. C. A., 8th Cir.), 11 Am. B. R. 192, 125 Fed. 913; *Duncan v. Ferguson-McKinney Co.* (C. C. A., 5th Cir.), 18 Am. B. R. 155, 150 Fed. 269.

73. *Matter of Pindel* (C. C. A., 9th Cir.), 34 Am. B. R. 600, 221 Fed. 342.

74. *In re First National Bank of Louisville* (C. C. A., 6th Cir.), 18 Am. B. R. 766, 155 Fed. 100; *Mulford v. Fourth Street National Bank* (C. C. A., 3d Cir.), 19 Am. B. R. 742, 157 Fed. 897.

75. *Ohio Valley Bank Co. v. Switzer* (C. C. A., 6th Cir.), 18 Am. B. R. 689, 153 Fed. 362. See also *Davidson & Co. v. Friedman* (C. C. A., 6th Cir.), 15 Am. B. R. 489, 140 Fed. 853, holding that an order allowing the expenses incurred by a trustee for counsel fees in realization of assets is reviewable by petition.

(IX) *Proceedings for discharge*.—It has been held that an order denying a motion to dismiss a bankrupt's application for a discharge, where the facts were undisputed, was reviewable on petition.⁷⁷ An order refusing to allow specifications of objections to the discharge of the bankrupt to be filed or amended may be revised,⁷⁸ but where an amendment is permitted, the order is not of sufficient finality to admit of revision.⁷⁹

g. Practice.—(1) **IN GENERAL.**—The General Orders and Forms are silent as to the practice on petitions to review in matter of law.⁸⁰ The petition should be presented by a party having a substantial interest in the controversy,⁸¹ and usually entitled in, addressed to and filed with the clerk of, the proper circuit court of appeals. If more convenient, it may also be addressed to and filed with the clerk of the court appealed from.⁸²

(2) **WHAT TO RECITE; RECORD.**—It should recite the proceedings below, state specifically the question of law involved and the ruling of the district court thereon, and be accompanied by a certified copy of so much of the record as will show the issue of law and how it arose.⁸³ If it does not, the court may dismiss, with leave to supplement, or may suspend consideration until the record is completed.⁸⁴ If the record does not contain the evidence

Where objections to a trustee's account, seeking to charge him with assets coming into his possession, but not accounted for, raise questions which the bankrupt may summarily determine, its decision thereon is reviewable only upon a petition for review. *In re Moore & Bridgman* (C. C. A., 5th Cir.), 21 Am. B. R. 651, 166 Fed. 689.

76. *Davidson & Co. v. Friedman* (C. C. A., 6th Cir.), 15 Am. B. R. 489, 140 Fed. 853, in which it was held that an order allowing the expenses incurred by a trustee for counsel fees in the realization of assets is reviewable only by petition for review; *Ohio Valley Bank Co. v. Switzer* (C. C. A., 6th Cir.), 18 Am. B. R. 689, 153 Fed. 362.

77. *Lindeke v. Converse* (C. C. A., 8th Cir.), 28 Am. B. R. 596, 198 Fed. 618.

78. *In re Carley* (C. C. A., 3d Cir.), 8 Am. B. R. 720, 117 Fed. 130; *Goodman v. Curtis* (C. C. A., 5th Cir.), 23 Am. B. R. 504, 174 Fed. 644; *Matter of Pechin* (C. C. A., 3d Cir.), 35 Am. B. R. 738, 227 Fed. 853.

79. *Matter of Chotiner* (C. C. A., 3d Cir.), 33 Am. B. R. 288, 218 Fed. 813; *Matter of Pechin* (C. C. A., 3d Cir.), 35 Am. B. R. 738, 227 Fed. 853.

80. See, however, rules in the First Circuit, 94 Fed., pp. 3, 4; and in the Fourth Circuit, 97 Fed., pp. 3, 4. See also Forms within these rules in "Supplementary Forms," *post*, and Hagar and Alexander's *Bankruptcy Forms* (2d Ed.), Forms Nos. 377-379. If the petition is filed in the first instance in the district court, it is heard by the judge *ex parte*, and is followed by an order allowing or declining allowance. If allowed, the clerk prepares, at the expense of the petitioner, a transcript of the record and certifies the same to the proper Circuit Court of Appeals. Thereafter the practice in that court is the same as that outlined in the text and the rules in the First and Fourth Circuits above referred to.

81. *In re Jemison Mercantile Co.* (C. C. A., 5th Cir.), 7 Am. B. R. 588, 112 Fed. 966; *In re Baker* (C. C. A., 1st Cir.), 4 Am. B. R. 779, 104 Fed. 287, holding that where the petitioner has no longer any such interest the petition must be dismissed.

82. Section 24-b provides that "such power shall be exercised on due notice and petition by any party aggrieved." It contemplates that a petition shall be filed as in other cases.

83. *In re Richards* (C. C. A., 7th Cir.), 3 Am. B. R. 145, 96 Fed. 935; *In re Baker* (C. C. A., 1st Cir.), 4 Am. B. R. 778, 104 Fed. 287; *In re Reed*, Fed. Cas. 11,638; *In re Casey*, Fed. Cas. 2,495; *Steiner v. Marshall* (C. C. A., 4th Cir.), 15 Am. B. R. 486, 140 Fed. 710, 72 C. C. A. 103; *In re O'Connell* (C. C. A., 1st Cir.), 14 Am. B. R. 237, 137 Fed. 838; *In re Pettingill & Co.* (C. C. A., 1st Cir.), 14 Am. B. R. 757, 137 Fed. 840, holding that the opinion of the district judge does not take the place of a finding of facts. The certified copy can usually be filed within thirty days.

Specific questions of law to be stated.—In the case of *In re Taft* (C. C. A., 6th Cir.), 13 Am. B. R. 417, 133 Fed. 511, it was held that a petition for review should present the specific decisions of law made by the lower court, by which the petitioner deems himself aggrieved, and set forth the facts upon which such order was made. While neither the bankruptcy act nor the general orders prescribe the practice to be adopted in proceedings on revisory petitions, the matters of law of which revision is sought should in some manner be clearly presented. *Ross v. Stroh* (C. C. A., 3d Cir.), 21 Am. B. R. 644, 165 Fed. 628.

84. In the case of *Steiner v. Marshall* (C. C. A., 4th Cir.), 15 Am. B. R. 486, 140 Fed. 710, a petition to review was dismissed because of a failure to set out the finding of facts on which the matters of law sought

taken before the referee, it will be presumed that the facts were sufficient to sustain his findings, and only matters of law, apparent upon the face of the record, will be considered.⁸⁵ The petition should be accompanied by a certified copy of so much of the record as will exhibit the manner in which the question arose and its determination.⁸⁶ It has been held that if the record shows that issues of fact and law were raised, but fails to state the testimony, or settlement of facts upon which the order was predicated, the petition presents no question of law for review.⁸⁷ If the questions to be reviewed are not plainly and concisely set forth the court may, in its discretion, dismiss the petition.⁸⁸ The opinion of the district judge on review of an order of the referee, not specially made a matter of record, does not take the place of a finding of facts, although it may be referred to for the purpose of ascertaining the principle of law governing the court in making its decision, or for the general purpose of determining whether the case was decided on the facts or the law.⁸⁹

(3) **TIME OF FILING PETITION.**—The statute or the general orders do not limit the time within which a petition for review should be filed.⁹⁰ So

to be reviewed arose. *Devries v. Shanahan* (C. C. A., 4th Cir.), 10 Am. B. R. 518, 122 Fed. 629; *In re Pettingill & Co.* (C. C. A., 1st Cir.), 14 Am. B. R. 757, 137 Fed. 840, in which case the petition was dismissed because the facts were not set forth.

85. *In re Baum* (C. C. A., 8th Cir.), 22 Am. B. R. 295, 169 Fed. 410; *First State Bank of Corinth v. Haswell* (C. C. A., 8th Cir.), 23 Am. B. R. 330, 174 Fed. 209.

Only those questions of law that are fairly presented by the petition and record will be considered. *Ross v. Stroh* (C. C. A., 3d Cir.), 21 Am. B. R. 644, 165 Fed. 628.

Findings of fact by special master.—Upon petition to review in matter of law, under section 24-b of the Bankruptcy Act, an order of the bankruptcy court confirming the report of a referee sitting as special master in a proceeding to establish the ownership of a specific fund, the master's findings of fact so approved by the district judge are not brought up for review. *Matter of Caponigri* (C. C. A., 2d Cir.), 25 Am. B. R. 509, 183 Fed. 307.

86. *In re Richards* (C. C. A., 7th Cir.), 3 Am. B. R. 145, 96 Fed. 935.

Record.—A petition for review must present enough of the record in the district court to enable the Circuit Court of Appeals to perceive the issue of law which is sought to be raised. *In re Baker* (C. C. A., 1st Cir.), 4 Am. B. R. 778, 104 Fed. 287. The record should present clearly and unequivocally the issues of law presented, and in order that it may appear that such issues were presented to the court below, findings of fact which involve distinct propositions of law or something else as a substitute therefor are necessary. *In re O'Connell* (C. C. A., 1st Cir.), 14 Am. B. R. 237, 137 Fed. 838. But see *In re Witherbee* (C. C. A., 1st Cir.), 30 Am. B. R. 314, 202 Fed. 896, where the petition to revise did not allege that the error

complained of was in "matter of law," or assign any specific errors of law, but the court held that where it alleges that no proof was taken in the District Court and no opinion filed, and this is admitted by the trustee's answer, the District Court will be regarded as having denied the petition because as matter of law what is set forth did not entitle petitioner to the relief he sought.

Petition to be accompanied by transcript or findings.—The Circuit Court of Appeals upon a petition for review, unaccompanied either by a transcript of the record and proceedings had below or findings of fact, will not consider and pass upon the regularity and validity of proceedings under which lands belonging to the bankrupt were sold free from liens and the proceeds arising therefrom distributed. *In re Throckmorton* (C. C. A., 6th Cir.), 28 Am. B. R. 487, 196 Fed. 656.

87. *Hegner v. American Trust & Savings Bank* (C. C. A., 7th Cir.), 26 Am. B. R. 571, 187 Fed. 599.

88. *In re Boston Dry Goods Co.* (C. C. A., 1st Cir.), 11 Am. B. R. 97, 125 Fed. 226; *Rush v. Lake* (C. C. A., 9th Cir.), 10 Am. B. R. 455, 122 Fed. 561; *Ross v. Stroh* (C. C. A., 3d Cir.), 21 Am. B. R. 644, 165 Fed. 628.

89. *In re Pettingill & Co.* (C. C. A., 1st Cir.), 14 Am. B. R. 757, 137 Fed. 840; *Samel v. Dodd* (C. C. A., 5th Cir.), 16 Am. B. R. 163, 142 Fed. 68, holding that the opinion of the court below may be looked to for the purpose of determining in a general way the questions of law which were passed on.

90. *In re N. Y. Economical Printing Co.* (C. C. A., 2d Cir.), 5 Am. B. R. 697, 106 Fed. 839; *In re Worcester County* (C. C. A., 1st Cir.), 4 Am. B. R. 496, 102 Fed. 808; *In re Good* (C. C. A., 8th Cir.), 3 Am. B. R. 605, 99 Fed. 389.

long as the delay is not unreasonable the petition may be entertained.⁹¹ The ten-day limitation made by § 25-a on the taking of an appeal does not apply. But the necessity has been asserted of limiting the time within which such petitions may be filed to the end that a speedy determination of the bankruptcy may be brought about.⁹² In recognition of this principle it has been held that a petition to review should be filed within six months after the order or decree appealed from was granted, in analogy to the practice in circuit courts of appeals in ordinary actions.⁹³ The time within which the

91. In *re* N. Y. Economical Printing Co. (C. C. A., 2d Cir.), 5 Am. B. R. 697, 106 Fed. 839; In *re* Foss (D. C., Me.), 17 Am. B. R. 439, 147 Fed. 390. But see In *re* Worcester County (C. C. A., 1st Cir.), 4 Am. B. R. 496, 102 Fed. 808; In *re* Good (C. C. A., 8th Cir.), 3 Am. B. R. 605, 99 Fed. 389; *Littlefield v. D., H. & C. Co.*, Fed. Cas. 8,400. This, or a similar, limitation is, however, usually made by the rules of the Circuit Court of Appeals. As to reasonable excuse for delay see In *re* Groetzinger (C. C. A., 3d Cir.), 11 Am. B. R. 467, 127 Fed. 124; *Meyer Drug Co. v. Pipkin Drug Co.* (C. C. A., 5th Cir.), 14 Am. B. R. 477, 136 Fed. 396; *Crim v. Woodford* (C. C. A., 4th Cir.), 14 Am. B. R. 302, 136 Fed. 34; In *re* Holmes (C. C. A., 8th Cir.), 15 Am. B. R. 689, 142 Fed. 391.

92. Petition dismissed for failure to file order enlarging the time to file the petition within the time limited by rule 38 of the Circuit Court of Appeals, Second Circuit. In *re* Brown (C. C. A., 2d Cir.), 23 Am. B. R. 93, 174 Fed. 339.

93. Time within which petition must be filed.—In the case of In *re* Holmes (C. C. A., 8th Cir.), 15 Am. B. R. 689, 693, 142 Fed. 391, the court said: "One of the main purposes of the law was to provide a speedy method whereby a bankrupt might be finally discharged from liability to his creditors and his property might be equitably distributed among them. This object would be entirely defeated if the orders and judgments in bankruptcy were forever open, or were open for an uncertain or unknown time to revision and reversal upon petitions under § 24-b, because in that case they would never become or be known to be either final or conclusive. An uncertainty relative to the time within which such petitions may be maintained necessarily leaves the conclusiveness of the orders of the bankruptcy courts in doubt and thus tends to defeat one of the main purposes of the law. There ought, therefore, to be a well known and certain limit to the time within which such judgments and orders may be challenged in matter of law by petition as well as by appeal. A proceeding in bankruptcy is a proceeding in equity. The acts of Congress prescribed no time within which bills of review must be presented in ordinary cases in chancery and yet the rule is well settled that such bills, to correct errors apparent upon the face of the record, may not be successfully maintained unless they are

filed within the times limited for the review by appeal of the decrees they question. . . . This rule is just and salutary. It is an established rule in equity. A petition for revision, like all proceedings in bankruptcy, is a proceeding in equity, and it ought to be and is governed by this rule. A petition to revise or superintend in matter of law under § 24-b, an appealable order or judgment, may not be maintained after the time for the appeal has expired." See also In *re* Tomlinson Co. (C. C. A., 8th Cir.), 18 Am. B. R. 691, 154 Fed. 834, holding that a petition for review of an order must be filed within six months after the order was made and citing the act of March 3, 1891, ch. 517, § 11; In *re* Groetzinger & Sons (C. C. A., 3d Cir.), 11 Am. B. R. 467, 127 Fed. 124; In *re* Worcester County (C. C. A., 1st Cir.), 4 Am. B. R. 496, 102 Fed. 808, holding that as there is no statutory limitation fixing the time for review of matters arising on the face of the record, a petition for review is limited by analogy to the six months allowed by statute for taking appeals generally in the Circuit Court of Appeals. *Kenova Loan & Trust Co. v. Graham* (C. C. A., 4th Cir.), 14 Am. B. R. 313, 135 Fed. 717.

Appeal from order of distribution.—Where an action was brought by bankrupt's trustee to set aside the conveyance, and a judgment was recovered directing the trustee to hold the proceeds of a sale of the land subject to the order of the bankruptcy court, an order of the bankruptcy court, subsequently made, decreeing that such creditors were entitled to share in the fund, was an order made in a controversy arising in a bankruptcy proceeding, reviewable by an appeal taken within the six months' period prescribed by section 11 of the Circuit Court of Appeals Act, and not a judgment allowing claims, from which an appeal under section 25a of the Bankruptcy Act must be taken within ten days. In *re* Martin (C. C. A., 6th Cir.), 29 Am. B. R. 935, 201 Fed. 31.

Petition filed within reasonable time.—In the case of *Blanchard v. Ammons* (C. C. A., 9th Cir.), 25 Am. B. R. 590, 592, 183 Fed. 556, the court said: "There is no time fixed in the Bankruptcy Act within which a petition for revision shall be presented, but it is the acknowledged rule that it must be presented within a reasonable time. An appeal from the adjudication of bankruptcy is required to be taken within 10 days, and by analogy it would seem that a petition for

petition must be filed is controlled by rule in some circuits; as for instance by Rule 38 of the Rules of the Second Circuit, it is required that the petition be filed within ten days after the entry of the order. Where such a rule exists the petition must be dismissed unless filed within the prescribed time.⁹⁴

(4) OTHER MATTERS RELATING TO PRACTICE.—If not regulated by the rules of the appellate court, the analogies of the statute and general orders suggest that the petition be signed and verified by the party aggrieved, and not by his attorney. On filing, "due notice" to the opposite party is required,⁹⁵ and the case is proceeded with in accordance with the rules and practice of the court;⁹⁶ the respondent answering, and argument being had with or without briefs. The decision of the circuit court of appeals on such a review is not in turn appealable,⁹⁷ but can be transferred to the Supreme Court on certiorari.⁹⁸ Such a petition for revision does not remove the case or that portion of it on review to the highest court, and if, while there pending, the respondent below dismisses it, he should pay the costs of the review.⁹⁹ Nor should it be dismissed for lack of parties, where the missing parties were represented below by the trustee who is a party in the appellate court.¹⁰⁰ Whether a petition can be filed asking revision of the order of the district court of a territory is yet a question.¹⁰¹ If the district court is not within the territorial jurisdiction of any circuit court of appeals, it seems that it cannot, though superintendence may perhaps be had in

revision of the adjudication of bankruptcy ought to be taken within a similar time, unless there are circumstances excusing delay. But the courts have generally held that a petition for revision must be presented within six months. There are no circumstances which excuse the delay in this case. All the rights of the petitioners were determined on December 19, 1905. If the petitioners were aware that their petition as stockholders had not been specifically mentioned in the order of the court then made, it was their duty to bring the matter to the attention of the court. They waited more than three years before suggesting that on the record one of the petitions remained undetermined. In the meantime the property of the bankrupt was sold, and distributed among creditors. The petitioners' position as stockholders to attack the adjudication of bankruptcy upon the facts alleged in their petition was no stronger than their position as creditors upon the facts alleged in their creditors' petition. The order which they seek here to revise must be deemed to have been made at the time when both petitions were heard and determined, December 19, 1905. The Bankruptcy Law contemplates that the bankrupt's estate shall be administered with all convenient dispatch, so that the property may be distributed among the creditors, and the bankrupt discharged from his debts, and to that end parties litigant shall be alert and active to protect their rights, and to proceed with promptness in asserting the same."

94. *Matter of Vanoscope Co.* (C. C. A., 2d Cir.), 36 Am. B. R. 778, 233 Fed. 53; *Matter*

of *Tanenhouse* (C. C. A., 2d Cir.), 33 Am. B. R. 648, 211 Fed. 971; *In re Brown* (C. C. A., 2d Cir.), 23 Am. B. R. 93, 174 Fed. 339; *Matter of Linck Construction Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 860, holding that the time may not be extended by a motion to resettle the case.

95. § 24-b. This is usually by a notice or order to show cause issued by the clerk and served by mail or otherwise, with a copy of the petition.

96. *In re Baker* (C. C. A., 1st Cir.), 4 Am. B. R. 778, 104 Fed. 287.

Rule 39 of the Rules of the Circuit Court of Appeals, Eighth Circuit, relating to practice upon petition for review in matters of law, under section 24-b of the bankruptcy act, provides that the response to the petition shall be filed at least fifteen days before the day set for the hearing. Held, that under such rule a failure of the respondent to deny or otherwise controvert the facts alleged in the petition will be deemed to be an admission that they are true. *In re Frank* (C. C. A., 8th Cir.), 25 Am. B. R. 486, 182 Fed. 794.

97. *Hall v. Allen*, 12 Wall. 452; *Conro v. Crane*, 94 U. S. 441, 24 L. Ed. 145. Nor is it reviewable on a motion to amend the order appealed from. *In re Henschel* (D. C., N. Y.), 8 Am. B. R. 201, 114 Fed. 968.

98. See in this section, *post*, p. 606.

99. *In re Orman* (C. C. A., 5th Cir.), 5 Am. B. R. 698, 107 Fed. 101.

100. *In re Utt* (D. C., N. Y.), 5 Am. B. R. 383, 105 Fed. 754.

101. *In re Stumpff* (Sup. Ct., Okla.), 9 Okla. 639, 4 Am. B. R. 267, 60 Pac. 96.

another way.¹⁰² A judgment entered upon an appeal from a judgment of a bankruptcy court, which was only reviewable upon a petition to review, is not void, but only erroneous, and may not be expunged upon a motion made at a subsequent term of the court.¹⁰³

III. APPEALS AS IN EQUITY CASES.

a. In general.—Subsection *a* of this section specifies the appeals that may be taken, as in equity cases in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals. It will be noticed here that the appeals referred to are those “in bankruptcy proceedings” as distinguished from “controversies arising in bankruptcy proceedings.” If a claimant appears in bankruptcy court, recognizes the title and possession of the property by the trustee, asserts his lien upon such property and insists that the validity of such lien be recognized and the assets of the bankrupt estate be administered accordingly he institutes “a proceeding in bankruptcy,” as distinguished from a “controversy arising in the course of bankruptcy proceedings,” and, if in other respects within the statute, an appeal will lie from a decision therein.¹⁰⁴ The general jurisdiction over appeals in controversies arising in bankruptcy proceedings is discussed under § 24.¹⁰⁵ This subsection supplements and explains such general jurisdiction. As to the three classes of judgments mentioned therein it seems now to be well settled that the jurisdiction here conferred is exclusive.¹⁰⁶

b. As in equity cases.—Congress by conferring appellate jurisdiction upon circuit courts of appeals as in equity cases only intended to provide thereunder for appeals from judgments when trial by jury is not demanded and the court of bankruptcy proceeds on its own findings of fact. In such a case the facts and the law are reviewable on appeal, but if the judgment is entered on the verdict of a jury it is conclusive as to facts and the judgment is reviewable for error of law.¹⁰⁷

c. From what judgments.—(1) **IN GENERAL.**—Subsection *a* of this section contemplates that an appeal may be taken under this subsection only from (1) a judgment granting or refusing an adjudication, (2) granting or denying a discharge or (3) allowing or rejecting a claim of five hundred dollars or over. The subsection thus clearly states the cases in which appeals may be taken in bankruptcy proceedings from courts of bankruptcy to the circuit

¹⁰² In re Blair (C. C. A., 8th Cir.), 5 Am. B. R. 793, 106 Fed. 662.

¹⁰³ Loeser v. Savings Dep. Bank & Trust Co. (C. C. A., 6th Cir.), 20 Am. B. R. 845, 163 Fed. 212, in which the court further held that upon such a motion every presumption in favor of the judgment which does not contradict the record must be indulged.

¹⁰⁴ Coder v. Arts, 213 U. S. 223, 22 Am. B. R. 1, 53 L. Ed. 772.

¹⁰⁵ See p. 563, *ante*, and Duncan v. Landis (C. C. A., 3d Cir.), 5 Am. B. R. 649, 106 Fed. 839.

¹⁰⁶ See cases cited *ante*, pp. 562-569; Cook Inlet Coal Fields Co. v. Caldwell (C. C. A., 4th Cir.), 17 Am. B. R. 135, 147 Fed. 475, holding that if the case falls within one or more of the three classes specified it can be reviewed only on appeal.

Not falling within the specified classes the final decree, though rendered in a proceeding in bankruptcy is not appealable. Bank of Clinton v. Kondert (C. C. A., 5th Cir.), 20 Am. B. R. 178, 159 Fed. 703; Matter of Lane Lumber Co. (C. C. A., 9th Cir.), 33 Am. B. R. 497, 217 Fed. 546; Ogden & Jamieson v. Gilt Edge Mines Co. (C. C. A., 8th Cir.), 34 Am. B. R. 893, 225 Fed. 723.

¹⁰⁷ Elliott v. Toeppner, 187 U. S. 327, 9 Am. B. R. 50, 47 L. Ed. 200; Bower v. Holzworth (C. C. A., 8th Cir.), 15 Am. B. R. 22, 138 Fed. 28; Lenox v. Allen Lane Co. (C. C. A., 1st Cir.), 21 Am. B. R. 648, 167 Fed. 114. See Bernard v. Lea (C. C. A., 9th Cir.), 31 Am. B. R. 436, 210 Fed. 583, citing text.

court of appeals.¹⁰⁸ The right to an appeal conferred by this subsection may not be taken away by the court; as given by the statute it can neither be enlarged nor restricted by the district court or the circuit court of appeals.¹⁰⁹

(2) ORDER OR DECISION MUST BE FINAL.—Circuit courts of appeals exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts.¹¹⁰ A decision which finally determines the rights of parties to secure in that suit the relief they seek is a final decision, although it does not bar another action or proceeding in the same cause.¹¹¹ If the order or judgment appealed from is interlocutory it is not appealable under this subsection.¹¹²

(3) JUDGMENT GRANTING OR REFUSING AN ADJUDICATION.—(I) *In general.*—It will not usually be difficult to determine whether a judgment is one granting or refusing an adjudication. An appeal from such a judgment is permissible even though the question of jurisdiction was raised.¹¹³ But an order adjudging a person to be a member of a partnership which has been adjudicated a bankrupt is not appealable.¹¹⁴ An order of dismissal of a petition in bankruptcy on the ground that it does not state facts sufficient to constitute an act of bankruptcy is in effect a judgment refusing an adjudication and is appealable.¹¹⁵ An order sustaining a demurrer to a petition filed for the purpose of vacating an adjudication is not a judgment from which an appeal will lie under this section.¹¹⁶

(II) *Effect of jury trial.*—When an alleged bankrupt demands a jury trial on an issue of fact as to the evidence of one of the grounds for adjudging him a bankrupt, the trial proceeds according to the course of the common law and a judgment rendered therein is revisable only on writ of error.¹¹⁷

108. The Judicial Code, § 130, states: "The circuit courts of appeals shall have the appellate and supervisory jurisdiction conferred upon them by the act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States,' approved July 1st, 1898, and all laws amendatory thereof, and shall exercise the same in the manner and under the regulations therein prescribed."

109. *In re Abraham* (C. C. A., 5th Cir.), 2 Am. B. R. 266, 292, 93 Fed. 767; *In re Whitener* (C. C. A., 5th Cir.), 5 Am. B. R. 198, 105 Fed. 180; *Lockman v. Lang* (C. C. A., 8th Cir.), 12 Am. B. R. 497, 501, 132 Fed. 1.

110. Judicial Code, § 128.

111. *Stevens v. Nave-McCord Mercantile Co.* (C. C. A., 8th Cir.), 17 Am. B. R. 609, 150 Fed. 71.

112. *Goodman v. Brenner* (C. C. A., 5th Cir.), 6 Am. B. R. 470, 109 Fed. 481, holding that no right of appeal is given under this section from an interlocutory order reversing a ruling of a referee refusing to compel the bankrupt to produce his books for examination.

113. *Columbia Iron Works v. National Lead Co.* (C. C. A., 6th Cir.), 11 Am. B. R. 340, 127 Fed. 99, holding that a court of bankruptcy has jurisdiction to determine whether a corporation is principally engaged in such a business that it could be adjudged

a bankrupt, and the order of adjudication is appealable to the circuit court of appeals. This case was decided on the authority of *First Nat. Bank of Denver v. Klug*, 186 U. S. 202, 8 Am. B. R. 12, 46 L. Ed. 1127.

114. *Francis v. McNeal* (C. C. A., 3d Cir.), 22 Am. B. R. 337, 170 Fed. 445.

115. *Stevens v. Nave-McCord Mercantile Co.* (C. C. A., 8th Cir.), 17 Am. B. R. 609, 150 Fed. 71.

As to appeals generally from judgments granting or refusing adjudication, see *Taft Co. v. Century Sav. Bank* (C. C. A., 8th Cir.), 15 Am. B. R. 594, 141 Fed. 369; *Cook Inlet Coal Fields Co. v. Caldwell* (C. C. A., 4th Cir.), 17 Am. B. R. 135, 147 Fed. 475, holding that the validity of an order of adjudication entered *nunc pro tunc* can only be considered on an appeal; *Zugalla v. Mercantile Agency* (C. C. A., 3d Cir.), 16 Am. B. R. 67, 142 Fed. 927; *Merchants' Nat. Bank of Toledo v. Code* (C. C. A., 6th Cir.), 18 Am. B. R. 44, 149 Fed. 708; *In re Good* (C. C. A., 8th Cir.), 3 Am. B. R. 605, 99 Fed. 389.

116. *In re Ives* (C. C. A., 6th Cir.), 7 Am. B. R. 692, 113 Fed. 911.

117. *Effect of jury trial.*—In the case of *Elliott v. Toeppner*, 187 U. S. 327, 9 Am. B. R. 50, 47 L. Ed. 200, the court said: "The distinction between a writ of error which brings up matter of law only, and an appeal which, unless expressly restricted, brings up both fact and law, has always been

Where the right to trial by jury exists and has been invoked, neither the appellate court nor the court below can review the facts, but can only control in matters of law which a writ of error is peculiarly fitted to raise in the appellate court.¹¹⁸

(4) GRANTING OR DENYING DISCHARGE.—An order dismissing an application for a discharge for want of prosecution, is in substance and effect a judgment denying the discharge, and can only be reviewed on appeal.¹¹⁹ A judgment confirming a composition is a judgment granting a discharge, since, under § 14-c a discharge results from the confirmation of a composition, and is therefore reviewable by appeal and not by a petition to revise.¹²⁰

observed by this court and been recognized by Congress from the foundation of the government. So far from any restriction being imposed by section 25-a, the language used is 'appeals as in equity cases,' and on appeal in equity cases the whole case is open. But Congress did not thereby attempt to empower the appellate court to re-examine the facts determined by a jury under § 19 otherwise than according to the rules of the common law. The provision applies to judgments 'adjudging or refusing to adjudge' the defendant a bankrupt when trial by jury is not demanded, and the court of bankruptcy proceeds on its own findings of fact. In such cases the facts and the law are re-examinable on appeal, while the verdict of a jury on which judgment is entered, concludes the issues of fact, and the judgment is reviewable only for error of law."

In the case of *Grant Shoe Co. v. Laird Co.*, 203 U. S. 502, 17 Am. B. R. 1, 51 L. Ed. 292, the court said: "Section 25-a of the bankruptcy act which authorizes appeals as in equity cases to be taken to the circuit court of appeals among other cases, from a judgment adjudging or refusing to adjudge the defendant a bankrupt, was expressly considered in *Elliott v. Toepfner*, 187 U. S. 327, 9 Am. B. R. 50, 47 L. Ed. 200, and it was held that the provision only applied to judgments adjudging or refusing to adjudge the defendant a bankrupt, 'when a trial by jury had not been demanded and where the court of bankruptcy proceeded on its own findings of fact.' The reasoning upon which the decision was based was in substance that as in the character of proceeding under consideration the right of a trial by jury was absolute, such a trial was a trial according to the course of the common law, and judgments therein rendered are revisable only on writ of error. As in the case at bar a jury was demanded, the trial was before such jury, and their verdict determined the questions at issue; it follows that a record should have been brought to this court by writ of error and not by appeal."

See also *Lennox v. Allen Lane Co.* (C. C. A. 1st Cir.), 21 Am. B. R. 648, 167 Fed. 114; *Bowen v. Holzworth* (C. C. A., 8th Cir.), 15 Am. B. R. 22, 138 Fed. 28; *Duncan v. Landis* (C. C. A., 3d Cir.), 5 Am. B. R. 649, 106 Fed. 839.

118. Writs of error and appeals.—In the case of *Duncan v. Landis* (C. C. A., 3d Cir.), 5 Am. B. R. 649, 106 Fed. 839, the court said: "The practice of the courts, but especially the act of Congress establishing the court of appeals already referred to (see Judicial Code, § 128), had designated 'writs of error' and 'appeals,' as those terms are used and understood in our jurisprudence, as the appropriate methods for invoking the appellate jurisdiction. The form, scope and peculiar functions of these two several methods for exercising appellate jurisdiction are well understood, and their peculiar and separate functions clearly established by the decisions and practice of the courts. This practice has so shaped itself that the rulings of a trial court in a jury trial can only be reviewed in the appellate court by a writ of error, while an appeal is peculiarly fitted to equity proceedings where it brings up for review to the appellate court both the law and the facts."

119. In *re Kuffler* (C. C. A., 2d Cir.), 11 Am. B. R. 469, 127 Fed. 125; *Matter of Semons* (C. C. A., 2d Cir.), 15 Am. B. R. 822, 140 Fed. 989, 72 C. C. A. 683. As to appeal from order dismissing a petition to revoke a discharge see *Thompson v. Mauzy* (C. C. A., 4th Cir.), 23 Am. B. R. 489, 174 Fed. 611.

120. Judgment confirming composition.—A judgment confirming a composition is by virtue of § 14-c of the bankruptcy act, a judgment granting a discharge and is only reviewable by appeal to the circuit court of appeals under § 25-a (2), and a petition to revise in matter of law the rulings which culminated in such confirmation will be dismissed for want of jurisdiction. In *re Friend* (C. C. A., 7th Cir.), 13 Am. B. R. 595, 134 Fed. 778; *Matter of Bay State Milling Co.* (C. C. A., 2d Cir.), 35 Am. B. R. 112, 223 Fed. 778. In the case of *United States ex rel. Adler v. Hammond* (C. C. A., 6th Cir.), 4 Am. B. R. 736, 104 Fed. 862, the single question presented for determination was whether an appeal lies to the circuit court of appeals under § 25-a (2) from an order of the district court refusing confirmation of a composition tendered by the bankrupt and accepted by the requisite number of creditors. The court said: "The act provides an appeal from a judgment which

But a refusal to confirm a composition does not always have the effect of denying a discharge and is not on this account appealable.¹²¹ The question as to whether an order dismissing a petition to review a discharge is appealable under this subsection has not been determined; it would seem, however, that such an order is in effect an order granting a discharge and is therefore appealable.¹²² An order overruling or dismissing objections to a bankrupt's discharge, is not an order granting or refusing a discharge and is in no sense final; an appeal therefrom will not lie to the circuit court of appeals.¹²³

(5) ALLOWING OR REJECTING CLAIM.—(I) *In general.*—The judgment or order appealed from may be one allowing or rejecting a claim. In determining whether it be of such a character, its purpose and effect must be given due consideration. The word "claim" has been held limited to a money demand.¹²⁴ An appeal may be taken under this subsection from an order allowing or disallowing a claim as from a judgment,¹²⁵ or from an order

grants or denies a discharge. The meaning of the word discharge is defined by section 1 to be 'the release of a bankrupt from all of his debts which are provable in bankruptcy except such as are excepted by this act.' By section 14 it is declared that a confirmation of the composition shall discharge, i. e., release the bankrupt from his debts except those from which by the other method he was not discharged. But when 'discharge' is the equivalent of the other for the purposes of the act, and both are covered by the same section of the act (§ 14), it relates solely to that subject. Moreover, it is to be observed, that in both methods the procedure is under the control of the judge. In the case of a composition the non-consenting creditors are given the opportunity to contest the confirmation which is to operate as a discharge. It is against that consequence that the contest is directed. It is made because the non-consenting creditors are not satisfied that their claims shall be discharged by the payment of the amount tendered. Questions as important, perhaps, as any that may occur in bankruptcy proceedings may arise upon the hearing. If the composition is confirmed, the contesting creditors are cut off from any further consideration of the facts unless they can appeal; and so of the bankrupt, whichever way the decision goes, it is the end of that endeavor of the debtor and creditors to close the matter. . . . It seems to us that the giving effect of a discharge to the order confirming a composition makes it the equivalent of an order in terms discharging the bankrupt; and that the right to appeal is given where either party considers himself aggrieved by granting or refusing, as the case may be, as well where the right accrues by reason of a composition as where the assets of the debtor are taken in hand by the trustee for distribution." In the case of *Ross v. Saunders* (C. C. A., 1st Cir.), 5 Am. B. R. 350, 105 Fed. 915, the court distinguishes the case last cited on the ground that in that case there was objecting

creditors, issue made and proper parties to the appeal, and holds that where upon an application to confirm a composition no creditors appear in opposition an order refusing to confirm was not appealable. From the reasoning applied in the two cases it must be conceded that they are diametrically opposed to each other.

121. *In re McVoy Hardware Co.* (C. C. A., 7th Cir.), 29 Am. B. R. 322, 200 Fed. 949, holding that an order refusing to confirm a composition on the sole ground that it is not for the best interests of creditors is not a bar to a subsequent discharge and, therefore, is not a final order denying a discharge, from which an appeal will lie.

122. *Thompson v. Mauzy* (C. C. A., 4th Cir.), 23 Am. B. R. 489, 174 Fed. 611.

123. *Ragan, Malone & Co. v. Cotton & Preston* (C. C. A., 5th Cir.), 28 Am. B. R. 246, 195 Fed. 69. See *Walter Scott Co. v. Wilson* (C. C. A., 7th Cir.), 8 Am. B. R. 349, 115 Fed. 284, 53 C. C. A. 76. As to petition to review in case of orders pertaining to specifications in opposition to discharges see f (3) (ix) *Proceedings for discharge*, ante.

124. *In re Whitener* (C. C. A., 5th Cir.), 5 Am. B. R. 198, 105 Fed. 180.

125. *Chesapeake Shoe Co. v. Seldner* (C. C. A., 4th Cir.), 10 Am. B. R. 466, 122 Fed. 593; *Rush v. Lake* (C. C. A., 9th Cir.), 10 Am. B. R. 455, 122 Fed. 561, revg. 1 Am. B. R. 96; *Dickson v. Nyman* (C. C. A., 1st Cir.), 7 Am. B. R. 186, 111 Fed. 726; *Postlethwaite v. Hicks* (C. C. A., 4th Cir.), 21 Am. B. R. 70, 165 Fed. 897. In the case of *Hutchinson v. Otis*, 190 U. S. 552, 10 Am. B. R. 135, 47 L. Ed. 1179, it was held that a decree rendered upon a petition asserting a lien on the proceeds of a seat in a stock exchange which formerly belonged to the bankrupts was not "a judgment allowing or rejecting a debt or claim of \$500 or over," within subdivision 3 of subsection 25-a; *In re Mueller* (C. C. A., 6th Cir.), 14 Am. B. R. 256, 135 Fed. 711. See cases digested in Am. Bankr. Dig. § 1226.

reconsidering the allowance of a claim and disallowing a portion thereof, which resulted in the restoration and allowance of the claim as originally allowed.¹²⁶ An order directing a sale of the bankrupt's alleged homestead to satisfy the claim of a creditor thereon is within subdivision 3, and appealable.¹²⁷

An order summarily directing a third person to turn over to the trustee money or property in his possession is not appealable.¹²⁸ When a judgment or decree settles two or more distinct controversies, the acceptance of a sum of money, to which appellant is declared to be entitled by one portion of the judgment or decree, does not estop him from appealing from another and independent adjudication therein.¹²⁹

(II) *Amount involved.*—The amount involved is that which will be put in controversy by the appeal, and not the amount of the original claim.¹³⁰ Where the claim upon which the judgment is based amounts to five hundred dollars or over an appeal will lie.¹³¹

(III) *Validity or priority of lien.*—The rule is that where the appeal is from the allowance or disallowance of the claim, the validity of liens or priorities incidental thereto may be considered.¹³² Where a creditor seeks to estab-

Order remanding proceeding without decision on merits.—Where a district judge without passing on the merits of a proceeding before a referee for the allowance of a claim, sends the matter back with instructions to take testimony which had been offered and excluded, such order is not appealable. *Matter of Strauss* (C. C. A., 2d Cir.), 32 Am. B. R. 237, 211 Fed. 123.

126. *Kiskadden v. Steinle* (C. C. A., 6th Cir.), 29 Am. B. R. 346, 203 Fed. 375.

127. *Burow v. Grand Lodge* (C. C. A., 5th Cir.), 13 Am. B. R. 542, 133 Fed. 708. But see *McCarty v. Coffin* (C. C. A., 5th Cir.), 18 Am. B. R. 148, 150 Fed. 307.

128. *In re Rose Shoe Co.* (C. C. A., 2d Cir.), 21 Am. B. R. 725, 168 Fed. 39.

129. *Peck v. Richter* (C. C. A., 8th Cir.), 33 Am. B. R. 11, 217 Fed. 880, holding that a bankrupt who has filed three separate claims for administering the estate is entitled to a revision of the refusal of the referee to allow him anything on his second and third claim, although he has accepted an allowance under his first claim.

130. Amount in controversy.—In the case of *Gray v. Grand Forks Mercantile Co.* (C. C. A., 8th Cir.), 14 Am. B. R. 780, 138 Fed. 344, it was held that the provisions of §. 25-a, restricting appeals to the Circuit Court of Appeals from a judgment of the bankruptcy court, "allowing or rejecting a debt or claim of \$500.00 or over," has reference not to the amount of the original claim, but to the amount which will be put in controversy by the appeal. The court said: "The purpose of Congress in restricting the right of appeal was evidently to avoid inconvenience, delay and expense to claimants and bankrupt estates which would be disproportionate to the amount in controversy. When read with due regard to this purpose, the restrictions plainly has reference not to the amount of the original claim but to the amount of the allowance or rejection; that

is to the amount which will be put in controversy by the appeal."

131. *In re Dickson* (C. C. A., 1st Cir.), 7 Am. B. R. 186, 111 Fed. 726; *In re Jourdan* (C. C. A., 1st Cir.), 7 Am. B. R. 186, 111 Fed. 726; *In re Groetzinger* (C. C. A., 3d Cir.), 11 Am. B. R. 467, 127 Fed. 124; *Cook, etc., Coal Co v. Caldwell* (C. C. A., 4th Cir.), 17 Am. B. R. 135, 147 Fed. 475; *Union Nat. Bank of Kansas City v. Neill* (C. C. A., 5th Cir.), 17 Am. B. R. 853, 149 Fed. 720; *In re Friend* (C. C. A., 7th Cir.), 13 Am. B. R. 595, 134 Fed. 778; *In re Cosmopolitan Power Co.* (C. C. A., 7th Cir.), 14 Am. B. R. 604, 137 Fed. 858; *Adams v. Deckers Valley Lumber Co.* (C. C. A., 4th Cir.), 29 Am. B. R. 42, 202 Fed. 48.

132. *Cunningham v. German Ins. Bank* (C. C. A., 6th Cir.), 4 Am. B. R. 192, 103 Fed. 932; *In re Doran* (C. C. A., 6th Cir.), 18 Am. B. R. 760, 154 Fed. 467; *In re First Nat. Bank of Louisville* (C. C. A., 6th Cir.), 18 Am. B. R. 766, 155 Fed. 100; *In re Cosmopolitan Power Co.* (C. C. A., 7th Cir.), 14 Am. B. R. 604, 137 Fed. 858; *Livingston v. Heineman* (C. C. A., 6th Cir.), 10 Am. B. R. 39, 120 Fed. 786; *In re Mueller* (C. C. A., 6th Cir.), 14 Am. B. R. 256, 135 Fed. 711; *In re First Nat. Bank of Canton* (C. C. A., 6th Cir.), 14 Am. B. R. 180, 135 Fed. 62; *Hutchinson v. Otis*, 190 U. S. 552, 10 Am. B. R. 135, 47 L. Ed. 1179.

Presentation of demand and lien.—The presentation for allowance of a demand against a bankrupt's estate is a step in bankruptcy proceedings as to which appeal is specially provided by section 25. If both a demand and a lien to secure it be presented at the same time the procedure for the former dominates, the lien is an incident, and the double presentation is also regarded as a step in the bankruptcy proceeding. *Century Savings Bank v. Robert Moody & Son* (C. C. A., 8th Cir.), 31 Am. B. R. 586, 209 Fed. 775.

lish the validity of a lien against property in the hands of the trustee by a proceeding in a court of bankruptcy, and such property exceeds \$500 in value, an appeal will lie from the decision of the court.¹³³ Whether the assertion of a lien in bankruptcy proceedings is in connection with a claim for a debt which it is alleged it secures, or a lien only upon the property, an appeal lies from a decision of a court of bankruptcy establishing the priority of liens.¹³⁴ But it must appear that the property came into the possession of the court through the direct operation of the adjudication in bankruptcy.¹³⁵ If the question of the lien or priority be involved in the appeal independent of the claim it should not be entertained.¹³⁶ Where a party seeks to intervene to establish an alleged equitable mortgage interest in the bankrupt's real property acquired through transactions with a third person, which interest is not connected in any way with the claim against the bankrupt estate, the order of the court dismissing the petition for intervention is not appealable under this

Order allowing claim and incidentally establishing lien of another.—The fact that a decree of a referee disallowing a claim incidentally established a lien and affected the interests of another claimant does not destroy the essential character of the proceeding, and an order reviewing the decree is reviewable by appeal under section 24a of the Bankruptcy Act. *Sterne v. Merchants' Nat. Bank* (C. C. A., 8th Cir.), 33 Am. B. R. 205, 216 Fed. 862.

Existence of alleged preferences.—An order which distinctly involves both the rejection and allowance of claims and also a controversy of fact, touching bankrupt's financial condition at the time claimant received alleged preferential payments, and the existence or not of reasonable cause on his part to believe that such payments would, if enforced, effect a preference, is reviewable by appeal. *Cooper v. Miller* (C. C. A., 6th Cir.), 30 Am. B. R. 194, 203 Fed. 383.

Decree denying claim to preference based upon levy.—The remedy of a claimant whose claim to a preference, based upon a levy upon the property of the bankrupt within four months before bankruptcy, has been denied, is by appeal and a petition to superintend and revise should be dismissed. *Home Bank for Savings v. Lohm* (C. C. A., 4th Cir.), 34 Am. B. R. 624, 223 Fed. 633.

133. Coder v. Arts, 213 U. S. 223, 22 Am. B. R. 1, 53 L. Ed. 772.

Value of property.—A decision of the district court as to the rights of a landlord and mortgage to priority in the proceeds of the sale of property amounting to \$675, is not an allowance or rejection of a claim over \$500, so as to authorize an appeal under this section, although the landlord claimed \$800 and the mortgagee claimed over \$2,000. *Bank of Hattiesburg v. Carter* (C. C. A., 5th Cir.), 36 Am. B. R. 749, 230 Fed. 127.

Appeal from order establishing priority of liens.—Where it is sought by appeal to review a judgment declaring appellants' mortgage liens to be inferior to mechanics' liens of the appellees, it is the amount of the ap-

pellants' liens respectively that determines their right to appeal, and not the amount of the several liens of the appellees. *New Hamp. Savings Bank v. Wichita Lumber Co.* (C. C. A., 8th Cir.), 33 Am. B. R. 1, 216 Fed. 721.

Claim secured by specific liens of less than \$500 each.—A judgment approving a claim of more than \$500, secured by separate and specific liens, none of which amount to \$500, is appealable. *Stuart v. Britton Lumber Co.* (C. C. A., 5th Cir.), 35 Am. B. R. 719, 227 Fed. 49.

134. New Hampshire Savings Bank v. Wichita Lumber Co. (C. C. A., 8th Cir.), 33 Am. B. R. 1, 216 Fed. 721.

135. Property in possession of court.—Where the effect of action taken by claimants in the District Court, as an ancillary tribunal, is to assert priorities, or liens against a fund in the possession of the court, which was not derived through the direct operation of the adjudication in bankruptcy, the action is not to secure a judgment allowing a debt or claim within the meaning of section 25-a(3). *Emerson v. Castor* (C. C. A., 6th Cir.), 37 Am. B. R. 719, 236 Fed. 29.

136. In re Doran (C. C. A. 6th Cir.), 18 Am. B. R. 760, 154 Fed. 467, where the claim itself was allowed and only the incident remained and it was held that appeal did not lie under § 25-a. In re *Cosmopolitan Power Co.* (C. C. A., 7th Cir.), 14 Am. B. R. 604, 137 Fed. 858; *Hutchinson v. Otis*, 190 U. S. 552, 10 Am. B. R. 135, 47 L. Ed. 1179; In re *Rouse, Hazard & Co.* (C. C. A., 7th Cir.), 1 Am. B. R. 234, 91 Fed. 96; In re *Richards* (C. C. A., 6th Cir.), 3 Am. B. R. 145, 96 Fed. 935; *Courier-Journal Job Printing Co. v. Schaefer-Meyer Brewing Co.* (C. C. A., 6th Cir.), 4 Am. B. R. 183, 101 Fed. 699.

Claim of lien a priority.—In the case of *Hutchinson v. Otis*, 190 U. S. 552, 10 Am. B. R. 135, 47 L. Ed. 1179, it appeared that a petition was filed asserting a lien on the proceeds of a seat in the New York Stock Exchange which formerly belonged to the bankrupt. This lien had not been insisted

clause.¹³⁷ But the Supreme Court has held that an intervention for the purpose of asserting a claim to property in the possession of the trustee is an intervention in equity, and a decree is reviewable by appeal, as where a claimant submits his claim to accounts in the possession of the trustee which he alleges were assigned to him.¹³⁸ An appeal will also lie from a judgment fixing the amount due on a secured claim.¹³⁹ And a judgment denying the right to file a claim as secured and make substituted proof thereof, after it had been allowed as unsecured in an amount exceeding \$500, is only reviewable by an appeal.¹⁴⁰ A judgment of the bankruptcy court that a chattel mortgage is not a valid lien and does not entitle a creditor to preference of payment out of the proceeds of the estate, is appealable,¹⁴¹ and so, also, is any decision of a bankruptcy court in a proceeding by a trustee to have certain adverse claims against, and liens upon the bankrupt estate declared void, and for a sale of the property free and clear of such liens.¹⁴² Likewise a decree of the District Court, rejecting a claim for rent, and allowing a lien covering a portion thereof, is appealable.¹⁴³

(IV) *Claims for fees and expenses.*—A claim for attorney's fees and expenses incurred by the trustee in the administration of the estate,¹⁴⁴ or by

on by the petitioners because of their impression that they had been effectually paid; no one having changed his position on the faith of their waiver, the District Court allowed the lien; the Circuit Court of Appeals held that this portion of the decree of the District Court was not subject to an appeal to the Circuit Court of Appeals. The court said: "The argument chiefly relied upon by the appellant is that this is an intervening petition to reach a fund in court and is not a proceeding in bankruptcy. Under the circumstances of this case it seems to us that the petition was incident to the claim, and was a bankruptcy proceeding under section 2, clause 7, within the meaning of section 25, regulating appeals in 'bankruptcy' proceedings, and that the decree upon it was not 'a judgment allowing or rejecting a debt or claim of \$500.00 or over,' within § 25-a (3), and was not a ground of appeal."

137. *In re Columbia Real Estate Co.* (C. C. A., 7th Cir.), 7 Am. B. R. 441, 112 Fed. 643.

138. *Houghton v. Burden*, 228 U. S. 161, 30 Am. B. R. 16, 57 L. Ed. 780.

139. *In re Roche* (C. C. A., 5th Cir.), 4 Am. B. R. 369, 101 Fed. 956; *Livingston v. Heineman* (C. C. A., 6th Cir.), 10 Am. B. R. 39, 120 Fed. 756, holding that an order denying a motion by the trustee to expunge a claim unless preferences received thereon are surrendered and directing the return to the creditor of the preferences surrendered is appealable.

140. *Matter of Lane Lumber Co.* (C. C. A., 9th Cir.), 33 Am. B. R. 497, 217 Fed. 546.

141. *Claim of assets under chattel mortgage.*—A judgment of a bankruptcy court entered upon a claim of a bank under a chattel mortgage to assets in possession of a trustee in bankruptcy is reviewable by appeal. *Loeser v. Savings Deposit Bank & Trust Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 845, 163 Fed. 212; *Dodge v. Norlin* (C. C.

A., 8th Cir.), 13 Am. B. R. 176, 133 Fed. 363. Where, in answer to a trustee's petition for leave to sell the bankrupt's stock in trade, a creditor claimed a lien upon part of the assets under chattel mortgages which were held void, the order for leave to sell is reviewable only by appeal. *Knapp v. Milwaukee Trust Co.* (C. C. A., 7th Cir.), 20 Am. B. R. 671, 162 Fed. 675.

A contest in a bankruptcy court over the distribution of a fund in the possession of a trustee in bankruptcy, derived from the sale of property held by a State court to have been conveyed by the bankrupt in fraud of creditors, is a controversy arising in bankruptcy proceedings, and hence is appealable as other cases in equity under the Circuit Court of Appeals Act to the Circuit Court of Appeals. *Globe Bank & Trust Co. v. Martin*, 236 U. S. 288, 34 Am. B. R. 162, 59 L. Ed. 583, affg. 27 Am. B. R. 545 and 29 Am. B. R. 935.

142. *Thomas v. Wood* (C. C. A., 8th Cir.), 23 Am. B. R. 132, 173 Fed. 585.

Adverse claims.—Decrees of bankruptcy courts in respect to claims against property in the possession of bankrupts at the time of adjudication are appealable. *Mound Mines Co. v. Hawthorne* (C. C. A., 8th Cir.), 23 Am. B. R. 242, 173 Fed. 882; *Franklin v. Stoughton Wagon Co.* (C. C. A., 8th Cir.), 22 Am. B. R. 63, 168 Fed. 857; *Rison v. Parham* (C. C. A., 4th Cir.), 33 Am. B. R. 571, 219 Fed. 176. Compare *In re Rose Shoe Mfg. Co.* (C. C. A., 2d Cir.), 21 Am. B. R. 725, 168 Fed. 39.

143. *Courtney v. Trust Co.* (C. C. A., 6th Cir.), 33 Am. B. R. 400, 219 Fed. 57.

144. *Davidson v. Friedman* (C. C. A., 6th Cir.), 15 Am. B. R. 489, 140 Fed. 853; *In re Blanchard Shingle Co.* (C. C. A., 9th Cir.), 21 Am. B. R. 142, 164 Fed. 311. *Contra: In re Curtis* (C. C. A., 7th Cir.), 4 Am. B. R. 17, 100 Fed. 784.

creditors in contesting claims of others, to the benefit of the estate, is not appealable;¹⁴⁵ although it may be otherwise where the claim was for services rendered to the bankrupt either before or after adjudication.¹⁴⁶ So, also, the rejection of charges against a receiver for expenses incurred under his orders or contracts looking to the care or preservation of the bankrupt estate, is within the discretion of the bankruptcy court, and is not appealable.¹⁴⁷

d. Time of taking appeal.—(1) **IN APPEALS IN BANKRUPTCY PROCEEDINGS.**—An appeal under this subsection in a bankruptcy proceeding, as distinguished from an appeal in a controversy arising in bankruptcy proceedings as provided in § 24-a, can be taken only from a district court sitting in bankruptcy to the circuit court of appeals of its circuit. Such an appeal must be taken, as expressly provided in subsection a, within ten days after the judgment was rendered.¹⁴⁸ But, if the time has expired, the district court may in a meritorious case grant a reargument, so that the ten days may run from the second order.¹⁴⁹ But a rehearing for the purpose of allowing an appeal should not be granted unless clearly warranted by the facts,¹⁵⁰ nor unless the motion for a rehearing is made within the required time.¹⁵¹ It has been held that it should not be granted if the sole purpose is to extend the time of taking an appeal.¹⁵² The time may not be extended by the subsequent entry of an alias adjudication;¹⁵³ nor by any other subsequent proceeding in the case.¹⁵⁴ The time begins

145. *Ohio Valley Bank Co. v. Switzer* (C. C. A., 6th Cir.), 18 Am. B. R. 689, 153 Fed. 362.

146. *Pratt v. Bothe* (C. C. A., 6th Cir.), 12 Am. B. R. 529, 130 Fed. 670.

147. *O'Brien v. Ely* (C. C. A., 5th Cir.), 28 Am. B. R. 247, 195 Fed. 64.

148. Compare, for time under the former law, *Sedgwick v. Fridenberg*, Fed. Cas. 12,611; *Wood v. Bailey*, 21 Wall. 640. See cases cited Am. Bank Dig. §§ 1235, 1236.

Time limit.—An appeal from a judgment allowing a claim must, under section 25a of the Bankruptcy Act, be taken within ten days after the judgment is rendered, the limitation contained in said section being both distinct and imperative. In *re Martin* (C. C. A., 6th Cir.), 29 Am. B. R. 935, 201 Fed. 31, *affd. sub nom. Globe Bank & Trust Co. v. Martin*, 236 U. S. 288, 34 Am. B. R. 162, 59 L. Ed. 583; *Massachusetts Bonding & Ins. Co. v. Kemper* (C. C. A., 6th Cir.), 34 Am. B. R. 80, 220 Fed. 847; *Southern Cotton Oil Co. v. Elliott* (C. C. A., 6th Cir.), 33 Am. B. R. 375, 218 Fed. 567; *Rhame v. Southern Cotton Oil Co.* (C. C. A., 4th Cir.), 35 Am. B. R. 732, 230 Fed. 403; *Barton Lumber & Brick Co. v. Prewitt* (C. C. A., 8th Cir.), 36 Am. B. R. 718, 231 Fed. 919.

149. In *re Wright* (D. C., Mass.), 3 Am. B. R. 184, 96 Fed. 820; *s. c.* on appeal, In *re Worcester County* (C. C. A., 1st Cir.), 4 Am. B. R. 496, 102 Fed. 808; In *re McCall* (C. C. A., 6th Cir.), 16 Am. B. R. 670, 145 Fed. 898; *Mills v. Fisher & Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 237, 159 Fed. 897; *Stickney v. Wilt*, 23 Wall. 150.

150. In *re Hudson Clothing Co.* (D. C.,

Me.), 15 Am. B. R. 254, 140 Fed. 49. It has been held that a rehearing will not be granted upon the pretense of reconsidering the merits for the purpose of reviving the petitioners' right of appeal. In *re Girard Glazed Kid Co.* (D. C., Pa.), 12 Am. B. R. 295, 129 Fed. 841.

151. *Conboy v. Nat. Bank*, 203 U. S. 141, 16 Am. B. R. 775, 51 L. Ed. 128; In *re Alden Elec. Co.* (C. C. A., 7th Cir.), 10 Am. B. R. 370, 123 Fed. 415. In the case of *Morgan v. Benedum* (C. C. A., 4th Cir.), 19 Am. B. R. 601, 157 Fed. 232, the time for taking an appeal had expired and it was held that such time could not be extended by a petition for a rehearing filed a month later; *Mills v. Fisher & Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 237, 159 Fed. 897, holding that the time to appeal from an order sustaining a demurrer to a petition for an involuntary adjudication does not begin to run until the determination of a petition for a rehearing, filed in time, which makes the judgment dismissing the bankruptcy proceedings final; *Rode v. Horn & Phipps* (C. C. A., 6th Cir.), 27 Am. B. R. 827, 195 Fed. 414.

152. *West v. McLaughlin Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 654, 162 Fed. 124.

153. In *re Berkebile* (C. C. A., 2d Cir.), 16 Am. B. R. 277, 144 Fed. 577.

154. *Brady v. Bernard & Kittinger* (C. C. A., 6th Cir.), 22 Am. B. R. 342, 170 Fed. 576. **Motion to vacate.**—The time to appeal from an order of adjudication may not be indirectly extended by a motion to vacate the adjudication. In *re Goldberg* (C. C. A., 2d Cir.), 21 Am. B. R. 828, 167 Fed. 808.

A request for an extension of time within which to file notice of appeal to the Circuit

from the actual entry of the judgment by delivering the same to the clerk,¹⁵⁵ or in the case of the denial of a motion for a rehearing from the time of the entry of the order upon the records of the court.¹⁵⁶ It is the time of the presentation of the application or petition which controls, and the appeal may not be dismissed because the order allowing it was made more than ten days subsequent to making and filing the decree.¹⁵⁷

(2) IN APPEALS IN CONTROVERSIES ARISING IN BANKRUPTCY PROCEEDINGS.—Appeals in “controversies arising in bankruptcy proceedings” under § 24-a must be taken as in other cases in equity under the circuit court of appeals act.¹⁵⁸ The ten-day limitation prescribed in § 25-a does not therefore affect appeals in independent suits to recover assets.¹⁵⁹ The ten-day limit, although applicable when a reversal of an order disallowing a general claim is sought, does not apply to an appeal from a denial of a lien on the property of the bankrupt, for the assertion of a lien may be regarded as presenting a controversy over the title to or rights in specific property, and the appeal is entitled to be considered as taken under § 24-a.¹⁶⁰

e. Parties to appeal.—An appeal must be taken by a party aggrieved.¹⁶¹ All the parties interested in the proceeding should be made parties to the appeal and should be given notice of its pendency and hearing.¹⁶² On an appeal from an order of adjudication the bankrupt should be made a party, but where it appears that, after a motion to dismiss the appeal on the ground that the bankrupt was not a party, the bankrupt voluntarily entered his appearance waiving notice of appeal and other proceedings the appeal should not be dismissed.¹⁶³ Where an appeal is taken from a decree denying an adjudication and dismissing the petition, all creditors who joined in the petition, including those who have intervened under § 59-f, must unite in the appeal, unless an order of reverence has been made as to them, otherwise the appellate court has no jurisdiction.¹⁶⁴ Where separate judgments are rendered at the same time an appeal from one of them may be brought without making the persons interested in the other judgments parties to the appeal.¹⁶⁵ Where the creditors as a body are aggrieved, the trustee only should appeal.¹⁶⁶ But this right

Court of Appeals should not be granted, although made within ten days after judgment. *Rhame v. Southern Cotton Oil Co.* (C. C. A., 4th Cir.), 35 Am. B. R. 732; 230 Fed. 403.

155. *Peterson v. Nash Bros.* (C. C. A., 8th Cir.), 7 Am. B. R. 181, 112 Fed. 311

156. *In re McCall* (C. C. A., 6th Cir.) 16 Am. B. R. 670, 145 Fed. 898.

157. *Robertson Banking Co. v. Chamberlain* (C. C. A., 5th Cir.), 36 Am. B. R. 198, 228 Fed. 580.

158. *Globe Bank & Trust Co. v. Martin*, 236 U. S. 288, 34 Am. B. R. 162, 59 L. Ed. 583.

159. *Boonville, etc., v. Blakey* (C. C. A., 7th Cir.), 6 Am. B. R. 13, 107 Fed. 891; *Steele v. Buel* (C. C. A., 8th Cir.), 5 Am. B. R. 165, 104 Fed. 968; *Stelling v. Jones Lumber Co.* (C. C. A., 7th Cir.), 8 Am. B. R. 521, 116 Fed. 261; *Southern Cotton Oil Co. v. Elliotte* (C. C. A., 6th Cir.), 33 Am. B. R. 375, 218 Fed. 567; *Massachusetts Bonding & Insurance Co. v. Kemper* (C. C. A., 6th Cir.), 34 Am. B. R. 80, 220 Fed. 847.

160. *Massachusetts Bonding & Ins. Co. v. Kemper* (C. C. A., 6th Cir.), 34 Am. B. R. 80, 220 Fed. 847.

161. *In re Roche* (C. C. A., 5th Cir.), 4 Am. B. R. 369, 101 Fed. 956; *Stevens v. Nave-McCord Mercantile Co.* (C. C. A., 8th Cir.), 17 Am. B. R. 609, 150 Fed. 71.

162. *Stevens v. Nave-McCord Co.* (C. C. A., 8th Cir.), 17 Am. B. R. 609, 150 Fed. 71, holding that all parties aggrieved by a final decision, whereby a petition in bankruptcy is dismissed, may join in an appeal although some complain of one alleged error and some of another, because on such an appeal all prior rulings are reviewable.

163. *Hill v. Western Electric Co.* (C. C. A., 6th Cir.), 32 Am. B. R. 332, 214 Fed. 243.

164. *Matter of Dandridge & Pugh* (C. C. A., 7th Cir.), 31 Am. B. R. 15, 209 Fed. 838.

165. *Love v. Export Storage Co.* (C. C. A., 6th Cir.), 16 Am. B. R. 171, 143 Fed. 1.

166. *Foreman v. Burleigh* (C. C. A., 1st Cir.), 6 Am. B. R. 230, 109 Fed. 313.

is not, strictly speaking, limited to him. It seems that a creditor may appeal,¹⁶⁷ and, if the trustee refuses to do so, the district court has the power, on a proper application, either to order him to take the appeal, or to direct that a creditor be permitted to do so.¹⁶⁸

f. Practice.—(1) **IN GENERAL.**—The practice on appeals under subsection a conforms in all respects to other appeals in equity to a circuit court of appeals.¹⁶⁹ General Order XXXVI should be consulted; also the rules of each circuit.¹⁷⁰ The appeal is instituted by a petition, accompanied by an assignment of errors, presented to and allowed “by a judge of the court appealed from or the court appealed to.” Section 997 of the Revised Statutes makes an assignment of errors, a prayer for reversal, and a citation to the adverse party essential parts of the record upon which the rulings of a trial court may be invoked in the appellate courts of the United States.

(2) **ASSIGNMENT OF ERRORS.**—The filing of an assignment of errors is indispensable to the perfection of the appeal.¹⁷¹ If the assignment of errors is

^{167.} *In re Roche* (C. C. A., 5th Cir.), 4 Am. B. R. 369, 101 Fed. 956; *Chatfield v. O'Dwyer* (C. C. A., 8th Cir.), 4 Am. B. R. 313, 101 Fed. 797; *Matter of National Pressed Brick Co.* (C. C. A., 6th Cir.), 32 Am. B. R. 224, 212 Fed. 878.

Right of creditor in opposition to be heard.—An objecting creditor who has filed objections against discharge and not withdrawn them is entitled to be heard by the Circuit Court of Appeals on their merits; his rights cannot be prejudiced by the vote of a majority of the other creditors expressing satisfaction with a proposed compromise of conflicting claims. *Matter of Doyle* (C. C. A., 2d Cir.), 34 Am. B. R. 28, 220 Fed. 434.

^{168.} *McDaniel v. Stroud* (C. C. A., 4th Cir.), 5 Am. B. R. 685, 106 Fed. 486; *Foreman v. Burleigh* (C. C. A., 1st Cir.), 6 Am. B. R. 230, 109 Fed. 313.

Where a trustee, though requested, refuses to appeal from an order which affirmed an order of a referee allowing a contested claim, the court in its discretion may allow a dissatisfied creditor to appeal, though the better practice would be to order the trustee to appeal or to allow the dissatisfied creditor to appeal in his name, being indemnified in either case against costs by such creditor. *Ohio Valley Bank Co. v. Mack et al.* (C. C. A., 6th Cir.), 20 Am. B. R. 40, 163 Fed. 155; *Matter of National Pressed Brick Co.* (C. C. A., 6th Cir.), 32 Am. B. R. 224, 212 Fed. 878.

^{169.} Gen. Order XXXVI (1) provides that “Appeals from a court of bankruptcy to a circuit court of appeals shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided by the act, by the rules governing appeals in equity in the courts of the United States.” See also *In re Baker* (C. C. A., 1st Cir.), 4 Am. B. R. 778, 104 Fed. 287; *In re Robertshaw Co.* (D. C., Pa.), 14 Am. B. R. 341, 135 Fed. 220; *Board of Commissioners v. Hurley* (C. C. A., 8th Cir.), 22 Am. B. R. 209, 169 Fed.

92; *In re Quality Shop* (C. C. A., 7th Cir.), 29 Am. B. R. 854, 202 Fed. 196. Such general order does not apply to appeals in controversies in bankruptcy proceedings under § 24a. *Baker Ice Machine Co. v. Bailey*, 31 Am. B. R. 513, 209 Fed. 844.

It is the practice in the eighth circuit not to anticipate a further appeal but to await requests for findings and conclusions under General Order XXXVI, and if the decree has then been entered, to vacate it so that the order may be observed. *Century Savings Bank v. Robert Moody & Son* (C. C. A., 8th Cir.), 31 Am. B. R. 586, 209 Fed. 775.

^{170.} No forms are suggested in “Supplementary Forms,” *post*, for the reason that the customary forms on appeals and writs of error under the Federal practice are available and should be used. For forms to be used on appeals to the Circuit Court of Appeals see *Hagar & Alexander's Bankruptcy Forms* (2d ed.) Nos. 358-376.

^{171.} **Filing of assignment of errors.**—In the case of *Lockman v. Lang* (C. C. A., 8th Cir.), 11 Am. B. R. 597, 128 Fed. 279, the court said: “Section 997 of the Revised Statutes makes the assignment of errors, a prayer for reversal and the citation to the adverse party essential parts of the record upon which a review of the rulings of a trial court may be invoked in the appellate courts of the United States. When an appeal is prayed for and allowed in open court the prayer for reversal and the citation may be waived, but the assignment of errors is indispensable to the perfection of the appeal. Rule 11 of this court provides that ‘The plaintiff in error or appellant shall file with the clerk of the court below with his petition for a writ of error or appeal, an assignment of errors which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed.’ The reasons for this rule and the importance of compliance with it have been stated in numer-

so defective as not to indicate the error complained of, the court may not take cognizance of them.¹⁷² A single assignment which is partly good and partly bad may not be sustained.¹⁷³ An amendment will be allowed when the special circumstances justify it, and the application is promptly made on discovery of the mistake.¹⁷⁴

(3) BOND.—If the appellant is not the trustee,¹⁷⁵ an appeal bond is properly executed either then or on the perfection of the appeal in the appellate court, and must be approved by the judge and filed.¹⁷⁶ It has been held that since the practice on appeals in bankruptcy proceedings under § 25-a are controlled by the rules in equity proceedings, the giving of a bond is not a jurisdictional requisite.¹⁷⁷ A bond on appeal from an order of involuntary adjudication is sufficient although it does not run to all the petitioning creditors.¹⁷⁸ Where an appeal is allowed within the prescribed time, it will not be dismissed because of a delay of a few days in filing the bond.¹⁷⁹

(4) CITATION.—When the appeal is allowed, a citation is issued to and served on the opposite party,¹⁸⁰ although this is not a jurisdictional

ous opinions of this court. In *Frame v. Portland Gold Min. Co.*, 47 C. C. A. 664, 108 Fed. 750, this court dismissed a writ of error because the assignment of errors was not filed until two days after the issue of the writ. In *Webber v. Mihills*, 124 Fed. 64, we dismissed an appeal because the assignment of errors was not filed until seven days after the appeal was allowed. . . . The assignment of errors in this case was not filed until the seventh day after the appeal was allowed, and under Rule 11 and the uniform decisions of this court the appeal must be dismissed."

Failure to file assignment of error under Rule 11.—Under Rule 11 of the Circuit Court of Appeals a failure to file assignment of error in cases in which a writ of error is the prescribed statutory method of securing a review of the judgment below, or in an appeal, does not invalidate the writ, or appeal, or prevent the court, into which it is returnable, from acquiring jurisdiction. Where a trustee in open court gives notice of his intention to appeal to the Circuit Court of Appeals, which follows the judge's signature to the decree, but does not file assignments of error until four days later when he presents a formal petition for appeal and files his assignments of error, the appeal will be deemed to have been taken and allowed on the date of the notice in open court, and the assignments of error, if necessary, properly in the record, and a motion to dismiss will not be allowed. *Bernard v. Lea* (C. C. A., 9th Cir.), 31 Am. B. R. 436, 210 Fed. 583.

172. *Flickinger v. First Nat. Bank* (C. C. A., 6th Cir.), 16 Am. B. R. 678, 145 Fed. 162, holding that in special circumstances an amendment will be allowed. A defective writ of error is amendable. *Long v. Farmers' State Bank* (C. C. A., 8th Cir.), 17 Am. B. R. 103, 147 Fed. 360.

173. In the case of *Acme Food Co. v. Meier* (C. C. A., 6th Cir.), 18 Am. B. R. 550, 153 Fed. 74, the court said: "The eleventh rule of this court requires that each error intended to be assigned shall be separately and particularly set out, and when it is to the charge, the assignment shall set out the part referred to *totidem verbis*. We have already ruled that this assignment, so far as it covers the questions last alluded to, is not well taken. We cannot sustain a single assignment as partly good and partly bad without violating our rules."

174. *Flickinger v. First Nat. Bank* (C. C. A., 6th Cir.), 16 Am. B. R. 678, 145 Fed. 162. 175. Bankr. Act, § 25-c.

176. R. S., §§ 1000, 1001; *Peugh v. Davis*, 110 U. S. 227, 28 L. Ed. 127; *Dodge v. Knowles*, 114 U. S. 430, 29 L. Ed. 144. See *Williams Bros. v. Savage* (C. C. A., 4th Cir.), 9 Am. B. R. 720, 120 Fed. 497.

177. In re *Quality Shop* (C. C. A., 7th Cir.), 29 Am. B. R. 854, 202 Fed. 196; In re *Hill Co.* (C. C. A., 7th Cir.), 17 Am. B. R. 517, 148 Fed. 832.

Security for costs.—There is no statute, rule or settled practice giving a respondent or appellee the right to apply for security for costs on a petition to review in matter of law the proceedings of the District Court for Porto Rico in a bankruptcy case. *Matter of Vidal* (C. C. A., 1st Cir.), 35 Am. B. R. 806, 230 Fed. 603.

178. *Flickinger v. First Nat. Bank* (C. C. A., 3th Cir.), 16 Am. B. R. 678, 145 Fed. 162.

179. *Columbia Iron Works v. National Lead Co.* (C. C. A., 6th Cir.), 11 Am. B. R. 340, 127 Fed. 99; In re *Hill Co.* (C. C. A., 7th Cir.), 17 Am. B. R. 517, 148 Fed. 832.

180. R. S. §§ 998, 999. Compare also *Jacobs v. George*, 150 U. S. 415, 37 L. Ed. 1127.

requisite.¹⁸¹ It has been held that the citation may be waived.¹⁸² The citation should give the names of all the applicants for the writ.¹⁸³ Citations should issue to all parties having an interest in the controversy; if parties are omitted the court may direct the issuance of an alias citation to them, and time for its service will be allowed if application be made in due time.¹⁸⁴ Defects in citations may be cured after the time limited for taking an appeal.¹⁸⁵

(5) **PERFECTING APPEAL.**—(I) *In general.*—The appeal is perfected by the giving and approval of the bond, and the issue of citation. The authorities are conflicting as to whether this must be done within ten days. There are a number of cases holding positively that the appeal is not taken within the prescribed time unless so perfected within the ten days.¹⁸⁶ On the other hand it has been held that the failure to perfect the bond and issue citation within the time prescribed for the appeal does not furnish ground for a dismissal of the appeal.¹⁸⁷ The time to appeal begins to run from the date of the entry of the order upon the records of the court.¹⁸⁸

(II) *Record to be certified; contents.*—After the filing of the bond and issue of citation the record is certified to the court and printed; the case is then brought on and argued in the usual way.¹⁸⁹ The rule of the circuit court of appeals provides that "no case will be heard until a complete record, containing in itself and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, shall be filed."¹⁹⁰ There should be a substantial compliance with this require-

181. *In re Quality Shop* (C. C. A., 7th Cir.), 29 Am. B. R. 854, 202 Fed. 196; *In re Hill Co.* (C. C. A., 7th Cir.), 17 Am. B. R. 517, 148 Fed. 832.

182. *Lockman v. Lang* (C. C. A., 8th Cir.), 11 Am. B. R. 597, 128 Fed. 279.

183. *Kerch v. United States* (C. C. A., 1st Cir.), 22 Am. B. R. 544, 171 Fed. 366.

184. *Gray v. Grand Forks Mercantile Co.*, (C. C. A., 8th Cir.), 14 Am. B. R. 780, 138 Fed. 344, 70 C. C. A. 634; *Lockman v. Lang* (C. C. A., 8th Cir.), 11 Am. B. R. 597, 128 Fed. 279.

185. *In re Hill Co.* (C. C. A., 7th Cir.), 17 Am. B. R. 517, 148 Fed. 832.

186. *Norcross v. Nave* (C. C. A., 8th Cir.), 4 Am. B. R. 317, 101 Fed. 796; *Kenova Loan & Trust Co. v. Graham* (C. C. A., 4th Cir.), 14 Am. B. R. 313, 135 Fed. 717; *In re Mueller* (C. C. A., 6th Cir.), 14 Am. B. R. 256, 135 Fed. 711; *In re McCall* (C. C. A., 6th Cir.), 16 Am. B. R. 670, 145 Fed. 898.

187. *Lockman v. Lang* (C. C. A., 8th Cir.), 12 Am. B. R. 497, 132 Fed. 1; *Gray v. Mercantile Co.* (C. C. A., 8th Cir.), 14 Am. B. R. 780, 138 Fed. 344; *In re Quality Shop* (C. C. A., 7th Cir.), 29 Am. B. R. 854, 202 Fed. 196; *Robertson Banking Co. v. Chamberlain* (C. C. A., 5th Cir.), 36 Am. B. R. 198, 228 Fed. 500, holding in effect that the filing of the petition for an appeal within the prescribed time is sufficient.

Curing defects in bond and citation.—In the case of *Columbia Iron Works v. National Lead Co.* (C. C. A., 6th Cir.), 11 Am. B. R. 340, 127 Fed. 99, the court said: "It appears that the appeal was prayed and allowed within ten days as prescribed by the act, but that the bond was not filed nor the

citation issued and served until a few days after the expiration of the ten days. But the general rule is that when an appeal is allowed within the time prescribed by law, it is sufficient for the purpose of moving the case though it is necessary in order to perfect the appeal, that a bond should be filed, and that a citation should be issued and served, where, as in this case, the appeal is not prayed in open court. The filing of the bond and the service of the citation are steps to be taken in perfecting the appeal, and if these steps are taken before the motion to dismiss the appeal is made, the court will ordinarily decline to dismiss the appeal because of the delay in filing the bond and serving the citation. In the present case the delay was for a few days only, and we do not think the interests of the opposite party were to any appreciable extent impaired thereby. The motion to dismiss upon that ground is therefore denied." See also *In re Hill Co.* (C. C. A., 7th Cir.), 17 Am. B. R. 517, 148 Fed. 832, holding that a citation and bond are not jurisdictional requisites, and defects therein may be cured after the time limited for taking an appeal.

188. So held in respect to an appeal from an order confirming a composition. *In re McCall* (C. C. A., 6th Cir.), 16 Am. B. R. 670, 145 Fed. 898.

189. As to practice on certification of record, see *In re Robertshaw Mfg. Co.* (D. C., Pa.), 14 Am. B. R. 341, 135 Fed. 220; *Cook, etc., Coal Co. v. Caldwell* (C. C. A., 4th Cir.), 17 Am. B. R. 135, 147 Fed. 475.

190. *Rules of Circuit Court of Appeals*, No. 14.

ment.¹⁹¹ It is a common practice for the parties to stipulate that certain portions of the record should be certified to the appellate court; where such a stipulation is entered into parts of the record may be certified, although of course the record must be sufficient to enable the appellate court to pass upon the questions submitted.¹⁹² The bankruptcy court is not required to find as to the facts and the record need not contain findings of facts. It is preferable, however, to include such findings as an aid to the appellate court.¹⁹³ It is sufficient if all the evidence on which the district court determined the question is contained in the record.¹⁹⁴ A proceeding in bankruptcy is a proceeding in equity and the taking of testimony therein and the review by appeal are governed by the practice which obtains in suits in equity except where otherwise specified; all the evidence offered by either party should be taken and recorded and, in case of an appeal, be returned to the appellate court. The evidence which is held by the referee or district court to be incompetent, irrelevant or immaterial should be included so that the appellate court may render its opinion as to whether the evidence rejected should or should not have been received.¹⁹⁵ The appellate court need not consider errors not specifically assigned,¹⁹⁶ though this is, of course, discretionary. The record should show when the appeal was perfected.¹⁹⁷ The court from which an appeal is taken may not interfere in the discretion allowed to the appellant in designating the record to be certified.¹⁹⁸ The record should disclose the

191. *Cook, etc., Coal Co. v. Caldwell* (C. C. A., 4th Cir.), 17 Am. B. R. 135, 147 Fed. 475; *In re Robertshaw Mfg. Co.* (D. C., Pa.), 14 Am. B. R. 341, 135 Fed. 220; *Flickinger v. First Nat. Bank* (C. C. A., 6th Cir.), 16 Am. B. R. 678, 145 Fed. 162; *Devries v. Shanahan* (C. C. A., 4th Cir.), 10 Am. B. R. 518, 122 Fed. 629; *In re Richards* (C. C. A., 7th Cir.), 3 Am. B. R. 145, 96 Fed. 935.

192. *In re Robertshaw Mfg. Co.* (D. C., Pa.), 14 Am. B. R. 341, 135 Fed. 220; *Cunningham v. Bank* (C. C. A., 6th Cir.), 4 Am. B. R. 192, 103 Fed. 932.

Record containing no evidence.—An appeal to the Circuit Court of Appeals from an order or decree denying an adjudication and dismissing an involuntary petition cannot be entertained where the record contains none of the testimony, either in form or substance, returned by the referee and passed upon by the District Court. *Matter of Murphy* (C. C. A., 9th Cir.), 36 Am. B. R. 712, 229 Fed. 988.

193. *In re Meyers* (D. C., N. Y.), 5 Am. B. R. 4, 105 Fed. 353.

Necessity of special finding.—The circuit court of appeals in the second circuit has pointed out that in the absence of special findings the court cannot tell except by inference what facts were or were not found, but must examine all the evidence and determine whether the decree of the court below was right. *Van Iderstine v. National Discount Co.* (C. C. A., 2d Cir.), 23 Am. B. R. 345, 174 Fed. 518, *affd.* 227 U. S. 575, 29 Am. B. R. 478, 57 L. Ed. 652.

194. *Cunningham v. German Ins. Bank* (C. C. A., 6th Cir.), 4 Am. B. R. 192, 103 Fed. 932.

195. Evidence objected to and ruled out.—In the case of *First National Bank of Philadelphia v. Abbott* (C. C. A., 8th Cir.), 21

Am. B. R. 436, 165 Fed. 852, the court said: "If evidence is objected to and ruled out it must nevertheless be written down and preserved in the record, subject to the objection, or the ruling cannot be considered in the appellate court. From the general rule that all evidence offered must be taken and preserved, the evidence of a privileged witness, evidence plainly privileged and evidence which clearly and affirmatively appears to be so incompetent, irrelevant or immaterial that it would be an abuse of the process or power of the court to compel its production or to permit its introduction, are excepted. Referees, other officers taking testimony and the district court, are governed by the same rule of practice in the taking of evidence and the hearing of controversies in bankruptcy, where the reason for the rule is much stronger than in ordinary suits in equity, because many of the orders and decrees in bankruptcy are reviewable, first in the district court and again in the court of appeals, and the delays would be intolerable if it were necessary for each court to remand for further testimony whenever it found that excluded evidence should have been received."

196. *Boonville, etc., v. Blakey* (C. C. A., 7th Cir.), 6 Am. B. R. 13, 107 Fed. 891; *In re Gutterson* (D. C., Mass.), 14 Am. B. R. 495, 136 Fed. 698.

197. *Williams Bros. v. Savage* (C. C. A., 4th Cir.), 9 Am. B. R. 720, 120 Fed. 497.

198. Designation of parts of record.—In the case of *In re Robertshaw Mfg. Co.* (D. C., Pa.), 14 Am. B. R. 341, 135 Fed. 220, the court said: "The petition of the Imperial Woolen Co. upon which this rule was granted, sets forth such parts of the record as they regard sufficient for a full and com-

appearances by the parties, but it will be presumed that the appearances required to be entered by objecting creditors under General Order XXXII were duly and properly entered where no objection thereto had been urged in the court below.¹⁹⁹ Where the record is incomplete the appeal should not be dismissed but the record should be completed upon motion by the appellee to compel the appellant to file a transcript of such other papers and evidence as are deemed necessary.²⁰⁰ If it appears that books and other exhibits cannot be transcribed or represented by photographic copies, an order may be made to present such books and exhibits to the appellate court as a part of the return.²⁰¹ The certification must be made by the clerk of the district court and not by the referee.²⁰²

(6) **FORCE AND EFFECT OF FINDINGS OF FACT.**—In conformity with the rule in equity the circuit court of appeals will not interfere with findings of facts by the district judge; or by a referee, affirmed by a district court, unless the findings are clearly erroneous, or, as it is sometimes expressed, manifestly against the weight of evidence.²⁰³ When the court has considered conflicting

plete understanding of the case in the appellate court, and we are of the opinion that their judgment is right in this respect, but we know of no law which authorizes the court from which an appeal is taken, to designate what records in the court below shall be certified upon which the appellate court shall determine the appeal; in fact, the judge of the court from which the appeal is taken ought not in the least to interfere in the discretion allowed by the general terms used in the act of Congress and rules of court in designating the record to be certified in cases of appeal, as his judgment is to be reviewed and his opinion of the importance and relevancy of matters contained in the record might in the estimation of counsel for one side or the other be as faulty as it is claimed his judgment is from which an appeal is taken; and if an order of the court from which the appeal is taken should have the effect of restricting the record in all cases where such a defect had been made, there would be the possibility of a feeling upon the one side or the other that they had not secured a fair hearing on the full record.”

199. *Shaffer v. Koblegard Co.* (C. C. A., 4th Cir.), 24 Am. B. R. 898, 183 Fed. 71.

200. *Flickinger v. First Nat. Bank* (C. C. A., 6th Cir.), 16 Am. B. R. 678, 145 Fed. 162.

Cost of supplying additional matter.—Where on the appeal by the debtor from an adjudication in involuntary proceedings it appears that an alleged amount of evidence in the case has not been inserted in the record because claimed by the appellant to be immaterial on the appeal, a motion of the appellee to include such evidence in the record will be allowed, with the reservation of power in the appellate court to ultimately determine who shall pay the cost incident to the supplying of such additional matter. *Herman Keck Mfg. Co. v. Lorsch* (C. C. A., 6th Cir.), 24 Am. B. R. 705, 179 Fed. 485.

Remedy for incomplete record.—When the certificate of the clerk of the district court does not show that the record is a full and complete record of the entire proceedings, the appeal should not be dismissed, but if it does not appear by stipulation or otherwise that the record contains all that is necessary to the determination of the matters involved in an appeal, and if the appellee is not content with the transcript as filed, he should promptly move the court to require the appellant to complete the record by filing a transcript of such other papers in evidence as he deems necessary and points out. The motion papers should show that the documents and proofs desired constitute a part of the record upon which the judgment of the district court was rendered, and not simply that such documents and proofs constitute the original evidence upon which the referee made the findings which were subsequently reviewed by the district judge. *Cunningham v. German Insurance Bank* (C. C. A., 6th Cir.), 4 Am. B. R. 192, 103 Fed. 932.

201. *Herman Keck Mfg. Co. v. Lorsch* (C. C. A., 6th Cir.), 24 Am. B. R. 705, 179 Fed. 485.

202. *Cook, etc., Coal Co. v. Caldwell* (C. C. A., 4th Cir.), 17 Am. B. R. 135, 147 Fed. 475.

203. *In re Noyes* (C. C. A., 1st Cir.), 11 Am. B. R. 506, 127 Fed. 286; *Burleigh v. Foreman* (C. C. A., 1st Cir.), 12 Am. B. R. 88, 139 Fed. 13; *Barton Bros. v. Texas Produce Co.* (C. C. A., 8th Cir.), 14 Am. B. R. 502, 136 Fed. 355; *In re Cole* (C. C. A., 1st Cir.), 18 Am. B. R. 302, 144 Fed. 392; *In re Lawrence* (C. C. A., 2d Cir.), 13 Am. B. R. 798, 134 Fed. 843; *Edinburg Coal Co. v. Humphreys* (C. C. A., 7th Cir.), 13 Am. B. R. 593, 134 Fed. 839; *Dodge v. Norlin* (C. C. A., 8th Cir.), 13 Am. B. R. 176, 133 Fed. 363; *Canner v. Webster Taper Co.* (C. C. A., 1st Cir.), 21 Am. B. R.

evidence and made a finding or decree it is presumptively correct and unless some obvious error of law has intervened or some serious mistake of fact has been made the finding or decree must be permitted to stand.²⁰⁴ An order of adjudication will be reversed on appeal where a stipulation in which all proved or provable claims against the bankrupt are represented is filed asking that the order be reversed and the appeal dismissed.²⁰⁵

872, 168 Fed. 519; *In re Sweeney* (C. C. A., 6th Cir.), 21 Am. B. R. 866, 168 Fed. 612; *Matter of Schmid* (C. C. A., 3d Cir.), 36 Am. B. R. 548, 230 Fed. 818; *Owens v. Farmers' Bank of Abbeville* (C. C. A., 4th Cir.), 36 Am. B. R. 324, 228 Fed. 508; *Matter of Brown Commercial Car Co.* (C. C. A., 7th Cir.), 36 Am. B. R. 45, 227 Fed. 387; *Wilson v. Continental Building & Loan Association* (C. C. A., 9th Cir.), 37 Am. B. R. 444, 232 Fed. 824; *Matter of Perrell* (C. C. A., 3d Cir.), 32 Am. B. R. 241, 214 Fed. 337; *Deupree v. Watson* (C. C. A., 6th Cir.), 32 Am. B. R. 407, 216 Fed. 483. See cases digested Am. Bankr. Dig. § 1232.

Review of findings of fact.—Where the testimony is conflicting and the findings of fact of the referee and district judge are the same, the facts will not be inquired into by an appellate court unless there is plain error. *In re Dorr* (C. C. A., 9th Cir.), 28 Am. B. R. 505, 196 Fed. 292; *Matter of National Pressed Brick Co.* (C. C. A., 6th Cir.), 32 Am. B. R. 324, 212 Fed. 878.

Mistake of fact.—Where both the master and the district court have agreed upon findings and conclusions from conflicting evidence, they are presumptively correct and must be sustained unless an obvious error of law or some serious mistake of fact appears. *Aller-Wilmes Jewelry Co. v. Osborn* (C. C. A., 8th Cir.), 36 Am. B. R. 714, 231 Fed. 907; *Wood Mowing and Reaping Machine Co. v. Croll* (C. C. A., 6th Cir.), 36 Am. B. R. 610, 231 Fed. 679.

204. *Coder v. Arts* (C. C. A., 8th Cir.), 18 Am. B. R. 513, 152 Fed. 943, *affd.* 213 U. S. 223, 22 Am. B. R. 1, 53 L. Ed. 772; *Houck v. Christy* (C. C. A., 8th Cir.), 18 Am. B. R. 330, 152 Fed. 612; *Merchants' Nat. Bank v. Cole* (C. C. A., 6th Cir.), 18 Am. B. R. 44, 149 Fed. 708; *Hussey v. Richardson-Roberts Dry Goods Co.* (C. C. A., 8th Cir.), 17 Am. B. R. 511, 148 Fed. 598; *Brady v. Bernard & Kittinger* (C. C. A., 6th Cir.), 22 Am. B. R. 342, 170 Fed. 576; *Carroll v. Stern & Goldsmith* (C. C. A., 6th Cir.), 34 Am. B. R. 570, 223 Fed. 723. See cases digested Am. Bankr. Dig. § 1231.

Review of discretionary rulings.—In the case of *Gold v. South Side Trust Co.* (C. C. A., 3d Cir.), 24 Am. B. R. 578, 179 Fed. 210, it was held that where a ruling concurred in by both referee and district judge in an administrative matter involves the exercise of discretionary power, the court's action should not be reversed upon appeal unless it clearly appears wrong was done. This case was an appeal from an order of

the bankruptcy court confirming a report of the referee which rejected a claim of a real estate broker for commissions, and the court said: "No legal liability existed and while it may be that under the facts here disclosed the referee might have allowed compensation, such allowance would be an exercise of discretionary power and not an enforcement of legal right. Indeed, the counsel for the defense conceded at the argument in this court that the allowance of this claim by the court and referee was discretionary. Such being the case and although there may be merit in the appellant's contention, we are strongly averse unless it clearly appears wrong was done, to reverse a ruling concurred in by both referee and district judge in any administrative matter. If abuses threaten to creep into bankruptcy procedure, those charged with local administration are in better position to prevent such abuses than are appellate tribunals. It follows therefore that in such matters the court's action should not be reversed unless unmistakably wrong."

Findings of fact, dependent upon conflicting testimony, by a judge, master or referee, who have seen and heard the witnesses testify, have every reasonable presumption in their favor, and should not be set aside or modified, unless it clearly appears that there was error or mistake on their part. *Finlayson v. Barrows* (C. C. A., 5th Cir.), 34 Am. B. R. 429, 221 Fed. 936.

When findings of district court not to be disturbed.—An appeal "as in equity," under section 25a of the Bankruptcy Act, presents the controversy for determination *de novo* under the new rules as under the old rules; but where the trial judge has heard the testimony in open court his finding of fact should not be disturbed unless the record very clearly discloses either a misapprehension of the testimony or a mistaken application of the law. *Matter of Kaplan* (C. C. A., 7th Cir.), 37 Am. B. R. 104, 234 Fed. 866.

Conflicting evidence.—When a trial court has considered conflicting evidence, made his findings and decree thereon, they will be held by appellate courts to be presumptively correct, and unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence, the findings must stand. *Nichols v. Elken et al.* (C. C. A., 8th Cir.), 35 Am. B. R. 365, 225 Fed. 689.

205. *Matter of Donnelly* (C. C. A., 6th Cir.), 32 Am. B. R. 232, 211 Fed. 118.

(7) **EFFECT OF APPEAL AND DECISION.**—Whether an appeal acts as a stay on proceedings in the court below is a question not often important. It may be obviated by an application to the judge below for a *supersedeas*.²⁰⁶ When the appellate court confirms or reverses an order of the court below and remands the same to such court, the court below is bound to obey the mandate and carry it into effect without any change or limitation.²⁰⁷

(8) **COSTS OF APPEAL.**—Costs follow the practice and rules of the court, but where, in an appeal against a trustee, the order below is reversed on a proposition brought forward by the appellate court itself, no costs will be allowed.²⁰⁸ The bankrupt is not entitled to have the cost of the transcript and the printing of the record paid out of the funds of the estate because he is without the necessary means to defray the expense.²⁰⁹

IV. REVIEWS BY SUPREME COURT.

a. From a circuit court of appeals.—(1) **EFFECT OF ACT OF 1915 LIMITING APPEALS.**—All decrees and judgments of the circuit courts of appeal in cases arising under the bankruptcy act are made final by Act of Congress of January 28, 1915 (38 Stat. at Large, 804, ch. 22), as amended by Act of Congress, approved September 6, 1916, (ch. 448 of Laws of 1916), as follows: “That judgments and decrees of the circuit courts of appeals in all proceedings and causes arising under ‘An Act to establish a uniform system of bankruptcy throughout the United States,’ approved July first, eighteen hundred and ninety-eight, and in all controversies arising in such proceedings and causes; also, in all causes arising under ‘An Act relating to the liability of common carriers by railroad to their employees in certain cases,’ approved April twenty-second, nineteen hundred and eight; also, in all causes arising under ‘An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon,’ approved March fourth, nineteen hundred and seven; also, in all causes arising under ‘An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes,’ approved March second, eighteen hundred and ninety-three; and, also, in all causes arising under any amendment or supplement to any one of the aforementioned Acts which has been heretofore or may hereafter be enacted, shall be final, save only that it shall be competent for the Supreme Court to require by certiorari, upon the petition of any party thereto, that the proceeding, case, or controversy be certified to it for review and determination, with the same power and authority and with like effect as if taken to that court by appeal or writ of error.”

The language of this act is very comprehensive, and embraces proceedings and cases arising under the bankruptcy act and controversies arising in such proceedings, and provides that the judgments and decrees of the Circuit Court of Appeals in such controversies, proceedings, and cases shall be final.^{209a}

The purpose of the act is obvious. It is to relieve the Supreme Court from the necessity of considering cases in bankruptcy, where a determination is made by a circuit court of appeal, except when brought to the Supreme Court by writ of certiorari.^{209b} It will be observed that the Supreme Court may require the case

206. See R. S., § 1007; *Covington Stock Yards v. Keith*, 121 U. S. 248, 30 L. Ed. 914; *Adams v. Lane*, 16 How. 148; *French v. Shoemaker*, 12 Wall. 86; *Hunt v. Oliver*, 109 U. S. 177; *Texas, etc., Co. v. Murphy*, 111 U. S. 488, 28 L. Ed. 492.

Without a *supersedeas* an appeal never suspends the execution of an order nor stops its enforcements. *Matter of Brady* (D. C., Ky.), 21 Am. B. R. 364, 169 Fed. 152.

207. In re *Hudson River Electric Power*

Co. (D. C., N. Y.), 25 Am. B. R. 873, 184 Fed. 970.

208. In re *Jourdan* (C. C. A., 1st Cir.), 7 Am. B. R. 186, 111 Fed. 726.

209. *Herman Keck Mfg. Co. v. Lorsch* (C. C. A., 6th Cir.), 24 Am. B. R. 705, 179 Fed. 485.

209a. *Staats Co. v. Security Trust and Sav. Bank* (U. S. Sup. Ct.), 39 Am. B. R. 335.

209b. *Central Trust Co. v. Lueders*, 239 U. S. 11, 35 Am. B. R. 730.

"to be certified to it for review and determination, with the same power and authority as if taken to that court by appeal or writ of error." It would appear that the intent was to limit the right of review under this act to the cases in which an appeal might be brought under § 25-b of the bankruptcy act. In this view, many of the determinations of the Supreme Court under that section are now applicable. The practice on review will be that prescribed where writs of certiorari are issued out of the Supreme Court. It may be useful to retain references to former cases on appeal to the Supreme Court, and for that reason we have included the following paragraph as to appeals to the Supreme Court.

(2) **FORMER APPEALS TO SUPREME COURT.**—Under the law as it existed prior to the act of January 28, 1915, above referred to, appeals to the Supreme Court of the United States were, in bankruptcy, limited by § 25-b of the act to controversies on claims of over \$2,000,²¹⁰ where a Federal question, so-called, is involved, or, if no such question is involved, where a justice of that court has certified that the decision of the question in controversy "is essential to the uniform construction of the act throughout the United States."²¹¹ In the absence of a certificate an appeal from a decision of a circuit court of appeals allowing or rejecting a claim where the amount in controversy exceeds \$2,000, may not be taken unless a Federal question of the kind described in § 237 of the Judicial Code is involved.²¹² Sections 239-241 of the Judicial Code, providing for appeals and writs of error from circuit court of appeals to the Supreme Court have no relation to the revisory power conferred by § 24-b of the bankruptcy act and parties having elected to litigate in such court under these sections, the proceedings terminate there unless the case is one arising under § 25-b and is properly certified to the Supreme Court as therein required.²¹³ Under the Judicial Code the jurisdictional amount is \$1,000; under § 25-b it is \$2,000; of course the two cannot stand together. If the case relates to establishing a lien on real property, and involves a question which might arise independently of a proceeding in bankruptcy, it is appealable to the Supreme Court under the above sections of the Judicial Code.²¹⁴ If the appeal is from a decision allowing or rejecting a claim offered in proof in bankruptcy the jurisdiction conferred by the bankruptcy act is exclusive.²¹⁵ Authority to appeal from an order disallowing a claim in bankruptcy proceedings must be found in the provisions of the bankruptcy act, since the modes

210. The plain purport of the act seems to limit an appeal by a certificate of a justice of the Supreme Court to a claim in controversy which exceeds the sum of \$2,000. See *Hutchinson v. Otis* (C. C. A., 1st Cir.), 10 Am. B. R. 275, 123 Fed. 14; *Barrie v. Barrie*, 5 How. (U. S.) 103; *Gordon v. Ogden*, 3 Pet. (U. S.) 33.

211. **Federal question involved.**—Where the appellant insisted upon a construction of the bankruptcy act which would defeat the lien, and the construction contended for by appellee would give it validity, a construction of the bankruptcy act was directly involved in the determination of the question as to the validity of said lien, and the judgment of the Circuit Court of Appeals was appealable to this court under section 25-b. *Coder v. Arts* (Sup. Ct.), 22 Am. B. R. 1, 213 U. S. 223, 53 L. Ed. 772.

Determination of question.—The question whether a case arises under the laws of the United States, so as to permit an appeal to the Supreme Court from a judgment of the Circuit Court of Appeals, must be determined, not on questions which may have arisen or which might arise in the subsequent progress of the case, but upon the grounds of jurisdiction set forth in the petition. *Lovell v.*

Newman & Son, 227 U. S. 412, 29 Am. B. R. 482, 57 L. Ed. 577.

Claim for damages on breach of contract.—A decision of the Circuit Court of Appeals that a claim for damages for an anticipatory breach of contract caused by bankruptcy is provable but that the damages should be limited to six months after filing the petition because the contract was mutually obligatory for that period only, does not involve a Federal question, and is not appealable under section 25-b (1) of the Bankruptcy Act. *Central Trust Co. of Ill. v. Chicago Auditorium Assoc.*, 240 U. S. 581, 36 Am. B. R. 679.

212. *Central Trust Co. of Illinois v. Chicago Auditorium Assoc.*, 240 U. S. 581, 36 Am. B. R. 679.

213. *Hutchinson v. Otis* (C. C. A., 1st Cir.), 10 Am. B. R. 275, 123 Fed. 14; *Western Tie & Timber Co. v. Brown*, 196 U. S. 502, 13 Am. B. R. 447, 49 L. Ed. 571; *Lucius v. Cawthorn-Coleman Co.*, 196 U. S. 149, 13 Am. B. R. 696, 49 L. Ed. 425.

214. *Hobbs v. Head & Dowst Co.* (C. C. A., 1st Cir.), 27 Am. B. R. 484, 191 Fed. 811.

215. *Hutchinson v. Otis* (C. C. A., 1st Cir.), 10 Am. B. R. 275, 123 Fed. 14.

of review of questions arising in steps in bankruptcy proceedings, therein specifically provided for, are exclusive.²¹⁶ An order of the district court allowing an exemption in bankruptcy proceedings is not a "final decision allowing or rejecting a claim," within the meaning of subsection *b*, and an appeal from a decision of the circuit court of appeals in respect thereto does not lie to the Supreme Court.²¹⁷ No appeal lies from a judgment of the circuit court of appeals, affirming a judgment refusing to grant a discharge.²¹⁸ The decision allowing or rejecting the claim must be final. A referee's order disallowing a claim "for the present" so as to permit the claimant to vote for a trustee without prejudice to the claimant's right to present the claim thereafter is not a final decision allowing or rejecting a claim so as to permit an appeal to be taken to the Supreme Court.²¹⁹ An objection to the want of proof of an act of bankruptcy which was not raised in the court below may not be raised for the first time on appeal.²²⁰

b. Practice.—The practice on appeal to the Supreme Court, as regulated by General Order XXXVI (2) (3),²²¹ is now abrogated by the act of January 28, 1915, which prohibits appeals from determination of circuit courts of appeals, and authorizes reviews of such determination under writs of certiorari. An appeal from a final order of the circuit court of appeals affirming an order allowing a claim was required to be taken within 30 days after the making of the order, as required by General Order XXXVI, and such time cannot be extended by filing a petition for a rehearing.²²² The record must contain

216. *Tefft, Weller & Co. v. Munsuri*, 222 U. S. 114, 27 Am. B. R. 338, 56 L. Ed. 118.

217. *Holden v. Stratton*, 191 U. S. 115, 10 Am. B. R. 786, 48 L. Ed. 116; *Smalley v. Langemour*, 196 U. S. 93, 13 Am. B. R. 692, 49 L. Ed. 400.

218. *James v. Stone & Co.*, 227 U. S. 410, 29 Am. B. R. 476, 57 L. Ed. 573.

219. *Duryea Power Co. v. Sternbergh*, 218 U. S. 299, 25 Am. B. R. 66, 54 L. Ed. 1047.

Order allowing or rejecting a claim.—Where the district court made an order, which was not appealed from, directing that the claim of bankrupt's president should be postponed to the claim of intervener, and, subsequently, an order was made that the dividend on said claim be paid to the intervener, which order was reviewed by the Circuit Court of Appeals where the controversy was limited to a complaint as to the mode of distribution, no issue being raised or contention made as to the prior order, held that the question whether the prior order was correctly interpreted by the referee and district court in the distribution directed by the subsequent administrative order was not one concerning the allowance or rejection of a claim but was a matter arising in the administration of the bankrupt estate, which the Supreme Court was not empowered to review. *Wynkoop, Hallenbeck, Crawford Co. v. Gaines* (U. S. Sup. Ct.), 227 U. S. 4, 29 Am. B. R. 369, 57 L. Ed. 391.

220. *Armstrong v. Fernandez*, 208 U. S. 324, 19 Am. B. R. 746, 52 L. Ed. 514, holding that where the only question contested below was whether or not the alleged bankrupt was a person engaged chiefly in agriculture, and

the opposing creditors make no objection to the want of proof of the act of bankruptcy alleged, an objection first raised on appeal that other findings should have been made in respect to the act of bankruptcy comes too late. As to objections first raised on appeal, see *Frank v. Volkommer*, 205 U. S. 521, 17 Am. B. R. 806, 51 L. Ed. 411. See also *Wood v. Wilbert's Sons Shingle & Lumber Co.*, 226 U. S. 384, 29 Am. B. R. 220, 57 L. Ed. 264, holding that an objection not made in the court below and not assigned as error on appeal to the United States Supreme Court, will not be passed upon by the latter court.

221. See *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224, 46 L. Ed. 405, for meaning of this general order. For forms, see any of works on Federal practice, for instance, *Desty's Federal Procedure*, 9th Ed., Vol. IV.

222. *Conboy v. First Nat'l Bank*, 203 U. S. 141, 16 Am. B. R. 773, 51 L. Ed. 128. In the case of *Hobbs v. Head & Dowst Co.* (C. C. A., 1st Cir.), 27 Am. B. R. 484, 191 Fed. 811, it was held that the limit of 30 days prescribed in the General Order only applies to appeals taken expressly under the Bankruptcy Act.

Time for taking appeal.—The time within which an appeal to the United States Supreme Court, under section 7 of the Act of March 3, 1891, must be taken, is one year, the thirty-day limitation contained in section 7 being applicable only to appeals thereunder to the Circuit Court of Appeals. *United States Fidelity & Guaranty Co. v. Bray*, 225 U. S. 205, 28 Am. B. R. 207, 56 L. Ed. 1055.

the findings of fact and conclusions of law of the court below as required by General Order XXXVI (3), otherwise the appeal will be dismissed; the omission may not be supplied by reference to the opinion of the court below.²²³ One who contemplates an appeal to the Supreme Court should make a request for findings of facts before the decree of the circuit court of appeals is entered.²²⁴ The rule that where two courts have concurred in findings of fact the Supreme Court will accept those findings unless clear error is shown, will always be applied.²²⁵ The general order is limited to cases where either party is entitled to take an appeal to the Supreme Court under the bankruptcy act; it is therefore limited in its application to appeals in respect to claims of the required amount; it has no reference to appeals and controversies arising in bankruptcy proceedings which are appealable to the Supreme Court under the Judicial Code; in such a case the requirement as to special findings of fact and conclusions of law does not apply.²²⁶ A judgment that a person is not a bankrupt on a verdict by the jury in the trial of the cause, is reviewable in the Supreme Court only by writ of error.²²⁷ This method of reviewing the judgment of a circuit court of appeals is, because of the limitations hedging it in, very rare.

V. NO APPEAL BOND REQUIRED OF TRUSTEE WHO APPEALS.

The words of the statute are clear. Appeal bonds are required from all appellants save trustees. Appeal bonds are not required on petitions to revise. It would seem that this subsection applies also to writs of error from the highest courts of the States.

VI. CERTIFICATE AND CERTIORARI.

a. *Certificates to the Supreme Court.*—The reference as to certification to the Supreme Court is clearly to the Evarts act (now Judicial Code, §§ 239–241).²²⁸ This power may be exercised by either a circuit court of appeals or a district court. If from the district court, the question certified must be

²²³ *Chapman v. Bowen*, 207 U. S. 89, 18 Am. B. R. 844, 52 L. Ed. 116. As to practice in eighth circuit, see *Century Savings Bank v. Robert Moody & Son* (C. C. A., 8th Cir.), 31 Am. B. R. 586, 209 Fed. 775.

Request for findings.—Where an appeal to the United States Supreme Court is contemplated, a suggestion of such intention should be made to the Circuit Court of Appeals at the argument, so that such court may render separate findings of fact and conclusions of law thereon, as provided in General Order No. 36. *Lumpkin v. Foley* (C. C. A., 5th Cir.), 29 Am. B. R. 673, 204 Fed. 372. See also *Knapp v. Milwaukee Trust Co.* (C. C. A., 7th Cir.), 20 Am. B. R. 671, 162 Fed. 675.

²²⁴ *Washington v. Tearney* (C. C. A., 4th Cir.), 28 Am. B. R. 633, 197 Fed. 307.

²²⁵ *Page v. Rogers*, 211 U. S. 575, 21 Am. B. R. 496, 53 L. Ed. 332; *Greey v. Dockendorff*, 231 U. S. 513, 31 Am. B. R. 407, 58 L. Ed. 339.

²²⁶ *In re Standard Telephone & Electric*
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Co., 216 U. S. 545, 24 Am. B. R. 761, 54 L. Ed. 610, in which case it appeared that a trustee in bankruptcy had filed a petition to sell all the stock-in-trade and other property of the bankrupt and the appellant had intervened to establish the lien of a chattel mortgage on such property to be satisfied out of the proceeds of sale and the validity of such a mortgage had been attacked by the trustee; it was held that the controversy was one arising in a bankruptcy proceeding, and the procedure upon appeal was the same as in like cases under the court of appeals act of 1891 (Judicial Code, §§ 239–241), and no special findings of fact and conclusions of law are required since General Order XXXVI does not apply to such a case.

²²⁷ *Grant Shoe Co. v. Laird Co.*, 203 U. S. 502, 17 Am. B. R. 1, 52 L. Ed. 292; *Elliott v. Toepfner*, 187 U. S. 327, 334, 9 Am. B. R. 50, 47 L. Ed. 200.

²²⁸ The act of March 3, 1891, was revised in Judicial Code, in effect January 1, 1912.

after final judgment,²²⁹ and one of jurisdiction.²³⁰ The certificate is a matter of right, provided a jurisdictional question has been decided. If from the circuit court of appeals, any question on which the court desires instruction may be certified up; but the certificate is discretionary. It seems also that here a final judgment is not necessary.²³¹ Such certificates bring up only questions of law.²³² The practice and precedents are already numerous,²³³ though there are few cases which originated in bankruptcy.

b. Writs of certiorari from the Supreme Court.—Here again the reference is to the Evarts act. Such a writ (a) can be directed to the circuit court of appeals only, and (b) may be asked only in those cases where the ultimate decision of that court is final. While the Supreme Court has often disclaimed an intention to use this writ,²³⁴ it has grown quite common. The statute gives the court a wide discretion as to time,²³⁵ but, as a rule, such a writ should not be asked until a final decision is had below. The application is by petition to the Supreme Court, accompanied by a printed record of the case, and the question on which the writ is desired is, after due notice, moved on a motion day and submitted by written briefs. The effect of the writ, if granted, is to remove the question to the Supreme Court; and it is thereafter proceeded with there, as if brought up on an appeal.²³⁶ The precedents on certiorari under the Evarts act (now Judicial Code, §§ 239–241) are already numerous and may be consulted with profit.²³⁷ Where a mandate has issued from the Supreme Court directing the district court to modify its decree in accordance with the Supreme Court's opinion, a peremptory mandamus may issue from the circuit court of appeals enforcing obedience of such mandate.²³⁸ But a writ of mandamus is no proper substitute for a writ of error, and mandamus will not lie to compel a court of bankruptcy to dismiss proceedings in bankruptcy against an alleged bankrupt on the ground that the petition in bankruptcy failed to show that the alleged bankrupt was subject to the jurisdiction of the court.²³⁹

229. *Bardes v. Bank*, 175 U. S. 526, 3 Am. B. R. 680, 44 L. Ed. 261; *Tefft, Weller & Co. v. Munsuri*, 222 U. S. 114, 27 Am. B. R. 338, 56 L. Ed. 118.

230. *First Nat'l Bank of Denver v. Klug*, 186 U. S. 202, 8 Am. B. R. 12, 46 L. Ed. 1127; *Columbia Iron Works v. National Lead Co.* (C. C. A., 6th Cir.), 11 Am. B. R. 340, 127 Fed. 99. See also *Van Wagenen v. Sewall*, 160 U. S. 369, 40 L. Ed. 460; *Maynard v. Hecht*, 151 U. S. 324; *McLish v. Roff*, 141 U. S. 661, 35 L. Ed. 893.

231. *Duff v. Carrier*, 55 Fed. 433.

232. *Warner v. New Orleans*, 167 U. S. 467, 42 L. Ed. 239; *Cross v. Evans*, 167 U. S. 60, 42 L. Ed. 77.

233. For instance, *Columbus Watch Co. v. Robbins*, 148 U. S. 266, 37 L. Ed. 443. For forms, see *Desty's Federal Procedure*, 9th ed., Vol. IV.

234. See *Forsyth v. Hammond*, 166 U. S. 506, 41 L. Ed. 1095.

235. Compare *The Conqueror*, -166 U. S. 110, 41 L. Ed. 937.

236. *Hubbard v. Todd*, 171 U. S. 474, 43 L. Ed. 246.

237. *American Const. Co. v. Jacksonville*, etc., 148 U. S. 372, 37 L. Ed. 486; *Lav Ow Bew v. U. S.*, 144 U. S. 47, 36 L. Ed. 340; *Chicago, etc., v. Osborne*, 146 U. S. 354, 36 L. Ed. 1002. For forms see *Desty's Federal Procedure*, 9th ed., Vol. IV.

238. *Ex parte Chicago Title & Trust Co.* (C. C. A., 7th Cir.), 16 Am. B. R. 848, 146 Fed. 742. See *Kyle v. Hammond* (C. C. A., 1st Cir.), 34 Am. B. R. 547, 192 Fed. 559, in which it was held that where a petition to review a decision in bankruptcy is dismissed by the Circuit Court of Appeals for want of jurisdiction the remedy of the petitioner is by application to the Supreme Court for writ of mandamus or certiorari, and not by application for leave to appeal to the Supreme Court.

239. *Matter of Riggs*, 214 U. S. 9, 22 Am. B. R. 720, 53 L. Ed. 887.

SECTION TWENTY-SIX.

ARBITRATION OF CONTROVERSIES.

§ 26. **Arbitration of Controversies.**—*a* The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.

b Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator.

c The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury.

Analogous provisions: In U. S.: Act of 1867, § 17, R. S., § 5061; Act of 1800, § 43.

In Eng.: Act of 1883, § 57(6).

Cross-References: To the law: Jurisdiction of court of bankruptcy to determine controversies, §§ 2(7), 23.

Compromise of controversies, § 27.

To the General Orders: Application to submit controversies to arbitrators, XXXIII

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ARBITRATION OF CONTROVERSIES.

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a. In general, 611.

b. Scope and practice, 612.

II. Arbitrators, How Chosen, 612.

III. Effect of Arbitration, 612.

I. ARBITRATION.

a. In general.— Under subsection *a* of this section, “any controversy arising in the settlement of the estate,” may be submitted to arbitration. General Order XXXIII controls as to the application for the submission of such a controversy to arbitration.

b. Scope and practice.— This section provides a means to judgment by lay judges. It resembles a similar practice in most of the States; and is availed of as rarely. Under the English law, no application to court is necessary; the trustee may submit to arbitration, if the committee of inspection consent.¹ With us, the direction of the court must first be obtained. The proceeding is initiated by a petition, which should specify "the subject-matter of the controversy and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise."² Both the law and general orders are silent as to what notice is required; the analogies of the statute suggest the same notice as that required on the settlement of controversies.³ The notice should, however, take the form of an order to show cause. The granting of the order is discretionary. Under the former law, it could not be addressed to the register.⁴ Now it can, and almost invariably will be, to the referee.⁵

II. ARBITRATORS, HOW CHOSEN.

Subsection *b* provides the method of choosing arbitrators. The statute requires no elucidation. It is construed strictly. The arbitrators must be chosen in one of the ways indicated, or their finding will be set aside.⁶ Once chosen, the practice thereafter should conform to that on arbitrations in the State courts. The inquiry is necessarily somewhat informal, but the findings must be reduced to writing and signed by the arbitrators, or a majority of them.⁷ It should be filed, not with the referee, but in the district court clerk's office.

III. EFFECT OF ARBITRATION.

The findings when filed become in effect the verdict of a jury. They need not be formally approved by the court. But they may be set aside by the district judge;⁸ they are also subject to review in the same way a verdict is. If not set aside by the judge or on appeal, the findings are *res adjudicata* on all parties to the proceeding, even in a collateral action.⁹

1. Eng. Act of 1883, § 57(6).

2. General Order XXXIII.

3. See Bankr. Act, § 58-a(7). Note, also, *In re Hoole*, 3 Fed. 496.

4. *In re Graves*, Fed. Cas. 5,709.

5. Bankr. Act, § 38-a(4).

6. *In re McLam* (D. C., Vt.), 3 Am. B. R.

245, 97 Fed. 922. See also *In re Dibblee*, Fed. Cas. 3,885.

7. Bankr. Act, § 26-c.

8. *In re McLam* (D. C., Vt.), 3 Am. B. R. 245, 97 Fed. 922.

9. *Johnson v. Worden*, 13 N. B. R. 355.

SECTION TWENTY-SEVEN.

COMPROMISES.

§ 27. **Compromises.**—*a* The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.

Analogous provisions: In U. S.: Act of 1867, § 14, R. S., § 5061; Act of 1841, § 11.

In Eng.: Act of 1883, § 57(7).

Cross-references: To the law: Power of bankruptcy court to determine controversies, § 2(7).

Compositions, confirmation and setting aside, §§ 12, 13.

Arbitration of controversies, § 26.

Notice to creditors of proposed compromise, § 58-a(7).

To the General Orders: Compounding or settlement of claims or debts, XXVIII.

Application by trustee to settle or compound claims or debts, XXXIII.

SYNOPSIS OF SECTION.

COMPROMISES.

I. Compromises, 613

a. *Scope of section*, 613

b. *Practice*, 614

c. *Approval of court*, 614

I. COMPROMISES.

a. **Scope of section.**—This section should not be confused with § 12 on compositions. It is intended to supply a summary and inexpensive way of settling questions arising in the administration of bankrupt estates. It is most often used in connection with contests on claims filed against the estate, or the contested collections of claims due the estate. It cannot, of course, be resorted to where the matter in controversy is the right to a discharge. But any controversy arising in the administration of the estate may be compromised.¹ There is no authority to compel dissenting creditors of a bankrupt corporation to give up their existing claims and in their stead to accept stock in a new corporation to be formed to take over all the assets of the bankrupt, and to assent to many other provisions such as are usually contained in a contract of reorganization, even though such a plan may seem desirable and the usual course of administration is certain to result in a heavy loss.²

1. In re Northampton Portland Cement Co. (D. C., Pa.), 25 Am. B. R. 565, 179 Fed. (D. C., Pa.), 25 Am. B. R. 565, 179 Fed. 726. 726; In re Woodend (D. C., N. Y.), 12 Am.

2. In re Northampton Portland Cement Co. B. R. 768, 133 Fed. 593.

b. Practice.—Here also the proceeding is initiated by a petition, which may be made by the trustee, the bankrupt, or a creditor.³ It should be filed with the referee, if the case has been referred. The subject-matter of the controversy and the reasons why there should be a compromise must be clearly and distinctly set forth.⁴ The referee, on the filing of such a petition, sets a day and place for the hearing and gives notice to all creditors and persons interested, in the usual way.⁵ The notice should also contain a direction to show cause why the proposed compromise should not be allowed. The hearing is before the referee, not the judge, and conforms to like hearings on similar notice or order.

c. Approval of court.—The compromise must be “with the approval of the court,” which means that even the action of the creditors on the proposition is not final.⁶ The court will ordinarily approve a compromise which results in an increase of the assets of the estate and will prove beneficial to the creditors, but it will not sanction such compromise if coupled with an agreement not to furnish evidence in a criminal prosecution against the bankrupt, or in any way to stifle such prosecution.⁷ A minority of the creditors will not be permitted to prevent a compromise of an action against the estate, where it appears that the defense would probably be unsuccessful, delay the settlement of the estate and add materially to the cost of administration, unless such creditors indemnify the estate.⁸ The referee may disapprove the action of creditors. His decision may be reviewed by the district judge, on proper and timely application.⁹ Compromises are often agreed to informally at

3. General Order XXVIII.

4. Compare General Order XXXIII.

5. Though the general order seems to leave the kind and duration of the notice to the referee, it should be by publication and mailing and a ten days' notice. See Bankr. Act, § 58-a (7) -b-c.

6. Note the reasons for this in *In re Heyman* (D. C., N. Y.), 5 Am. B. R. 808, 104 Fed. 677; *In re Kranich* (D. C., Pa.), 23 Am. B. R. 550, 553, 174 Fed. 908, citing *Collier on Bankruptcy* (4th ed.), p. 275.

Approval by the court; compromise proposed by debtor.—In the case of *In re Heyman* (D. C., N. Y.), 5 Am. B. R. 808, 104 Fed. 677, Brown, District Judge, said: “I am of the opinion that section 27, and section 58(7) and section 56-a, so far as the latter affect settlements of claims or controversies between the trustees and others, are to be construed together; that any compromise proposed by the trustees under section 27 should be submitted to the creditors in accordance with section 58(7), and that the action of the creditors thereon under section 56 is not absolutely conclusive, but may for good cause be disallowed by the court under section 27; and that a compromise in like manner proposed to creditors by the debtor is equally subject to the judgment of the court under section 27. There is no specific provision as to what shall be the consequence of the mere approval by the creditors at a creditors' meeting of a proposed compromise submitted to it by the debtor. The case, as it seems to me, must necessarily come ultimately under section 27,

from the fact that no compromise with the debtor, and no release to him can possibly be effected except through the trustee. Notwithstanding any previous vote by creditors, the compromise must still be carried out and executed by the trustee. It becomes, therefore, a compromise by and through the trustee, and hence falls under section 27, and must therefore have the ‘approval of the court.’”

7. *In re Rosenblatt* (D. C., Pa.), 18 Am. B. R. 663, 153 Fed. 335.

8. *In re Kearney Bros.* (D. C., N. Y.), 25 Am. B. R. 757, 184 Fed. 190.

As to indemnity against expenses of suit by or against estate, by creditors opposing compromise, see *In re Meadows, Williams & Co.* (D. C., N. Y.), 25 Am. B. R. 100, 181 Fed. 911.

9. See General Order XXVII.

Compromise of claims by trustee; approval by court.—Where it appeared that the schedules of a bankrupt included among the assets a steam shovel valued at \$2,500, that upon the sale of the assets, at which \$1,500 had been offered for the shovel, the receiver withdrew it claiming title in his own right, and subsequently sold it for \$1,200, and that there was doubt as to the validity of his title, the court should, under this section, withhold approval of an order of the referee permitting the trustee to accept an offer of the receiver for \$500 in settlement of all claims of the bankrupt estate “upon or by reason of a certain steam shovel.” *Matter of Stier March Contracting Co.* (D. C., Pa.), 38 Am. B. R. 74.

meetings of creditors where more than a majority in number and amount are present. This practice is, however, unsafe, as the section is construed strictly.¹⁰ The reported cases are few and, other than those previously referred to, are set out in the foot-note.¹¹

10. Compare *In re Dibblee*, Fed. Cas. 3,885; *Duff v. Hopkins*, 33 Fed. 599.

11. *In re Phelps* (Ref., N. Y.), 3 Am. B. R. 396; *Blight v. Ashley*, Fed. Cas. 1,541; *In re Franklin Fund, etc.*, Fed. Cas. 5,058; *In re Rowe*, Fed. Cas. 12,092; *In re Firemen's*

Ins. Co., Fed. Cas. 4,796; *In re Furbish*, Fed. Cas. 5,159; *In re Hoole*, 3 Fed. 496; *In re Linderman* (D. C., Pa.), 22 Am. B. R. 131, 166 Fed. 593. See also Am. B. R. Dig., § 575.

SECTION TWENTY-EIGHT.

DESIGNATION OF NEWSPAPERS.

§ 28. **Designation of Newspapers.**—*a.* Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published.

Analogous provisions: In U. S.: Act of 1867, § 11, as amended, R. S., § 5019; Act of 1841, § 7.

In Eng.: None.

Cross-references: To the law: Publication of notices to creditors, § 58-b.

SYNOPSIS OF SECTION.

DESIGNATION OF NEWSPAPERS.

I. Newspapers, 616

a. Comparative legislation, 616

b. Result of section, 616

I. NEWSPAPERS.

a. Comparative legislation.— All bankruptcy notices in England are officially gazetted by the Board of Trade, and published, if in London, in the London "Gazette;" if elsewhere, in a local paper.¹ Under our law of 1867, the marshal attended to the publication, the paper being fixed by the judge before the amendment of 1874, and the papers, one or more, being designated by the marshal thereafter.² The present provision is, therefore, new. It makes for uniformity.

b. Result of section.— The result of this section has been a standing order in each district, specifying the newspaper in each county in which bankruptcy

1. Eng. Act of Bankruptcy, 1883, §§ 13, 20, etc., General Rules 280, 281, etc.

2. Act of 1867, § 11, R. S., § 5019.

notices are required to be published. This general designation is in practice made by the judge. A referee, being also a court of bankruptcy in each case referred to him, can designate the paper in which the notice in that case shall be published, provided the judge shall not already have designated one for that county. It sometimes becomes wise to designate an additional newspaper in a particular case, as where partnership bankrupts reside in different districts. The judge or the referee is empowered so to do by the statute. The only notice which must be published is that of the first meeting.³ After that, there is no publication, unless "the court shall direct."

3. See Bankr. Act, § 58-b. For effect of publication under law of 1898, see under failure to publish, under the old law, see § 58, *post*, and compare *Smith v. Brinkerhoff*, 6 N. Y. 305. In *re Hall*, Fed. Cas. 5,922. For effect of

SECTION TWENTY-NINE.

OFFENSES

§ 29. **Offenses.**— *a* A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee.

b A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

c A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly (1) acted as a referee in a case in which he is directly or indirectly interested; or (2) purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or (3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of estates in his charge by parties in interest when directed by the court so to do.

d A person shall not be prosecuted for any offense arising under this act unless the indictment is found or the information is filed in court within one year after the commission of the offense.

Analogous provisions: In U. S.: As to offenses by the bankrupt, Act of 1867, § 44, R. S., § 5132; As to offenses by officers or others, Act of 1867, §§ 45, 46, R. S., § 5012.

In Eng.: Debtors Act of 1869, Part II.

Cross-References: To the law: "Conceal," term defined, § 1(22).

Jurisdiction to arraign, try and punish bankrupts and others for violations of act, § 2(4).

Duties of bankrupt specified, § 7.

Discharge barred by commission of offense punishable under this section, § 14-b.

Jurisdiction to try offenses, § 23-c.

Duties of referees prescribed, § 39.

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IV. Offenses by a Referee and Punishment, 633.

a. *In general*, 633.

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V. No Prosecution After One Year, 633.

I. BANKRUPTCY CRIMES IN GENERAL.¹

a. **Comparative legislation.**—An enumeration of offenses is properly no part of a bankruptcy law. The debtors act of 1869 in England gives a long catalogue of acts or omissions on the part of the bankrupt which constitute crimes punishable by imprisonment at hard labor for from one to two years.² Officers and other persons, indeed, even the bankrupt, may also be punished for other offenses, such as malfeasance in office or false swearing, under general statutes or the common law. This seems to have been the rule in this country prior to the act of 1867. That statute³ made many wrongful acts on the part of the bankrupt—some covered and some not by the present law—misdemeanors punishable by not to exceed three years' imprisonment; while any officer who intentionally took excessive fees⁴ was liable to a like imprisonment, as well as a fine and the forfeiture of his office. But offenses against the law by others were not made crimes or misdemeanors by the statute. The present section differs greatly from those in the former law, and the older cases are comparatively of little value.

b. **How section is construed; application.**—Being highly penal in its effect, the section must be strictly construed.⁵ This is a familiar rule of statutory interpretation and is specially applicable to a provision like this where new offenses are created and denounced.⁶ This section does not make criminal an act of the bankrupt committed before the bankruptcy;⁷ although the offense

1. See also Am. B. R. Dig., §§ 1179–1201.

2. See Baldwin on Bankruptcy (8th ed.), p. 490 *et seq.*

3. Act of 1867, § 44, R. S., § 5132.

4. Act of 1867, § 45, R. S., § 5012.

5. Construction of section.—Field v. U. S. (C. C. A., 8th Cir.), 14 Am. B. R. 507, 137 Fed. 6, holding that where a statute is plain and unambiguous, the courts may not lawfully extend it by interpretation to a class of persons who are excluded from its effect by its terms for the reason that their acts may be more mischievous than those of the class whose deeds it denounces.

6. U. S. v. Lake (D. C., Ark.), 12 Am. B. R. 270, 129 Fed. 499. See also U. S. v. Wiltberger, 5 Wheat. 96, 5 L. Ed. 37; U. S. v. Clayton, Fed. Cas. No. 14,814; In re McDonough, 49 Fed. 360.

7. Acts prior to bankruptcy.—In the case of In re Steed (D. C., N. Car.), 6 Am. B. R. 73, 107 Fed. 682; United States v. Cohn (D. C., N. Y.), 15 Am. B. R. 357, 142 Fed. 983, the court said: "This provision of the bankrupt act does not make any act of the bankrupt before the bankruptcy criminal. But if a bankrupt, before the bankruptcy, has concealed his property, and, after his trustee is appointed, continues to conceal it from the trustee, he is criminally liable under this section, and, if indicted for such crime, evidence of his acts of concealment before the bankruptcy, as well as those subsequent thereto, would undoubtedly be admissible as a part of the *res gestæ*."

may be continued after bankruptcy and thus the bankrupt become amenable to its provisions.⁸

c. Offenses knowingly and fraudulently committed.—The offenses, punishable by imprisonment pursuant to this section, all involve the element of conscious fraud, namely, knowingly and fraudulently transferring or embezzling property, or concealing it from the trustee, and committing perjury by taking a false oath during the proceeding.⁹

d. Jurisdiction.—The district court sitting in bankruptcy has jurisdiction to arraign, try, and punish any person who has committed any of the offenses enumerated in this section.¹⁰ So had the circuit court.¹¹ So, it seems, have the State courts, under State laws making the same acts crimes.¹² Likewise, the Federal courts in the exercise of their customary criminal jurisdiction, have power to try and punish for crimes committed in bankruptcy proceedings, other than those enumerated in the law.¹³

e. Indictment or information.—(1) **IN GENERAL.**¹⁴—The use of word “information” in § 29-d seems to indicate that a prosecution under this section can be by information.¹⁵ Since *In re Wilson*,¹⁶ and *Mackin v. U. S.*,¹⁷ however, it may be doubted whether any offense referred to in subsections *a* and *b*—each one being a crime, rather than a misdemeanor—can be proceeded on save by indictment. The debtor being technically a bankrupt¹⁸ from the time even an involuntary petition is filed, an indictment will lie before an adjudication.¹⁹ Where the indictment has been drawn under U. S. R. S., § 5392, relating to false statements, and a conviction had, the judgment will be reversed and the cause remanded to the trial court with instructions to enter a new judgment imposing such punishment as § 29 permits.²⁰ All matters necessary to constitute the offense must be clearly pleaded.²¹ It is not sufficient to set forth the offense in the words of the statute, unless these words are sufficient to include all the elements of the offense, without uncertainty and ambiguity.²² Objections as to the sufficiency of the indictment,

8. As in the case of a continuing concealment, see *U. S. v. Cohn* (D. C., N. Y.), 15 Am. B. R. 357, 142 Fed. 983; *U. S. v. Goldstein* (D. C., Va.), 12 Am. B. R. 755, 132 Fed. 789.

9. *Matter of Lenweaver* (D. C., N. Y.), 36 Am. B. R. 73, 226 Fed. 987; *Matter of Agnew and Sherman* (D. C., N. Y.), 35 Am. B. R. 709, 225 Fed. 650; *In re Gilpin* (D. C., Pa.), 20 Am. B. R. 374, 160 Fed. 171.

10. See Bankr. Act, § 2(4). See also Am. B. R. Dig. § 1179.

11. See Bankr. Act, § 23-c. Circuit courts were abolished by the Judicial Code.

12. *State v. Thompson*, 58 N. H. 270; *Commonwealth v. Walker*, 108 Mass. 309.

13. *U. S. v. Nichols*, Fed. Cas. 15,880. *Contra: Anon.*, Fed. Cas. 475.

14. See also Am. B. R. Dig. § 1188.

15. *U. S. v. Block*, Fed. Cas. 14,609.

16. 114 U. S. 422.

17. 117 U. S. 348.

18. Bankr. Act, § 1(4).

19. *U. S. v. Myers*, Fed. Cas. 15,848.

20. *Wechsler v. United States* (C. C. A., 2d Cir.), 19 Am. B. R. 1, 158 Fed. 579, revg. 16 Am. B. R. 1, holding that the imposition of a sentence under § 5392, though

erroneous, did not involve an entire failure of prosecution, and the judgment of conviction might be reversed and the cause remanded to the trial court with instructions to enter a new judgment imposing such imprisonment as § 29 of the bankruptcy act permits.

The indictment itself controls.—It is immaterial what statute the district attorney had in mind when he drew the indictment, if the charges made are embraced by some statute in force. The indictment itself must be looked to, and if it properly charges an offense under the laws of the United States, that is sufficient to sustain it, although the representative of the United States may have supposed that the offense charged was covered by a different statute. *Williams v. U. S.*, 168 U. S. 389.

21. *U. S. v. Prescott*, Fed. Cas. 16,084. Thus, an indictment charging perjury for omitting assets from schedules is defective unless it charges directly that there was other property. *Bartlett v. U. S.* (C. C. A., 8th Cir.), 5 Am. B. R. 678, 106 Fed. 884.

22. *McNiell v. U. S.* (C. C. A., 5th Cir.), 18 Am. B. R. 19, 150 Fed. 82, citing *U. S. v. Carll*, 105 U. S. 611, 26 L. Ed. 1135; *U. S.*

taken after the verdict by motion in arrest, must relate to matters of substance; formal or artificial insufficiencies are waived.²³ Useful precedents will be found in cases cited in the foot-note.²⁴ Cases construing those subsections of the law of 1867 which made the obtaining of property on credit on false representation an offense, are no longer in point. Such offenses can, however, still be punished by a proper proceeding under the State laws.

(2) **FALSE OATH; INDICTMENT.**—The indictment need not allege that the oath was corruptly false,²⁵ but it should charge that the alleged false oath was wilfully false.²⁶ An allegation in indictments for perjury that the defendant's testimony was false and that they believed it to be false is sufficient without alleging the actual facts.²⁷ An indictment, charging that defendants conspired to give false oaths in a bankruptcy proceeding, should state what false oaths were to be given, or the subject thereof with such reasonable particularity that the defendants may be apprised of the nature of the charge against them.²⁸ If the alleged false oath pertains to a statement of assets in the bankrupt's schedule, the indictment must allege in what respects the statement was deficient, by stating that property was omitted, and describing such property.²⁹

(3) **CONCEALMENT OF PROPERTY; INDICTMENT.**—The statute referring to the offense of a person having "knowingly and fraudulently concealed, while a bankrupt or after his discharge, from his trustee any property belonging to his estate in bankruptcy," sets forth all the elements of the offense, and an indictment which uses the words "unlawfully, knowingly and fraudulently" to characterize the word "conceal" is good, and plainly excludes unintentional acts. The indictment need not charge that the alleged bankrupt, at the time

v. Hess, 124 U. S. 483, 31 L. Ed. 516; Evans v. U. S., 153 U. S. 584, 38 L. Ed. 830; Keck v. U. S., 172 U. S. 434, 43 L. Ed. 505; Meyer v. U. S. (C. C. A., 5th Cir.), 33 Am. B. R. 877, 220 Fed. 822.

23. Ulmer v. United States (C. C. A., 6th Cir.), 34 Am. B. R. 143, 219 Fed. 641.

24. U. S. v. Chapman, Fed. Cas. 14,784; U. S. v. Crane, Fed. Cas. 14,887; U. S. v. Latorre, Fed. Cas. 15,567; U. S. v. Jackson, 2 Fed. 502; U. S. v. Lake, 12 Am. B. R. 270, 129 Fed. 499 (sustaining allegation as to false oath to schedules by an officer of a corporation); Jacobs v. United States (C. C. A., 1st Cir.), 20 Am. B. R. 550, 161 Fed. 694. See also Am. B. R. Dig. §§ 1187-1191.

25. United States v. Hearing, 26 Fed. 744; Kovaloff v. United States (C. C. A., 7th Cir.), 28 Am. B. R. 767, 202 Fed. 475. See also Am. B. R. Dig. § 1190.

26. United States v. Lake (D. C., Ark.), 12 Am. B. R. 271, 129 Fed. 499.

27. United States v. Freed (C. C., S. Dak.), 25 Am. B. R. 89, 179 Fed. 236, holding that there is no necessity that the record negative the exceptions of the statute, alleging that the indicted corporation was in fact engaged principally in one of the occupations mentioned in § 4-b of the bankruptcy act.

Allegation of falsity of statements.—An indictment which charges in substance that the defendant committed perjury when he swore, upon examination before the referee, that his books of account were burned on a certain date, that instead of having been

burned on that date, they were in existence and in his possession up to the date of the examination, and that he knew he was making false oath when he swore that they were burned, sufficiently charges that the statements made by the defendant were false. Kovaloff v. United States (C. C. A., 7th Cir.), 28 Am. B. R. 767, 202 Fed. 475.

Allegation of belief as to falsity of statement.—An indictment charging a bankrupt with perjury upon his examination in testifying as to the giving of a check in payment of a debt, which recites the testimony of the defendant, that he was indebted to the payee in the amount named, that he paid him such sum and that such payment was a liquidation of the indebtedness, and then continues, "all of which statement the said (bankrupt) did not believe to be true," sufficiently alleges nonbelief as to the veracity of the statements. Daniels v. United States (C. C. A., 6th Cir.), 27 Am. B. R. 790, 196 Fed. 459.

28. United States v. Waldman (C. C., N. Y.), 26 Am. B. R. 677.

29. Bartlett v. U. S. (C. C. A., 9th Cir.), 5 Am. B. R. 678, 106 Fed. 884.

Sufficiency of description.—An indictment against the president of a bankrupt corporation for making a false oath to its schedules, may describe the assets charged to have been fraudulently and knowingly omitted from such schedules as "one hundred and fifty thousand dollars in lawful money of the United States." U. S. v. Lake (D. C., Ark.), 12 Am. B. R. 270, 129 Fed. 499.

of the alleged concealment of his property, knew that a trustee had been appointed or the name of the trustee. The mode of the concealment is also entirely immaterial and need not be set forth in the indictment, and no allegation of ownership is made essential by the statute, save that the property was property "belonging to his estate in bankruptcy."³⁰ It is sufficient to charge that the bankrupt has "knowingly and fraudulently concealed and secreted" property.³¹ In indicting a bankrupt corporation for fraudulently concealing assets, there is no necessity, in order to show the jurisdiction of the bankruptcy court, to adjudicate, that the record should negative the exceptions of the statute, alleging that the corporation was in fact engaged principally in one of the occupations mentioned in § 46.³² An indictment, charging that defendant unlawfully, knowingly, wilfully and fraudulently concealed from his trustee certain property, carries with it a sufficient averment that defendant knew that said property belonged to his estate in bankruptcy.³³ A general allegation that the property alleged to have been concealed consisted of goods, wares, and merchandise, the character, kind, and particular description of which is to the grand jury unknown, is permissible from necessity only, when the grand jury does not have and cannot obtain a knowledge of the facts.³⁴

(4) CONSPIRACY TO CONCEAL PROPERTY; INDICTMENT.³⁵—An indictment, under § 5440 of the U. S. R. S., of a conspiracy to violate § 29-b, which charges defendants with conspiring that a bankrupt corporation shall conceal its assets, is not insufficient, because it appears that the defendants were not bankrupts.³⁶ If the act of conspiracy was committed prior to bankruptcy it

30. *United States v. Comstock* (Cir. Ct., Mass.), 20 Am. B. R. 520, 162 Fed. 416; *United States v. Rhodes* (D. C., Ala.), 32 Am. B. R. 523, 212 Fed. 513. See also Am. B. R. Dig. § 1189.

Unnecessary allegations.—An indictment which commences and concludes with averment substantially in the language of the statute to the effect that the bankrupt concealed money from the trustee, is not subject to a demurrer because it contains an averment that the defendant "then and there knowingly, wilfully and fraudulently, and while he was a bankrupt as aforesaid, concealed the aforesaid sum of money from his said receiver which said sum of money belonged then and there to the bankruptcy estate of the said Morris M. Meyer." As the indictment averred every fact necessary to be proved to constitute the offense denounced by the statute, its sufficiency was not impaired by the unnecessary averment as to a concealment from the receiver. Such an indictment need not allege a demand on the defendant by the trustee for the property claimed to have been concealed. *Meyer v. United States* (C. C. A., 5th Cir.), 33 Am. B. R. 877, 220 Fed. 822.

31. *United States v. Phillips* (D. C., N. Y.), 27 Am. B. R. 625, 196 Fed. 574.

32. *U. S. v. Freed* (C. C., N. Y.), 25 Am. B. R. 89, 179 Fed. 236.

33. *McNiel v. United States* (C. C. A., 5th Cir.), 18 Am. B. R. 18, 150 Fed. 82.

34. *United States v. Rhodes* (D. C., Ala.), 32 Am. B. R. 523, 212 Fed. 513.

35. See also, under this section, sub-title "Conspiracy," *post*, p. 632 and Am. B. R. Dig. § 1191.

36. *Cohen v. United States* (C. C. A., 2d Cir.), 19 Am. B. R. 8, 157 Fed. 651, *affg.* 15 Am. B. R. 357; *United States v. Young & Holland Co.* (Cir. Ct., R. I.), 22 Am. B. R. 484, 170 Fed. 110, holding that an indictment for conspiracy to conceal the assets of a corporation in anticipation is not demurrable on the ground that there was no existing bankruptcy when the conspiracy originated.

Indictment date of offense.—Indictments charging conspiracy under section 5440, U. S. R. S., and concealment under section 29-b of the bankruptcy act, as of June 9, 1909, the date when a demand for the property had been made by the trustee, properly charge the offenses as of that date, notwithstanding that the evidence given thereunder shows the offenses to have been committed thirty days before filing the petition in bankruptcy, for a refusal to produce the property upon demand constitutes a continuance of the offenses as of the date charged. *United States v. Stern* (D. C., Pa.), 26 Am. B. R. 110, 186 Fed. 854, *affd.* 28 Am. B. R. 101.

Sufficiency of indictment for concealment of assets.—Counts of an indictment, alleging that the bankrupt had a large number of provable claims and insufficient assets to pay the same, and that, while the "company"

must be alleged that it was in contemplation of such bankruptcy,³⁷ and must allege the commission of an overt act after bankruptcy.³⁸ An indictment which charges that defendants, contemplating bankruptcy proceedings against the bankrupt, a corporation, conspired to conceal from the trustee in bankruptcy property belonging to the estate in bankruptcy of the said corporation and that in pursuance of such conspiracy they removed the bankrupt's entire stock of goods from its place of business, sold the same and concealed the proceeds from the receiver and trustee in bankruptcy, but contains no allegations that any of the defendants were officers of or connected in any way with the bankrupt, does not state a crime, it being no criminal offense under the bankruptcy act for a person who is not a bankrupt to conceal the bankrupt's property from the trustee.³⁹ An indictment under this section for conspiracy to commit the criminal offense of knowingly and fraudulently concealing property of a partnership from their trustee in bankruptcy, is not insufficient because it fails to allege that a trustee was actually appointed, where the indictment avers that the conspirators contemplated, anticipated and planned that an involuntary petition in bankruptcy should be filed and the partners should be adjudicated bankrupts and a trustee should thereafter be appointed for their estate.⁴⁰ Neither is it necessary to allege in an indictment for conspiracy to conceal the assets of a corporation to allege the insolvency of the corporation at the time of the disposition of the assets, since conspiracy by a solvent corporation to conceal assets in contemplation of insolvency would be a crime.⁴¹ But § 29-d providing that "a person shall not be prosecuted for any offense arising under this act unless the indictment is found or the information filed in court within one year after the commission of the offense," is inapplicable to an indictment under § 5440 of the U. S. R. S. for conspiracy to commit an offense arising under the bankruptcy act.⁴² The omission of the words "knowingly and fraudulently" or any equivalent therefor, from an indictment for conspiracy to conceal from the trustee assets of a bankrupt estate, is fatal on demurrer.⁴³

was bankrupt, the defendant (an individual) did conceal from the trustee in bankruptcy the proceeds of a certain sale of property of the bankrupt, but does not allege that there was any concealment by the bankrupt or any receipt of assets after the filing of the petition or any act by officers acting for the corporation, are demurrable. *United States v. Rosenstein* (D. C., N. Y.), 33 Am. B. R. 730, 211 Fed. 738.

37. An indictment for conspiracy to conceal assets of a bankrupt estate, which shows that the conspiracy was entered into and the assets removed and concealed prior to the bankruptcy, but that said acts were done in contemplation of bankruptcy, is not alleged, nor the commission of any overt act after the bankruptcy, no offense under section 5440 of the United States Revised Statutes is charged, even though a further conspiracy to continue to conceal the alleged concealed property is alleged. *United States v. Grodson* (D. C., Ill.), 21 Am. B. R. 68, 164 Fed. 157. An indictment for conspiracy, the substance of which was that B, one of the defendants,

should purchase goods and that A, the other defendant, should conceal them, and that afterward B should go into bankruptcy, and that the concealment should continue, with the intention that at some subsequent time the profit by the concealment should be divided between the conspirators, sufficiently charges an offense under section 29-b(1) of the bankruptcy act, 1898, which punishes a concealment of property "while a bankrupt." *Alkon v. United States* (C. C. A., 1st Cir.), 22 Am. B. R. 489, 163 Fed. 810.

38. *United States v. Grodson* (D. C., Ill.), 21 Am. B. R. 68, 164 Fed. 157.

39. *United States v. Waldman* (C. C. A., N. Y.), 26 Am. B. R. 677, 188 Fed. 524.

40. *Radin v. United States* (C. C. A., 2d Cir.), 25 Am. B. R. 640, 189 Fed. 568.

41. *United States v. Rosenstein* (D. C., N. Y.), 33 Am. B. R. 730, 211 Fed. 738.

42. *United States v. Comstock* (Cir. Ct., R. I.), 20 Am. B. R. 526, 162 Fed. 416.

43. *United States v. Comstock* (Cir. Ct., R. I.), 20 Am. B. R. 525, 162 Fed. 416.

f. **Practice in general.**—There being no rules or forms prescribed for the practice under this section, that practice should conform to criminal proceedings other than in bankruptcy in the court where the trial is had.⁴⁴

II. OFFENSES BY A TRUSTEE AND PUNISHMENT.

a. **What constitute the offenses.**—Subsection *a* is new. Its purpose is plain, and the words used are of such simple yet comprehensive meaning as to cover every intentional withholding of or parting with the property of the estate, or the concealment or destruction of a document, by a trustee. The words "transfer,"⁴⁵ "document,"⁴⁶ and "trustee"⁴⁷ have enlarged meanings in this law. An allegation that the person named in the indictment was "duly appointed trustee," is sufficient;⁴⁸ although it is better practice to give details as to his appointment and qualification. That the act was "knowingly and fraudulently" done must be distinctly charged and clearly proven. It seems also that a trustee may commit the offense specified in § 29-b (2).⁴⁹ A trustee cannot be compelled to give testimony which may tend to show that he has misappropriated the funds of the bankrupt's estate.⁵⁰

b. **Punishment.**—The penalty under subsection *a* is imprisonment and the only limitation is that the time shall not be more than five years.

III. OFFENSES BY OTHER THAN OFFICERS AND PUNISHMENT.

a. **By a bankrupt.**—This subject has already been discussed elsewhere.⁵¹ Any offense which, if committed by a bankrupt, can be punished under this subsection is also an objection to his discharge. Under the rule that a penal statute must be strictly construed, the word "person" as used in clause *b* of this section has been held not to include an officer of a corporation which is declared a bankrupt,⁵² but the better rule would seem to be that the officers of a corporation may be indicted for the crime of concealing its assets, if they participated in its commission.⁵³

b. **Concealment of property.**⁵⁴—(1) **IN GENERAL.**—It is a felony to conceal the assets of a bankrupt from his trustee.⁵⁵

The somewhat elastic meaning of the word "conceal" should be borne in

44. Trial; disqualification of counsel.—The fact, that the attorney for the petitioning creditors, the receiver appointed by the court, and the trustee in bankruptcy, aided, as a duly appointed special assistant U. S. district attorney in the prosecution of an indictment under the Federal statute against a bankrupt for fraudulent concealment of assets, is not a ground for reversal, although such counsel would have been disqualified under the state statute. *Terry v. United States* (C. C. A., 6th Cir.), 37 Am. B. R. 666, 235 Fed. 701.

45. Bankr. Act, § 1 (25).

46. Bankr. Act, § 1 (13).

47. Bankr. Act, § 1 (26).

48. *Kerrch v. United States* (C. C. A., 1st Cir.), 22 Am. B. R. 544, 171 Fed. 366.

49. See in this section, *post*.

50. *In re Smith* (D. C., N. Y.), 7 Am. B. R. 213, 112 Fed. 509.

51. See generally under Section Fourteen of this work.

52. *United States v. Lake* (D. C., Ark.), 12 Am. B. R. 270, 129 Fed. 499; *Field v. United States* (C. C. A., 8th Cir.), 14 Am. B. R. 507, 137 Fed. 6.

53. *Kauffman v. United States* (C. C. A., 2d Cir.), 32 Am. B. R. 22, 212 Fed. 613.

In indicting a bankrupt corporation for an offense against the bankruptcy act of fraudulently concealing assets, there is no necessity, in order to show the jurisdiction of the bankruptcy court to adjudicate, that the record should negative the exceptions of the statute, alleging that the corporation was in fact engaged principally in one of the occupations mentioned in section 4-b of the Bankruptcy Act. *United States v. Freed* (Cir. Ct., N. Y.), 25 Am. B. R. 89, 179 Fed. 236. See under this section, sub-title "Conspiracy to conceal property," *ante*, p. 623.

54. See also Am. B. R. Dig. §§ 1180-1182.

55. *Kauffman v. United States* (C. C. A., 2d Cir.), 32 Am. B. R. 22, 212 Fed. 613.

mind.⁵⁶ Likewise, the necessity of charging and proving that the act was "knowingly and fraudulently" done, as this is an essential element of the crime.⁵⁷ Concealment of property was also an offense under the former law, and the cases then decided will be found valuable.⁵⁸

(2) CONTINUING CONCEALMENT.—The well-recognized doctrine of "continuing concealment" should also be considered, for the continuance of a concealment by a bankrupt after bankruptcy may constitute the offense,⁵⁹ and evidence of his acts of concealment prior to bankruptcy is admissible as part of the *res gestae*.⁶⁰

(3) WHAT CONSTITUTES OFFENSE.—The offense is completed, if the property was concealed knowingly and fraudulently before bankruptcy, and on the appointment of a trustee, the bankrupt fails to surrender it or to disclose the disposition he has made of it.⁶¹ A concealment from a trustee after his appointment and a failure to deliver over to him upon demand any property or cash which the bankrupt may have in his possession, is an offense as of any date that the concealment continues.⁶² So, a concealment of property by a

56. A criminal concealment of property by a bankrupt is the continuous concealment of the property from the trustee during the whole course of the bankruptcy proceedings or beyond, but to prove such concealment it is not necessary to take up each moment of the bankrupt's life while the proceedings last and to prove what he did as a means of proving what he did not. *Johnson v. U. S.* (C. C. A., 1st Cir.), 20 Am. B. R. 724, 163 Fed. 30.

57. See p. 622, *ante*; In re Taplin (D. C. Iowa), 14 Am. B. R. 360, 135 Fed. 861; *U. S. v. Cohn* (C. C., N. Y.), 15 Am. B. R. 357, 142 Fed. 983; *U. S. v. Levinson* (D. C., S. Car.), 13 Am. B. R. 29; In re Griffin Bros. (D. C., Ala.), 19 Am. B. R. 78, 154 Fed. 537; *Klein v. Powell* (C. C. A., 3d Cir.), 23 Am. B. R. 494, 174 Fed. 640; *Matter of Agnew and Sherman* (D. C., N. Y.), 35 Am. B. R. 709, 225 Fed. 650.

Essential elements.—The essential elements of concealment, etc., are that it must be by the bankrupt, while a bankrupt or after his discharge, and from his trustee, of property belonging to the estate in bankruptcy, and such concealment must be "knowingly and fraudulently" done. *United States v. Rhodes* (D. C., Ala.), 32 Am. B. R. 523, 212 Fed. 513.

58. Consult Vol. 6, Am. Dig., Century Ed., "Bankruptcy," § 735.

"The term 'concealed' used in this section [in § 68 of the act of 1799] is one of plain interpretation and obviously applies to articles intended to be secreted and withdrawn from public view on account of their being so subject to duties, or from some fraudulent motive." *U. S. v. 350 Chests of Tea*, 12 Wheat. 493, 6 L. Ed. 702.

59. See under Section Fourteen of this work, subtitle "Continuing concealment." *United States v. Rhodes* (D. C., Ala.), 32 Am. B. R. 523, 212 Fed. 513.

Continuing concealment.—Thus if a bankrupt has disposed of property belonging to him, prior to the adjudication, and has the proceeds thereof in his possession or within

his authority, to use and appropriate subsequently, there is a continuing concealment, for which he is amenable to the law, although the fact of concealment by intent and purpose took place while he was not a bankrupt. In re Jacobs & Verstandig (D. C., Ore.), 17 Am. B. R. 470, 147 Fed. 797.

60. *U. S. v. Cohn* (C. C., N. Y.), 15 Am. B. R. 357, 152 Fed. 983; *United States v. Rhodes* (D. C., Ala.), 32 Am. B. R. 523, 212 Fed. 513. Compare *Matter of Gilroy* (D. C., N. Y.), 14 Am. B. R. 627, 633, 140 Fed. 733, where Judge Holt says: "It is a serious defect in the bankrupt law that it contains no adequate provisions for criminal punishment for the fraudulent concealment of property in contemplation of bankruptcy."

Evidence of continuing concealment.—Testimony of facts indicating concealment of property before bankruptcy is admissible in proof of its concealment continued and completed after bankruptcy. As evidence of acts committed before bankruptcy is admissible in proof of concealment then begun and thereafter completed, so evidence of acts before bankruptcy is admissible in proof of fraudulent intent with which concealment is completed after bankruptcy. *Glass v. United States* (C. C. A., 3d Cir.), 36 Am. B. R. 550, 222 Fed. 773.

61. *Kauffman v. United States* (C. C. A., 2d Cir.), 32 Am. B. R. 22, 212 Fed. 613; *Warren v. United States* (C. C. A., 5th Cir.), 29 Am. B. R. 555, 199 Fed. 753, holding, that where one conceals property before bankruptcy, keeps it concealed until after bankruptcy and the appointment of a trustee, and fails to surrender it, he is guilty of the crime of concealing assets, although the initial concealment was before he became a bankrupt, the offense in such case being complete when he fails to surrender the property to his trustee in bankruptcy or to disclose to him its whereabouts.

62. *United States v. Stern* (D. C., Pa.), 26 Am. B. R. 110, 186 Fed. 854, *affd.* 28 Am. B. R. 101.

voluntary bankrupt after he has filed his petition and before the appointment of a trustee is an offense under this section.⁶³ Likewise, it is a crime to fraudulently conceal property from the trustee, even though the property had been disposed of before an order to pay over to the trustee was made.⁶⁴ The offense of fraudulently concealing assets is committed where the bankrupt dishonestly applies money or property to his own use or purposes so that he himself or some other person whom he may desire to benefit receives advantage and profit by the concealment; the application of money in good faith to the payment of a debt after a petition in voluntary bankruptcy is filed does not necessarily constitute a fraudulent concealment, although as a result of the payment the creditor receives an undue advantage.⁶⁵

(4) CONCEALMENT FROM TRUSTEE.—The appointment of a trustee in bankruptcy is an essential element of the offense of knowingly and fraudulently concealing a bankrupt's property from his trustee; but such appointment of the trustee is not an ingredient of the crime of conspiring to commit such offense.⁶⁶ The bankruptcy act does not make it a criminal offense for a person who is not a bankrupt to conceal the bankrupt's property from the trustee.⁶⁷ Thus, there can be no conviction unless it is shown that the defendant had been adjudicated a bankrupt.⁶⁸

(5) CONCEALMENT BY CORPORATION.—A bankrupt corporation is capable of committing the criminal offense of knowingly or fraudulently concealing its property from its trustee.⁶⁹ Although it has been held that the concealment must be by the bankrupt, and that an officer of a bankrupt corporation is not liable to punishment under § 29 for concealment by such corporation,⁷⁰ the more effective rule seems to be, that, if the officers of a corporation have par-

63. *U. S. v. Goldstein* (D. C., Va.), 12 Am. B. R. 755, 132 Fed. 789, in which the court said: "It is true that clause 1 applies to concealing property from the trustee, and that in the case at bar the alleged concealment was prior to the appointment of the trustee. But when a person files his voluntary petition in bankruptcy, he knows that a trustee will be appointed, and that such trustee takes title as of the date of the adjudication. It follows that a concealment of property after the adjudication, even if before the appointment of the trustee, is a concealment from the trustee."

64. *Matter of Stern* (D. C., N. J.), 32 Am. B. R. 281, 215 Fed. 979.

65. *U. S. v. Lowenstein* (D. C., Pa.), 11 Am. B. R. 134, 126 Fed. 884. This view was also taken under the act of 1867 (*United States v. Smith*, Fed. Cas. No. 16,339), where Judge Hall of the Northern District of New York, instructed a jury as follows: "If he, in point of fact, received money to the extent of \$2,000, and withheld it from his creditors and from his assignee; then he is liable to be convicted. . . . If he paid it over to his creditors, to honest creditors, and stated the fact upon his examination, then he would not be liable."

66. *Radin v. United States* (C. C. A., 2d Cir.), 25 Am. B. R. 640, 189 Fed. 568.

67. *United States v. Waldman* (C. C.,

N. Y.), 26 Am. B. R. 677, 188 Fed. 524; *United States v. Rosenstein* (D. C., N. Y.), 33 Am. B. R. 730, 211 Fed. 738.

68. *Matter of Agnew and Sherman* (D. C., N. Y.), 35 Am. B. R. 709, 225 Fed. 650; *Gilbertson v. United States* (C. C. A., 7th Cir.), 22 Am. B. R. 32, 168 Fed. 672, holding that without adjudication as a bankrupt within the meaning of the bankruptcy act, a conviction upon a charge of concealing from his trustee, while a bankrupt, property of the estate in violation of section 29-b, cannot be upheld, notwithstanding proof of flagrant concealment of the property from the *de facto* trustee.

69. *Kauffman v. United States* (C. C. A., 2d Cir.), 32 Am. B. R. 22, 212 Fed. 613; *Cohen v. United States* (C. C. A., 2d Cir.), 19 Am. B. R. 8, 157 Fed. 651.

70. *Field v. U. S.* (C. C. A., 9th Cir.), 14 Am. B. R. 507, 137 Fed. 6; *United States v. Lake* (D. C., Ark.), 12 Am. B. R. 270, 129 Fed. 499. These cases were before the court in *Cohen v. United States* (C. C. A., 2d Cir.), 19 Am. B. R. 8, 157 Fed. 653, and held inapplicable where the indictment charges a conspiracy that a bankrupt corporation should conceal its assets, as distinguished from a conspiracy that the officers of a bankrupt corporation should conceal its assets.

ticipated in the commission of the offense, they may be indicted and punished therefor.⁷¹

(6) **CONCEALMENT BY THIRD PARTY IN AID OF BANKRUPT.**—It has been ruled that while a third person cannot be convicted under this section of concealing property he may be convicted under the United States Criminal Code as a principal under the provision making all who aid and abet the commission of a crime liable as principal.⁷²

(7) **OMISSION TO SCHEDULE PROPERTY.**—It is not an offense under this section to omit to name property in the schedule by accident or mistake,⁷³ or worthless claims upon which an action could not be maintained,⁷⁴ or property which the debtor did not know that he owned,⁷⁵ or property which the bankrupt honestly thought did not pass to the trustee,⁷⁶ or where the evidence does not show that a legally consummated gift or transfer has been made.⁷⁷ But if it appear that property was omitted from the schedules with the fraudulent purpose of concealing it, an offense is committed.⁷⁸ The omission if fraudulent will constitute the oath to the schedule, a false oath, and as such a distinct offense from that of concealing property from the trustee.⁷⁹ The advice of counsel has been held to be no defense.⁸⁰ The offense may not be retrieved by the subsequent good conduct of the defendant, although the court may consider such conduct in imposing sentence.⁸¹

(8) **EVIDENCE OF CONCEALMENT.**—The court may exclude evidence of facts, which, though relevant, is too remote to be material in the circumstances.⁸² The act to constitute a concealment need not be a physical act in the nature of a conversion, begun and completed after bankruptcy, and hence evidence of acts committed before bankruptcy may be admitted as showing intent.⁸³ Neither a bankrupt's schedules in bankruptcy nor his examination

71. **Crime by officers of corporation.**—In the case of *United States v. Freed* (C. C., N. Y.), 25 Am. B. R. 89, 179 Fed. 236, the court said: "The crime of concealing assets could be committed by a corporation, and Freed (president of the corporation) could be indicted for the offense, if he participated in its commission. *Cohen v. U. S.* (C. C. A., 2d Cir.), 19 Am. B. R. 8, 157 Fed. 651, 85 C. C. A. 113; *U. S. v. Young & Holland Co.* (C. C., R. I.), 22 Am. B. R. 484, 170 Fed. 110. Those were cases of conspiracy; but, if one may be guilty of conspiracy to commit an act, it cannot be that he is not guilty if the conspiracy is accomplished. I do not regard *Field v. U. S.* (C. C. A., 8th Cir.), 14 Am. B. R. 507, 137 Fed. 6, 69 C. C. A. 568, as binding, after *Cohen v. U. S.*, *supra*." See also Am. B. R. Dig. § 1182.

72. *Kauffman v. United States* (C. C. A., 2d Cir.), 32 Am. B. R., 22, 212 Fed. 613; *Good v. Kane* (C. C. A., 8th Cir.), 32 Am. B. R. 19, 211 Fed. 956.

Necessity of convicting corporation first.—Under the United States Criminal Code (§ 332) all abettors are made principals. It is not necessary therefore, that a bankrupt corporation should first be convicted before bringing to trial one charged with aiding and abetting in the concealment of its assets from a trustee in bankruptcy. *Shea v. Lewis* (C. C. A., 8th Cir.), 30 Am. B. R. 436, 206 Fed. 877.

73. See p. 260, *ante*. Although it may be evidence of a fraudulent intent, *Gretsch v. United States* (C. C. A., 3d Cir.), 36 Am. B. R. 571, 231 Fed. 57.

74. *In re Pearce*, 21 Vt. 611.

75. *In re Parker*, Fed. Cas. 10,720, 4 Biss. 501.

76. *In re Adams* (D. C., N. Y.), 4 Am. B. R. 696, 104 Fed. 72; *Rugely v. Robinson*, 19 Ala. 404.

77. *In re DeLeeuw* (D. C., N. Y., 3 Am. B. R. 418, 98 Fed. 408.

78. *In re Bacon* (D. C., N. Y.), 30 Am. B. R. 584, 205 Fed. 545.

79. *Gretsch v. United States* (C. C. A., 3d Cir.) 36 Am. B. R. 571, 231 Fed. 57.

80. *McNiel v. United States* (C. C. A., 5th Cir.), 18 Am. B. R. 18, 150 Fed. 82, holding that evidence that counsel advised the bankrupt to keep his business open up to the usual closing time of the day of his adjudication is not admissible to relieve the bankrupt from liability for keeping the funds received on such day.

81. *Kern v. United States* (C. C. A., 6th Cir.), 22 Am. B. R. 223, 169 Fed. 617.

82. *Johnson v. United States* (C. C. A., 1st Cir.), 22 Am. B. R. 359, 170 Fed. 581. See also Am. B. R. Dig. § 1194.

83. *Glass v. United States* (C. C. A., 3d Cir.), 36 Am. B. R. 550, 222 Fed. 773.

before the referee, if objected to by the bankrupt, are admissible on an indictment for concealment of property.⁸⁴ The books of the bankrupt are admissible in evidence upon a trial of the indictment although he claims his privilege.⁸⁵ The nature of the act of concealment is such that it can rarely be proved by direct testimony; the evidence must be largely if not wholly circumstantial, and "such as in practical affairs of life tends to produce belief and conviction in the minds of those to whom such evidence is addressed."⁸⁶

c. False oath.⁸⁷—(1) **IN GENERAL.**—The Fifth Amendment of the United States Constitution does not prohibit the imposition of a punishment for false swearing on a compulsory examination.⁸⁸ Nor does the immunity provision of § 7 (9) of the bankruptcy act, that no testimony given by a bankrupt upon his examination "shall be offered in evidence against him in any criminal proceeding" exempt him from a criminal prosecution for giving false testimony on such an examination.⁸⁹ The insertion of this common-law offense in the statute simply creates a different penalty for a crime already defined.⁹⁰ The false oath must have been "knowingly and fraudulently" made.⁹¹

(2) **WHAT CONSTITUTES FALSE OATH.**—What is a "false oath" in bankruptcy is considered elsewhere.⁹² The words "false oath," as employed in this section, comprehend false swearing by the bankrupt in a proceeding to investigate the truth of specifications filed against his discharge.⁹³ And also false testimony given by a witness before a special commissioner, appointed under § 21-a, prior to the bankrupt's adjudication,⁹⁴ but it does not embrace the verification by the bankrupt of schedules from which he has omitted property transferred in fraud of creditors more than four months before the filing of the petition;⁹⁵ although it may include a verification of schedules from which property which should have been transferred to the trustee has been fraudulently omitted.⁹⁶ The making of a false oath either in or out of bank-

⁸⁴ *Johnson v. United States* (C. C. A., 1st Cir.), 20 Am. B. R. 724, 163 Fed. 30; *Jacobs v. United States* (C. C. A., 1st Cir.), 20 Am. B. R. 550, 161 Fed. 694.

Failure to schedule not a concealment.—The offense denounced by the provisions of section 29-b contemplate the concealment of property by some other act or acts upon the part of the bankrupt than merely omitting it from the schedules, and affirmative false statements of some material fact or facts by the bankrupt, wilfully and intentionally made by him, knowing the same to be false. In *re Hennebry* (D. C., Iowa), 31 Am. B. R. 231, 207 Fed. 882; *Gretsch v. United States* (C. C. A., 3d Cir.), 36 Am. B. R. 571, 231 Fed. 57.

⁸⁵ *Johnson v. United States* (U. S. Sup. Ct.), 30 Am. B. R. 14, 228 U. S. 457; *Kerch v. United States* (C. C. A., 1st Cir.), 22 Am. B. R. 544, 171 Fed. 366, distinguishing *Johnson v. United States* (C. C. A., 1st Cir.), 20 Am. B. R. 724, 163 Fed. 30. Compare *People v. Swarts and Greenberg* (Ill. Crim. Ct.), 8 Am. B. R. 487, 24 Mut. Corp. Rep. 266.

⁸⁶ *Stern v. United States* (C. C. A., 3d Cir.), 28 Am. B. R. 101, affg. 26 Am. B. R. 110, 186 Fed. 854.

⁸⁷ See also Am. B. R. Dig. § 1183.

⁸⁸ *Glickstein v. United States*, 27 Am. B. R. 786, 222 U. S. 139.

⁸⁹ *Wechsler v. United States* (C. C. A., 2d Cir.), 19 Am. B. R. 1, 158 Fed. 579, revg. 16 Am. B. R. 1.

⁹⁰ *Wechsler v. United States* (C. C. A., 2d Cir.), 19 Am. B. R. 1, 158 Fed. 579.

⁹¹ *National Bank of Louisville v. Carley* (C. C. A., 3d Cir.), 12 Am. B. R., 119, 127 Fed. 686.

Knowingly and fraudulently.—When a person states matter which he does not believe to be true, wilfully and contrary to his oath, he may certainly be said to make a false oath "knowingly and fraudulently." *Wechsler v. United States* (C. C. A., 2d Cir.), 19 Am. B. R. 1, 158 Fed. 579, revg. 16 Am. B. R. 1.

⁹² See under Section Fourteen of this work, subtitle "A false oath in the proceeding."

⁹³ *Edelstein v. United States* (C. C. A., 8th Cir.), 17 Am. B. R. 649, 159 Fed. 636.

A false oath is evidently a corruptly false oath, such as will subject the affiant to a prosecution for perjury. In *re Gilpin* (D. C., Pa.), 20 Am. B. R. 374, 389, 160 Fed. 171.

⁹⁴ *United States v. Liberman* (C. C., N. Y.), 23 Am. B. R. 734, 176 Fed. 161.

⁹⁵ In *re Hennebry* (D. C., Iowa), 31 Am. B. R. 231, 207 Fed. 882.

⁹⁶ *Gretsch v. United States* (C. C. A., 3d Cir.), 36 Am. B. R. 571, 231 Fed. 57.

ruptcy proceedings is perjury, and punishable as such; if made in a bankruptcy proceeding it is punishable as prescribed in this section, rather than as prescribed in the Federal Penal Code.⁹⁷ Although this section prescribes no punishment for one who suborns another to make a false oath in a proceeding in bankruptcy, one who is guilty of such subornation is punishable under the Penal Code,⁹⁸ but the crime of false swearing in bankruptcy proceedings is not equal in enormity to the crime of perjury.⁹⁹ The offense, when once committed, cannot be retrieved by right and lawful conduct on the part of the defendant in assisting his trustee in gathering assets which ought to have been disclosed before.¹⁰⁰ The making of a "false account" is not a crime except as here prescribed. These latter words when applied to a debtor are not important, as an unverified account by the bankrupt is practically unknown. Not so where the false account is filed by the trustee or receiver; it is often not verified, but this would not save the guilty officer from the penalty of the statute. This subsection then refers to the perjury of, or the making of a false account in the proceeding by, any person.

(3) ADMINISTRATION OF OATH.—In a trial of an indictment under this clause, it must be shown that the oath was administered by an officer authorized to administer it.¹⁰¹ A referee may administer such an oath.¹⁰²

(4) EVIDENCE OF FALSE OATH.—Evidence should be clear and satisfactory.¹⁰³ In a prosecution for false swearing evidence which not only contradicts the testimony of the defendants, but so far preponderates it as to justify the jury in finding that the latter was not only false but was made by the defendant knowingly and fraudulently is all that is necessary to prove the crime of making a false oath.¹⁰⁴ Proof that the defendant took the oath either before he began to testify or when he finished and signed the testimony is sufficient to support the charge of perjury.¹⁰⁵

97. *U. S. v. Wechsler* (D. C., N. Y.), 16 Am. B. R. 1, revd. on other grounds, 19 Am. B. R. 1, 158 Fed. 579.

98. *Epstein v. United States* (C. C. A., 7th Cir.), 28 Am. B. R. 561, 196 Fed. 354. See U. S. Penal Code, § 126.

99. *Kahn v. United States* (C. C. A., 2d Cir.), 32 Am. B. R. 109, 214 Fed. 54.

100. *Kern v. United States* (C. C. A., 6th Cir.), 22 Am. B. R. 223, 169 Fed. 617.

101. *In re Conroy* (D. C., Pa.), 14 Am. B. R. 249, 134 Fed. 764, holding that if the bankrupt knowingly and fraudulently made a false oath in respect to a conveyance of real property owned by him, at any time, he is guilty of this offense.

102. *United States v. Simon* (D. C. Wash.), 17 Am. B. R. 41, 146 Fed. 89, holding that an indictment of a bankrupt for perjury is not demurrable upon the ground that the referee was not authorized to administer an oath to the defendant.

103. *In re Troeder* (C. C. A., 1st Cir.), 17 Am. B. R. 723, 150 Fed. 710. See also Am. B. R. Dig. § 1195.

An inquiry as to assets or liabilities of a bankrupt may be carried back as far as is necessary, and everything bearing upon the question at the time of bankruptcy is

material. Hence a question with respect to the financial condition of the business of the said bankrupt and with respect to the amount of assets and liabilities of the said bankrupt, is material, although relating to the bankrupt's financial condition several years before the filing of the petition in bankruptcy. *United States v. Rosenstein* (D. C., N. Y.), 33 Am. B. R. 730, 211 Fed. 738.

Evidence of business relations between defendant and bankrupt.—Where the defendant testified before the referee that he received cash for a check delivered to the bankrupt, while the prosecution claimed that he merely received checks in return, the object being to pad the bankrupt's bank account, evidence may be admitted tending to show close business and confidential relations between the accused and the bankrupt to show motive. *Ulmer v. United States* (C. C. A., 6th Cir.), 34 Am. B. R. 143, 219 Fed. 641, citing *Daniels v. United States* (C. C. A., 6th Cir.), 27 Am. B. R. 790, 196 Fed. 459.

104. *Kahn v. United States* (C. C. A., 2d Cir.), 32 Am. B. R. 109, 214 Fed. 54.

105. *United States v. Wechsler* (D. C., N. Y.), 16 Am. B. R. 1, revd. on other grounds 19 Am. B. R. 1, 158 Fed. 579.

d. Punishment.—Here, too, the only punishment is by imprisonment; but the maximum is two, not five, years.¹⁰⁶ If perjury is charged and the indictment is laid under the general law, the punishment prescribed by that law will, of course, follow a conviction.

e. Offenses by others.—(1) **IN GENERAL.**—While the word “person”¹⁰⁷ includes the officers¹⁰⁷ named in the law, and thus any of the offenses enumerated in subsection *b* may be chargeable to an officer, yet the last three subdivisions of subsection *b* are manifestly intended to meet acts or omissions by others than the bankrupt or such officers. These subdivisions are new, and have as yet received little attention from the courts.

(2) **PRESENTING A FALSE CLAIM.**—The presenting of a false claim under oath against a bankrupt’s estate is a crime. Though the clause is phrased somewhat awkwardly, it is thought that it applies to an attorney who presents such a claim in an ordinary proceeding, as well as in one for a composition. The intention clearly is to penalize the filing of false claims, and to make both the claimant and any one who acts in his stead in presenting the claim liable therefor. The words “used any such claim in composition” enlarge the scope of the clause in such proceedings; it may have been presented without knowledge of its falsity, but acted on, as by assenting to the offer of composition, after that fact became known. Knowledge of falsity is essential, but that the presentation or use was fraudulent does not seem a necessary element.

(3) **RECEIVING PROPERTY WITH INTENT TO DEFEAT THE ACT.**—The elements of pleading and proof here are: (a) The receipt of a material amount of property belonging to the bankrupt, (b) after the filing of the petition,¹⁰⁹ and (c) with intent to defeat the act.¹¹⁰ This offense can, therefore, not be committed by one who is the unconscious beneficiary of a fraudulent transfer or preference before bankruptcy,¹¹¹ though intent to defeat the act is palpable. On the other hand, only intent, not also the result, need be shown. But intent will never be presumed where the acts complained of are made the foundation of an indictment; it must be proved. This offense will, in the nature of things, be rare, and occur only in involuntary cases before actual adjudication.

106. Three counts in an indictment for a false oath under section 29, where the defendant made substantially the same statement at three different times, charge but one offense, and in such a case imprisonment for more than two years specified in such section is unauthorized. *Ulmer v. United States* (C. C. A., 6th Cir.), 34 Am. B. R. 143, 219 Fed. 641.

Effect of Revised Statutes, § 5392.—While the effect of section 5392 of the United States Revised Statutes, making oral and written false statements perjury, when sworn to before any competent tribunal, officer or person in any case in which a law of the United States authorizes an oath to be administered, is restricted by section 29 of the Bankruptcy Act, both sections may be construed together as providing a stated penalty for the crime of false swearing, with the proviso that when the offense is committed in a bankruptcy proceeding the offender, upon conviction, shall be subjected to a dif-

ferent penalty. *Wechsler v. United States* (C. C. A., 2d Cir.), 19 Am. B. R. 1, 158 Fed. 579, revg. 16 Am. B. R. 1.

107. Bankruptcy Act, § 1 (19).

108. Bankruptcy Act, § 1 (18).

109. See *U. S. v. Latorre*, Fed. Cas. 15,567, 8 Blatchf. 134; *Knapp, etc., Co. v. Drew* (C. C. A., 8th Cir.), 20 Am. B. R. 355, 160 Fed. 413. See also Am. B. R. Dig., § 1185.

110. *Knapp, etc., Co. v. Drew* (C. C. A., 8th Cir.), 20 Am. B. R. 355, 160 Fed. 413; In re *Luftig* (D. C., Mass.), 15 Am. B. R. 773, 162 Fed. 322, holding that the mere sale of a creditor’s claim to a brother-in-law of a bankrupt is not necessarily a commission of the offense of receiving “any material amount of property from a bankrupt after the filing of the petition,” nor does it necessarily involve any intent to defeat the act.

111. See *Wayne Knitting Mills v. Nugent* (D. C., Ky.), 4 Am. B. R. 747, 104 Fed. 530. Compare also *s. c.*, in Supreme Court, *Mueller v. Nugent*, 181 U. S. 1, 7 Am. B. R. 224.

(4) **EXTORTING MONEY.**—The fifth subdivision is clearly aimed at those creditors who seek an advantage as a consideration for consenting to a proposed composition. It may, of course, be availed of where pressure, including a money payment, is exerted, resulting in the withdrawal of objections to a discharge. Whether it is available where a debt is not proven in consideration of a new promise may be doubted; such a new promise is neither money nor property.¹¹² Cases are conceivable, too, where the bankrupt may commit this offense. The broad meaning of "person" should be remembered.¹¹³ The mere attempt to extort is enough. But extortion is not shown where a creditor loaned money to a bankrupt for use in paying the consideration of a composition and the bankrupt promised that when the composition was confirmed he would pay the creditors the balance of their claim, after deducting their share of the consideration of such composition.¹¹⁴

(5) **CONSPIRACY.**¹¹⁵—Under § 5440 of the U. S. R. S. it has been held that a person who conspires with another to commit an offense against the bankruptcy act is liable to prosecution.¹¹⁶ If a bankrupt conceal his property before the appointment of a trustee and continue to conceal it after the appointment he violates the bankruptcy act and a conspiracy that he shall do so violates the conspiracy statute.¹¹⁷ The offense of conspiracy, as defined by § 37 of the U. S. Criminal Code, is not one arising under the Bankruptcy Act.¹¹⁸ Individuals may be guilty of the offense of conspiring to conceal the assets of a corporation, although the corporation, as such, was not a party to the conspiracy.¹¹⁹ Circumstantial evidence is admissible to prove the crime of conspiracy to conceal assets,¹²⁰ as the crime, from the nature of the case, can rarely be proved by direct oral evidence. If the proof shows a previous meeting and a concert of action thereafter, each of the parties doing some act contributing toward the accomplishment of an unlawful purpose, a jury is justified in finding that they were conspiring to accomplish that purpose.¹²¹ Upon a prosecution for conspiracy, the schedules are admissible in evidence.¹²² Evidence not only of the fraudulent concealment of assets by a bankrupt, but of the joint participation of the defendants in the acts by which the fraudulent concealment was accomplished is sufficient to sustain a conviction for con-

112. Where an alleged bankrupt, without suggesting the pendency of bankruptcy proceedings permits an action at law by the principal petitioning creditor to go to judgment, and pays the same, if the payment is received with intent to take no further action in the bankruptcy proceedings, it may constitute the receipt of money, "after the filing of the petition, with intent to defeat this act," within the meaning of section 29b (4) of the Bankruptcy Act. *Matter of Lavery & Son* (D. C., Mass.), 37 Am. B. R. 606, 235 Fed. 910.

113. Bankruptcy Act, § 1 (19).

The provision applies to all persons who exact money or property from any one as a consideration for acting or forbearing to act in bankruptcy proceedings. *United States v. Dunkley* (D. C., Cal.), 38 Am. B. R. 127, 235 Fed. 1000.

114. *Zavelo v. Reeves*, 227 U. S. 625, 29 Am. B. R. 493.

115. See under this section, sub-title "Conspiracy to conceal property; Indictment,"

ante, p. 623. See also Am. B. R. Dig., § 1184, 1191, 1196.

116. *U. S. v. Bayer*, Fed. Cas. 14,547, 4 Dill. 407.

117. *Cohen v. United States* (C. C. A., 2d Cir.), 19 Am. B. R. 8, 12, 157 Fed. 651, affg. 15 Am. B. R. 357; *United States v. Rhodes* (D. C., Ala.), 32 Am. B. R. 523, 212 Fed. 513.

118. *Rabinowitz v. United States* (C. C. A., 2d Cir.), 34 Am. B. R. 130, 222 Fed. 846.

119. *United States v. Young & Holland Co.* (Cir. Ct., R. I.), 22 Am. B. R. 484, 170 Fed. 110; *United States v. Rhodes* (D. C., Ala.), 32 Am. B. R. 523, 212 Fed. 513.

120. *Stein v. United States* (C. C. A., 3d Cir.), 28 Am. B. R. 101, 193 Fed. 888; *United States v. Green* (D. C., Va.), 34 Am. B. R. 405, 220 Fed. 973.

121. *Radin v. United States* (C. C. A., 2d Cir.), 25 Am. B. R. 640, 189 Fed. 658.

122. *United States v. Green* (D. C., Pa.), 34 Am. B. R. 405, 220 Fed. 973.

spiracy.¹²³ Each one of joint defendants may take the stand in his own behalf and his testimony is admissible for and against his codefendant.¹²⁴

(6) PUNISHMENT.—The punishment for either of these offenses, like those committed by the bankrupt, is imprisonment for not more than two years.

IV. OFFENSES BY A REFEREE AND PUNISHMENT.

a. **In general.**—The former law penalized the taking of unlawful fees. This subsection is, therefore, new. There are no cases yet reported under it. For what will make a referee “directly or indirectly interested,” see under section thirty-nine, *post*; also for what constitutes his duty as to giving information. But the offense defined in subdivision 3 cannot be committed until the referee has been directed by the court, which here means the judge, to permit the inspection.

b. **Punishment.**—Here the punishment does not involve imprisonment; but ousts the guilty officer from office and makes him liable to a fine of not more than \$500. This offense is, therefore, not an infamous crime.¹²⁵

V. NO PROSECUTION AFTER ONE YEAR.¹²⁶

The limitation contained in subsection *d* is absolute. The indictment must be found or the information filed within one year after the commission of the offense.¹²⁷ This subdivision has no application to an indictment under § 5440 of the U. S. R. S. for conspiracy to commit an offense arising under the bankruptcy act.¹²⁸

123. United States v. Green (D. C., Pa.), 34 Am. B. R. 405, 220 Fed. 973.

124. Radin v. United States (C. C. A., 2d Cir.), 25 Am. B. R. 640, 189 Fed. 658.

125. Compare U. S. v. Block, Fed. Cas. 14,609.

126. See also Am. B. R. Dig., § 1199.

127. **Continuing concealment; indictment barred by statute of limitations.**—The fact that concealed property remains concealed does not continue the offense; and where an indictment which charged bankrupt with having knowingly and fraudulently concealed assets from his trustee, was found more than twelve months after the filing of the bankruptcy petition and schedules and more than twelve months after bankrupt's adjudication and the appointment of a trustee, but the evidence as to defendant's acts in relation to the property all related to a period prior to his filing his petition in bankruptcy,

he having done nothing since that time but remain passive and silent, the prosecution for the offense was barred by section 29d of the Bankruptcy Act, which provides that an indictment for concealing assets shall be found within one year after the commission of the offense. Warren v. United States (C. C. A., 5th Cir.), 29 Am. B. R. 555, 199 Fed. 753.

128. United States v. Comstock (Cir. Ct., R. I.), 20 Am. B. R. 526, 162 Fed. 416.

The prosecution of a bankrupt for conspiracy under § 37 of the U. S. Criminal Code, is regulated by § 1044 of the U. S. Revised Statutes, which provides a limitation of three years, and not by § 29d of the Bankruptcy Act, which provides a limitation of one year. Rabinowitz v. United States (C. C. A., 2d Cir.), 34 Am. B. R. 130, 222 Fed. 846.

SECTION THIRTY.

RULES, FORMS, AND ORDERS.

§ 30. **Rules, Forms, and Orders.**—*a* All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.

Analogous provisions: In U. S.: Act of 1868, § 10.
In Eng.: Act of 1883, § 127.

SYNOPSIS OF SECTION.

RULES, FORMS, AND ORDERS.

I. Rules, Forms, and Orders, 634.

- a. Comparative legislation and meaning of section, 634.*
- b. Those prescribed should be followed, 634.*
- c. Supplemental rules and forms, 635.*

RULES, FORMS, AND ORDERS.¹

a. Comparative legislation and meaning of section.—The English bankruptcy authorizes the lord chancellor, with the concurrence of the president of the board of trade, to make, revoke, and alter general rules in bankruptcy, which, when laid before parliament, have the same effect as if previously enacted by that body.² The general rules in England are, therefore, as much law as the statute. Our system does not permit judicial legislation of this character. The former act gave the justices of the Supreme Court power to frame general orders for a variety of purposes.³ The orders then framed and the forms prescribed for carrying them out have been used as models for those now in vogue,⁴ and the court will construe the present general orders as the general orders under the earlier statute were construed.⁵ The purpose is, of course, to accomplish uniformity in practice throughout the States.⁶

b. Those prescribed should be followed.—It has been distinctly held that the general orders promulgated by the Supreme Court in accordance with this section are binding upon courts of bankruptcy. They confer rights as well as prescribe rules of practice.⁷ The rules and forms prescribed by

1. See also Am. B. R. Dig., § 37.

2. Eng. Act of 1883, § 127.

3. Act of 1867, § 10.

4. See Bump on Bankruptcy (9th ed.), and General Orders and Forms therein.

5. In re Levin (C. C. A., 1st Cir.), 23 Am. B. R. 845, 176 Fed. 177.

6. Savings Bank v. Bank, Fed. Cas. 12,919.

7. State rules of practice.—When an adjudication is made in bankruptcy the case is in the U. S. District Court, and rules of State

practice regarding acts to be done within a specified time yield to the rules of the Federal court. In re Fall City Shirt Mfg. Co. (D. C., Ky.), 3 Am. B. R. 437, 98 Fed. 592.

7. In re Scott (D. C., N. Car.), 3 Am. B. R. 625, 99 Fed. 404; In re Schiller (D. C., Va.), 2 Am. B. R. 704, 96 Fed. 400. It is the duty of referees to comply with General Order XXIII. Faulk & Co. v. Steiner (C. C. A. 5th Cir.), 21 Am. B. R. 623, 165 Fed. 861.

the Supreme Court under and by virtue of the bankruptcy act have the force and effect of law.⁸ It is the duty of referees and trustees to conform therewith.⁹ Filing has been refused to papers not in accordance with the official forms.¹⁰ The general orders are not to be taken as enlarging the statute, but must, if possible, be construed consistently with it.¹¹ But the general orders are not always in tune with the law; and the forms show a want of harmony at times both with the law and the general orders. In such cases, the law, of course, controls.¹² The general orders and forms have not, in respect to procedure, the full force and effect of law.¹³ In any event they do not abrogate the law. The orders being simply an amplification of the law with respect to procedure, they should not be construed as extending the powers granted to the court by virtue of the law itself.¹⁴ Rules may not enlarge the statute, but are merely prescribed to carry the act into effect.¹⁵

c. Supplemental rules and forms.—The general orders are intended only to confine the practice in bankruptcy within certain broad limits. They are not exclusive, and most of the district courts have prescribed supplemental rules; these should always be consulted. Even these have not always been found sufficient, and local rules are sometimes promulgated by the referees.¹⁶ Rules of the district courts may not conflict with the rules and forms pro-

8. *In re Gerber* (C. C. A., 9th Cir.), 26 Am. B. R. 608, 617, 186 Fed. 693, so held as to the rules and forms in regard to exemptions; *Powell v. Pangborn* (N. Y. Sup. Ct.), 31 Am. B. R. 650; *Sabin v. Blake-McFall Co.* (C. C. A., 9th Cir.), 35 Am. B. R. 179, 223 Fed. 501.

Effect on jurisdiction.—A rule, not expressly authorized by some law of Congress, cannot confer judicial power on a District Court, to set aside or disregard the findings of fact of a referee, in an action by a trustee in bankruptcy to recover an alleged preference, where the parties had expressly stipulated to have the matter tried and determined by the referee. *Grant v. National Bank of Auburn* (D. C., N. Y.), 37 Am. B. R. 329, 232 Fed. 201.

9. *Faulk v. Steiner* (C. C. A., 5th Cir.), 21 Am. B. R. 623, 165 Fed. 861; *In re Jamieson* (D. C., Ill.), 9 Am. B. R. 681, 120 Fed. 697.

10. *Mahoney v. Ward* (D. C., N. Car.), 3 Am. B. R. 770, 100 Fed. 278, holding that a written or typewritten schedule will not be accepted. The printed blank containing forms prescribed by the rules of court must be used.

11. *In re City Contracting Co.* (D. C., Hawaii), 30 Am. B. R. 133.

12. See *In re Soper* (Rec., N. Y.), 1 Am. B. R. 193. See also comments and discussions of rules and forms at the various conventions of referees in bankruptcy, 1 N. B. N. 435-438; also 2 N. B. N. Rep., Number for Oct. 1, 1900, pp. 29-32. As to case where there was conflict between rule and statute, see *In re Isaacson* (D. C., N. Y.), 20 Am. B. R. 430, 161 Fed. 779; *In re City Contracting Co.* (D. C., Hawaii), 30 Am. B. R. 133.

13. *West Co. v. Lea*, 174 U. S. 590, 2 Am. B. R. 463, where the court said: "These rules were but intended to execute the act, and not to add to its provisions by making that which the statute treats in some cases as immaterial a material fact in every case." Compare *In re Baxter*, Fed. Cas. 1,121.

14. *Orcutt Co. v. Green*, 204 U. S. 96, 17 Am. B. R. 72, in which the court, in considering the effect of General Order 21, said: "There is nothing in that provision inconsistent with, or opposed to, anything stated in the bankruptcy law upon the subject, and we must therefore take the statute and read them together, the order being simply somewhat of an amplification of the law with respect to procedure, but nothing which can be construed as beyond the powers granted to the court by virtue of the law itself."

15. *Weidenfeld v. Tillinghast* (C. C., N. Y.), 18 Am. B. R. 531, 104 N. Y. Supp. 712.

Forms prescribed are not intended to effect any change in the law. *Burke v. Guarantee & Trust Co.* (C. C. A., 3d Cir.), 14 Am. B. R. 31, 134 Fed. 562. They are to be "observed and used with such alterations as may be necessary to suit the circumstances of any particular case." General Order 38. The fact that the official form for involuntary petitions contains an allegation of insolvency does not make such an allegation material where the statute provides that other facts alone constitute a sufficient cause for adjudication. *West Co. v. Lea*, 174 U. S. 590, 2 Am. B. R. 463.

16. For those in force in the western district of New York, see 1 N. B. N. 112-116. See also *Samson v. Burton*, Fed. Cas. 12,285. For additional forms, see *Hagan & Alexander's Bankruptcy Forms*, 2d ed.

mulgated by the Supreme Court.¹⁷ Likewise of the forms. Some of the more valuable, as well as many new ones suggested by experience, will be found under "Supplementary Forms," *post*. Where there is no rule to the contrary, or official form which is applicable, they may be used. Existing forms, too, may often be modified to fit a particular case; so, also, two or more prescribed forms may be combined.¹⁸ The goal to be reached is the important consideration. If without much violence done to prescribed rules and forms, the practitioner does so, he need concern himself as little about a technical observance of them as the court will with a captious objection on the other side.¹⁹

17. *In re Johnson* (D. C., Ark.), 19 Am. B. R. 814, 158 Fed. 342. Thus, in *Matter of Nathanson* (D. C., N. Y.), 19 Am. B. R. 56, 152 Fed. 585, it was held that Form 58, promulgated by the Supreme Court under this section, must be complied with by a creditor desiring to oppose an application for a discharge.

18. *Mather v. Coe* (D. C., Ohio), 1 Am. B. R. 504, 92 Fed. 333. Reference should be made to Hagar and Alexander's *Bankruptcy Forms*, 2nd Ed., for forms not included in this work.

19. Compare *In re Paige* (D. C., Ohio), 3 Am. B. R. 679, 99 Fed. 538.

SECTION THIRTY-ONE.

COMPUTATION OF TIME.

§ 31. **Computation of Time.**—*a* Whenever time is enumerated by days in this act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.

Analogous provisions: In U. S.: Act of 1867, § 48, R. S., § 5013.

In Eng.: Act of 1883, § 141, General Rule 4.

Cross-references: To the law: Expiration of four months' period, § 3-b; time limit for vacating preference secured by legal proceeding, § 3-a(3).

Schedules to be filed within ten days, § 7(8).

Composition, application to set aside within six months, § 13.

Discharge, time limit upon application, § 14-a.

Revocation of discharge within one year, § 15.

Petition in involuntary proceedings, returned within fifteen days, § 18-a.

Bankrupt to appear within five days, § 18-b.

Appeal from judgment within ten days, § 25-a.

Allowance of claim, proof filed within one year, § 57-n.

Notice to creditors, by mail, ten days, § 58-a.

Time for publication, § 58-b.

Preferential transfers, etc., within four months, § 60.

Priority of wages earned within three months, § 64-b(4).

Dividends, time of declaring, § 65.

Unclaimed for six months, paid into court, § 66.

Transfers, liens, etc., within four months' period, § 67.

Vesting property in trustee as of date of adjudication, § 70.

To the General Orders: Time of filing papers to be indorsed by clerk or referee, II.

Schedules in involuntary proceedings, within five days, IX.

Times and places where referees shall act, XII.

Trustee's report as to exemptions within twenty days, XVII.

Order to show cause granted by referee where trustee fails to report within five days, XVII.

Referee to make return to judge under oath on first Tuesday of each month, XXVI.

SYNOPSIS OF SECTION.

COMPUTATION OF TIME.

I. Computation of Time, 638.

a. In general, 638.

b. By months and years, 638.

c. By days, 638.

d. By fractions of a day, 638.

I. COMPUTATION OF TIME.

a. In general.—The rule stated in this section is familiar. The English law is similar.¹ The law of 1867 differed only in the words prescribing what days were holidays.² This the present statute does elsewhere.³ But the rule does not permit the exclusion of Sundays or holidays, save those coincident with the "day last included."⁴

b. By months and years.—The phrases "four months" and "one year" are frequent in the act. The present section speaks only of "time enumerated by days." Under the former statute, however, it was held that the same rule applied when the time was enumerated by months and years.⁵ So, also, under the law of 1898.⁶ While the first six words of the section would seem to indicate that it was not intended to apply where the time is enumerated by months or years, the following words "or in any proceeding in bankruptcy" makes it applicable to any proceeding in bankruptcy where the number of days is material.⁷ In the dissolution of attachments made within four months this section has been applied in computing those months.⁸

c. By days.—Here the statute is self-explanatory. Time limitations, based on days, are found in many sections;⁹ also in some of the general orders.¹⁰ Cases on the timely filing of petitions will be found in the footnote.¹¹

d. By fractions of a day.—Here the rule seems to be that fractions of a day will be disregarded. This doctrine is the composite of an ancient controversy. Cases under the present law and its predecessor are cited in the footnote.¹² There can now, however, be no question about the rule being as stated.¹³

1. Eng. Act of 1883, § 141.

2. Act of 1867, § 48; R. S., § 5013.

3. Bankruptcy Act, § 1 (14).

4. Compare *In re York*, Fed. Cas. 18,139.

5. *In re Lang*, Fed. Cas. 8,056; *Cooley v. Cook*, 125 Mass. 406.

6. Compare *In re Stevenson* (D. C., Del.), 2 Am. B. R. 66, 94 Fed. 110; *In re Holmes* (D. C., Vt.), 21 Am. B. R. 339, 165 Fed. 225, in which the court said: "Applying this section to section 14, I hold that the old expression of 'a year and a day' is applicable, or, in other words, if a bankrupt is adjudicated on the 23d day of November, 1908, he may file his application for discharge on the 24th day of November, 1909, and if the 24th falls on Sunday, or a holiday, the next day thereafter."

7. *In re Holmes* (D. C., Vt.), 21 Am. B. R. 339, 165 Fed. 225.

8. *Jones v. Stevens*, 5 Am. B. R. 571, 94 Me. 582; *In re Warner* (D. C., Conn.), 16 Am. B. R. 519, 144 Fed. 987.

9. Thus, see *In re Wolf* (D. C., N. J.), 2 Am. B. R. 322, 94 Fed. 382. Where a bankrupt has to vacate or discharge a preference five days before the 22d of a certain month it has been held that he has all of the 17th day of such month. *Pittsburgh Laundry v. Imperial Laundry* (C. C. A., 3d Cir.), 18 Am. B. R. 756, 154 Fed. 662.

10. See *In re Scott* (D. C., N. Car.), 3 Am. B. R. 625, 99 Fed. 404.

11. *In re Rogers*, Fed. Cas. 12,003; *In re*

Lang, Fed. Cas. 8,056. Exceptions to a trustee's report, filed one day late, that is, more than twenty days thereafter, will be dismissed. *Matter of Amos* (Ref., Ga.), 19 Am. B. R. 804. See also Am. B. R. Dig., § 234.

12. *In re Stevenson* (D. C., Del.), 2 Am. B. R. 66, 94 Fed. 110; *In re Dupree* (D. C., N. Car.), 8 Am. B. R. 321, 97 Fed. 28; *Leidigh Carriage Co. v. Stengel* (C. C. A., 6th Cir.), 2 Am. B. R. 383, 95 Fed. 637; *In re Stoner* (D. C., Pa.), 5 Am. B. R. 402, 105 Fed. 752; *Jones v. Stevens*, 5 Am. B. R. 571, 94 Me. 582, disapproving of *Westbrook Mfg. Co. v. Grant*, 60 Me. 88; *In re Tonawanda St. Planing Mill Co.* (Spec. M., N. Y.), 6 Am. B. R. 38. And under the law of 1867, *Dutcher v. Wright*, 94 U. S. 553.

13. **Fractions of a day.**—The rule in bankruptcy, as in other judicial proceedings, is that as to the general doctrine the law does not allow fractions of a day, and that such fractions will only be considered when substantial justice so requires. *Moore v. Third Nat. Bank of Philadelphia* (Super. Ct. Pa.), 24 Am. B. R. 568, 41 Pa. Super. Ct. 497, quoting *Collier on Bankruptcy* (6th ed.), p. 332; *In re Warner* (D. C., Ct.), 16 Am. B. R. 519, 144 Fed. 987, holding that an attachment made on February 5, 1905, in the forenoon, is within four months prior to June 8, 1905, at 5 p. m., the time of the filing of the petition in bankruptcy and adjudication thereon, and is thereby dissolved.

SECTION THIRTY-TWO.

TRANSFER OF CASES

§ 32. **Transfer of Cases.**—*a* In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest.

Analogous provisions: In U. S.: None, save in General Order XVI, under the Act of 1867. See also R. S., § 5121.

In Eng.: Act of 1883, § 97; General Rules, 18–26.

Cross-references: To the law: Jurisdiction of court of bankruptcy to transfer cases to other courts of bankruptcy, § 2(19).

Jurisdiction over one partner includes all partners, § 5.

To the General Orders: Petitions in different districts; priorities, VI.
Proceedings in partnership cases, VIII.

I. TRANSFER OF CASES.

Meaning and scope.—This section is intended to avoid conflicts of jurisdiction between the courts of different districts. Three different district courts might have jurisdiction, *i. e.*, where the bankrupt resides, where he has his domicile, and where he has his principal place of business.¹ Three petitions even might be filed, were the case involuntary. The possible complications increase when partnerships are considered. Therefore, the Supreme Court, under the former law, influenced doubtless by the analogy of the last clause of § 36 of that law prescribed by rule² that the court first acquiring jurisdiction should keep it. This rule is now General Order VI, but with a sentence added to make it conform to the section under discussion. The latter is new. It seems intended to modify the hard and fast rule of seniority formerly applied, by permitting one of the courts having jurisdiction to relinquish it and to order a consolidation, if “for the convenience of parties in interest.”³ Neither the act nor

1. Bankruptcy Act, § 2.

2. See Act of 1867, General Order XVI.

3. In re Elmira Steel Co. (D. C., N. Y.), 5 Am. B. R. 484, 109 Fed. 456; In re Globe Security Co. (D. C., N. Y.), 12 Am. B. R. 764, note, 132 Fed. 709.

Transfer for convenience of parties in interest.—Where petitions have been filed in different districts, the case should be heard in the district of the bankrupt's domicile, or else be transferred to the district where it would be for the greatest convenience of the parties in interest. In re Waxelbaum (D. C., N. Y.), 3 Am. B. R. 392, 98 Fed. 589.

Where a petition has been filed against a corporation in the district of its domicile, and thereafter a petition is filed against it in a district in another State, the court in which the first petition is filed, unless satisfied that it is for the greatest convenience of all parties in interest that the case should be transferred, is required to retain jurisdiction until the proceedings are closed. In re Tybo Mining & Reduction Co. (D. C., Me.), 13 Am. B. R. 68, 132 Fed. 697.

Where proceedings in bankruptcy against a corporation had been commenced in Alabama, Tennessee and New Jersey, in order

the general order attempts to define the terms, "greatest convenience" or "parties in interest." The interpretation placed upon them by the court,⁴ that the term "parties in interest," covers every party having any interest in or connection with the case, including priority, secured and unsecured creditors, as well as the bankrupts themselves, and that the term, "greatest convenience," depends upon all the circumstances—proximity of a majority of creditors and the place of business of the bankrupts to the court, proximity of witnesses whose attendance is desired in any hearing, and, perhaps numerous other factors—would seem to be the correct view.⁵ Jurisdiction so to do is conferred by § 2 (19). The expressed preference of a majority of the creditors for a transfer, while worthy of careful consideration, is not conclusive upon the question of convenience; the burden of proving greater convenience is upon those seeking the transfer.⁶ Save as modified by this section, however, the practice in vogue under the former law is continued under the present. Unless the court in which the first petition is filed is satisfied that it is for the greatest convenience of all parties in interest that the case should be transferred, it will retain jurisdiction,⁷ and may stay the other court or courts from further proceeding until an adjudication is made or refused.⁸ The petitioners in the

named, and the proceeding in the latter State, including the adjudication therein, is by order transferred to the Tennessee court, an order of the Alabama court transferring the proceeding therein to the Tennessee court, upon the ground of "greatest convenience of parties in interest," is only reviewable by appeal from the order of transfer, although the court granting such order may have made an erroneous finding that the Tennessee court had jurisdiction of the proceeding therein. *Kyle Lumber Co. v. Bush* (C. C. A., 5th Cir.), 13 Am. B. R. 535, 133 Fed. 688.

A motion to transfer a proceeding against a domestic corporation commenced in the Southern District of New York three days prior to the filing of a petition against it in Colorado, will be granted, and the proceedings consolidated. *Matter of The General Metals Co.* (D. C., N. Y.), 12 Am. B. R. 770, 133 Fed. 84.

General Order No. 6 as to the jurisdiction of the court where two or more petitions are filed in different districts against the same debtor is subject to the provisions of this section (§ 32) relating to the transfer and consolidation of petitions for the convenience of parties in interest. *In re Isaacson* (D. C., N. Y.), 20 Am. B. R. 430, 161 Fed. 779.

4. *Matter of United Button Co.* (D. C., Del.), 13 Am. B. R. 454, 137 Fed. 668.

5. *In re Sterne & Levi* (D. C., Tex. Ref.), 26 Am. B. R. 259.

6. **Burden of proving convenience.**—*Matter of United Button Co.* (D. C., Del.), 13 Am. B. R. 454, 137 Fed. 668, which construes generally the provisions of this section.

In a proceeding before the bankruptcy court first taking jurisdiction of a bankruptcy case, to determine the question which of two bankruptcy courts should proceed

with the case for the greatest convenience of parties in interest, the burden of satisfying the court by a fair preponderance of the evidence that it would be for the greatest convenience of parties in interest to transfer such case to the other court is, under section 32 of the Bankruptcy Act and General Order VI, upon the party seeking the transfer, and where ample notice of the time and object of a hearing upon the matter has been given to all parties in interest and no creditor appears in favor of a transfer and nothing in support of such petition to transfer is offered by the petitioner against an array of facts and circumstances constituting a great preponderance of the evidence in favor of the court first taking jurisdiction retaining and proceeding with the case, such petition to transfer should be denied. *In re Sterne & Levi* (D. C., Tex. Ref.), 26 Am. B. R. 259.

7. *In re Greenfield*, 42 How. Pr. (N. Y.), 469; *In re Penn*, Fed. Cas. 10,927; *In re Boylan*, Fed. Cas. 1,757; *In re Boston, H. & E.*, etc., Fed. Cas. 1,678; *In re Leland*, Fed. Cas. 8,228; *Shearman v. Bingham*, Fed. Cas. 12,733.

8. *In re Sears* (D. C., N. Y.), 7 Am. B. R. 279, 112 Fed. 58, as modified on another point by s. c., 8 Am. B. R. 713, 117 Fed. 294; *Matter of United Button Co.* (D. C., N. Y.), 12 Am. B. R. 261, 132 Fed. 378.

Bankrupt corporations.—The word "individual," as used in General Order VI, providing that "in case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile," is equivalent to "person," and as such includes a corporation. *Matter of United Button Co.* (D. C., N. Y.), 12 Am. B. R. 761, 132 Fed. 378.

preferred district must proceed with diligence to secure their rights, for if there be an adjudication in another district, jurisdiction thereon to administer the estate is obtained.⁹

Where the business transactions of two alleged bankrupt corporations organized in different jurisdictions are so intermingled as to be impossible of separation, the court which first acquires jurisdiction may pro-

ceed. *In re South-Western Bridge & Iron Co.* (D. C., Kan.), 13 Am. B. R. 304, 133 Fed. 568.

9. *Matter of United Button Co.* (D. C., N. Y.), 12 Am. B. R. 261, 132 Fed. 378.

SECTION THIRTY-THREE.

CREATION OF TWO OFFICES.

§ 33. **Creation of Two Offices.**—*a* The offices of referee and trustee are hereby created.

Analogous provisions: In U. S.: Act of 1867, § 3, R. S., § 4943.

In Eng.: None.

Cross-references: To the law: Court may include referee, § 1(7).

Officer includes referee and trustee, § 1(18).

Referee means referee who has jurisdiction, § 1(21).

Trustee includes all trustees of the estate, § 1(26).

Offenses by referee and trustee, § 29.

Referees, appointment, removal and districts, § 34.

Qualifications and oath, §§ 35, 36.

Number and jurisdiction, §§ 37, 38.

Duties, compensation, contempts before, §§ 39-41.

Records; absence or disability, §§ 42, 43.

Trustees, appointment, § 44.

Qualifications; death or removal, §§ 45, 46.

Duties and compensation, §§ 47, 48.

Accounts and papers, § 49.

Bonds of referees and trustees, § 50.

SYNOPSIS OF SECTION.

CREATION OF TWO OFFICES.

I. Creation of Offices of Referee and Trustee, 642.

a. Comparative legislation, 642.

b. Referee and trustee, 642.

I. CREATION OF OFFICES OF REFEREE AND TRUSTEE.

a. Comparative legislation.—The corresponding officers under the English system are registrars and trustees; under the law of 1867, registers and assignees.¹ No statute heretofore, however, has formally created the offices.

b. Referee and trustee.—The statute elsewhere prescribes that the word "officer" shall include clerk, marshal, receiver, referee, and trustee.² The two former existed before the law was passed; the third comes into being only in those cases where the court finds him necessary and appoints him.³ It is a little difficult to understand why this section was necessary; § 34 provides for the appointment of referees, § 44 of trustees. Each, though thus an officer, has but intermittent functions. The effect of this doctrine

1. Act of 1867, § 3, R. S., § 4993.

2. Bankruptcy Act, § 1 (18).

3. Bankruptcy Act, § 2 (3) (15).

on the limitations of § 72 is considered later.⁴ The referee is formally designated for a special term,⁵ and is vested with powers only as to such cases as have been referred to him. The trustee is, save for this section, not an officer at all, but a liquidator, appointed by the creditors.⁶ For the jurisdiction, duties, and compensation of these officers, and the like, reference should be had to the succeeding sections.⁷

4. See § 72 of this work.

5. Bankruptcy Act, § 34 (1).

6. Bankruptcy Act, § 44.

7. Bankruptcy Act, §§ 34-50.

SECTION THIRTY-FOUR.

APPOINTMENT, REMOVAL, AND DISTRICTS OF REFEREES.

§ 34. **Appointment, Removal, and Districts of Referees.**—*a* Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction, (1) appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and (2) designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district.

Analogous provisions: In U. S.: As to appointment, Act of 1867, § 3, R. S., § 4993; Act of 1841, 5; Act of 1800, § 2; As to removal, Act of 1867, § 5, R. S., § 4997.

In Eng.: None.

Cross-references: To the law: Court may include referee, § 1(7).

Referee means referee having jurisdiction of estate, § 1(2).

Reference to referee where judge is absent from district, § 18-f.

Offenses by referee, § 29.

Qualifications; oath of office, §§ 35, 36.

Number of referees, § 37.

Jurisdiction and duties; compensation, §§ 38-40.

Contempts before referees, § 41.

Bonds of referees, § 50.

SYNOPSIS OF SECTION.

APPOINTMENT, REMOVAL, AND DISTRICTS OF REFEREES.

I. Appointment, Removal, and Districts of Referees, 644.

- a. *Appointment*, 644.
 - b. *Removal*, 645.
 - c. *Term*, 645.
 - d. *Limits of district*, 645.
-

I. APPOINTMENT, REMOVAL, AND DISTRICTS OF REFEREES.

a. **Appointment.**¹—Under the present law, the judge of each district appoints the referees. By the former law, the registers were appointed by him, but on the nomination of the chief justice.² The power to appoint is limited

1. See also Am. B. R. Dig., § 66.

2. Act of 1867, § 3, R. S., § 4993.

within the territorial limits of the court; a judge of one district while holding court in another district cannot appoint a referee for the latter district. The "court" must appoint the referee, and not "the judge."³ But a district judge holding a court of bankruptcy, may appoint or remove a referee, though there is another district judge in the district having equal and concurrent authority.⁴ The appointment is usually in the form of a court order, designating the limits of the referee's district and his term of office. From that time and during such term all bankruptcy cases arising in his district are usually referred to him, unless he is absent, disqualified or removed;⁵ they may, however, for the convenience of parties be referred to any referee within the territorial jurisdiction of the court,⁶ or the court may appoint a special referee to hear a particular case in the event of the disqualification of the regular referee.⁷ The order of designation being discretionary the circuit court of appeals will not undertake to review it.⁸ If there is more than one referee in the referee district, the cases are distributed in such manner as the court directs.

b. Removal.⁹—This is, like the appointment, discretionary. But it must be either because the services of a referee are not needed, or for other cause. The cause should be stated in the order of removal. It is not thought that the words "for cause" here give the right to notice and a hearing. As long as the judge finds the cause sufficient, it is enough.¹⁰ The circuit court of appeals may not control the discretion of a district court in the matter of the appointment or removal of a referee.¹¹

c. Term.—The register held office until the judge deemed his assistance unnecessary. The term of the referee is, however, fixed at two years. There is nothing in the statute which invalidates the acts of a referee after the expiration of his term. He continues a referee in each unclosed case previously referred. If removed, the order of removal will doubtless remove him as to such cases. Without any standing order of appointment, the court can continue to refer cases in his district to him, provided there is no other regularly appointed referee in his district, and the order of reference will in itself confer jurisdiction and be deemed an appointment to that extent.

d. Limits of district.—Under the former law, at least one register was appointed in each congressional district. This seems to have been dropped out when that law was fused into the Revised Statutes.¹² Now the referee district is fixed by the judge, but should be so that each county "may constitute at least one district." This seems to mean that referee districts cannot be larger than a single county, a provision apparently ignored in many jurisdictions.¹³ There is warrant, however, for the practice, for the judge may conclude that the services of a referee are not needed in a particular county and combine it with another county or counties into a single referee district.

3. *In re Steele* (D. C., Ala.), 20 Am. B. R. 446, 162 Fed. 694.

4. *Birch v. Steele* (C. C. A., 5th Cir.), 21 Am. B. R. 539, 165 Fed. 577.

5. Compare Bankruptcy Act, § 43.

6. See under § 22 of this work.

7. *Bray v. Cobb* (D. C., N. Car.), 1 Am. B. R. 153, 91 Fed. 102.

8. *In re Alden* (C. C. A., 1st Cir.), 30 Am. B. R. 48, 205 Fed. 145.

9. See also Am. B. R. Dig., § 66.

10. Compare *State v. Doherty*, 25 La. Ann. 119.

11. *Birch v. Steele* (C. C. A., 5th Cir.), 21 Am. B. R. 539, 165 Fed. 577.

12. Act of 1867, § 3, R. S., § 4993.

13. It is well known that referee districts of two or three counties, or even of a score of counties, and in one case, the Southern District of Illinois, of a whole district, have been created under this seemingly inelastic clause.

SECTION THIRTY-FIVE.

QUALIFICATIONS OF REFEREES.

§ 35. **Qualifications of Referees.**— *a* Individuals shall not be eligible to appointment as referees unless they are respectively (1) competent to perform the duties of that office; (2) not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public; (3) not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and (4) residents of, or have their offices in, the territorial districts for which they are to be appointed.

Analogous provisions: In U. S.: Act of 1867, § 3, R. S., §§ 4994, 4995.

In Eng.: None.

Cross-references: To the law: Referee includes referee having jurisdiction of estate, § 1(21).

Creation of office; appointment and removal, §§ 33, 34.

Oaths of office, § 36.

Referee's absence a disability, effect, § 43.

Bond of referee, § 50.

SYNOPSIS OF SECTION.

QUALIFICATIONS OF REFEREES.

I. Qualifications of Referees, 646.

a. In general, 646.

b. Disqualification, 647.

I. QUALIFICATIONS OF REFEREES.¹

a. In general.— A referee is a judicial officer;² and this section sets proper limits on nepotism in his appointment or the enjoyment by him of more than one office.³ The former law contained no restriction save that the register

1. See also Am. B. R. Dig., §§ 67, 68.

2. Compare *White v. Schloerb*, 178 U. S. 542, 4 Am. B. R. 178; *Mueller v. Nugent*, 181 U. S. 1, 7 Am. B. R. 224; *Clendening v. Red River Valley Nat. Bank* (Sup. Ct.,

N. Dak.), 11 Am. B. R. 245, 12 N. Dak. 51, 94 N. W. 901.

3. In unpopulous districts, this is often a hardship, as a referee by this section is clearly disqualified from holding any other

must be a counselor-at-law of the district or the State courts.⁴ Further restrictions were prescribed in his oath of office, and he was prohibited from acting as attorney or counselor in any bankruptcy case in his district, especially after the amendment of 1874.⁵ Now a referee must be (a) a resident of, or have offices in the district for which he is appointed,⁶ and (b) competent to serve; (c) provided he does not hold any other office of profit or emolument (except certain offices here enumerated) or (d) is related to certain judicial officers of the United States by consanguinity or affinity within the third degree.

b. Disqualification.—Referees, although duly appointed, if not strictly within the terms of this section, would probably be disqualified to act at all. Disqualification often occurs in specific cases.⁷ Whether he is disqualified is usually a matter either of discretion on the part of the judge or of conscience on the part of the referee. This matter is discussed elsewhere.⁸

office, either legislative, executive, or municipal (with the exceptions specified in this section), provided it is one of profit or emolument. The restriction is, however, on the whole, a wise one. It is sufficiently unfortunate that referees must practice their profession as a means of livelihood, thus, one day sitting in judgment, the next perhaps pleading in another court against him who was a pleader in the referee court but yesterday. They certainly should not exercise other functions of a political or public character.

4. Act of 1867, § 3, R. S., § 4994.

5. R. S., §§ 4995, 4995-a.

6. In re Schenectady Engineering & Con-

struction Co. (D. C., N. Y.), 17 Am. B. R. 279, 147 Fed. 868, holding that a court of bankruptcy of one district has no power to appoint a referee residing without its territorial jurisdiction.

7. When referee not disqualified.—A debtor who owes an alleged bankrupt a debt which is not denied by the debtor, and whose status as a debtor cannot be changed by any of the proceedings in bankruptcy, and whose liability would be unaffected by such proceedings, is not disqualified to act as referee in bankruptcy. *Bray v. Cobb* (D. C., N. Car.), 1 Am. B. R. 153, 91 Fed. 102.

8. See under §§ 39 and 43.

SECTION THIRTY-SIX.

OATHS OF OFFICE OF REFEREES.

§ 36. **Oaths of Office of Referees.**—*a* Referees shall take the same oath of office as that prescribed for judges of United States courts.

Analogous provisions: In U. S.: Act of 1867, § 3, R. S., § 4995.

In Eng.: None.

Cross-references: To the Forms: Form of oath of office, No. 16.

OATH OF OFFICE OF REFEREES.¹

This provision emphasizes the difference between the register under the former law and the referee under the present. The register was merely an assistant to the judge, his functions largely clerical;² the referee is, in effect, in all cases referred to him, save in name and concerning a few matters reserved to the judge by the statute, a court of original jurisdiction.³ Therefore, this section requires him to take the same oath as that taken by other Federal judges.⁴ This is the historic oath found in § 712 of the U. S. R. S., and from it incorporated into Form No. 16. It should be taken before the district judge.⁵

1. See also Am. B. R. Dig., § 69.

2. Act of 1867, § 3, R. S., § 4993.

3. For cases holding this, see under § 39.

4. *White v. Schloerb*, 178 U. S. 542, 4 Am. B. R. 181.

5. Form No. 16.

SECTION THIRTY-SEVEN.

NUMBER OF REFEREES.

§ 37. **Number of Referees.**—*a* Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy.

Analogous provisions: In U. s.: Act of 1867, § 3, R. S., § 4993.

In Eng.: None.

Cross-references: To the law: Appointment, removal and districts of referees, § 34.

I. NUMBER OF REFEREES.

This section should be read with § 34. The former act gave a like discretion.¹ The only limit on the number of referees in any given district is that, only so many shall be appointed as may be necessary “to assist in expeditiously transacting the bankruptcy business” pending in such district.² The authority of the court of bankruptcy to appoint referees is confined in number only within the discretion of the court itself.³

1. Act of 1867, § 3, R. S., § 4993.

2. Save in large trade centers like New York, Chicago, Philadelphia, Boston and Baltimore, but one referee has, as a rule, been appointed for each referee district.

3. In re Steele (D. C., Ala.), 19 Am. B. R.

671, 156 Fed. 853, holding that where there are two district judges having concurrent jurisdiction, one of them may appoint a referee without the concurrence of the other, while the other is absent from the district.

SECTION THIRTY-EIGHT.

JURISDICTION OF REFEREES.

§ 38. **Jurisdiction of Referees.**—*a* Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to (1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions; (2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment; (3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act; (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and (5) upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.

Analogous provisions: In U. S.: Act of 1867, § 4, R. S., §§ 4998, 4999, 5002, 5009.

In Eng.: § 99; General Rule 7.

Cross-references: To the law: Court may include referee, § 1 (7).

Referee means referee having jurisdiction of the bankrupt estate, § 1 (21).

Jurisdiction of court of bankruptcy, § 2.

Bankrupts to comply with lawful orders, § 7-a(2).

Examination of bankrupt, § 7-a(9).

Stay of suits by or against bankrupt, § 11-a.

Composition, jurisdiction as to, § 12.

Discharges, application to be made to judge, § 14-a.

Adjudication, filing petition, § 18-a.

Reference of case to referee where judge is absent from district, § 18-f.

Oaths administered by referee, § 20-a(1).

Examination of persons before referee, § 21.

Certified copies of proceedings, § 21-d.

Cross-references: *Continued.*

- Reference of cases after adjudication, § 22.
- Wrongful acts by referee, punishment, § 29-c.
- Duties of referees, § 39-a.
- Acts of referees prohibited, § 39-b.
- Compensation of referees, § 40.
- Contempts before referees, § 41.
- Records of referees, how kept, § 42.
- Absence or disability of referee, § 43.
- Bonds of referees, execution and sureties, § 50.
- Meetings of creditors, referee's duties, § 55.
- Proof and allowance of claims, § 57.
- Notices to creditors given by referee, § 58-c.
- Expenses of administering estates, payment, § 62.
- Dividends, declaration and payment, § 65.
- To the General Orders:** Referee may require indemnity for expenses, X.
- Duties of referee as to administration, XII.
- Order of reference; thereafter proceedings to be before referee, XII(1); time and place where referee acts, XII(2).
- Taking testimony before referee, XXII.
- To the Forms:** Order of reference, No. 14.
- Order of reference in judge's absence, No. 15.
- Order for examination of bankrupt, No. 28.
- Certificate by referee to judge, No. 56.
- See also Supplemental Forms, *post*; Hagar and Alexander's Bankruptcy Forms, 2nd Ed.

SYNOPSIS OF SECTION.

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I. JURISDICTION OF REFEREES IN GENERAL.¹

a. **Comparative legislation.**—The English act of 1883 has a similar section.² The jurisdiction of registrars in bankruptcy is, however, both larger and

¹ See also Am. B. R. Dig., §§ 70-79.

² Eng. Act of 1883, § 99.

smaller than that of our referees. They, as a rule, cannot act save on applications unopposed, yet they have the very important power of making interim orders in cases of urgency and, if of the high court, may grant discharges and confirm compositions. Under our law of 1867, the registers had power to transact administrative or *ex parte* business,³ but issues of law or fact were always heard by the judge.⁴ A comparison of the two sections will indicate the great difference between their functions and those of the present referees.

b. Scope and meaning of section.—Manifestly this section is one of limitation. Unless jurisdiction is given or can reasonably be inferred from its words, it cannot, as a rule, be exercised by the referee.⁵ However, the broad terms of subdivision 4 coupled with, in many districts, rules conferring on them all the powers and functions of the judge that are not by the statute or the general orders specifically reserved to the court proper, make the section almost unlimited in its scope, and read into it the numerous other sections conferring jurisdiction on the court itself. The breadth and importance of these functions are discussed later.⁶ It should be noted, however, that (a) this jurisdiction is territorial, *i. e.*, it must be exercised "within the limits of their districts;"⁷ and (b) it is always subject "to a review by the judge."⁸ A referee is a judicial officer, and all his acts are presumed to be legal within the scope of his authority.⁹ The findings of referees acting within their jurisdiction are entitled to the respect and credit given to officers acting judicially,¹⁰ and on matters within their jurisdiction have the same force and effect as if rendered by any court of general jurisdiction,¹¹ and are conclusive upon State courts.¹² It is especially provided in this section that all the referee's acts are subject to review by the judge.¹³ The practice on review is considered hereafter under the next section.¹⁴ Some of the illustrative cases are collated in the foot-note.¹⁵

3. Act of 1867, § 4, R. S., § 4998.

4. Act of 1867, §§ 4 and 6, R. S., §§ 5009, 5010.

5. Other sections confer powers on the referees, as, for instance, Bankruptcy Act, § 39. But the intention seems to have been to summarize all general grants of jurisdiction here. See also Am. B. R. Dig., § 71.

6. See discussion under section 39, as well as this section.

7. *In re Schenectady Eng. & Const. Co.* (D. C., N. Y.), 17 Am. B. R. 279, 147 Fed. 868. See also Am. B. R. Dig., § 72.

8. For reviews by the judge and practice thereon, see section 39 of this work. By this section every act of a referee in bankruptcy is subject to review by a judge of the United States District Court. *Ellis v. Krulwich* (C. C. A., 8th Cir.), 15 Am. B. R. 615, 141 Fed. 954.

9. *Conti v. Sunseri* (C. C. P., Pa.), 18 Am. B. R. 891.

10. *In re Covington* (D. C., N. Car.), 6 Am. B. R. 373, 110 Fed. 143; *In re Eagles* (D. C., N. Car.), 3 Am. B. R. 733, 99 Fed. 695.

11. *McMahon v. Pithan*, 66 Ia. 498, 33 Am. B. R. 125, 147 N. W. 920; *Coen v. James*, 164 N. Y. App. Div. 419, 33 Am. B. R. 249, 150 N. Y. Supp. 202.

See also Am. B. R. Dig., § 86.

Findings as *res judicata*.—Although a

referee has specific power to hear and determine all questions arising upon claims filed and objections thereto, he has no power to bring a claimant before him to determine the validity of the claim; but where the claimant voluntarily appears seeking relief, a determination of the referee, disallowing the claim unless the claimant surrender to the trustee preferences in accordance with section 57-g of the Bankruptcy Act, is a valid adjudication of the facts involved in a subsequent suit by the trustee to recover the preferences, in so far as it was necessary for the referee to consider the facts. *McCulloch v. Davenport Savings Bank* (D. C., Ia.), 35 Am. B. R. 765, 226 Fed. 309; *Coen v. James*, 164 N. Y. App. Div. 419, 33 Am. B. R. 249, 150 N. Y. Supp. 202, holding that an order of a referee, denying the right to recover a check payable to a trustee in bankruptcy, as a part of the deposit required upon a composition, is *res adjudicata*.

12. *Clendenen v. Red River Valley Nat. Bank* (Sup. Ct., N. Dak.), 12 N. Dak. 51, 11 Am. B. R. 245, 94 N. W. 901; *Coen v. James*, 164 N. Y. App. Div. 419, 33 Am. B. R. 249, 150 N. Y. Supp. 202.

13. *In re Hanson* (D. C., Minn.), 19 Am. B. R. 235, 156 Fed. 717.

14. See *post*, p. 667.

15. *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224; *White v. Schloerb*, 178 U. S.

II. EXPRESS POWERS.

a. To make adjudications or dismiss petitions.—(1) IN GENERAL.—Subdivision 1 confers upon referees the power to consider petitions in bankruptcy referred to them by the clerk and to make adjudications or dismiss the petitions. This clause has reference to petitions in bankruptcy which have been referred by the clerk to a referee when the judge is absent from the judicial district, or division of the district in which the petition is pending, as provided by § 18-f of the act.¹⁶ In such cases the referee has jurisdiction to make the adjudication or dismiss the petition. This refers to involuntary as well as voluntary cases, and charges the referee with a distinct duty, which, where a petition does not show the jurisdictional facts, should result in a dismissal. A referee cannot, however, grant an adjudication in any other case.¹⁷ The form used should be an adaptation of Forms Nos. 11 and 12.

(2) GENERAL ORDER XII.¹⁸—The Supreme Court has supplemented the statute with a rule which is in turn supplemented by the terms of Forms Nos. 14 and 15. The first paragraph of this general order requires the court to fix a day upon which the bankrupt shall attend before the referee, and provides that from that day the bankrupt shall be subject to his orders and that all proceedings shall thereafter be before the referee. This has sometimes been thought to withhold jurisdiction from the referee until the day set. The better opinion is that—the limitation on jurisdiction imposed being clearly against the manifest purpose of the statute to vest the referee with complete jurisdiction at once the order of reference is made—he immediately has power to exercise any of the functions or perform any of the duties prescribed, and even before the order of reference is actually received. The second paragraph of this general order is of little importance. Referees invariably fix the times and places when they will act. It would be both confusing and impracticable if the judges did so. In important districts the referee's court has a stated place for sittings, often specified by a standing order, and frequently in courtrooms or chambers set apart for them in the local Federal building; the time is specified either by a general order or in each notice or order.

(3) PRACTICE AFTER REFERENCE IN INVOLUNTARY CASES.—On receiving or making an adjudication in an involuntary case, the referee should forthwith enter and have served on the bankrupt an order directing him to prepare and file his schedules as required by § 7 (8),¹⁹ this that the case may be presently proceeded with, or, the bankrupt, if recalcitrant, reported in con-

542, 3 Am. B. R. 178; In re Steuer (D. C., Mass.), 5 Am. B. R. 209, 104 Fed. 976; In re Scott (Ref., Mass.), 7 Am. B. R. 35; affd. on review, s. c., 7 Am. B. R. 39; In re Huddleston (Ref., Ala.), 1 Am. B. R. 572. Compare also *Gierveiter v. Sevier*, 33 Ark. 592.

16. In re Elby (D. C., Iowa), 19 Am. B. R. 734, 157 Fed. 935, holding that the referee has no jurisdiction to dismiss a bankruptcy proceeding after the adjudication. Compare In re Scott (Ref., Mass.) 7 Am. B. R. 35, wherein it was held that, after an adjudication of bankruptcy, the referee has original jurisdiction to entertain a creditor's petition to dismiss the proceedings upon the ground that the bankrupt was not at the time of the filing of his petition a resident of the district.

See also Am. B. R. Dig., § 73.

17. For effect of erroneous adjudication, if jurisdictional question is not promptly raised, see In re Polakoff (Ref., N. Y.), 1 Am. B. R. 358; In re Chisdell (D. C., N. Y.), 4 Am. B. R. 95, 101 Fed. 246. But see In re Mason (D. C., N. Car.), 3 Am. B. R. 599, 99 Fed. 256. Compare, under former law, In re Penn, Fed. Cas. 10,927. If the bankrupt contests, the issues presented must be tried by the court. In re Humbert Co. (D. C., Iowa), 4 Am. B. R. 771, 100 Fed. 439.

18. See also notes and cases cited under General Order XII.

19. In re Franklin Syndicate (D. C., N. Y.), 4 Am. B. R. 244, 101 Fed. 402.

tempt. Where the bankrupt is absent or has absconded, it is customary first to call on his attorneys of record, if any, to prepare and file such schedules. Where he has none or they have not the facts to do this—the practice suggested by General Order IX being usually out of the question—the practice has grown up of issuing subpoenas to any or all persons who seem likely to know of the bankrupt's business affairs and, after an examination of them and the debtor's books, to make out as complete schedules as possible. To this end, the referee, who is charged with this duty,²⁰ usually drafts the attorneys of the petitioning creditors as his assistants. Schedules so prepared should be in triplicate, but need not be verified; they will often require amendment. Not, however, until they are prepared and filed, should a first meeting be called. The expense of this preliminary proceeding is chargeable to the estate.

b. Power to administer oaths, conduct examinations, etc.—Subdivision 2 of this section grants to referees the power to administer oaths, examine witnesses, require production of documents and generally to conduct examinations. These powers would also flow from subdivision 4. The previous statute gave similar, though not as comprehensive, functions to the register.²¹ Subpoenas are not to be issued by the referee under any circumstances, but by the clerk.²² The power to swear witnesses is distinct from that conferred on referees to administer the oaths "required by this act" by § 20-a (1).²³ The formula used in swearing witnesses is similar to that in the local courts, but its phraseology should always be adapted to the proceeding or trial in which the witness is sworn. The power expressly conferred upon referees by subdivision 4 to perform "such part of the duties except, etc., as are by this act so conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts," has been thought sufficient to authorize them to pass upon the competency, relevancy, or materiality of any question considered in the course of an examination.²⁴ Rules have been promulgated in several of the districts conferring power in this regard.²⁵ The weight of authority seems now to favor the rule that a referee acting as such, or as a special commissioner may not exclude evidence which he deems inadmissible; it is his duty under General Order XXII to receive the evidence which is offered, to note objections and to record the evidence.²⁶ But this is clearly subject to the exception that evidence should not be permitted to be introduced, or its production compelled, where it is plainly privileged or so clearly and affirmatively incompetent,

²⁰ Bankruptcy Act, § 39-a (6). But see General Order IX. Consult also § 7 of this work.

²¹ Act of 1867, § 4, R. S., § 4998.

²² *In re Pierce* (D. C., Col.), 6 Am. B. R. 747, 111 Fed. 516.

²³ *U. S. v. Simon* (D. C., Wash.), 17 Am. B. R. 41, 146 Fed. 89, holding that the Bankruptcy Law expressly authorizes an oath to be administered by a referee in bankruptcy to a witness appearing voluntarily or under compulsory process to give testimony in support of claims presented by alleged creditors.

²⁴ The authority of the referee extends beyond taking, ruling upon and reporting evidence, and includes making findings and recommendations thereon. *In re Kaiser* (D. C., Minn.), 3 Am. B. R. 767, 99 Fed. 689

²⁵ Rule 22, Western District of New York.

²⁶ Power to exclude evidence.—*Bank of Ravenswood v. Johnson* (C. C. A., 4th Cir.), 16 Am. B. R. 206, 143 Fed. 463; *In re Romine* (D. C., W. Va.), 14 Am. B. R. 785, 138 Fed. 837; *In re Sturgeon* (C. C. A., 2d Cir.), 14 Am. B. R. 681, 139 Fed. 608; *Dressel v. North State Lumber Co.* (D. C., N. Car.), 9 Am. B. R. 541, 119 Fed. 531; *In re Lipset* (D. C., N. Y.), 9 Am. B. R. 32, 119 Fed. 379; *In re Covington* (D. C., N. Car.), 6 Am. B. R. 373, 110 Fed. 143; *In re De Gottardi* (D. C., Cal.), 7 Am. B. R. 723, 114 Fed. 328; *First National Bank of Philadelphia v. Abbott* (C. C. A., 8th Cir.), 21 Am. B. R. 436, 165 Fed. 852. But in *Matter of Wilde's Sons* (D. C., N. Y.), 11 Am. B. R. 714, 131 Fed. 142, it was held that a referee in bankruptcy, whether acting in his charac-

irrelevant and immaterial that such introduction or production would be an abuse of the process of the court.²⁷ If the proceeding is one originally instituted before the referee, as for the discovery of concealed assets, it has been held that he has full power to exclude irrelevant testimony, and that General Order XXII does not prevent the exercise of such power in such a proceeding.²⁸ And in any case the referee should determine, in the first instance, the question of the witness' competency or the admissibility of his testimony; he should certify the question to the court when requested to do so in a proper manner; such a method of procedure will tend to expedite the proceeding and avoid confusion.²⁹ The requirement in such general order that the testimony of a witness must be read over to him and be signed, does not exclude or render useless testimony given under oath; but upon the death of the witness before signature it may be proven by the oath of the stenographer who reported it, or by a witness who heard it.³⁰ If a referee fails to include rejected evidence with objections noted, the remedy is an application to the district court, or failing there, to the circuit court of appeals for an order that such evidence be taken and preserved.³¹ Documents may be ordered in the usual way. When the bankrupt is present, the direction is often verbal. If he is not present, or the document is in the possession of a third person, a subpoena *duces tecum*, or an order to the same effect, is customary.³² The concluding clause of this subdivision reserves to the judges the right to commit, and doubtless, therefore, to attach a balky witness.³³

c. Power to seize and release property.—Subdivision 3 seems to refer to a power to seize and hold property conferred upon the judge by § 69. A like power is suggested by § 3-e; and it seems, given by § 2 (15). This subdivision will, however, probably be construed as such a limitation on the general words of the two sections last mentioned as to prohibit the referee from exercising this jurisdiction, save in cases where the clerk has issued a certificate showing the inability of the judge to act for one of the reasons specified. The power is an important one in involuntary cases.³⁴ It is

ter as referee or as special commissioner, has a right to exclude evidence which he deems inadmissible.

Duty to take all testimony.—It is the duty of examiners, masters, referees, and the court taking evidence in controversies in bankruptcy, in the absence of a jury, to take, record, and, in case of an appeal, to return to the reviewing court, all the evidence offered by either party, that which they hold to be incompetent or immaterial as well as that which they deem competent and relevant, to the end that if the appellate court is of the opinion that evidence rejected should have been received it may consider it, render a final decree, and thus conclude the litigation without remanding the suit to procure the rejected evidence. *Missouri Electric Co. v. Hamilton Brown Co.* (C. C. A., 8th Cir.), 21 Am. B. R. 270, 272, 165 Fed. 283.

See also Am. B. R. Dig., § 83.

27. *Matter of Clark* (Ref., Cal.), 21 Am. B. R. 776, 782; *Missouri Electric Co. v. Hamilton Brown Co.* (C. C. A., 8th Cir.), 21 Am. B. R. 270, 272, 165 Fed. 283; *First National Bank of Philadelphia v. Abbott* (C. C. A., 8th Cir.), 21 Am. B. R. 436, 165 Fed. 852.

28. *In re Harrison Bros.* (D. C., Pa.), 28 Am. B. R. 293, 197 Fed. 320, holding that a referee who is presiding in a proceeding originally instituted before him to compel a bankrupt to turn over concealed assets, acts in a judicial capacity, being regarded as a judicial officer, invested with the same powers and duties in bankruptcy matters as a district judge, and having full power to exclude irrelevant testimony.

29. *In re Harrison Bros.* (D. C., Pa.), 28 Am. B. R. 293, 197 Fed. 320; *In re Ruos* (D. C., Pa.), 20 Am. B. R. 281, 159 Fed. 252; *In re Wilde's Sons* (D. C., N. Y.), 11 Am. B. R. 715, 131 Fed. 142.

30. *Matter of Blaesser* (D. C., N. Y.), 36 Am. B. R. 795, 230 Fed. 528.

31. *First National Bank of Philadelphia v. Abbott* (C. C. A., 8th Cir.), 21 Am. B. R. 436, 165 Fed. 852.

32. *Matter of Clark* (Ref., Cal.), 21 Am. B. R. 776.

33. See Bankruptcy Act, § 41. See also Am. B. R. Dig., §§ 1164, 1165.

34. *In re Knopf* (D. C., S. Car.), 16 Am. B. R. 432, 144 Fed. 245, holding that the referee may make a summary order authorizing the seizure of property in the hands

clear that this provision of the Bankruptcy Act refers to the appointment of receivers, or the releasing of property, in involuntary cases, and is to be read in connection with section 18-f.³⁵ It is apparently the only instance where the referee as such has jurisdiction before an order of reference. Perhaps the clerk's certificate has the effect of such an order.

d. Power to exercise generally the statutory jurisdiction of the judge, except in certain matters.— (1) **IN GENERAL.**— The referee is given, by subdivision 4, power "to perform such duties, except, etc., as shall be prescribed by the rules and orders of the courts of bankruptcy in their respective districts, except as herein otherwise provided." The exact effect of the words "and as shall be prescribed," etc., has not yet been authoritatively declared. "Jurisdiction" and "duties" are, of course, widely different things. While a court of bankruptcy may direct referees to perform "duties" not enumerated in § 39, it cannot by rule confer a "jurisdiction" it does not itself have. Further, this clause occurs in a section devoted to the "jurisdiction of referees." It seems to follow that "duties" is here used in the sense of jurisdiction; and, therefore, that to be vested with jurisdiction other than that expressly conferred by this section or charged with duties other than those set out in § 39, referees must be given such jurisdiction by a standing or special rule of the district court.³⁶ The question is not without difficulty and the opposite view seems sometimes to be taken for granted. It is not, however, often important. The district courts have quite generally supplied the necessary rule.³⁷ It seems that the word "herein" refers to the whole statute.³⁸ Under this clause, it has been held that the referee may grant stays,³⁹ appoint receivers,⁴⁰ issue summary orders to compel restitution of property,⁴¹

of an alleged fraudulent vendee, where it is necessary for the preservation of such property.

Taking possession and releasing property.

— Referees in bankruptcy are invested, subject always to a review by the judge, within the limits of their district as established from time to time, with jurisdiction to exercise the powers of the judge for taking possession and releasing of the property of the bankrupt, in the event of the issuance by the clerk of a certificate showing the absence of the judge from the judicial district, or the division of the district, or his sickness or inability to act. *Darrough v. First National Bank of Claremore* (Okla. Sup. Ct.), 37 Am. B. R. 75, 156 Pac. 191.

^{35.} *Matter of Sonnabend* (Ref., Mass.), 18 Am. B. R. 117.

^{36.} General Order XII (1). And see *In re Sabine* (Ref., N. Y.), 1 Am. B. R. 315, for a case where jurisdiction to stay was exercised before there was any rule giving it.

Where the bankruptcy court has jurisdiction, the referee has also jurisdiction except when the case is referred to him for a special purpose, or where the bankrupt asks to be adjudged a bankrupt or seeks a discharge. *Matter of Brenner* (D. C., Pa.), 26 Am. B. R. 646, 649, 190 Fed. 209.

^{37.} Thus, the following rule was early promulgated in the Northern District of New York, and adopted by the Western District of the same State:

XXVI. Powers delegated to referees.— The referees heretofore or hereafter appointed for the Northern District of New York are hereby, respectively, vested with the jurisdiction which, by the Bankruptcy Act of July 1, 1898, and the general orders of the Supreme Court, promulgated at the October term of 1898, the court or judge may delegate to or confer upon said referees; and they are, respectively, empowered and authorized to do all acts, take all proceedings, make all orders and decrees, and perform all duties so authorized to be delegated by said act, and said general orders, without special authority in each case and under the general authority conferred by this order.

^{38.} *In re Berkowitz* (D. C., Pa.), 16 Am. B. R. 251, 143 Fed. 598.

^{39.} See *post*, this section, "Power of referee to grant injunctions." See also Am. B. R. Dig. § 77.

^{40.} That the referee has jurisdiction to appoint receivers after the reference under his general powers, conferred upon him by § 38 (4), and General Order XII (1), has often been decided. *Matter of Sonnabend* (Ref., Mass.), 18 Am. B. R. 117.

^{41.} *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224; *In re Logan* (D. C., N. Y.), 28 Am. B. R. 543, 196 Fed. 678; *Matter of Schmid* (C. C. A., 3d Cir.), 36 Am. B. R. 548, 230 Fed. 818; *Knapp & Spencer Co. v. Drew* (C. C. A., 8th Cir.), 20 Am. B. R. 355,

dismiss a petition on which an adjudication has already been had,⁴² determine the ownership of property which is in the possession of the bankrupt at the time of the bankruptcy proceedings and passes as part of the estate into the possession of the receiver or trustee in bankruptcy, where a third party claims the ownership of such property,⁴³ and determine whether the claim of a third person is adverse or merely colorable,⁴⁴ but that he has no jurisdiction to determine adverse claims to property claimed to belong to the bankrupt's estate, which, at the time of the institution of the proceedings in bankruptcy, was in the possession of a third person, claiming an interest therein.⁴⁵ Nor may a referee make an order directing the restoration of property by the bankrupt, where upon his examination at the first meeting of creditors, he was not apprised of the fact that an order would be issued; and there were no formal pleadings.⁴⁶ A referee may order a sale of the bankrupt's real estate, discharged of liens, and may hear and determine the validity and priority of claims upon the proceeds of the sale.⁴⁷ It has also been held that the referee may grant

160 Fed. 413, holding that a petition of a trustee for a summary order upon a corporation creditor to show cause why it should not turn over money received from the bankrupt, after the institution of the bankruptcy proceedings, may be entertained by a referee. See Am. B. R. Dig., § 76.

Surrender of property.—To justify an order that a bankrupt pay over money or deliver property to his trustee, the referee should find as a fact that the bankrupt, since filing his petition, had concealed and withheld from the trustee property belonging to the bankrupt estate. In re Felson (D. C., N. Y.), 10 Am. B. R. 716, 124 Fed. 288. The referee or the district court may compel bailees or agents of the bankrupts to surrender property. Matter of Cohn (Ref., Cal.), 18 Am. B. R. 786.

42. In re Scott (Ref., Mass.), 7 Am. B. R. 35. Compare In re Elby (D. C., Iowa), 19 Am. B. R. 734, 157 Fed. 935.

43. Mueller v. Nugent, 184 U. S. 1, 7 Am. B. R. 224, 22 Sup. Ct. 269, 46 L. Ed. 405; In re Scrinopskie (Ref., Kan.), 10 Am. B. R. 221; In re Holbrook Shoe & Leather Co. (D. C., Mont.), 21 Am. B. R. 511, 165 Fed. 973; In re Schimmel (D. C., Pa.), 29 Am. B. R. 361, 203 Fed. 181; Mound Mines Co. v. Hawthorne (C. C. A., 8th Cir.), 23 Am. B. R. 242, 173 Fed. 882; Matter of Traunstein & White (D. C., Mass.), 34 Am. B. R. 482, 225 Fed. 317; In re Drayton (D. C., Wis.), 13 Am. B. R. 602, 135 Fed. 883.

Compelling restoration of assets.—Where the treasurer of a bankrupt corporation submits to the jurisdiction of the referee in attempting to establish a claim against the bankrupt, jurisdiction is thereby acquired to make an order under proper circumstances compelling him to turn over money improperly withdrawn from the treasury of the bankrupt. Matter of Auto Safety Signal Lamp Co. (D. C., Pa.), 37 Am. B. R. 17, 237 Fed. 299. Where property was in the bankrupt's possession, under a claim of ownership by him at the time when his voluntary petition in bankruptcy was filed and adjudication thereon occurred, the referee may en-

tain summary proceedings to compel the restoration of such property or its value to the bankruptcy officials. Matter of First (D. C., Mass.), 37 Am. B. R. 512.

Determination of validity of claims or liens.—The power to determine the extent, character, or validity of claims or liens asserted against property in the hands of the bankruptcy court is necessarily broad. Hence, where a holder of bonds issued by the bankrupt appeared in response to a petition by the trustee to determine the validity of all liens, and litigated the question of the validity of the bonds, the referee had jurisdiction. Matter of Valecia Condensed Milk Co. (D. C., Wis.), 37 Am. B. R. 504, 233 Fed. 173.

Determination of fact of possession.—A referee may determine upon conflicting testimony whether property claimed by the trustee has or has not come into the possession of a third party. This because no question of the *right to possession* is thus determined. Matter of Kramer and Muchnick (D. C., Pa.), 33 Am. B. R. 223, 218 Fed. 138.

44. In re Blum (C. C. A., 7th Cir.), 29 Am. B. R. 332, 202 Fed. 883; In re Hayden (D. C., Mass.), 22 Am. B. R. 764, 172 Fed. 623; In re Holbrook Shoe & Leather Co. (D. C., Mont.), 21 Am. B. R. 511, 165 Fed. 973; In re Logan (D. C., N. Y.), 28 Am. B. R. 543, 196 Fed. 678.

45. In re Walsh Bros (D. C., Iowa), 21 Am. B. R. 14, 163 Fed. 352; Spears v. Frenchton and Burnsville R. R. Co. (C. C. A., 4th Cir.), 31 Am. B. R. 679, 213 Fed. 784; In re Gill (C. C. A., 8th Cir.), 26 Am. B. R. 883, 190 Fed. 706; In re Cohn (D. C., N. Y.), 3 Am. B. R. 421, 98 Fed. 75; In re Peacock (D. C., N. Y.), 24 Am. B. R. 159, 178 Fed. 851; In re Bacon (D. C., N. Y.), 28 Am. B. R. 565, 196 Fed. 986; Dreyer v. Perkins (C. C. A., 5th Cir.), 33 Am. B. R. 232, 217 Fed. 889.

46. Matter of Atwater (D. C., N. Y.), 36 Am. B. R. 109, 227 Fed. 511.

47. In re Miner's Brewing Co. (D. C., Pa.), 20 Am. B. R. 717, 162 Fed. 327.

an order authorizing the trustee to intervene in an attachment suit for the purpose of maintaining it for the benefit of the bankrupt estate.⁴⁸ There may be some doubt as to the right of a referee, in the exercise of functions pertaining to a court of bankruptcy, to entertain plenary jurisdiction over suits or proceedings for the setting aside of preferences, or the recovery of property fraudulently transferred.⁴⁹ There are instances where such jurisdiction has been asserted and fully sustained by the district court.⁵⁰ It must be conceded that where the property in question has been taken from the lawful possession of the bankruptcy court,⁵¹ or where the preferred creditor voluntarily submits a claim secured by the preference to the court, the jurisdiction of the referee to determine as to the validity of the preference is absolute.⁵² A referee is not vested with power to order the trustee to specifically perform a contract of the bankrupt,⁵³ nor has he jurisdiction to compel the specific performance by third persons of an agreement with the bankrupt.⁵⁴ And a plenary proceeding should be brought on the equity side of the court for the reformation of a contract entered into by the bankrupt.⁵⁵ The numerous functions of a court of bankruptcy which, through this subdivision, may be performed by the referee are pointed out in the "cross-references." For the law and practice in the exercise of them, reference should be had to the appropriate sections of this work.

(2) JURISDICTION OVER DISCHARGES AND COMPOSITIONS.—The referee is denied jurisdiction of these important matters, as he is of adjudications save in the absence of the judge.⁵⁶ All questions, at every step, arising out of

48. *Conti v. Sunseri* (C. C. P., Pa.), 34 Pa. C. C. 25, 18 Am. B. R. 891.

49. **Recovery of preference.**—The referee has no jurisdiction of a proceeding brought by the trustee to recover from an adverse claimant choses in action, or the proceeds thereof, transferred by the bankrupt within the four months' period, which transfer is alleged to constitute a voidable preference, but the remedy of the trustee is by plenary suit. In *re Carlile* (D. C., N. Car.), 29 Am. B. R. 373, 199 Fed. 612; In *re Overholzer* (D. C., N. Dak.), 23 Am. B. R. 10.

See also Am. B. R. Dig. § 661.

50. In *re Kearney* (D. C., Pa.), 21 Am. B. R. 721, 167 Fed. 995; In *re O'Brien* (D. C., Mass. Ref.), 21 Am. B. R. 11, *affd.* by Judge Dodge; In *re Shults & Mark*, (D. C., N. Y.), 11 Am. B. R. 690; In *re Murphy* (Ref., N. Y.), 3 Am. B. R. 499; In *re Jules & Frederic Co.* (Ref., Mass.), 27 Am. B. R. 136, 193 Fed. 533 (*revid.* on other grounds, 34 Am. B. R. 5); In *re Coffey* (D. C., N. Y.), 19 Am. B. R. 148.

51. *Knapp & Spencer v. Drew* (C. C. A., 8th Cir.), 20 Am. B. R. 355, 160 Fed. 413.

52. In *re Elletson Co.* (D. C., W. Va.), 23 Am. B. R. 530, 174 Fed. 859, holding that a referee has jurisdiction to determine the validity of a deed of trust given by the bankrupt within the four months' period to a bank as security for his unpaid notes, where the bank by filing proof of its claim upon the notes submits to the jurisdiction of the bankruptcy court.

53. *Dreyer v. Perkins* (C. C. A., 5th Cir.), 33 Am. B. R. 232, 217 Fed. 889.

54. **Specific performance.**—A referee in bankruptcy has no jurisdiction of a suit by the trustee to compel the specific performance of an agreement by promoters of a corporation to issue stock to the bankrupt in payment for services. *Matter of Ballou* (D. C., Ky.), 33 Am. B. R. 21, 215 Fed. 810, holding that section 23b of the bankruptcy act providing that "Suits by the trustee shall only be brought or presented in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant," except suits under sections 60, 67, and 70, does not confer jurisdiction upon a referee of a suit by a trustee to compel specific performance of an agreement between promoters of a corporation and the bankrupt. The word "courts" in said section does not include a court of bankruptcy.

55. Holding that an application to reform a contract made to a referee in bankruptcy, with request that if he thinks he lacks jurisdiction to entertain it he should forward it to the court, does not bring the matter before the court in a proper manner. *Matter of Bondurant Hardware Co.* (D. C., Ga.), 37 Am. B. R. 308, 231 Fed. 247.

56. *Bankr. Act*, § 18-e-f-g; In *re McDuff* (C. C. A., 5th Cir.), 4 Am. B. R. 110, 101 Fed. 241; *International Harvester Co. v. Carlson* (C. C. A., 8th Cir.), 33 Am. B. R. 178, 217 Fed. 736; In *re Taylor* (D. C., Ala.), 26 Am. B. R. 143, 188 Fed. 479; In *re Johnson* (D. C., Ark.), 19 Am. B. R. 814, 158

applications for discharges are original questions for the court,⁵⁷ and the referee has no jurisdiction to decide any question unless it has been referred to him.⁵⁸ The words of the subdivision extend such limitation not only to applications for discharge or composition, but "to questions growing out of" the two specified proceedings. Thus, a referee has no jurisdiction over a proceeding for the revocation of a discharge or for setting aside a composition.⁵⁹ This limitation in actual practice is often one of nomenclature rather than fact. As previously observed, save when a jury trial is had, on objections to a discharge the referee usually sits on the case as a special master in chancery, and reports the facts and his opinion to the court for its guidance.⁶⁰ The practice on such references is discussed under § 14, *ante*.

(3) POWER OF REFEREE TO GRANT INJUNCTIONS.—The third paragraph of General Order XII supplements subdivision 4 of this section and withdraws jurisdiction from referees to grant injunctions to stay proceedings of a court or officer of the United States or of a State.⁶¹ Where the rules adopted by the district court negative the right of a referee to issue injunction orders, such power does not exist.⁶² But the referee may have jurisdiction to issue injunctions, directed to any party not an officer of the United States or of a State, unless the injunction stays the proceedings of the court.⁶³ In some districts it is the custom for referees to grant temporary injunctions returnable before the judge.⁶⁴

Fed. 342; *Matter of Sonnabend* (Ref., Mass.), 18 Am. B. R. 117; *Matter of Amer* (D. C., Pa.), 35 Am. B. R. 627, 228 Fed. 576. See also Am. B. R. Dig. § 1047.

57. *In re Johnson* (D. C., Ark.), 19 Am. B. R. 814, 158 Fed. 342.

58. *In re McDuff* (C. C. A., 5th Cir.), 4 Am. B. R. 110, 101 Fed. 241; *International Harvester Co. v. Carlson* (C. C. A., 8th Cir.), 33 Am. B. R. 178, 217 Fed. 736; *Matter of Amer* (D. C., Pa.), 35 Am. B. R. 627, 228 Fed. 576; *In re Randall* (D. C., Pa.), 20 Am. B. R. 305, 159 Fed. 298, holding that a certificate of conformity granted by the referee is void, where the specification of objections have not been disposed of.

A referee, as a special master, upon the hearing of specifications of objections to a discharge, should not base a finding upon the original examination of the bankrupt before him as referee. *In re Murray* (D. C., Conn.), 20 Am. B. R. 700, 162 Fed. 983.

59. Consult Sections Thirteen and Fifteen of this work.

60. See discussion under Section Fourteen of this work.

61. "The reason for section 3 of General Order XII seems to me to be obvious; the Supreme Court had in mind the dignity of other courts, Federal and State, and of other officers, and provided that they might only be interfered with by a tribunal of equal rank, and not by a subordinate official, unless for definitely described reasons action by the latter should be unavoidable." *In re Berkowitz* (D. C., Pa.), 16 Am. B. R. 251, 143 Fed. 598.

62. *In re Siebert* (D. C., N. J.), 13 Am. B. R. 348, 133 Fed. 781. In this case it was

held that, if, by consent of the parties in a case, the referee acquires jurisdiction to hear a motion for injunction, he may hear it, and advise the judge of his decision by filing it with the clerk of the court. The judge of the court, and he only, may then, if the decision of the referee be that an injunction should issue, make an order for injunction. The referee may also, without consent of the parties, in order to prevent injury to the property of the bankrupt, grant a temporary stay of judicial proceedings; but such stay should be but for a few days, and only until the applicant can have an opportunity to move for an injunction before the judge.

63. *In re Steuer* (D. C., Mass.), 5 Am. B. R. 209, 214, 104 Fed. 976, 980, approved in *In re Berkowitz* (D. C., Pa.), 16 Am. B. R. 251, 143 Fed. 598. See also Am. B. R. Dig. § 77.

An injunction granted by the referee will be sustained where the parties have submitted to him for disposition the question at issue between them. *In re Benjamin* (D. C., Pa.), 15 Am. B. R. 351, 140 Fed. 320.

Injunction re-issued by court.—Where a district court upon its own motion broadens and issues anew an injunction restraining the prosecution of a suit in a state court, it is immaterial whether the referee had authority to order the stay in the first instance. *In re Roger Brown & Co.* (C. C. A., 8th Cir.), 28 Am. B. R. 336, 196 Fed. 758.

64. See *In re Sabin* (Ref., N. Y.), 1 Am. B. R. 315; *In re Rogers* (Ref., Ky.), 1 Am. B. R. 541; *In re Siebert* (D. C., N. J.), 13 Am. B. R. 348, 133 Fed. 781; *In re Mussey*, 2 N. B. N. Rep. 113.

(4) **EMPLOYMENT AND COMPENSATION OF STENOGRAPHERS.**—The meaning of subdivision 5 of this section would seem to be that a referee in bankruptcy may make use of the services of a stenographer, when the trustee considers that the testimony should be taken, and that in such case the rate is fixed, but this rate has nothing to do with the employment of a stenographer on isolated and unusual occasions, where, at the request of the creditors or of the receiver, a special hearing is had before a special commissioner.⁶⁵ The purpose of this subdivision is clear—to permit the use of modern methods in preserving testimony. But, strictly, a stenographer will not be employed save “upon the application” of the trustee,⁶⁶ or where there has been a stipulation of the parties or money has been deposited for the expense as provided by General Order X;⁶⁷ though, it seems, the necessary expense of a referee in perpetuating testimony may be called for in advance, and is probably an expense of administration.⁶⁸ In a proper case,⁶⁹ the referee will doubtless direct the trustee to make such an application. Where the taking of the testimony was necessary to the estate or resulted

65. *Matter of Stark* (D. C., N. Y.), 18 Am. B. R. 467, 155 Fed. 694, holding that the provisions of section 38, subdivision 5, do not apply to hearings before a special commissioner.

Discretion of referee.—Whether the testimony of a bankrupt, upon the hearing of an application by the trustee to compel him to turn over certain property, shall be heard orally, taken in long hand or by a stenographer is within the discretion of the referee. *Matter of Goldstein* (D. C., N. Y.), 19 Am. B. R. 96, 155 Fed. 695.

66. **Expense of a stenographer** cannot be allowed to a referee, except where he is employed upon the application of the trustee under section 38, and a referee's allowance to himself of \$250 for stenographer's fees in “adjustment, correspondence and notices in matters of claims and other business of the state,” should be disallowed as unauthorized. In re *Mammoth Pine Lumber Co.* (D. C., Ark.), 8 Am. B. R. 651, 116 Fed. 731.

An allowance made to stenographers for services in taking testimony in proceedings before the referee commented upon, and the allowance reduced to forty cents per page for three copies of testimony. In re *Eliett Electric Co.* (D. C., N. Y.), 28 Am. B. R. 453, 197 Fed. 400.

Although under section 38, subdivision 5, an examination of the bankrupt and the employment of a stenographer therefor may, as a general rule, be allowed at the expense of the estate, that should not be allowed for the benefit of general creditors at the expense of the wages claims of workmen objecting thereto, when the funds in hand are only sufficient to pay the preferred claims. Such expenses should be at the charge of the general creditors alone. In re *Rozinsky* (D. C., N. Y.), 3 Am. B. R. 830, 101 Fed. 229.

Charges for clerk hire and stationery may

be disallowed to the referee, there being no voucher for the stationery and the employment of the clerk by the referee being unauthorized by statute. In re *Carolina Cooperage Co.* (D. C., N. Car.), 3 Am. B. R. 154, 96 Fed. 950.

67. **Stipulation as to payment of stenographer's fees.**—In re *Mammoth Pine Lumber Co.* (D. C., Ark.), 8 Am. B. R. 651, 116 Fed. 731; In re *Todd* (D. C., N. Y.), 6 Am. B. R. 8, 109 Fed. 265. In this case the court said: “The rule established by the late Mr. Justice Blatchford in this court, and ever since followed in regard to stenographer's fees, was that when not provided for by law, they could not be taxed in any cause, except upon a written stipulation between the attorneys. Such has been the uniform practice in this court, the attorneys usually dividing and paying the expense of taking and transcribing the stenographer's notes, and taxing in accordance with the stipulation in favor of the successful party the sums paid by him for his share of the notes.”

Agreement as to appointment and payment of stenographer.—Where the petitioning creditors and the alleged bankrupt agreed that the testimony should be taken before the referee by certain stenographers, and that each side should pay one-half of the expense thereof, but no order was made by the referee, it must be impliedly agreed that the stenographer's bill for taking the testimony and furnishing a transcript to the referee should go into the costs against the losing party. But such agreement does not cover the cost of a transcript of the testimony ordered by a party for his own use. *Matter of Pearce* (D. C., Mass.), 37 Am. B. R. 710, 235 Fed. 917. See Am. B. R. Digest, §§ 79, 284.

68. See General Orders X and XXXV(2); § 64-b(3).

69. Compare In re *Todd* (D. C., N. Y.), 6 Am. B. R. 88, 109 Fed. 265.

to its advantage, such an order can, it is thought, be made *nunc pro tunc*. The subdivision is also often supplemented by district or referee district rules.⁷⁰ The exigencies of speedy administration and the multitude of cases which have arisen in important jurisdictions early made the employment of regular stenographers imperative. It is thought that the very liberal interpretation of this subdivision thus far prevailing will continue. The method of taking testimony is prescribed by General Order XXII.

70. Thus, in the Western District of New York:

Rule 11. *Perpetuation of testimony*.—(1) The examination of the bankrupt and any witnesses at meetings of creditors or otherwise, and all testimony offered on contested claims, or for any other purpose, will be taken down by the official stenographer in the form of question and answer, and transcribed. One copy thereof will be inserted in the record book of the referee and the other copy will be delivered to the trustee. The expense of thus perpetuating testimony will be at the rate of ten cents (10c.) a folio for both copies, and shall be paid as follows: Where there are no assets, for one reasonable examination on one day, by the bankrupt, and thereafter by the creditor or party in interest for whose benefit or at whose request

such examination is had; where there are assets, as may be ordered by the referee in each particular case.

(2) After the testimony has been transcribed, the attorney in charge of the case will produce each witness before the referee, that such testimony may be signed, as provided in General Order XXII.

(3) If indemnity is not demanded, all moneys advanced by the referee in publishing or mailing notices, or for traveling expenses, or for procuring the attendance of witnesses, or in perpetuating testimony, or otherwise, shall be paid to the referee prior to, or at the time, application is made to him for the report or certificate called for by District Rule X (that on the bankrupt's application for a discharge).

SECTION THIRTY-NINE.

DUTIES OF REFEREES.

§ 39. **Duties of Referees.**—*a* Referees shall (1) declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable; (2) examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended; (3) furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest; (4) give notices to creditors as herein provided; (5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges; (6) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so; (7) safely keep, perfect, and transmit to the clerks the records, herein required to be kept by them, when the cases are concluded; (8) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail; (9) upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and (10) whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

b Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practice as attorneys and counsellors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly, any property of an estate in bankruptcy.

Analogous provisions: In U. S.: Act of 1867, §§ 4, 5, R. S., §§ 4998, 5000, 5001.

Cross-references: To the Law: Declaration and payment of dividends, § 65.

Bankrupts to file schedules and lists of creditors, § 7(8).

Examination of records and papers to be permitted, § 29-c.

Cross-references — Continued:

Notices to creditors to be given, § 58.

Making up and transmitting records, §§ 2(10), 42.

Perpetuation of testimony; employment of stenographer, § 38(2) (5).

Offenses by and disqualification of referee, §§ 29-b, 35.

To the General Orders: Filing schedules in involuntary cases, IX.

Referee may require indemnity for expenses, X.

Duties of referee in respect to administration, XII.

Approval of appointment of trustee, XIII.

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To the Forms: Notice of first meeting of creditors, No. 18.

Appointment of trustee by referee, No. 23.

Notice to trustee of his appointment, No. 24.

Order for examination of bankrupt, No. 28.

List of claims and dividends to be recorded by referee and delivered to trustee, No. 40.

Certificate by referee to judge on review, No. 56.

See also Supplementary Forms, *post*; Hagar and Alexander's Bankruptcy Forms, 2nd Ed.

SYNOPSIS OF SECTION.
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I. MISCELLANEOUS DUTIES OF REFEREES.

a. In general.—Subsection *a* of this section prescribes the general duties of referees. There is nothing exactly similar to this section in previous statutes. Manifestly, it is in the nature of an appendix to § 38. Though captioned "Duties of Referees," some of its clauses confer jurisdiction.

The more important duties of referees are here enumerated. But the section is not exclusive,¹ even in its prohibitions stated in subsection *b*. The referee has many other duties. The only distinction between them and those here specified seems to be that, as to the former, he has some discretion; as to the latter, little, perhaps none. It is apparently the intent of the statute that the supervision of the administration of the bankrupt's estate be left with the referee.²

b. To declare dividends and prepare dividend sheets.—This duty is required by subdivision 1 of subsection *a*. The general subject of dividends is discussed under Section Sixty-five. In actual practice, dividend sheets are prepared by the trustee or his attorney, and checked over and verified by the referee. Form No. 40 may be used, or, better, a schedule somewhat like it, the same to be attached to and made a part of the formal order of distribution. By General Order XXIX, the referee is also required to countersign all dividend checks drawn by the trustee. Since the amendatory act of 1903, there must always be two dividends, if any.

c. To examine and amend schedules and lists of creditors.—This duty is an important one. It seems that the schedules are not a part of the petition.³ They must, however, conform substantially to the law⁴ and the forms.⁵ Thus, the court proper is not called upon to investigate the sufficiency of the schedules. The referee must. If they seem incomplete or defective, he should suspend further proceedings until they are amended.⁶ An opinion by the author of the first and second editions of this work in the case of *In re Mackey*⁷ is illuminating both as to the duties of the referee in such cases and concerning what are defects or omissions.

d. To furnish information.—Subdivision 3 of this subsection should be read in connection with § 29-c (3), though mere failure to furnish information other than as there specified is not an offense. This duty clearly refers to replies to letters of inquiry, as well as to answers to oral questions and permission to inspect papers on file. Replies to letters may be franked. But

1. See, for instance, Bankr. Act, §§ 55-b and 58-c.

2. Matter of Rosenfeld-Goldman Co. (D. C., Mass.), 36 Am. B. R. 520, 228 Fed. 921.

3. *In re Patterson*, Fed. Cas. 10,815.

4. See Bankr. Act, § 7(8). See also Am. B. R. Dig. § 249.

5. Forms Nos. 1 and 2.

6. Matter of Spiller (D. C., Mass.), 36 Am. B. R. 399, 230 Fed. 490, holding that the jurisdiction of the referee is not necessarily suspended pending the amendment of the schedules.

7. Duty of referee to examine schedules.—The provisions of section 39-a(2) as to the

examination of schedules of property and lists of creditors is mandatory. It is the duty of the referee to make the examination and to order an amendment in case of defects or omissions, even though no interested party may move in the matter. Since an examination should be made immediately after the reference of the matter to the referee and prior to the meeting of creditors, in voluntary proceedings, at least, the examination should be made before many of the interested parties will, in the natural course of procedure, have entered their appearance. *In re Mackey* (Ref., N. Y.), 1 Am. B. R. 593.

it has been held that a referee is not required to furnish copies of papers.⁸ The duty here enjoined is often a burden. Some referees have adopted forms for answers, especially where information is sought concerning the total of claims shown and assets scheduled.

e. To give notices to creditors.—There is an unimportant conflict between subdivision 4 and § 58-c. The referee should give all notices. Some of the more common notices are specified in § 58-a, which see. General Order XVI prescribes another notice that the referee is supposed to give, but which in actual practice is rarely found necessary.⁹ As a rule, while the original notice must be signed by the referee, the clerical work of preparing and posting is done by the attorney in charge. In districts where no allowance was made for the giving of notices, such a practice has been necessary; if done by the referee, indemnity for the expense incurred can be demanded.¹⁰ Whatever the method, the "official business" envelope can be used. This subject is also considered under Section Fifty-eight.

f. To make up records and transmit them or copies to the clerk.—Subdivisions 5, 7 and 8 relating to records and papers are largely supplemented by § 42, which see. The size and completeness of the record book there prescribed varies in the different districts; in some it is a mere docket, with brief entries indicating the meetings held and orders granted; in others a detailed running account of the whole proceeding from day to day. Subdivision 7 requires the referee to keep records and to transmit them to the clerk when the case is concluded.¹¹ Subdivision 8 provides for the transmission to the clerk of such papers on file with the referee, or copies thereof, as shall be needed in the court proper before the whole case is sent up as provided in the previous subsection. By General Order XXIV, referees are also required to transmit forthwith to the clerk a list of claims proven. This is an inheritance from the law of 1867,¹² does not fit into the present system of administration, serves no useful purpose, and is rarely observed.¹³ The referee is also required to file monthly statements of disbursements with the judge.¹⁴

g. To prepare and file schedules in certain cases.—Section 7 (8) makes it the duty of the bankrupt to prepare, verify and file schedules of his property.¹⁵ If the bankrupt fails in this duty, subdivision 6 of this section requires the referee to prepare and file schedules of property and lists of creditors, or cause the same to be filed. We have already considered this duty of the referee under the preceding section.¹⁶

h. To preserve evidence when no stenographer is present.—The referee may determine whether testimony shall be heard orally, taken in longhand, or written out in the form of stenographer's minutes. If the bankrupt desires the testimony to be perpetuated, the obligation would seem to be on him to

8. Copy of petition for review of payment of attorney's fee need not be furnished by the referee. In re Lewin (D. C., Vt.), 4 Am. B. R. 632, 103 Fed. 850.

9. See Form No 24.

10. General Order X.

11. Compare Bankr. Act, § 42-c.

12. General Order XI, under Act of 1867.

13. In the Western District of New York, a district rule makes the certification of the

whole record, including the list of claims, addresses, etc., proven, a sufficient observance of this general order.

14. General Order XXVI.

15. See discussion under Bankr. Act, § 7 (8), *ante*. See also Am. B. R. Dig. §§ 245-254.

16. See discussion under Section Thirty-eight, sub-title "Practice after reference in involuntary cases," *ante*, p. 653.

provide the means therefor.¹⁷ As indicated elsewhere,¹⁸ a referee has ample power to secure the attendance and assistance of a stenographer. This subdivision is, therefore, unimportant.

i. To call for papers at the clerk's office.—Subdivision 10 of this section is supplemented by section 51 (3), which should be read in this connection. Even in the same town or city, papers are transmitted by the clerk to the referee by mail.

II. PROHIBITIONS ON REFEREES.

a. Cannot act in cases where interested.—The general disqualification of persons who might otherwise be referees is mentioned elsewhere.¹⁹ A referee duly appointed cannot, however, act in all cases. What amounts to disqualification must be determined in each case.²⁰ Relationship by blood or affinity, even though remote, is usually enough. But owing a debt to the bankrupt,²¹ or, perhaps, being a scheduled creditor of the bankrupt, at least in a no-asset case, does not disqualify. A prior relation of attorney to the debtor, likewise, does not.²² Pending litigation with the bankrupt, it is thought, will. If disqualified, the referee should immediately file a certificate to that effect, stating the reasons for disqualification, with the clerk; and a reference will then be made to another referee. Disqualification sometimes does not appear until the case is far along, and then only in some single matter. In such cases, that matter may be considered by the judge, on receipt of this certificate, or he may refer it specially to another referee. A referee who acts in a case where he is interested commits an offense under the law, and forfeits his office.²³

b. Cannot practice in bankruptcy proceedings.—There was a similar prohibition under the law of 1867.²⁴ The limitation here seems to be on practice "in any bankruptcy proceedings." Under the former law, a register could not practice "in or out of court" in any suit or matter pending in his own district or circuit. The difference between the statutes in literal significance is great; in effect, there should be none. The propriety of giving counsel in pending bankruptcy questions, even in another district, may be doubted. General counsel to clients or other attorneys concerning questions not yet in court seems, however, not to be prohibited and may not be thought improper. There are as yet no cases construing this clause. A violation of this prohibition is not an offense.

c. Cannot purchase property of a bankrupt estate.—This provision is new, and requires no comment. The purchase of the property of a bankrupt

17. Payment of stenographer's fees.—Where, upon the hearing of an application by the trustee to compel the bankrupt to turn over certain property, the trustee has no funds, and the bankrupt claims to be absolutely without means, his motion that the trustee be directed to pay for the stenographer's minutes of the bankrupt's testimony and the referee's fees and disbursements will be denied. *Matter of Goldstein* (D. C., N. Y.), 19 Am. B. R. 96, 155 Fed. 695.

18. See discussion under Section Thirty-eight of this note.

19. Bankr. Act, § 35, *ante*. See also Am. B. R. Dig. §§ 67, 68.

20. See learned foot-note of a former editor of this work, in *In re Gardner* (D. C., Va.),

4 Am. B. R. 420, 103 Fed. 922. See form in "Supplementary Forms," *post*.

21. A debtor who owns an alleged bankrupt a debt which is not denied by the debtor, and whose status as a debtor cannot be changed by any of the proceedings in bankruptcy, and whose liability would be unaffected by such proceedings, is not disqualified to act as referee in proceedings against his creditor. *Bray v. Cobb* (D. C., N. Car.), 1 Am. B. R. 153, 91 Fed. 102.

22. *Carr v. Fife*, 156 U. S. 494, 39 L. Ed. 508.

23. Bankr. Act, § 29-c(1).

24. Act of 1867, § 4. See the same as amended, R. S., § 4996.

estate, either directly or indirectly, by a referee is an offense whereby he forfeits his office and becomes liable to a fine of not to exceed five hundred dollars.²⁵

III. REVIEWS BY THE JUDGE.²⁶

a. In general.—Subdivision 5 of this section relating to records embodying the evidence seems to refer to such records as are needed on reviews, and should be read with General Order XXVII. Thus, a party to an order made by the referee, after hearing on the merits, cannot have a review of it, unless he pursues the mode prescribed by this general order.²⁷ It has been held, however, that notwithstanding the use of the word "creditor" in General Order No. 27, if the interests of several creditors are affected by the rulings or the allowances of the referee, a review should be taken by the trustee as their representative,²⁸ and that in case of a refusal by the trustee, the suitor's remedy is by a motion or petition filed with the court, asking that the trustee be ordered to take a review as to any questions of procedure or allowance.²⁹ A review should be asked by petition; if from an order, this is the only way.³⁰ In the absence of a petition the court is not authorized to review the action of the referee.³¹ A general review of the proceedings before the referee or a review of rulings not directly affecting an order made was not intended either by the bankruptcy act or the general order.³² Ordinarily a review by the judge will be confined to the errors pointed out in the petition,³³ and will be limited to the questions involved in the issues before the referee.³⁴ Where a referee dies after the entering of an order disallowing a claim, before perfecting his findings, the claimant is entitled to a review on both the facts and the law.³⁵

b. When review should be asked.—The time within which a review must be asked for is not specified either by the law or by the general orders.³⁶

25. Bankr. Act, § 29-c (2).

26. See also Am. B. R. Dig. §§ 87-94.

27. *Matter of Octave Mining Co.* (D. C., Ariz.), 32 Am. B. R. 474, 212 Fed. 457; *In re Russell* (D. C., Cal.), 5 Am. B. R. 566, 103 Fed. 501; *In re Home Discount Co.* (D. C., Ala.), 17 Am. B. R. 168, 147 Fed. 538, holding that a party cannot ignore an order until the referee, under section 41, certifies his disobedience to the judge, and then bring forward again, in his defense, matter contested before the referee prior to the making of the order, provided the order itself be not void.

28. *Matter of Arti-Stain Co.* (D. C., Mass.), 32 Am. B. R. 640, 216 Fed. 942; *In re Mexico Hardware Co.* (D. C., N. Mex.), 28 Am. B. R. 736, 197 Fed. 650.

29. *Matter of Arti-Stain Co.* (D. C., Mass.), 32 Am. B. R. 640, 216 Fed. 942; *In re Mexico Hardware Co.* (D. C., N. Mex.), 28 Am. B. R. 736, 197 Fed. 650.

30. *In re Carlile* (D. C., N. Car.), 29 Am. B. R. 373, 199 Fed. 612; *In re Greek Mfg. Co.* (D. C., Pa.), 21 Am. B. R. 111, 164 Fed. 211; *In re Marks* (D. C., Pa.), 22 Am. B. R. 568, 171 Fed. 281; *In re Clark Coal & Coke Co.* (D. C., Pa.), 23 Am. B. R. 273, 173 Fed. 658.

31. *In re Russell* (D. C., Cal.), 5 Am. B. R. 566, 105 Fed. 501.

The certificate of a referee cannot be considered as a petition to review his findings. *Craddock-Terry Co. v. Kaufman* (D. C., Tex.), 23 Am. B. R. 725, 175 Fed. 303. Rulings of a referee upon questions arising during the progress of a case, cannot be brought before a judge of the district court by simply filing in such court exceptions to the rulings. *In re Hawley* (D. C., Iowa), 8 Am. B. R. 632, 116 Fed. 428.

32. *In re Kelly Dry Goods Co.* (D. C., Wis.), 4 Am. B. R. 528, 102 Fed. 747.

33. *Matter of De Gottardi* (D. C., Cal.), 7 Am. B. R. 723, 114 Fed. 328.

See also Am. B. R. Dig. § 93.

34. *In re Lorch & Co.* (D. C., Ky.), 28 Am. B. R. 784, 199 Fed. 944.

35. *Matter of Wray* (C. C. A., 2d Cir.), 37 Am. B. R. 28, 233 Fed. 418.

36. *In re Milgraum* (D. C., Pa.), 13 Am. B. R. 337, 133 Fed. 802. See also Am. B. R. Dig. § 91.

General Order 27 does not fix the time within which petitions for review of orders of referees shall be taken. A compliance with a local rule, requiring that they be filed within ten days from the date of the order sought to be reviewed, is sufficient. *Matter of Kruse* (D. C., Iowa), 37 Am. B. R. 687, 234 Fed. 470.

As there are no terms in bankruptcy and

It is fixed in some districts by a standing rule.³⁷ In the absence of a rule the application should be made within a reasonable time. The cases are not uniform as to what constitutes a reasonable time; the time within which the petition is to be filed is discretionary with the court and will not be disturbed unless such discretion is abused;³⁸ it has been held that a petition for a review should be filed within the time fixed for an appeal from the same class of orders, and that this should be regarded as a reasonable time.³⁹ The right

no provision in the Bankruptcy Act limiting the time within which an order of a referee in bankruptcy may be reviewed or an order of the District Court reheard, a petition for an order directing the trustee to pay over moneys collected pursuant to an order of the referee may be filed nine months after the granting of said order. *Matter of Barker Piano Co.* (C. C. A., 2d Cir.), 37 Am. B. R. 271, 233 Fed. 522.

37. In some districts a review must be asked within ten days. See *Erie County* (N. Y.), Rule 16, 1 N. B. N. 115; *Matter of Isert* (D. C., Cal.), 36 Am. B. R. 431, 232 Fed. 484.

The effect of a special district rule, taken in connection with General Order 27, was considered in *Re Greek Manufacturing Co.* (D. C., Pa.), 21 Am. B. R. 111, 164 Fed. 211, and the court decided that under the rule and the general order a decision of a referee may only be reviewed by petition, and that such petition must be presented within the period specified by the rule, or afterward only upon special allowance by one of the judges; otherwise, the referee's order (unless, perhaps, when it is obviously beyond his jurisdiction) is no longer subject to review after the ten days have expired. And it was also decided that an order once entered is not subject to be reviewed or altered by the referee himself. In *re Leshner & Son* (D. C., Pa.), 25 Am. B. R. 218, 176 Fed. 650. See In *re Wink* (D. C., Md.), 30 Am. B. R. 298, 206 Fed. 348; *Matter of Wister* (D. C., Pa.), 36 Am. B. R. 809, 232 Fed. 898; s. c. (C. C. A., 3d Cir.), 38 Am. B. R. 215, 237 Fed. 793; *Cary v. International Agricultural Corp.* (D. C., Ohio), 38 Am. B. R. 590, *affd. sub nom.*; *International Agricultural Corp. v. Cary* (C. C. A., 6th Cir.), 38 Am. B. R. 753.

38. Reasonable time, what constitutes.—*Bacon v. Roberts* (C. C. A., 3d Cir.), 17 Am. B. R. 421, 146 Fed. 729, holding that a dismissal of a petition filed fifty days after the order should be sustained; In *re N. Y. Economical Printing Co.* (C. C. A., 2d Cir.), 5 Am. B. R. 697, 106 Fed. 839; In *re Milgram* (D. C., Pa.), 13 Am. B. R. 337, 133 Fed. 802, holding that three months was not a reasonable time; *Crim v. Woodford* (C. C. A., 4th Cir.), 14 Am. B. R. 302, 136 Fed. 34; In *re Foss* (D. C., Me.), 17 Am. B. R. 439, 147 Fed. 790, holding that thirty days is a reasonable time; In *re Grant* (D. C., R. I.), 16 Am. B. R. 256, 143 Fed. 661, holding that a petition filed three and one-half months after the making of the order should be dismissed; In *re Chambers* (Ref.,

R. I.), 6 Am. B. R. 709, holding that a petition filed eighteen months after the decision should be dismissed.

Where, more than six months after the allowance of a claim and three months after a refusal to expunge the claim at the request of the trustee, the referee, upon the creditors' petition for a review of the order allowing his claim, filed a certificate presenting only his refusal to expunge, the certificate will be dismissed upon the ground that the petition for review was too late. In *re Milgram* (D. C., Pa.), 13 Am. B. R. 337, 133 Fed. 802.

Where a referee made and signed an order dated January 24, 1914, disallowing a claim, a petition for review filed February 3, and an amendment filed February 12, are in time. *Matter of Wray* (C. C. A., 2d Cir.), 37 Am. B. R. 28, 233 Fed. 468.

Circumstances and conditions must be extreme which will excuse a delay of more than thirty days in asking for a review of an order of the referee; and where the only excuse offered for a delay of nearly five months, in filing a petition to review an order disallowing a claim, is the pendency of an appeal, taken by another party from an order disallowing part of another claim, which prevents the closing and final settlement of the estate, the petitioner is not entitled to an order compelling the referee to make the certificate for review, required by General Order No. 27. In *re Verdon Cigar Co.* (D. C., Mich.), 27 Am. B. R. 56, 193 Fed. 813.

Effect of mistake in filing.—Where a petitioner to review an order of a referee in bankruptcy filed its petition by mistake with the clerk instead of the referee as required by General Order No. 27, in the absence of a special rule prescribing an express limitation of time for initiating proceedings for such review, an application for special leave to file its petition anew is addressed to the discretion of the district court, even though the ten days which it has been customary to allow for making such applications has elapsed. In *re Nippon Trading Co.* (D. C., Wash.), 25 Am. B. R. 695, 182 Fed. 959.

39. In *re Nichols* (D. C., N. Y.), 22 Am. B. R. 216, 166 Fed. 603.

The time to file a petition to review an order of a referee commences to run upon the entry of the order, and the right to review is not waived by a motion to open the hearing and produce further evidence, made before the signature or entry of the order. *Matter of Place* (D. C., N. Y.), 35 Am. B. R. 426, 224 Fed. 778.

to file such petition may not be so exercised as to unreasonably and unnecessarily delay the distribution of the assets of the bankrupt.⁴⁰ A person who is not a party to proceedings for review may not intervene several months after they were begun, and, upon the withdrawal of the petitioner, be substituted as a party.⁴¹

c. Order only reviewable.—It seems that a review can be asked only after the granting of an order,⁴² though it would seem that the referee may certify a specific question also.⁴³ A petition for a review of the "decision" of the referee would be defective.⁴⁴ The courts will properly hesitate to review an interlocutory order of a referee; such a practice tends to delay the final disposition of the controversy, and will not be encouraged.⁴⁵

d. Contents of petition.—The petition should clearly point out the error complained of, and ask a review.⁴⁶ The matters of law sought to be reviewed should be set out fully.⁴⁷ New facts may not be set up unless by express leave of the court, and this will not be granted unless the evidence is material and likely to produce a different result.⁴⁸

e. Effect of referee's decision on facts.⁴⁹—The position of the referee and his duties are analogous to those of a special master directed to take evidence and report his conclusions, and the rule applicable to a review of a referee's findings of fact must be substantially that applicable to a master's report.⁵⁰ Findings of fact by the referee are presumed to be correct until the contrary is shown, and the burden of proof rests with the persons objecting thereto.⁵¹

40. *In re Grant* (D. C., R. I.), 16 Am. B. R. 256, 143 Fed. 661.

41. *Matter of Wister & Co.* (C. C. A., 3d Cir.), 38 Am. B. R. 215, 237 Fed. 793.

42. *In re Schiller* (D. C., Tex.), 2 Am. B. R. 190, 96 Fed. 400; *In re Chambers* (Ref., R. I.), 6 Am. B. R. 709. See also *In re Hawley* (D. C., Iowa), 8 Am. B. R. C32, 116 Fed. 428.

Reviewable order.—A sheet of paper in the handwriting of a referee in bankruptcy, without date, filing mark, signature, or authentication by the referee of any sort, and without verification, and constituting a mere tentative account, is not a reviewable order by the referee for payments by the trustee. *Matter of Lacey & Co.* (D. C., Sup. Ct.), 35 Am. B. R. 231, 43 Wash. Law Rep. 434.

43. *In re Kelly Dry Goods Co.* (D. C., Wis.), 4 Am. B. R. 528, 102 Fed. 747. Compare also Form No. 56. *In the case of In re Reukauff* (D. C., Pa.), 14 Am. B. R. 344, 135 Fed. 251, the court held that the act did not authorize the referee of his own motion to certify a question on which he wishes to be advised and which may arise in the proceeding.

44. *In re Chambers* (Ref., R. I.), 6 Am. B. R. 709; *In re Boston Dry Goods Co.* (D. C., Mass.), 11 Am. B. R. 97, 125 Fed. 226; *In re Schneider* (D. C., Pa.), 29 Am. B. R. 469, 203 Fed. 589.

45. *Matter of Graboyes* (D. C., Pa.), 36 Am. B. R. 29, Fed.

46. *In re Milgram* (D. C., Pa.), 13 Am. B. R. 337, 133 Fed. 802; *In re Schiller* (D. C., Va.), 2 Am. B. R. 704, 96 Fed. 400; *In*

re Harnden (D. C., N. Mex.), 29 Am. B. R. 507, 200 Fed. 175. For form of petition to review order of referee, see *Hagar & Alexander's Forms in Bankruptcy*, 2d ed., No. 124.

47. *In re Taft* (C. C. A., 6th Cir.), 13 Am. B. R. 417, 133 Fed. 511.

48. *In re McIntire* (D. C., W. Va.), 16 Am. B. R. 80, 85, 142 Fed. 593.

49. See also Am. B. R. Dig. § 94.

50. *Epstein v. Steinfeld* (C. C. A., 3d Cir.), 32 Am. B. R. 6, 210 Fed. 236, affg. 30 Am. B. R. 387, 206 Fed. 568.

51. *In re Elmore Cotton Mills* (D. C., Ala.), 33 Am. B. R. 544, 217 Fed. 810; *Matter of Schultz & Guthrie* (D. C., Mass.), 37 Am. B. R. 604, 235 Fed. 907; *Matter of Aronson* (D. C., Ala.), 37 Am. B. R. 385, 233 Fed. 1022; *Matter of Kean* (D. C., N. Y.), 38 Am. B. R. 628; *In re Williams* (D. C., Ga.), 9 Am. B. R. 731, 120 Fed. 542. In the absence of a clear showing that a finding of the referee in favor of the petitioning creditor was erroneous, the court must presume it to be correct. *In re Hutchins Co.* (D. C., N. Y.), 24 Am. B. R. 647, 179 Fed. 864; *In re Malschick & Levin* (D. C., Pa.), 30 Am. B. R. 237, 206 Fed. 71; *In re Cox* (D. C., N. Mex.), 29 Am. B. R. 456, 199 Fed. 952, citing text.

The findings of the master, concurred in by the court, are to be taken as presumptively correct, and will be permitted to stand unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, but are not

But findings, based on undisputed facts, which are set out in the record, are entitled to no presumption in their favor.⁵² No arbitrary rule can be laid down for determining the weight which should be attached to findings of fact by a referee or special master in bankruptcy. Much must depend upon the character of the findings.⁵³ But when there is neither pleading or proof respecting an issue a finding by the referee must be disregarded.⁵⁴ If the findings be deductions from established facts, they will not carry any great weight, for the judge, having the same facts, may as well draw inferences or deduce conclusions as the referee.⁵⁵ So, where the evidence is not in serious conflict, the court is not bound by the conclusions of the referee because the witnesses appeared before him and gave testimony.⁵⁶ But, if the findings are based upon conflicting evidence involving questions of credibility and the referee has heard the witnesses much greater weight

conclusive. *Houck v. Christy* (C. C. A., 8th Cir.), 18 Am. B. R. 330, 152 Fed. 612.

Review of order dismissing petition in reclamation proceedings.—Where a referee has denied a petition by an alleged conditional vendor to reclaim chattels, all presumptions with respect to the want or sufficiency of evidence are in favor of the validity of his order, and the court must not assume that evidence with respect to any matter was given which would be inconsistent with the conclusion reached by the referee, unless such evidence is sufficiently set forth in the record. *Matter of Farmers' Dairy Association* (D. C., Cal.), 37 Am. B. R. 672, 234 Fed. 118.

52. *Chambers v. Continental Trust Co.* (D. C., Ga.), 38 Am. B. R. 78, 235 Fed. 441; *In re Big Cahaba Coal Co.* (D. C., Ala.), 26 Am. B. R. 910, 190 Fed. 900; *Matter of Elmore Cotton Mills* (D. C., Ala.), 33 Am. B. R. 544, 217 Fed. 810; findings of fact should not be lightly distributed by the district judge on review. *Matter of Biehl* (D. C., Pa.), 38 Am. B. R. 150, 237 Fed. 720.

53. *In re McCrary Bros.* (D. C., Ala.), 22 Am. B. R. 161, 169 Fed. 485; *Ohio Bank v. Mack* (C. C. A., 6th Cir.), 20 Am. B. R. 40, 163 Fed. 155, 89 C. C. A. 605; *Baumhauer v. Austin* (C. C. A., 5th Cir.), 26 Am. B. R. 385, 186 Fed. 260, revg. 24 Am. B. R. 750, 179 Fed. 966; *Epstein v. Steinfeld* (C. C. A., 3d Cir.), 32 Am. B. R. 6, 210 Fed. 236, affg. 30 Am. B. R. 387, 206 Fed. 568.

54. *Matter of Pittsburg-Big Muddy Coal Co.* (C. C. A., 7th Cir.), 32 Am. B. R. 452, 215 Fed. 703.

55. *In re McCrary Bros.* (D. C., Ala.), 22 Am. B. R. 161, 169 Fed. 485; *Ohio Valley Bank v. Mack* (C. C. A., 6th Cir.), 20 Am. B. R. 919, 163 Fed. 155; *Matter of Elmore Cotton Mills* (D. C., Ala.), 33 Am. B. R. 544, 217 Fed. 808; *Matter of Heilbron Brothers* (D. C., Pa.), 35 Am. B. R. 568, 226 Fed. 803.

In re McDonald & Sons (D. C., S. Car.), 24 Am. B. R. 446, 178 Fed. 487, affd. 25 Am. B. R. 948, *Brawley*, district judge, said: "The rule is upon an appeal from a referee to accept his conclusions on questions of fact, un-

less the same are manifestly erroneous, and that is because he hears the testimony, can note the demeanor of witnesses, and is in a better position to determine the weight of the spoken words. If there was any conflict in the testimony, any question the determination of which was effected by the credibility of witnesses, I would refuse to disturb his conclusion. Such is not the case here, for there is no conflict in the testimony, and the case turns upon the inferences to be drawn from the proved or admitted facts, and I can no more escape drawing my own inferences than from the performance of any other judicial duty."

56. *Matter of Elmore Cotton Mills* (D. C., Ala.), 33 Am. B. R. 544, 217 Fed. 810; *Matter of New York and Philadelphia Parkage Co.* (D. C., N. J.), 35 Am. B. R. 94, 225 Fed. 219.

Where the evidence is not in serious conflict, and the inferences drawn by the referee from a peculiar state of facts are not sufficiently supported by the evidence, the court on review of the referee's order is not bound by his conclusions. *In re People's Department Store Co.* (D. C., N. Y.), 20 Am. B. R. 244, 159 Fed. 286; in this case Judge Hazel said: "Nor is the court bound by the conclusions of the referee because the witnesses appeared before him and gave testimony. The evidence is not in serious conflict, and the conclusions are principally based upon inferences to be drawn from a peculiar state of facts. The inferences drawn by the referee are not thought to be sufficiently supported by the evidence, and therefore there can be no valid objection to a decision based upon the facts and circumstances according to the judgment of this court."

In the case of *In re Swift* (D. C., Mass.), 9 Am. B. R. 237, 114 Fed. 947, Judge Lowell discusses the weight to be given to findings of fact made by a referee and intimates that where they depend upon inferences to be drawn from admitted facts, the court will exercise its own judgment as to whether such findings should be reversed. As to such findings he observes that the court may interfere, although they are not "clearly erroneous."

naturally attaches to his conclusion, and the weight of authority is that the district judge, while scrutinizing with care his conclusions upon a review, should not disturb his findings unless there is most cogent evidence of a mistake and miscarriage of justice.⁵⁷ They are entitled to the same con-

57. *Epstein v. Sternfeld* (C. C. A., 3d Cir.), 32 Am. B. R. 6, 210 Fed. 236, affg. 30 Am. B. R. 387, 206 Fed. 568; *Baker v. Bishop-Babcock-Becker Co.* (C. C. A., 4th Cir.), 34 Am. B. R. 396, 220 Fed. 657; *Findlayson v. Barrows* (C. C. A., 5th Cir.), 34 Am. B. R. 429, 221 Fed. 936; *Matter of Hirdin* (D. C., Cal.), 34 Am. B. R. 114, 219 Fed. 605; *Matter of Cozatsky* (D. C., Conn.), 33 Am. B. R. 323, 216 Fed. 920; *Matter of Stafford* (D. C., Conn.), 35 Am. B. R. 747, 221 Fed. 127; *Matter of Anderson* (D. C., Ga.), 35 Am. B. R. 487, 224 Fed. 790; *Matter of Crocker* (D. C., Iowa), 33 Am. B. R. 293, 217 Fed. 173; *Matter of Katz* (D. C., N. J.), 32 Am. B. R. 422, 216 Fed. 949; *Matter of Partridge Lumber Co.* (D. C., N. J.), 33 Am. B. R. 537, 215 Fed. 973; *Matter of New York and Philadelphia Package Co.* (D. C., N. J.), 35 Am. B. R. 94, 225 Fed. 219; *Matter of Hefron Co.* (D. C., N. Y.), 33 Am. B. R., 443, 216 Fed. 642; *Matter of Coney Island Lumber Co.*, D. C., N. Y.), 34 Am. B. R. 563, 199 Fed. 803; *Matter of Utica Pipe Foundry Co.*, (D. C., N. Y.), 34 Am. B. R. 617, 221 Fed. 787; *Ohio Bank v. Mack* (C. C. A., 6th Cir.), 20 Am. B. R. 40, 163 Fed. 155, 89 C. C. A. 605; *In re Rider* (D. C., N. Y.), 3 Am. B. R. 192, 96 Fed. 811; *In re Miner* (D. C., Ore.), 9 Am. B. R. 100, 117 Fed. 953; *In re Schriver* (D. C., Pa.), 10 Am. B. R. 746, 125 Fed. 511; *Couts v. Townsend* (D. C., Ky.), 11 Am. B. R. 126, 126 Fed. 249; *In re Royce Dry Goods Co.* (D. C., Mo.), 13 Am. B. R. 257, 133 Fed. 100; *In re Shults* (D. C., N. Y.), 14 Am. B. R. 378, 135 Fed. 623; *Southern Pine Co. v. Savannah Trust Co.* (C. C. A., 5th Cir.), 15 Am. B. R. 618, 141 Fed. 802; *In re Kenyon* (D. C., Ohio), 19 Am. B. R. 194, 156 Fed. 863; *In re Littman* (D. C., Pa.), 20 Am. B. R. 300, 159 Fed. 233; *In re Braselton* (D. C., Ga.), 22 Am. B. R. 419, 169 Fed. 960; *In re McCann Bros. Ice Co.* (D. C., Pa.), 22 Am. B. R. 555, 171 Fed. 265; *In re Hoffman* (D. C., Wis.), 23 Am. B. R. 19, 173 Fed. 234, citing *Collier on Bankruptcy* (7th ed.), p. 504; *In re Boner* (D. C., Ohio), 26 Am. B. R. 321, 189 Fed. 93; *Matter of Brenner* (D. C., Pa.), 26 Am. B. R. 647, 190 Fed. 209; *In re Wright-Dana Hardware Co.* (D. C., N. Y.), 30 Am. B. R. 582, 205 Fed. 335; *In re Walden Bros. Clothing Co.* (D. C., Ga.), 29 Am. B. R. 80, 199 Fed. 315.

Findings of referee not disturbed.—Thus, the findings of a referee, upon conflicting evidence, that specifications of objections to a discharge have not been sustained cannot be disregarded where there is sufficient testimony to support them. *In re Forth* (D. C., N. Y.), 18 Am. B. R. 186, 151 Fed. 951; *Matter of Black Lick Mining Co.* (D. C., Pa.), 36 Am. B. R. 4.

Where a referee, upon conflicting testimony, determines the amount due a secured creditor, his finding should not be disturbed. *In re MacKissic* (D. C., Pa.), 22 Am. B. R. 817, 171 Fed. 259. So, a finding of a special master that a deed was in fact fraudulent will not be set aside unless clearly and manifestly erroneous. *Fouche v. Shearer* (D. C., Ga.), 22 Am. B. R. 823, 172 Fed. 592. Decision of referee, allowing the bankrupt a rebate upon his purchases as against the creditor's claim, affirmed, although the court might not have come to the same conclusion. *In re Douglass & Sons Co.* (D. C., Conn.), 8 Am. B. R. 113, 114 Fed. 772. The court will not disturb the referee's findings of fact as to attorney's fees, except for manifest error. *Matter of Atcherley* (D. C., Hawaii), 25 Am. B. R. 827.

In the case of *Matter of Utica Pipe Foundry Co.* (D. C., N. Y.), 34 Am. B. R. 617, 221 Fed. 787, Judge Ray said:

"It has always been the practice of this court to adopt and approve the findings of the referee or special master on questions of fact, where there was a sharp dispute in the testimony, unless it clearly appeared that the finding and conclusion was either unsupported by the evidence or clearly against the weight of the evidence. It is not enough that the court thinks it might itself have arrived at a different conclusion. It must be satisfied on the record that the referee or special master was wrong in his conclusions. In this case this court cannot so say or find. It was a fair question of fact for the special master, who, as stated, saw and heard the witnesses, to decide."

Findings of fact, made upon conflicting evidence by a referee in bankruptcy, who heard and saw the witnesses, and could thus judge of their credibility, will not be disturbed, unless by a clear preponderance of evidence it appears that the referee was not justified in his conclusions. *In re O'Neil* (D. C., N. Y.), 27 Am. B. R. 5, 189 Fed. 1010; *In re Hodge* (D. C., N. Y.), 30 Am. B. R. 522, 205 Fed. 824.

The weight given to a referee's findings applies more particularly to cases in which such findings are deducted from conflicting evidence and depend upon the credibility of witnesses and not to cases upon which inferences are to be drawn from facts established. *In re Big Cahaba Coal Co.* (D. C., Ala.), 25 Am. B. R. 761, 183 Fed. 662; *Baumhauer v. Austin* (C. C. A., 5th Cir.), 26 Am. B. R. 385, 186 Fed. 260, revg. 24 Am. B. R. 750, 179 Fed. 966.

In re Swift (D. C., Mass.), 9 Am. B. R. 237, 118 Fed. 349, Judge Lowell said: "No precise quantitative weight is in this district

sideration as those of a district judge upon conflicting evidence.⁵⁸ The bearing of the witness, his appearance, his general intelligence and deportment are, in many cases, as important in determining the truth of evidence as the words he uses, and therefore the court should not always set aside findings which do not conform to the written evidence.⁵⁹ Where the evidence is not reported the findings of the referee must stand unless they appear to be erroneous on the face of the certificate.⁶⁰ The findings of the referee are not conclusive upon the court as is a verdict of the jury or the findings of facts made by a judge in an action at law, where a jury has been waived.⁶¹ However it is proper for a

assigned to the findings of fact made by a referee. If those findings are based largely upon the good or bad faith of witnesses seen and heard by the referee, this court will always bear in mind that the referee's means of judgment are in an important respect better than its own. If, on the other hand, the findings depend upon inferences to be drawn from admitted facts, this court's means of judgment are nearly as good as the referee's. The weight to be assigned to the referee's findings in the two cases supposed is by no means the same. No labor-saving formula will determine the weight of the findings, or show just how strongly the court must incline against it in order to reverse it. To say that the finding should not be set aside unless it is 'clearly erroneous,' 'manifestly erroneous,' 'so manifestly erroneous as to invoke the sense of justice of the court,' or 'unless it discloses prejudicial errors by the referee, some of which may, without exaggeration, be denominated gross' is to darken counsel, if more is meant than that the court will not set aside the finding unless it is deemed erroneous after due allowance for the circumstances under which it was made. Artificial and quantitative presumptions of fact are foreign to the spirit of the common law, and the introduction of these presumptions has been rare and unfortunate.⁶²

"It is the recognized rule of the federal courts—and especially in matters of bankruptcy—that on review of the decisions of a referee, based upon his conclusions on questions of fact, the court will not reverse his findings unless the same are so manifestly erroneous as to invoke the sense of justice of the court. This rule must, of necessity, be observed by the courts where the findings and conclusions of the referee are based upon conflicting testimony. He sees and hears the witnesses, and his vantage ground is much better than that of the court for determining the credibility of the witnesses and the weight of their testimony." In *re Stout* (D. C., Mo.), 6 Am. B. R. 505, 109 Fed. 794.

In *Georgia* the rule, that the finding of the referee on the facts will not be interfered with unless there is clear error, is particularly applicable to a finding as to good or bad faith on the part of the bankrupt in connection with his right to an exemption. In *re West* (D. C., Ga.), 8 Am. B. R. 564, 116 Fed. 767; In *re Waxelbaum* (D. C., Ga.), 4 Am. B. R. 120, 101 Fed. 228.

"The findings of fact by a special master

who attended the examination of the witnesses, thus giving him an opportunity of seeing them testify, while not as conclusive as the findings of facts by a jury or a trial judge sitting as a jury, are very persuasive, and if there is substantial testimony to sustain his findings uninfluenced by any mistaken conclusions of law they will not be disturbed by the court hearing the cause on a transcript of the evidence without opportunities to see the witnesses, and thus to judge of their credibility in the same manner as was enjoyed by the master." In *re Harr* (D. C., Wis.), 16 Am. B. R. 213, 143 Fed. 421. The findings of fact of a referee acting as special master, unless clearly erroneous, will not be disturbed. *Love v. Export Storage Co.* (C. C. A., 6th Cir.), 16 Am. B. R. 171, 143 Fed. 1; *Peterson v. Mettler* (D. C., Wash.), 29 Am. B. R. 159, 198 Fed. 938.

⁵⁸ In *re Simon & Sternberg* (D. C., Ga.), 18 Am. B. R. 204, 153 Fed. 507.

⁵⁹ In *re Schwartz* (D. C., N. Y.), 23 Am. B. R. 37, 179 Fed. 767; In *re Littman* (D. C., Pa.), 20 Am. B. R. 300, 159 Fed. 233.

⁶⁰ *Matter of Miller* (D. C., Mass.), 35 Am. B. R. 333, 225 Fed. 331; *Matter of Murphy* (D. C., Mass.), 35 Am. B. R. 635, 225 Fed. 392; *Matter of Boston French Range Co.* (D. C., Mass.), 37 Am. B. R. 508, 235 Fed. 916.

Matter of Gay & Sturgis (D. C., Mass.), 35 Am. B. R. 417, 224 Fed. 127, wherein it was held that findings of a referee in bankruptcy, establishing a time limit within which customers and creditors of bankrupt stockholders may file petitions for reclamation of securities and to establish liens on cash in possession of trustees, and that the time fixed by him is reasonable, must be affirmed, where the evidence is not reported.

⁶¹ In *re Hawks* (D. C., Kan.), 30 Am. B. R. 365, 204 Fed. 309; *Ohio Valley Bank v. Mack* (C. C. A., 6th Cir.), 20 Am. B. R. 40, 163 Fed. 155, 158, 89 C. C. A. 605; In *re Harr* (D. C., Wis.), 16 Am. B. R. 213, 143 Fed. 421.

Determination as *res adjudicata*.—The ruling of a referee on a petition to compel the trustee to convey real property under an agreement by the bankrupt is not *res adjudicata* as to the validity of a mortgage on the property, or as to lien creditors who were not parties to the proceeding. *Matter of Collins* (D. C., Ia.), 37 Am. B. R. 692, 235 Fed. 937.

referee or master, to whom a matter is referred to find the facts, to state his conclusions upon the case.⁶² The court may reverse findings where certain testimony in the case appears to have been overlooked or ignored.⁶³ The same rules apply on appeal in considering findings of referees which have been approved by district courts; unless clearly erroneous they will not be disturbed.⁶⁴ A referee's findings of fact may be reviewed, although no formal exceptions to his decision are filed where such filing is not required by a rule or order of the court.⁶⁵ The court will not ordinarily consider for the first time questions not raised below, or issues not presented by the record;⁶⁶ if a point is presented by the record the district court may consider it although it was not discussed before or by the referee.⁶⁷ The court is not barred by or confined to the matters certified by the referee; under its broad general powers it may consider any point presented by the record.⁶⁸ The administra-

62. *Matter of Baker* (D. C., Mass.), 32 Am. B. R. 378, 212 Fed. 769.

63. *In re Grant Bros.* (D. C., N. Y.), 9 Am. B. R. 93, 118 Fed. 73.

64. *In re Sweeney* (C. C. A., 6th Cir.), 21 Am. B. R. 866, 168 Fed. 612; *Canner v. Webster Tapper Co.* (C. C. A., 1st Cir.), 21 Am. B. R. 872, 168 Fed. 519; *First Nat'l Bank of Phila. v. Abbott* (C. C. A., 8th Cir.), 21 Am. B. R. 436, 165 Fed. 852; *Stephens v. Merchants' Bank* (C. C. A., 7th Cir.), 18 Am. B. R. 560, 154 Fed. 341; *In re Noyes Bros.* (C. C. A., 1st Cir.), 11 Am. B. R. 506, 127 Fed. 286; *Buckingham v. Estes* (C. C. A., 6th Cir.), 12 Am. B. R. 182, 128 Fed. 584; *In re Lawrence* (C. C. A., 2d Cir.), 13 Am. B. R. 798, 134 Fed. 843; *Poff v. Adams* (C. C. A., 4th Cir.), 35 Am. B. R. 307, 226 Fed. 187; *Matter of Pennell* (C. C. A., 3d Cir.), 32 Am. B. R. 241, 214 Fed. 337; *Matter of National Pressed Brick Co.* (C. C. A., 6th Cir.), 32 Am. B. R. 224, 212 Fed. 878; *Deupree v. Watson* (C. C. A., 6th Cir.), 32 Am. B. R. 407, 216 Fed. 483; *Carrol v. Stern* (C. C. A., 6th Cir.), 34 Am. B. R. 570, 223 Fed. 723.

Thus, the finding of a referee in favor of the allowance of a claim, approved by the district judge, will not be disturbed on appeal, in the absence of demonstration of plain mistake. *Ohio Valley Bank Co. v. Mack* (C. C. A., 6th Cir.), 20 Am. B. R. 40, 163 Fed. 155; *Canner v. Webster Tapper Co.* (C. C. A., 1st Cir.), 21 Am. B. R. 872, 163 Fed. 519. Such a finding will not be overruled except upon convincing proof that he was wrong. *In re Hatem* (D. C., N. Car.), 20 Am. B. R. 470, 161 Fed. 895. And a finding of a referee, upon conflicting testimony, affirmed by the district court, that an alleged bankrupt was not chiefly engaged in farming, and therefore amenable to bankruptcy, will not be disturbed on appeal. *Stephens v. Merchants' National Bank* (C. C. A., 7th Cir.), 18 Am. B. R. 560, 154 Fed. 341.

See also Am. B. R. Dig., § 1232.

65. Where the specific question as to the correctness of findings of fact by a referee is certified to the court for review no exception is necessary. *In re Miner* (D. C., Ore.), 9 Am. B. R. 100, 117 Fed. 953; *In re*

People's Department Store Co. (D. C., N. Y.), 20 Am. B. R. 244, 159 Fed. 286. Text approved in *In re Lane* (D. C., Idaho), 30 Am. B. R. 749, 206 Fed. 780; *Matter of Elmore Cotton Mills* (D. C., Ala.), 33 Am. B. R. 544, 217 Fed. 810.

Under U. S. Equity Rule 83, referee's findings of fact to which there is no objection filed, are conclusive, and a petition for a rehearing, alleging that the facts may be disproved, will be dismissed. *In re Royal* (D. C., N. Car.), 7 Am. B. R. 636, 113 Fed. 140; *In re Carver & Co.* (D. C., N. Car.), 7 Am. B. R. 539, 113 Fed. 138.

66. *In re Richard* (D. C., N. Car.), 2 Am. B. R. 506, 94 Fed. 633. See also *In re Sturgeon*, Fed. Cas. 13,564.

Objections to evidence received by a referee may not be raised for the first time on review of an order made by him. *In re McCann Bros. Ice Co.* (D. C., Pa.), 22 Am. B. R. 555, 171 Fed. 265.

67. *In re Wilde's Sons* (C. C. A., 2d Cir.), 16 Am. B. R. 386, 144 Fed. 972; *Matter of Elmore Cotton Mills* (D. C., Ala.), 33 Am. B. R. 544, 217 Fed. 810.

When the record is certified to the district judge, any manifest error will be noticed, that the referees and other officers of the court, if they have fallen into error, may correct the same, if possible, and avoid like error in the future. *In re Woodard* (D. C., N. Car.), 2 Am. B. R. 692, 95 Fed. 955. Upon the review of an order affirming the findings of a referee, the court may rely on any ground disclosed by the record even though it be not the ground upon which the decision was made. *Davis v. Prompton* (C. C. A., 3d Cir.), 20 Am. B. R. 53, 158 Fed. 735.

68. *In re Clay* (C. C. A., 1st Cir.), 27 Am. B. R. 715, 192 Fed. 830, citing *Collier on Bankruptcy* (8th ed.), 505; *In re Pettingill & Co.* (C. C. A., 1st Cir.), 14 Am. B. R. 757, 137 Fed. 840, 70 C. C. A. 338; *In re Samuel Wilde's Sons* (C. C. A., 2d Cir.), 16 Am. B. R. 386, 144 Fed. 972, 75 C. C. A. 60. Text quoted with approval in *In re Lane Lumber Co.* (D. C., Idaho), 30 Am. B. R. 749, 206 Fed. 780.

tive acts of referees, of which the approval of the choice of a trustee is a typical example, should not be disturbed by the court, unless a plain and injurious error of law or abuse of discretion is disclosed.⁶⁹

f. **What must be certified for review.**—The record usually consists of a certificate,⁷⁰ prepared and signed by the referee, which should state the question⁷¹ on which the review has been asked and the ruling of the referee, and, either in the certificate or in a schedule annexed to it, give the evidence or a summary of it,⁷² and a copy of the order,⁷³ if any. He is not required to certify objections made to his rulings upon the admissibility of evidence, where the reference was to ascertain facts above designed to aid the court in determining whether a bankrupt should be discharged.⁷⁴ The practice in the several districts necessarily varies as to the formalities to be observed in seeking a review by the judge of the orders or other proceedings of a referee; in some districts it is held sufficient to set out the substance of the matter in dispute without requiring the filing of formal exceptions to the referee's findings or rules.⁷⁵ Documents also may be handed up; if so, they should be numbered and either referred to or summarized in the certificate. This subdivision implies that the evidence must be agreed upon by the parties to the review. It is presumable that, if they do not agree, the referee will either settle the record as justice requires or send up the whole case. He must make up this record himself. It seems he is entitled to no additional compensation for so doing. By analogy with other clauses of the law and the general orders, however, he is entitled to his expenses in preparing the same and to an indemnity therefor.⁷⁶

69. *Matter of Rosenfeld-Goldman Co. (D. C., Mass.)*, 36 Am. B. R. 520, 228 Fed. 921.

70. See Hagar & Alexander's *Forms in Bankruptcy*, 2d ed., No. 125. See also Am. B. R. Dig. § 92.

71. The precise question ruled upon must be certified; this requirement is not complied with by a mere transmission to the clerk of the notes of testimony, the referee's opinion and the creditor's petition for review. In *re Kurtz (D. C., Pa.)*, 11 Am. B. R. 129, 125 Fed. 992.

Effect of insufficient report of referee.—Where, upon a petition for review of an order of a referee, his report does not state the facts with sufficient definiteness to enable the court to pass upon the questions which may arise, the case should be sent back to the referee, with instructions to grant a rehearing. *Matter of Hawley, etc., Furnace Co. (D. C., Pa.)*, 32 Am. B. R. 635, 214 Fed. 500.

72. The procedure prescribed by section 39 of the act, and General Order 27, should be followed. It is not an "appeal," but a petition to review, and is heard upon the certificate of the referee and such evidence as he sends to the judge. "A case on appeal" and a "counter case" are not required. *Matter of Humphreys (D. C., N. Car.)*, 34 Am. B. R. 655, 221 Fed. 997 (citing text).

General Order XXVII requires the referee to certify the question presented, "a summary of the evidence relating thereto, and the finding and order of the referee thereon."

It has been held that the plain meaning of this order is to require the referee to make a summary of the evidence in order to save the judge "the labor of examining what is often a mass of testimony on many different questions, and of extracting so much as may be relevant to the point immediately in hand." In *re Kurtz (D. C., Pa.)*, 11 Am. B. R. 129, 125 Fed. 992; *Matter of Hooks Smelting Co. (D. C., Pa.)*, 15 Am. B. R. 83, 138 Fed. 954. Petitioners should not be deprived of the opportunity to be heard upon questions of substantial right because the referee omitted to summarize the evidence. *Crim v. Woodford (C. C. A., 4th Cir.)*, 14 Am. B. R. 302, 136 Fed. 34.

The evidence taken before a referee should be taken and recorded, and in case of an appeal, returned to the reviewing court; it should include that deemed irrelevant as well as that deemed competent, so that the appellate court may determine whether the evidence rejected should have been received. From this rule evidence clearly privileged or incompetent may be excepted. *Missouri Elec. Co. v. Hamilton Brown Co. (C. C. A., 8th Cir.)*, 21 Am. B. R. 270, 165 Fed. 283.

73. For the necessary recitals in referees' orders, see General Order XXIII.

74. In *re Romine (D. C., W. Va.)*, 14 Am. B. R. 785, 138 Fed. 837.

75. In *re Swift (D. C., Mass.)*, 9 Am. B. R. 237, 114 Fed. 947.

76. See General Order X.

g. Hearing of reviews.—The referee must certify up a review “forthwith.” It is usually brought on for hearing on notice of motion, and heard on any rule day, or, by consent of the judge, at any time.⁷⁷ The practice here is often fixed by district rules. Jurisdiction “to consider, confirm, modify, or overrule or return, with instructions for further proceedings,” is conferred on the district court by § 2 (10). The order then made is entered in such court and a copy of it, with the papers on review, transmitted to the referee.⁷⁸

77. For an interesting case on practice, see *In re De Gottardi* (D. C., Cal.), 7 Am. B. R. 723, 114 Fed. 328.

78. For the use of this record on a peti-

tion or appeal from the judge to the Circuit Court of Appeals, see *Cunningham v. Bank* (C. C. A., 8th Cir.), 4 Am. B. R. 192, 103 Fed. 932.

SECTION FORTY.

COMPENSATION OF REFEREES.

§ 40. **Compensation of Referees.**—*a* Referees shall receive as full compensation for their services, payable after they are rendered, a fee of* *fifteen*† dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, *and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration,*‡ and from estates which have been administered before them one per centum commissions on‡ *all moneys disbursed to creditors by the trustee,*‡ or one-half of one per centum on the amount to be paid to the creditors upon the confirmation of a composition.

b Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees.

c In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee.

Analogous provisions: In U. S.: Act of 1867, §§ 4, 5, 10, 47, R. S., §§ 4990, 5008, 5124, 5125; General Order XXX; Act of 1841, §§ 6, 13; Act of 1800, § 47.

In Eng.: § 129.

Cross-references: To the law: Composition, offer to include costs of proceedings, § 12.

Clerk to collect fees of referee and pay them over within ten days, § 51(2) (4).

Report of expenses of administration of estate, § 62.

Cost of administration, priority of payment, § 64-b(3). No fees to be allowed except as authorized by the act, § 72.

To the General Orders: Referee may require indemnity for expenses of administration, X.

Referee to keep an account of expenses, and return same monthly, XXVI.

Payment of moneys deposited on check or warrant, XXIX.

Compensation of referee in full for services, XXXV.

* Here the word "fifteen" was substituted for the word "ten" by the amendatory act of 1903.

† Amendments of 1903 in italics.

‡ Here the words in italics were substituted for the words "sums to be paid as dividends and commissions" by such amendatory act.

SYNOPSIS OF SECTION.

COMPENSATION OF REFEREES.

I. Compensation of Referees in General, 677.

- a. *Comparative legislation*, 677.
- b. *Under the original law*, 677.
- c. *In pauper cases*, 678.
- d. *While sitting as special master*, 678.
- e. *In compositions*, 678.

II. Compensation for Specified Services, 679.

- a. *Amendment of 1903*, 679.
- b. *The filing fee*, 679.
- c. *The claim fee*, 679.
- d. *Commissions on disbursements to creditors*, 680.
- e. *"Full compensation,"* 681.
- f. *Allowance for expenses*, 682.

III. Compensation on Reference to Two or More Referees, 683.

I. COMPENSATION OF REFEREES IN GENERAL.¹

a. *Comparative legislation*.—In England, the registrars receive salaries, not fees.² Under previous laws in this country, the officers corresponding to the present referees have always been paid by fees, fixed sometimes by rules, sometimes by the statute, sometimes by both.³ The fee bills under the law of 1867 grew so long and proved so onerous that they were largely responsible for the repeal of that law.⁴ The difference between the two laws in this respect is marked; precedents will be found of little value. Then compensation depended largely on the number of hearings had and papers drawn; now, besides the fixed filing fee, the compensation of referees is determined by the number of claims proven and the amount of assets administered.

b. *Under the original law*.—Prior to the amendatory act of 1903, the inadequacy of the referee's compensation was conceded. Indeed, this condition was met in some districts by rules that went outside the law and authorized the collection of fees for filing and allowing claims and a *per diem* for hearings, or the like.⁵ The amendments of 1903 have made this practice no longer possible, whether or not previously excusable; and such rules, where in force, have, for the most part, been revoked. As the law stood originally, indeed, as it was interpreted and emphasized by General Order XXXV, a referee was entitled to compensation in the following ways and amounts only:⁶

1. See also Am. B. R. Dig. §§ 95-98.

2. Eng. Act of 1883, § 129(1).

3. Consult "Analogous Provisions," *ante*. See also Owen on Bankruptcy (1842), Appendix, p. 22.

4. Thus, see in the Congressional debates, on the pending bankruptcy bill in February, 1898, lurid phrases like: "the pillage of the fee-fiend," and "the rodents who burrow around the places of justice."

5. See in re Price (D. C., N. Y.), 1 Am.

B. R. 419, 91 Fed. 635; In re Todd (D. C., N. Y.), 6 Am. B. R. 88, 109 Fed. 265. But compare In re Pierce (D. C., Col.), 6 Am. B. R. 747, 111 Fed. 516; In re Barker (D. C., Iowa), 7 Am. B. R. 132, 111 Fed. 501. For another means to increase compensation, based doubtless on the practice under the law of 1867, see In re Dixon (D. C., Cal.), 3 Am. B. R. 145, 114 Fed. 675.

6. See in particular General Order XXXV (2).

(a) a filing fee of \$10 in all cases save those in which a pauper oath accompanied the petition, and (b) one per cent. commission on all sums paid "as dividends and commissions."⁷ It was held that the term "dividends" did not include commissions on moneys paid secured creditors.⁸ The reasons behind these—in our jurisprudence—rather novel ways of compensating Federal judicial officers were apparent: the filing fee was intended to cover ordinary services in no-asset cases, the commission on dividends was a *pro rata* reward dependent, not, as in 1867, on work done, but on the results of that work. The amendments of 1903 are merely an extension of this general policy.

c. **In pauper cases.**—By analogy with the State laws applicable to pauper litigants, the statute permits the indigent bankrupt to secure the services of clerk, referee, and trustee without the payment of the filing fee. This subject and the cases considering it are discussed elsewhere.⁹

d. **While sitting as special master.**—Under this section it was formerly held that the referee was entitled to extra compensation where he acted as a special master.¹⁰ The contrary was also held.¹¹ But since the amendment of § 72 in 1903, increasing the compensation of the referee, and adding the stringent prohibition against the receipt or allowance of "any other or further compensation for their services than that expressly authorized and prescribed in the act," extra compensation will not be allowed,¹² especially in the absence of an appointment as special master.¹³ Where, however, a referee performs services, not within his statutory duties, but of value to the bankrupt estate as a going concern, he may receive compensation therefor.¹⁴

e. **In compositions.**—The referee receives one-half of one per cent. "on the amount to be paid to creditors" upon the confirmation of a composition.¹⁵

7. The purpose of the law-making power is indicated by the following quotation from the analysis of the bill in its last form:

"Referees will receive a petty filing fee and a small commission on the net amount realized by estates administered before them. This arrangement will interest them in securing prompt and economical administrations."

8. *In re Utt* (C. C. A., 7th Cir.), 5 Am. B. R. 383, 105 Fed. 754.

9. See Bankr. Act, § 52; see also Am. B. R. Dig. § 285.

10. *Fellows v. Freudenthal* (C. C. A., 7th Cir.), 4 Am. B. R. 490, 102 Fed. 731; *In re Grossman* (D. C., Mich.), 6 Am. B. R. 510, 111 Fed. 507; *Bragassa v. St. Louis Cycle* (C. C. A., 5th Cir.), 5 Am. B. R. 700, 107 Fed. 77. See also Am. B. R. Dig. § 98.

11. *In re Troth* (D. C., Ohio), 4 Am. B. R. 780, 104 Fed. 291.

12. *In re Wilcox* (D. C., Mich.), 19 Am. B. R. 241, 156 Fed. 685, holding that a referee is not entitled to extra compensation upon a contested application for a discharge; *In re Sweeney* (C. C. A., 6th Cir.), 21 Am. B. R. 866, 168 Fed. 612; *Bray v. Johnson* (C. C. A., 4th Cir.), 21 Am. B. R. 383, 165 Fed. 57.

The case of *In re Goldville Manufacturing Co.* (D. C., S. C.), 10 Am. B. R. 552, 123 Fed. 579, does not hold to the contrary of this view. There the compensation was allowed because the service had been rendered before the act of 1903.

13. *Matter of McCubben Co.* (Sup. Ct., D. C.), 33 Am. B. R. 277, 42 Wash. L. Rep. 774.

14. *Matter of Hart & Co.* (D. C., Hawaii), 18 Am. B. R. 137. In this case the referee advised the trustee in regard to the finances of the bankrupt estate, examined the results of each day's work, and examined the weekly reports, auditing the same.

Additional compensation as special master.—The court will not hesitate, in cases where the business of the court demands it, to refer to a referee matters in bankruptcy not specially cognizable by him under the terms of a general reference. If, under the Act or the General Orders, provision is found for a permissive reference of such matters, no additional compensation will be allowed the referee. If, however, as to such special matters no authority or permission is found in the law for their reference to the referee as such, they will be referred to him, or to any other person specially qualified, as the circumstances may require, as *special master*, and the usual compensation allowed to special masters will be awarded. *Matter of Langford, Felts & Myers* (D. C., Cal.), 35 Am. B. R. 519, 225 Fed. 311.

15. For changes as to the trustee's fee in composition cases, see § 48, *post*.

In composition proceedings a referee is not entitled to compensation, as a special master, where he has held two meetings, and has been well paid under the statute,

This standard of compensation has not been modified by the act of 1903. Whether "creditors" includes priority claimants is, perhaps, debatable.¹⁶ The "amount paid to creditors" includes the amount which the creditors are to receive as a result of the composition agreement, although part of the consideration is in obligations filed with the court, to be afterwards turned into money;¹⁷ it was not intended to limit the referee's commissions to money actually deposited for disbursement to creditors.¹⁸ In view of this situation where the actual disbursement was made by a referee who was appointed after the deposit was made, there should be an apportionment of the commission between the two referees in accordance with the services performed by each.¹⁹

II. COMPENSATION FOR SPECIFIED SERVICES.

a. Amendment of 1903.—As is indicated in the notes to this section, it was materially modified in respect to the compensation for certain services by the amendatory act of 1903. They have already been indicated. The reasons for them are clear. In brief, (a) the filing fee is increased, (b) commissions are reckoned on all moneys disbursed to creditors, not merely on dividends paid them, and (c) a small fee is allowed out of each estate for the filing and allowing of claims. These different kinds of compensation will be considered separately.

b. The filing fee.—The filing fee under this section as it now stands is \$15 and is paid to the clerk at the time a petition is filed.²⁰ The clerk pays it to the referee within ten days after the case is closed. The word "closed" has been liberally construed in some districts, and the filing fee has been paid the referee at the end of one or two months, even if the case is not technically at an end.²¹

c. The claim fee.—This fee is already familiar in several important districts, where its collection has been authorized by rules. Its origin is doubtless in the commissioner's fee under the law of 1841.²² That officer's duty

his fees amounting to forty dollars. In *re Talton* (D. C., N. C.), 14 Am. B. R. 617, 137 Fed. 178.

16. See Bankr. Act, § 64, generally. Compare discussion under this Section, sub-title, "Commissions on Disbursements to Creditors," *post*.

17. *Matter of Batterman Co.* (C. C. A., 2d Cir.), 36 Am. B. R. 695, 231 Fed. 699. See Am. B. R. Dig. § 96.

Deposit in lieu of cash.—Where a bankrupt upon application for the confirmation of a composition has filed with the court certain obligations in lieu of a portion of the cash deposit required, and has agreed with the court to pay costs and expenses the same as if the money were actually in court, the referee is entitled to his commissions based upon the amount to be paid. *Matter of White & Co.* (D. C., Ga.), 35 Am. B. R. 670, 225 Fed. 796, distinguishing *Matter of Bacon & Sons* (D. C., Ky.), 34 Am. B. R. 825, 224 Fed. 764 (revd. 36 Am. B. R. 390, 224 Fed. 764) and *American Surety Co. v. Freed*, 35 Am. B. R. 103, 224 Fed. 333.

Basis of fees on composition.—Where in a composition proceeding creditors are offered an option of 25 per cent. cash, or 100 per

cent in the stock at par of a new corporation formed to take over the assets and business of the bankrupt, both offers are to be regarded as equivalent, and the referee's commissions should be computed on the basis of a 25 per cent. cash disbursement, in the absence of proof that the stock is worth more than the cash. *Matter of Mills Tea & Butter Co.* (D. C., Mass.), 37 Am. B. R. 711, 235 Fed. 815.

18. *Kinkead v. Bacon & Sons* (C. C. A., 6th Cir.), 36 Am. B. R. 390, 230 Fed. 362, in which the court held that a referee is entitled to a commission of one-half of one per cent. on the amount "to be paid by the bankrupt to creditors" regardless of the fact that payment was not made directly by the bankruptcy court. The amount to be paid "may include sums to which certain note-holders were entitled by virtue of the composition proceedings."

19. *Kinkead v. Bacon & Sons* (C. C. A., 6th Cir.), 36 Am. B. R. 390, 230 Fed. 362.

20. See Bankr. Act, § 51 (2) (4).

21. See Bankr. Act, § 51, *post*.

22. See § 6 and § 13 of that act, and consult *Owen on Bankruptcy* (1842), Appendix, pp. 8, 22.

was "to take the proof of debts and to take testimony to be used in the circuit or district court," and, for performing the former duty, something similar to the taking of a deposition, he was entitled to \$1. Clearly, however, the referee, to earn this fee now, is not required or expected to draft or supervise the preparation of the proof of debt. The fee is intended merely to cover the extra time required in filing, allowing, and investigating claims.²³ The words "to be paid from the estate, if any, as a part of the cost of administration" are important. Thus, this fee is not chargeable to the creditor who files, and cannot be demanded in advance.²⁴ Nor is it payable where there are no assets. It is simply one part of "the cost of administration,"²⁵ and had priority with other disbursements within that phrase. The amount, twenty-five cents, is half the filing fee previously fixed by rule in a few important districts, and but a fourth of that allowed in still others. The words "every proof of claim" seems to mean that the fee will be earned even if the proof is on a debt entitled to priority or secured. It is equally clear that the charge is against the whole estate and not on the dividend of each claimant.

d. Commissions on disbursements to creditors.—The rate on disbursements to the creditors by the trustee is one per cent. The basis of the percentage is "all moneys disbursed to creditors by the trustee,"²⁶ and not upon the total assets received by the trustee,²⁷ and cannot be otherwise fixed by agreement with the creditors.²⁸ This means all sums which should be paid to creditors through the trustee, notwithstanding an outside agreement between the parties and attorneys.²⁹ The language covers, and evidently was intended to include, all moneys, lawfully disbursed by the trustee, and held by him as such, whether to creditors, secured or unsecured, or having priority, or to other persons. If to creditors it is immaterial whether the amounts lawfully paid them from the funds in court are paid as dividends or in satisfaction of a lien or liens on the fund.³⁰ No commissions are to be paid on moneys disbursed for other pur-

23. Thus, in the Analysis of the Amendatory Bill of 1903 (Report No. 1698, 57th Congress, 1st Session, p. 8) it is said:

"The other changes are in the line of increasing efficiency and the securing of the best talent for the important work committed to these officers; thus . . . the fifty-cent filing fee for referees, as probably the fairest way properly to compensate them for the great amount of extra work in hearing contests on claims," etc.

24. The same report says:

"The collection of this filing fee in advance seems to be permitted by the rules in many districts, though without apparent sanction of law. The suggested amendment ratifies this practice, which has not proven burdensome, while removing the chief objection to it—the requirement that the fee be paid as a condition of filing a claim at all—by requiring that such fee be paid as a cost of administration."

25. See discussion under Section Sixty-four of this work, sub-title *sub nom*, "Cost of administration," *post*.

26. In *re Erie Lumber Co.* (D. C., Ga.), 17 Am. B. R. 689, 701, 150 Fed. 817; *Matter of Lacey & Co.* (D. C., Sup. Ct.), 35 Am. B. R. 231, 43 Wash. L. Rep. 434.

Where a corporation is formed to take over the business of the bankrupt under an agreement that the creditors will accept stock in the new corporation in payment of their claims, the referee is entitled to have his commission fixed on the amount disbursed through a new corporation by means of its shares of stock. *Matter of The Breakwater Co.* (D. C., Pa.), 33 Am. B. R. 721, 220 Fed. 226.

27. *Matter of Lacey & Co.* (D. C. Sup. Ct.), 35 Am. B. R. 231, 43 Wash. L. Rep. 434.

28. *American Surety Co. v. Freed* (C. C. A., 3d Cir.), 35 Am. B. R. 103, 224 Fed. 333.

29. In *re Sanford Furniture Mfg. Co.* (D. C., N. C.), 11 Am. B. R. 414, 126 Fed. 888, holding that when property subject to liens is sold by consent of parties holding such liens, the referee and trustee are entitled to commissions under the act, on the purchase price in full.

30. In *re Cramond* (D. C., N. Y.), 17 Am. B. R. 22, 30, 145 Fed. 966.

Where a secured creditor enforces his security in a State court and the proceeds do not come into the bankruptcy court, the referee is not entitled to commissions on sums paid to such creditor. In *re Iowa Falls Mfg. Co.* (D. C., Ia.), 15 Am. B. R. 384,

poses than to creditors.³¹ And where pledged property is sold in bankruptcy proceedings the referee is entitled to commissions only on the surplus.³² The referee is not entitled to commissions on sums paid by the trustee in the conduct or administration of the business of the bankrupt continued for the purpose of completing contracts partly executed by the bankrupt.³³ The omission of the words "to creditors" in a similar provision of § 48 is significant.³⁴ At any rate, the numerous cases defining the meaning of the word "dividends,"³⁵ which occurred here in the original law,³⁶ are no longer valuable.

e. "Full compensation."—The significance of these words is apparent. They have been dropped out of § 48.³⁷ Not so here. They are emphasized by § 72, considered later. A referee in bankruptcy, acting as such, is entitled to no fee, compensation, or emolument for any service performed in that

140 Fed. 527. But it has been held that a secured creditor, whose lien, created more than four months before the bankruptcy, has been satisfied in full, will be compelled to pay commissions on the amount received by him. *Matter of Anders Push Button Telephone Co.* (D. C., N. Y.), 13 Am. B. R. 643, 136 Fed. 995.

Disbursements to lien holders.—Under section 40, as amended in 1903, allowing a one per cent. commission to referees "on all moneys disbursed to creditors by the trustee," a referee is entitled to commissions on the amount constructively disbursed by a trustee to lien holders out of the sum for which they have bid their security in. *Varney v. Harlow* (C. C. A., 4th Cir.), 31 Am. B. R. 339, 210 Fed. 824.

Under the law, prior to the amendment of 1903, commissions were based upon the sums "to be paid as dividends and commissions." This was held not to include sums paid to satisfy fixed liens on real estate sold by the trustee, even when sold free and clear of all incumbrances, and when such liens were satisfied from the proceeds of sale. In *re Hinkel Brewing Co.* (D. C., N. Y.), 10 Am. B. R. 692, 124 Fed. 702.

31. In *re Iowa Falls Mfg. Co.* (D. C., Ia.), 15 Am. B. R. 384, 140 Fed. 527, holding that, where a trustee receives a sum in compromise of a suit against a mortgagee who foreclosed in a State court, a mortgage upon property which never came into the hands of the trustee, the amount actually disbursed by him to creditors is the basis of computation of the referee's commissions; *Fielding v. Phillips & McEachin* (C. C. A., 5th Cir.), 31 Am. B. R. 542, 210 Fed. 889; *Matter of McCubbin Co.* (Sup. Ct., D. C.), 33 Am. B. R. 277, 42 Wash. L. Rep. 774.

Property which comes to the possession of a trustee in bankruptcy through the fraud of the bankrupt, and is adjudged to be returned to the victim of the fraud, is not a part of the estate of the bankrupt, and the referee and trustee may not be allowed their statutory percentages out of it. *Gillespie v. Piles & Co.* (C. C. A., 8th Cir.), 24 Am. B. R. 502, 512, 178 Fed. 886.

32. *Matter of Meadows* (C. C. A., 2d Cir.), 33 Am. B. R. 649, 211 Fed. 948, affg. 29 Am. B. R. 165, 199 Fed. 304.

Property sold to person holding security thereon.—Where a creditor, holding a valid security on the entire estate, purchased the property but was only required to give a bond for a part of the purchase money in which it was stipulated that the amount of the bond was the amount fixed by order of the court to meet the payment of all legal taxable costs in said cause and to meet the payment of all prior lien claims in said matter, the referee should only be allowed commission on the sum mentioned in the bond as the amount of money to be disbursed by the trustee. *Matter of Elk Valley Coal Mining Co.* (D. C. Ky.), 32 Am. B. R. 197, 213 Fed. 383.

33. *Bray v. Johnson* (C. C. A., 4th Cir.), 21 Am. B. R. 383, 165 Fed. 57, so held; though in all that he did, the referee was supported by the creditors and trustees and their counsel, and expended much time and performed great labor, showing the utmost fidelity to his trust; *Matter of Rourke Co.* (D. C., Tenn.), 31 Am. B. R. 788, 209 Fed. 877, citing text.

34. *Varney v. Harlow*, (C. C. A. 4th Cir.), 31 Am. B. R. 339, 210 Fed. 824, as to the effect of failure to amend § 40 in the same manner as § 48, relative to commissions of trustees.

35. In *re Sabine* (Ref., N. Y.), 1 Am. B. R. 322; In *re Fort Wayne Corporation* (D. C., Ind.), 1 Am. B. R. 706, 94 Fed. 109; In *re Coffin* (Ref., Tex.), 2 Am. B. R. 344; In *re Gerson* (Ref., Pa.), 2 Am. B. R. 352; In *re Fielding* (D. C., Mo.), 3 Am. B. R. 135, 96 Fed. 800; In *re Barber* (D. C., Minn.), 3 Am. B. R. 306, 97 Fed. 547; In *re Utt* (C. C. A., 7th Cir.), 5 Am. B. R. 383, 105 Fed. 754; In *re Barker* (D. C., Ia.), 7 Am. B. R. 132, 111 Fed. 501. See also In *re Smith* (D. C., N. C.), 5 Am. B. R. 559, 108 Fed. 39; In *re Mammoth Pine Lumber Co.* (D. C. Ark.), 8 Am. B. R. 651, 116 Fed. 731.

36. See foot-notes to text of § 40-a, showing words omitted.

37. For reason, see § 48.

capacity, unless such fee is within the intendment of the section.³⁸ Thus a referee cannot charge extra compensation for his own services, merely because they are performed away from home.³⁹ But the fact that a referee in good faith agrees prior to a sale to accept a less amount as commissions than he is actually entitled to, is not a bar to his claim for the amount so stated.⁴⁰

f. Allowance for expenses.—Under General Order XXXV expenses necessarily incurred by referees in publishing or mailing notices, in traveling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act, when allowed by special order of the judge, are not included in the full compensation allowed to referees under this section. In some jurisdictions this has been held to authorize a charge for office expenses at a specified amount in each proceeding.⁴¹ The provision in regard to expenses of mailing notices, traveling, and perpetuating testimony, refers to actual expenses; but a referee may make a general charge, which should be uniform in all cases, for blanks that may be used, for notices to creditors, and for entering orders. He may make a similar charge for clerk hire, where the business is such that clerks are needed.⁴² Hotel bills and amounts paid stenographers may be allowed as expenses, when a detailed account thereof verified by the oath of the referee that they were necessarily and actually incurred, and showing the amount paid therefor, is returned to the bankruptcy court.⁴³

33. *In re Mammoth Pine Lumber Co.* (D. C., Ark.), 8 Am. B. R. 651, 116 Fed. 731; *American Surety Co. v. Freed* (C. C. A., 3d Cir.), 35 Am. B. R. 103, 224 Fed. 333.

A special allowance to a referee for services performed under the statute cannot be made, even with the consent of attorneys. *Dressel v. North State Lumber Co.* (D. C., N. C.), 9 Am. B. R. 541, 119 Fed. 531. Thus, a referee is not entitled to compensation for his own services in making copies of a petition for discharge. *In re Dixon* (D. C., Cal.), 8 Am. B. R. 145, 114 Fed. 675. But it was held prior to the amendment of 1903 that a reasonable compensation would be allowed for service outside the ordinary scope of the referee's duties. *In re Todd* (D. C., N. Y.), 6 Am. B. R. 83, 109 Fed. 265. An allowance of fees by a referee to himself is reviewable by the district judge. *In re Allert* (D. C., N. Y.), 23 Am. B. R. 101, 173 Fed. 691. *Contra:* *In re Troth* (D. C., Ohio), 4 Am. B. R. 780, 104 Fed. 291.

Compensation for auditing trustee's account.—A referee, who audits the trustee's account as a part of his regular duty, is not entitled to extra compensation therefor. *Matter of Lacey & Co.* (D. C., Sup. Ct.), 35 Am. B. R. 231, 43 Wash. L. Rep. 434; *Matter of McCubbin Co.* (Sup. Ct., D. C.), 33 Am. B. R. 277, 42 Wash. L. Rep. 774.

Ratification of illegal payments.—Payment by a trustee in bankruptcy to a referee of fees in excess of those legally allowable under the bankruptcy act, as construed in a prior decision, will not be allowed, although ratified by the creditors. *Matter of Schreiber* (D. C., Sup. Ct.), 35 Am. B. R. 241, 43 Wash. L. Rep. 500. See also *Matter of Borger* (D. C., Sup. Ct.), 35 Am. B. R. 238, 43 Wash. L. Rep. 436. Compare *Matter of*

Lacey & Co. (D. C., Sup. Ct.), 35 Am. B. R. 231, 43 Wash. L. Rep. 434; *Matter of Smith* (D. C., Sup. Ct.), 35 Am. B. R. 237, 43 Wash. L. Rep. 436.

39. *Matter of Elk Valley Coal Mining Co.* (D. C., Ky.), 32 Am. B. R. 197, 213 Fed. 383.

40. *Matter of The Breakwater Co.* (D. C., N. Y.), 33 Am. B. R. 721, 220 Fed. 226.

41. *Matter of McCubbin Co.* (D. C., Sup. Ct.), 33 Am. B. R. 277, 42 Wash. L. Rep. 774.

42. *Matter of McCubbin Co.* (Sup. Ct., D. C.), 33 Am. B. R. 277, 42 Wash. L. Rep. 774; *In re Tebo* (D. C., W. Va.), 4 Am. B. R. 235, 101 Fed. 419; *In re Carolina Cooperage Co.* (D. C., N. C.), 3 Am. B. R. 154, 96 Fed. 950; *In re Pierce* (D. C., Colo.), 6 Am. B. R. 747, 111 Fed. 516. See *Matter of Elk Valley Coal Mining Co.* (D. C., Ky.), 32 Am. B. R. 197, 213 Fed. 383, holding that the circumstance did not warrant an allowance for clerk and stenographer hire.

Cost of publication of notices upon an application for a discharge and for stationery are expenses properly chargeable to the bankrupt or his estate; but the referee is not entitled to charge for his own services. *In re Dixon* (D. C., Cal.), 8 Am. B. R. 145, 114 Fed. 675.

Allowances for publication, notice, hearings, clerk hire, etc., are unauthorized when made by the referee to himself without order of the judge. *Matter of Lacey & Co.* (D. C., Sup. Ct.), 35 Am. B. R. 231, 43 Wash. L. Rep. 434.

43. *General Order XXVI.* *In re Daniels* (D. C., Ia.), 12 Am. B. R. 446, 130 Fed. 597. See *Matter of Elk Valley Coal Mining Co.* (D. C., Ky.), 32 Am. B. R. 197, 213 Fed. 383.

III. COMPENSATION ON REFERENCE TO TWO OR MORE REFEREES.

The statute here needs no elucidation. When a case is transferred from one referee to another, or the order of reference is revoked before the case is concluded, or the proceeding has been specially referred, the judge is required to pro-rate "the fee and commissions." The words of these subsections have not been changed to fit the amendments to subsection *a*. The court has, however, ample power to pro-rate the new claim fee, without statutory authority, and, in given cases, will doubtless allow each referee twenty-five cents on each claim actually allowed by him.

SECTION FORTY-ONE.

CONTEMPTS BEFORE REFEREES.

§ 41. **Contempts Before Referees.**—*a* A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpoenaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law. *Provided*, That no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.

b The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of the court.

Analogous provisions: In U. S.: Act of 1867, §§ 4, 5, 7, R. S. §§ 4999, 5002, 5005, 5006; Act of 1800, §§ 14, 15.

In Eng.: Act of 1883, § 99(4); General Rules 70, 85–88.

Cross-references. To the law: Jurisdiction to enforce obedience to orders by fine or imprisonment, and punish persons for contempts before referees, § 2(13) (16).

Punishment for false oath, § 20.

Examination of bankrupt; conduct, § 7-a(9).

Examination of other witnesses, § 21.

Jurisdiction of referees in respect to examinations, § 38-a(2).

To the General Orders: Examination of witnesses before referee, XXII.

Imprisoned debtor produced on *habeas corpus*, XXX.

To the Forms: Subpoena to alleged bankrupt, No. 5.

Order for examination of bankrupt, No. 28.

Examination of bankrupt or witness; summons, Nos. 29, 30.

See also Supplementary Forms, *post*; Hagar and Alexander's Bankruptcy Forms, (2d ed.).

SYNOPSIS OF SECTION.

CONTEMPTS BEFORE REFEREES.

- I. Scope of Section, 685.
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 - e. *Punishment*, 694.

I. SCOPE OF SECTION.

While the referee is a court of original jurisdiction, he has not the power to commit for contempt.¹ Neither has the registrar in England,² nor had the register under the former law.³ Contempts in bankruptcy are, however, usually committed before the referee. Hence, it seems, this section. Were the law silent as to what are contempts before a referee, the latter is doubtless sufficiently a court⁴ to take notice of any contempt which might be so held if committed before the court proper. Congress having, however, defined what shall be contempts before referees, no acts or omissions not within the meaning of this section should be certified to the judge as contempts.⁵ This section sets forth the only authority conferred by the bankruptcy act for punishing for contempt in proceedings before a referee.⁶ But it should always be remembered that this section does not give bankruptcy courts broader powers to punish for contempt than are possessed by other Federal courts.⁷ The scope of the jurisdiction of a court of bankruptcy to punish a bankrupt for interfering with the bankruptcy proceedings, by giving false testimony and by failing to give correct information regarding the actual assets of his estate, depends upon the interference with that jurisdiction and not upon the injury to the public welfare and morals which is the basis of the crime of perjury.⁸

1. See Bankr. Act, § 41-b.

2. Eng. Act of 1883, § 99(4).

3. Act of 1867, § 4, R. S., § 4999; In re Woodward, Fed. Cas. 18,000.

4. See Bankr. Act, §§ 1 (7 and 38) (4). See also In re Speyer, Fed. Cas. 13,239.

5. Compare In re McBryde (D. C., N. C.), 3 Am. B. R. 729, 99 Fed. 686; Ex parte Buskirk, 72 Fed. 410.

6. Magen v. Campbell (C. C. A., 3d Cir.),

26 Am. B. R. 594, 186 Fed. 675, revg. 24 Am. B. R. 63, 179 Fed. 572.

7. Boyd v. Glucklich (C. C. A., 8th Cir.), 8 Am. B. R. 393, 116 Fed. 131.

8. In re Wiesebrock (D. C., N. Y.), 26 Am. B. R. 745, 189 Fed. 757. See also Magen v. Campbell (C. C. A., 3d Cir.), 26 Am. B. R. 594, 186 Fed. 675, revg. 24 Am. B. R. 63, 179 Fed. 572.

II. CONTEMPTS BEFORE REFEREES.

a. **Disobedience or resistance of orders.**⁹—(1) **IN GENERAL.**—The words of subdivision 1 are general. If it is an order that is disobeyed or resisted, it must be a "lawful" order.¹⁰ To "disobey or resist" will include any act in opposition to the order of the referee, which impedes or obstructs the performance of a duty, as where a person induces a bidder to withdraw his bid at a trustee's sale.¹¹ There is no such qualification of the words "writ" and "process;" yet the caution of the courts in asserting this remedy will probably make this omission immaterial. Disobedience may be charged of any one, bankrupt, creditor, or stranger. In most of the reported cases, the bankrupt has been haled to court on an order requiring him to surrender property belonging to his estate.¹² A bankrupt is not in contempt for disobedience of

9. See also Am. B. R. Dig. § 1160.

10. Lawful order.—In re Tudor (D. C., Col.), 2 Am. B. R. 808, 96 Fed. 942; In re McCormick (D. C., N. Y.), 3 Am. B. R. 340, 97 Fed. 566; In re Soloway § Katz (D. C., Conn.), 28 Am. B. R. 225, 195 Fed. 100.

11. Matter of Boyd (D. C., Tenn.), 36 Am. B. R. 497, 228 Fed. 1003, in which the court says: "I am constrained to conclude that to secretly buy off an actual bidder at a trustee's sale is an act of opposition to the order of the referee directing the sale, which impedes the trustee in its execution, and partially frustrates its primary purpose, and that hence it is to be regarded as a resistance thereto, as distinguished from a direct disobedience, coming within both the letter and the spirit of this inhibition."

12. Commitment for contempt ordered.—Where a bankrupt, at the time the petition was filed against him, and when the subpoena was served, was in the exclusive possession of certain property, but which he claimed to be using as bailee, and which two or three days afterwards he delivered to the person claimed by him to be the real owner, and failed to comply with a subsequent order of the court directing him to turn it over to the receiver, he is guilty of contempt, and should be committed to jail upon further failure to deliver such property to the receiver. In re Pottelger (D. C., Pa.), 24 Am. B. R. 648, 181 Fed. 640.

Where the bankrupt, a woman, fails to account for a relatively large amount of goods which she had purchased prior to bankruptcy, to keep any books of accounts, and to make any explanation of the great discrepancies in the amount turned over to the trustee and the amount which she should have had on hand, and where the husband and son, who carried on business for her, have testified that they did not appropriate or have the goods or the money, she must either account for this money or pay the penalty by being committed for contempt until she accounts for and turns over to the trustee the sum which, after making all possible allowances in her favor, represents the amount unaccounted for. In

re Deuell (D. C., Mo.), 4 Am. B. R. 60, 100 Fed. 633.

Where it appears that, upon a sale of property by a debtor within a month of his adjudication as an involuntary bankrupt, he turned over all the proceeds to his wife, she will be regarded as holding the money as his agent, and for disobedience of an order to turn over said money to his trustee, the bankrupt will be adjudged guilty of contempt, except as to such portion of said proceeds paid out by the wife, prior to the filing of the petition in bankruptcy, to one to whom she was indebted on a note and presumably an adverse claimant. In re Eddleman (D. C., Ky.), 19 Am. B. R. 45, 154 Fed. 160.

When a bankrupt has in his possession and control cash belonging to the bankrupt estate, the court may, within the meaning of the bankrupt act, make a "lawful order" directing him to turn the same over to the trustee, and on his failure to do so may commit him for contempt until he complies with the order. In re Purvine (C. C. A., 5th Cir.), 2 Am. B. R. 787, 96 Fed. 192.

Where the property of a bankrupt estate is traced to the recent control or possession of the bankrupt, it is presumed to remain there until he satisfactorily accounts to the court for its disposition or disappearance. Evidence considered and held to justify the granting of an order committing the bankrupt to jail for disobedience of an order to pay over to his trustees certain money in his possession or under his control, though the bankrupt, by affidavit, denied that he had the money. In re Lasky (D. C., Ala.), 20 Am. B. R. 729, 163 Fed. 99.

Where, upon consideration of all the record of the bankrupts' testimony upon their examination, it appears that they were carrying on business fraudulently for several months before their failure and must have had knowledge at the time of such examination of many details about which they professed ignorance or lack of recollection, even though allowance be made for a vicious method or lack of method in the conduct of their affairs, the bankrupts should be ad-

an order to deliver books to a receiver, where the person demanding the delivery thereof did not show that he was authorized to act for the receiver.¹³ Likewise in a proceeding to compel a bankrupt to turn over assets, some definite order that certain property should be turned over is necessary before a contempt of that order can occur.¹⁴

(2) INABILITY TO COMPLY WITH ORDERS OR TO RESTORE PROPERTY.¹⁵—A court of bankruptcy cannot lawfully order a bankrupt to deliver to his trustee money or property he has not got in his possession or under his control, and imprison him if he does not comply with the order, as that would be imprisonment for debt, and the order would not be relieved of that illegal and odious quality by calling it "imprisonment for contempt." Such orders are invalid.¹⁶ The court will not commit for contempt if convinced that the

judged guilty of contempt and committed to jail. In *re Magen and Magen* (D. C., Pa.), 24 Am. B. R. 63, 179, Fed. 572, revd. 26 Am. B. R. 594, 186 Fed. 675, on the ground that the trustee erred in not framing his petition so as to set forth a case of contempt under § 41.

Where, upon a proceeding to punish a bankrupt for contempt in refusing to obey an order of the referee in bankruptcy to turn over to the trustee money found by the referee to be in his possession which he had omitted from his schedules, it appears that the money was unquestionably in his possession just prior to his adjudication, that he made no attempt to explain what he did with it except by saying "I don't know" or "I can't remember," when questioned with reference thereto and that his whole course of conduct for several months prior to adjudication was evidence of a scheme to swindle his creditors by converting all of his assets he could into money, and first refuse to pay any creditors and then after the bankruptcy to defy the bankruptcy court by the false statement that he did not know how to account for the deficit in his assets, he will be committed to jail for four months, subject to such future order as may seem proper in the event he complies with the order of the referee. In *re Richards* (D. C., Ark.), 25 Am. B. R. 176, 183 Fed. 501.

The following cases have also held the acts or omissions charged to amount to contempt: In *re Tudor* (D. C., Colo.), 2 Am. B. R. 808, 96 Fed. 942; In *re McCormick* (D. C., N. Y.), 3 Am. B. R. 340, 97 Fed. 566; In *re Friedman* (Ref., N. Y.), 2 Am. B. R. 301; In *re Schleisinger* (D. C., N. Y.), 3 Am. B. R. 342, 97 Fed. 930; In *re Anderson* (D. C., S. C.), 4 Am. B. R. 640, 103 Fed. 854; *Ripon Knitting Mills v. Schreiber* (D. C., Wash.), 4 Am. B. R. 299, 101 Fed. 810; In *re Levin* (D. C., N. Y.), 6 Am. B. R. 743, 113 Fed. 498.

Commitment refused in the following cases: In *re Ogeles* (Ref., Tenn.), 2 Am. B. R. 514; In *re McBryde* (D. C., N. Car.), 3 Am. B. R. 729, 90 Fed. 686; In *re Mayer* (D. C., Wis.), 3 Am. B. R. 533, 98 Fed. 839; In *re Rosser* (C. C. A., 8th Cir.), 4 Am. B. R. 153, 101 Fed. 562, revg. s. c., 2 Am. B. R. 746, 96 Fed. 305; *Louisville Trust*

Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421, affg. *Sinsheimer v. Simonson* (C. C. A., 6th Cir.), 5 Am. B. R. 537, 107 Fed. 898; *Matter of Iron Clad Manufacturing Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 566, 201 Fed. 66. Consult also for "contempts," discussion under § 2, and "stays," under § 11, and cases cited *infra*, subd. 11.

13. *Skubinsky v. Bodek* (C. C. A., 3d Cir.), 22 Am. B. R. 699, 172 Fed. 340.

14. *Matter of Kalmanowitz* (D. C., N. Y.), 32 Am. B. R. 210, 211 Fed. 167.

15. See also Am. B. R. Dig. § 1166.

16. *Boyd v. Glucklich* (C. C. A., 8th Cir.), 8 Am. B. R. 393, 116 Fed. 131; *Epstein v. Steinfeld* (C. C. A., 3d Cir.), 32 Am. B. R. 6, 210 Fed. 236; *Matter of Stern* (D. C., N. J.), 32 Am. B. R. 281, 215 Fed. 979; *Freed v. Central Trust Co.* (C. C. A., 7th Cir.), 33 Am. B. R. 64, 215 Fed. 873.

Unless a bankrupt has the power to turn over property, no order requiring him to do so is valid. In *re Nisenon* (D. C., N. J.), 24 Am. B. R. 916, 182 Fed. 912. In *American Trust Co. v. Wallis* (C. C. A., 3d Cir.), 11 Am. B. R. 360, 126 Fed. 464, the court said: "In the absence of fraud or concealment, the bankruptcy court can only order the delivery of property to the trustee which the bankrupt is physically able to deliver up, having the same in his possession or control. If it shall appear that he is not physically able to deliver the property required by the order, then, confessedly, the proceedings for contempt, by fine or imprisonment, would result in nothing, certainly not in compliance with the order. The contempt in this case could only be purged by a reiteration of the physical impossibility to comply with the order whose disobedience is being thus punished. An order made under such circumstances would be as absurd as it is inconsistent with the principles of individual liberty."

Inability to comply with order.—"All the cases are practically harmonious in the declaration that, if the court is convinced that the bankrupt is unable to comply with the order, he should not be committed for contempt. Without the physical ability to comply, there can be no contempt. Un-

bankrupt is unable to pay, whether his inability is due to his criminal act,¹⁷ or misappropriation or any other reason; but a bare denial of ability to pay is by no means controlling.¹⁸ It has been held, however, that where a bankrupt denies that he had possession or control of money at the time he was ordered to pay it over to his trustee, and there is no evidence to indisputably show that such denial or claim is false or fraudulent, he cannot be punished for contempt.¹⁹ It is not enough to show that the referee's order has not been obeyed. It must be made to appear affirmatively that when the order was made the bankrupt had power to obey it and that the failure to obey was wilful.²⁰ The fact that a bankrupt had the property at one time may carry a

questionably that is the rule in this [3rd] circuit." In re Marks (D. C., Pa.), 23 Am. B. R. 911, 176 Fed. 1018. As laid down in the case of In re Chiles, 22 Wall. 157, 22 L. Ed. 819, where punishment for contempt is employed to compel the performance of some act or duty required of the respondent by the court, it must appear not only that he refuses to obey, but also that it is in his power to obey, and where an order is made, an attempt to punish for contempt in disregard of it, before it is made, is "*ex post facto* legislation and judicial enforcement at the same moment." Where the assignee for the benefit of creditors, in explaining his failure to turn over a certain balance to the trustee, stated that he had retained part of the said balance as his commission as assignee in reliance upon the belief that he was entitled to that amount, that he had used the money believing it to be his and had none of it left, that he is a man of no means and is unable to raise money to pay the sum into court, and that the remainder of the balance was paid to his attorneys for their professional services rendered to him as assignee, and that he is unable to pay over such sum for the reasons thus stated, the court will not compel an impossibility whether the inability to do the thing required may be in consequence of the respondent's own fault arising from a misconception of his rights, or committed before the court took jurisdiction of the matter, because there would be no way of enforcing such mandate of the court but imprisonment from which there could be no prospect of relief but by reiteration of the same facts, which would be unavailing. *Sinsheimer v. Simonson* (C. C. A., 6th Cir.), 5 Am. B. R. 537, 107 Fed. 898.

17. *Matter of McNaught* (D. C., Mass.), 35 Am. B. R. 609, 225 Fed. 511.

18. In re Cummings (D. C., Pa.), 26 Am. B. R. 130, 186 Fed. 1020.

Bare denial of ability.—If he cannot pay, and if this inability is the result of his own criminal act, he may, of course, be punished by the criminal law, although no civil remedy may be available in the situation. Even if he has misappropriated the money, the court has not the power to imprison him in a proceeding for contempt; for this would deprive him of his constitutional right to submit the charge of misappropriation to a jury in the

proper criminal court, and would deprive him, also of the inseparable right to be exempt from imprisonment for such an offense until he shall have been lawfully convicted. And it is also true that he cannot be imprisoned in a proceeding for contempt, if for any other reason he cannot produce the money; for the court cannot imprison as a punishment. It can only imprison to compel obedience to its order. But with an order to pay in force against him, and with the need to overcome the presumption of his ability to comply, it will no doubt happen at times that a bankrupt may fail to meet the burden of proof, and may be obliged to go to jail until he satisfies the court that he was telling the truth when he pleaded poverty. Certainly his bare denial of present ability to pay may be properly regarded with suspicion, and he may be required to satisfy the court with clearness that obedience to the order is wholly beyond his power. Such situations must be dealt with as they arise. No general rule can be laid down, and each case must stand upon its own facts. In re Marks (D. C., Pa.), 23 Am. B. R. 911, 176 Fed. 1018; if evidence shows denial to be false or fraudulent, bankrupt should be committed. *Matter of Kramer & Muchnick* (D. C., Pa.), 31 Am. B. R. 525, 210 Fed. 977.

Denial of possession insufficient.—Where, upon the application of the trustee to compel a director of a bankrupt corporation to turn over assets, testimony was taken upon which the referee found that such director was concealing a certain sum which he ordered to be turned over to the trustee, and no attempt was ever made to review such order, the affidavit of the director denying that he ever had such sum, without other explanation, is not a sufficient defense to an application to punish him for contempt for failing to obey the turn-over order. In re Weber Co. (C. C. A., 2d Cir.), 29 Am. B. R. 217, 200 Fed. 404.

19. *Matter of Stern* (D. C., N. J.), 32 Am. B. R. 281, 215 Fed. 979.

20. In re Cole (C. C. A., 1st Cir.), 20 Am. B. R. 761, 163 Fed. 180, 90 C. C. A. 50; In re Goodrich (C. C. A., 1st Cir.), 25 Am. B. R. 787, 184 Fed. 5; In re Soloway & Katz (D. C., Conn.), 28 Am. B. R. 225, 195 Fed. 100; *Freed v. Central Trust Co.* (C. C. A., 7th Cir.), 33 Am. B. R. 64, 215 Fed. 873, holding that the evidence must clearly demonstrate

presumption that he still has it, but the presumption may be rebutted by proof of a subsequent disposition.²¹ The settled rule is that, when property of a bankrupt estate is traced to the possession of one who receives it upon the eve of the bankruptcy of its owner, it is presumed that it remains in his possession or under his control until he satisfactorily accounts to the court of bankruptcy for its disposition or disappearance; that the burden is upon him to satisfactorily so account for it; and that he cannot escape an order for its surrender by simply denying under oath that he has it, or that it is the property of the bankrupt estate.²² This is a presumption of fact, varying in weight with the circumstances of each particular case.²³ The burden is upon the bankrupt to satisfactorily account for the non-production of property, in assuming which, however, he is entitled to the benefit of a reasonable doubt.²⁴ The bankrupt cannot escape an order for the surrender of such property by merely denying upon oath that he has it in his possession or under his control; it is still the duty of the referee and of the court, if satisfied beyond a reasonable doubt²⁵ that such property is in his possession or under his control, to

a present ability and wilful refusal to obey; citing *Samel v. Dodd* (C. C. A., 5th Cir.), 16 Am. B. R. 163, 142 Fed. 68; *Stuart v. Reynolds* (C. C. A., 5th Cir.), 29 Am. B. R. 412, 204 Fed. 709.

The power to punish for contempt should be cautiously exercised, and in cases only where wilful disobedience by the bankrupt is proved beyond a reasonable doubt, as in criminal cases. Where the disobedience charged is disobedience to the orders of a referee directing the bankrupt to pay money to the trustee, the better practice is to direct the bankrupt to be brought before the judge for a further examination upon petition as to whether or not he has made a full disclosure of the facts. In *re McCormick* (D. C., N. Y.), 3 Am. B. R. 340, 97 Fed. 566. Contempt proceedings are *quasi* criminal in their nature and it should be made clearly to appear that the persons charged knowingly and wilfully disregarded or set at defiance the order of the court. *Subkinsky v. Bodek* (C. C. A., 3d Cir.), 22 Am. B. R. 699, 172 Fed. 340.

21. *Matter of Heyman* (D. C., Pa.), 34 Am. B. R. 108, 225 Fed. 1000.

22. In *re Meier* (C. C. A., 8th Cir.), 25 Am. B. R. 272, 182 Fed. 799; *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; *Boyd v. Gluecklich* (C. C. A., 8th Cir.), 8 Am. B. R. 393, 116 Fed. 135-143, 53 C. C. A. 451; *Schweer v. Brown* (C. C. A., 3d Cir.), 12 Am. B. R. 178, 130 Fed. 328, 64 C. C. A. 574; *Matter of Dixon* (D. C., Mass.), 35 Am. B. R. 482, 224 Fed. 624; In *re Salkey*, Fed. Cas. Nos. 12,253 and 12,254. The principle there stated is sound, absolutely indispensable to the practical enforcement of the bankruptcy law, and it is the law of this circuit. In *re Richards* (D. C., Ark.), 25 Am. B. R. 176, 183 Fed. 501.

An order of a referee adjudging that a bankrupt turn over certain property to his trustee is a conclusive determination that at the time such order was made the bank-

rupt was in possession of the property directed to be turned over, and the time for review having expired, the bankrupt is estopped from denying such fact upon a motion to punish him for contempt for refusing to obey. The only issue open to the respondent in such case is to show what he had done with the property since the date of the order. In *re Frankel* (D. C., N. Y.), 25 Am. B. R. 920, 184 Fed. 539.

Upon what attachment must rest.—An order to compel a bankrupt to pay over assets which he has concealed may be wholly based upon the antecedent condition of facts existing at the time of the petition in bankruptcy; but an attachment for contempt for non-compliance with the order must rest upon conditions as the time of commitment, which is justified only by a finding of a present mental attitude of contumacy. *Matter of Heyman* (D. C., Pa.), 34 Am. B. R. 108, 225 Fed. 1000.

23. In *re Nisenen* (D. C., N. J.), 24 Am. B. R. 915, 182 Fed. 912; *Power v. Fuhrman* (C. C. A., 9th Cir.), 34 Am. B. R. 418, 220 Fed. 787.

24. *Power v. Fuhrman* (C. C. A., 9th Cir.), 34 Am. B. R. 418, 220 Fed. 787; In *re Nisenen* (D. C., N. J.), 24 Am. B. R. 915, 182 Fed. 912.

25. Reasonable doubt of ability to restore should relieve bankrupt of contempt. In *re Dickens* (D. C., Ala.), 23 Am. B. R. 660, 175 Fed. 808. And see In *re Marks* (D. C., Pa.), 23 Am. B. R. 911, 176 Fed. 1018.

Test of ability.—Upon a petition for an order directing a bankrupt to turn over property, the test is whether, by a fair preponderance of the testimony, it appears that the bankrupt has assets which have not been turned over, and the court need not be satisfied beyond any reasonable doubt that the property is in fact in the bankrupt's possession. *Matter of Dixon* (D. C., Mass.), 35 Am. B. R. 482, 224 Fed. 624.

order him to surrender it to the trustee and to enforce that order by confinement as for contempt.²⁶ Repeated refusals to explain or account for the disappearance of the property ordered to be turned over may lead to a belief that such property is in the bankrupt's possession or control,²⁷ but the rule should not be applied irrespective of the circumstances of the particular case.²⁸ The power to punish for a disobedience of an order to turn over assets should not be exercised in doubtful cases.²⁹ Where the bankrupt changes his mind and subsequently testifies truthfully, he ought not to be punished for contempt.³⁰

b. Misbehavior.—Subdivision 2 clearly refers to any act or omission at a session of the referee court or near its place of sitting, amounting to disrespect or contumacy. No accurate definition of the word "misbehave" is possible.³¹ But it must be during a hearing, or, if not, in the presence of the referee, amount to an obstruction of the hearing. This contempt may be committed by any person.³²

c. Contempts by witnesses.³³—(1) **IN GENERAL.**—Subdivisions 3 and 4 supplement subdivision 1. Subpoenæ are writs. Neglect to produce "any pertinent document" in response to subpoena is a contempt.³⁴ Refusal to appear after being subpoenaed is equally so.³⁵ A bankrupt who has no excuse or explanation to make as to his repeated disobedience of orders of a referee in bankruptcy to appear for examination and to produce his books of account, will be committed for contempt upon the certificate of the referee.³⁶ But a witness cannot be adjudged guilty of contempt where he has neither been tendered witness fees, nor served with a subpoena *duces tecum*.³⁷ The

²⁶ In re Shachter (D. C., Ga.), 9 Am. B. R. 499, 119 Fed. 1010; Boyd v. Glucklich (C. C. A., 8th Cir.), 8 Am. B. R. 393, 116 Fed. 131; In re Greenberg (D. C., N. Y.), 5 Am. B. R. 840, 106 Fed. 496; In re Schlesinger (C. C. A., 2d Cir.), 4 Am. B. R. 361, 42 C. C. A. 207, 102 Fed. 117; In re Deuell (D. C., Mo.), 4 Am. B. R. 60, 100 Fed. 633; In re Mayer (D. C., Wis.), 3 Am. B. R. 533, 98 Fed. 839; In re McCormick (D. C., N. Y.), 3 Am. B. R. 340, 97 Fed. 566; Matter of Stavrah (C. C. A., 2d Cir.), 23 Am. B. R. 168, 174 Fed. 330; In re Krall (D. C., Conn.), 24 Am. B. R. 941, 182 Fed. 191; In re Greenberg & Bro. (D. C., N. Y.), 24 Am. B. R. 943, 179 Fed. 413; In re Lippman (D. C., N. Y.), 25 Am. B. R. 874, 184 Fed. 551; Matter of Krichensky (D. C., Pa.), 34 Am. B. R. 362, 219 Fed. 347.

²⁷ In re Levy (C. C. A., 2d Cir.), 15 Am. B. R. 166, 142 Fed. 442; In re Nisenon (D. C., N. J.), 24 Am. B. R. 915, 182 Fed. 912; Matter of Dixon (D. C., Mass.), 35 Am. B. R. 482, 224 Fed. 624.

"I don't know," "I don't remember."—Such answers do not conceal the falsehood they are intended to hide. In re Meier (C. C. A., 8th Cir.), 25 Am. B. R. 272, 182 Fed. 799; In re Richards (D. C., Ark.), 25 Am. B. R. 176, 183 Fed. 501.

²⁸ In re Davidson (D. C., R. I.), 16 Am. B. R. 337, 143 Fed. 673.

²⁹ Samel v. Dodd (C. C. A., 5th Cir.), 16 Am. B. R. 163, 142 Fed. 68; In re Gordon (D. C., N. Y.), 21 Am. B. R. 290, 167 Fed. 239; In re Rogowski (D. C., Ga.), 21 Am. B. R. 553, 166 Fed. 165.

³⁰ **Recantation of false testimony.**—As a general rule, in cases in which the bankrupt has begun by giving even intentionally false testimony, if, during the course of the same examination, he changes his mind and testifies truthfully, he ought not to be punished for contempt. In exceptional cases, or in cases where the recantation does not take place until adjourned dates, and, in the meanwhile, because of his false testimony any injury has happened to the estate, a different conclusion may be reached. Matter of Gordon (D. C., N. Y.), 21 Am. B. R. 290, 167 Fed. 239. See also In re Wiesebrook (D. C., N. Y.), 26 Am. B. R. 745, 188 Fed. 757.

³¹ Consult *Blight v. Fisher*, Fed. Cas. 1,542; *U. S. v. Carter*, Fed. Cas. 4,740; *Sharon v. Hill*, 24 Fed. 726. See also Am. B. R. Dig. § 1163.

³² The statute does not limit contempt proceedings to the bankrupt only but includes any "person." Matter of Bronstein (Ref., N. Y.), 24 Am. B. R. 524.

³³ See also Am. B. R. Dig. § 1165.

³⁴ In re Fixen & Co. (D. C., Cal.), 2 Am. B. R. 822, 96 Fed. 748; In re Howard (D. C., Cal.), 2 Am. B. R. 582, 95 Fed. 415. See also Am. B. R. Dig. § 1164.

³⁵ In re Ellerbe, 13 Fed. 530; In re Spoford, 62 Fed. 443.

³⁶ Matter of Sorkin (D. C., N. Y.), 20 Am. B. R. 637, 166 Fed. 831.

³⁷ In re Johnson v. Knox Lumber Co. (C. C. A., 7th Cir.), 18 Am. B. R. 50, 151 Fed. 207.

emphasis laid upon "pertinent" should be noted. "Refuse" here probably includes "neglect." The restriction stated in the proviso clause is important. A referee's subpoena is really the district court's in effect, and, therefore, reaches as far as one issued in a case pending in such court. So, it is thought, of a mere order to appear, even if issued by the referee. Such a subpoena or order may be effective outside the judicial district, if the residence of the witness is not more than one hundred miles away;³⁸ but the witness cannot be compelled to appear before a referee outside of the State in which such witness resides.³⁹ If the party summoned is the bankrupt, he may be ordered to appear if his residence, whether in the district or the State, is no more than one hundred and fifty miles away.⁴⁰ The proviso that no person shall be required to attend as a witness before a referee at a place outside of the place of his residence does not limit the general provisions of the United States revised statutes relating to the taking of depositions and the attendance of witnesses.⁴¹

(2) "SUBPENAED."—The connection between this word and the last clause of subsection *a* seems close. A witness who refuses to appear may excuse himself in commitment proceedings if his lawful mileage and fee for one day's attendance was not paid or tendered him.⁴² The subsequent attempt to purge themselves of contempt, by offering themselves for examination should be considered in the infliction of punishment.⁴³

(3) REFUSAL TO BE SWORN OR TO TESTIFY.—This is as much a contempt as refusal to appear. A bankrupt who leaves the office of the referee before the completion of his testimony may be punished for contempt.⁴⁴ The refusal of a witness to answer questions because of their incriminating nature is discussed elsewhere.⁴⁵ After having taken the oath, as required, a refusal to answer questions at all subjects the witness to punishment for contempt for a refusal "to be examined according to law."⁴⁶ A witness who persists in using insulting and offensive language, not responsive to the questions put to him, and entirely irrelevant, should be punished for contempt.⁴⁷ The authorities are uniform that intentionally, testifying falsely or vaguely and contradictorily, constitutes a contempt of court under this section.⁴⁸ Where

38. See R. S., § 876. Consult *In re Hemstreet* (D. C., Ia.), 8 Am. B. R. 760, 117 Fed. 568.

39. *In re Cole* (D. C., Me.), 13 Am. B. R. 300, 133 Fed. 414. See also Am. B. R. Dig. § 49.

40. Compare under § 7.

41. *Matter of Washington Steel & Bolt Co.* (D. C., Wash.), 32 Am. B. R. 153, 210 Fed. 984.

42. For the mileage and fee, see R. S., §§ 848, 849, and, if in certain of the Western States, Act of August 3, 1892.

43. *In re Farkas* (D. C., N. Y.), 30 Am. B. R. 337, 204 Fed. 343.

44. *In re Vogel*, 5 N. B. R. 393, Fed. Cas. 16,984.

45. See Bankr. Act, § 7.

46. *In re Gitkin* (D. C., Pa.), 21 Am. B. R. 113, 164 Fed. 71.

47. *Ohio Valley Bank v. Mack* (D. C., Ohio), 20 Am. B. R. 919, 922, 163 Fed. 155.

48. *In re Fellerman* (D. C., N. Y.), 17 Am. B. R. 785, 149 Fed. 244; *Matter of Bick*

(C. C., N. Y.), 19 Am. B. R. 68, 155 Fed. 908; *Matter of Gordon* (D. C., N. Y.), 21 Am. B. R. 290, 167 Fed. 239; *Matter of Schulman* (D. C., N. Y.), 21 Am. B. R. 288, 167 Fed. 237; *Matter of Singer* (D. C., Pa.), 23 Am. B. R. 28, 174 Fed. 208; *Matter of Bronstein* (Ref., N. Y.), 24 Am. B. R. 524.

Refusal to make direct answers.—Where a bankrupt, under examination before a referee, persistently answers "I don't know" to questions about his property, which he must and evidently does know, and could answer fully, he refuses "to be examined according to law," and is guilty of "contempt" within the meaning of section 41-a, and punishable thereunder. *In re Gitkin* (D. C., Pa.), 21 Am. B. R. 113, 164 Fed. 71. Where a bankrupt, under examination before the referee, persistently evaded making direct answers to questions concerning the recent sale of a house, about which he could not have been ignorant, and it becomes necessary, because of such conduct, to suspend the examination, he will be committed to jail for

a bankrupt's whole examination is a perfectly transparent case of duplicity, intentional evasion and refusal to make any explanation of the facts connected with his bankruptcy, under the pretense of ignorance and stupidity, and he manifests a deliberate determination to conceal all the material facts within his knowledge, an order adjudging him guilty of contempt of court and committing him to jail will be affirmed.⁴⁹ Likewise where a bankrupt on his examination before the referee gives wilful false testimony as to his property, he may be summarily punished for contempt by the district judge.⁵⁰

III. PRACTICE AND PUNISHMENT.

a. In general.—This section makes it plain that the power to commit for contempt before a referee was not conferred upon the latter but was conferred on the judge of the court of bankruptcy before whom the matter must be certified in accordance with its provisions; and in order that the court may take cognizance of the offense and punish the offender, he must be proceeded against strictly in accordance with the mode pointed out by the bankruptcy act, and any deviation from that procedure the bankrupt may take advantage of on a motion to dismiss the proceedings. The statutory procedure being full and complete must be strictly followed and a failure to do so will be fatal.⁵¹

b. Notice to person charged.—The person charged with contempt for failure to comply with an order of the referee should not be punished before he is given an opportunity to prove his inability to do so.⁵² He should have notice of the motion to punish him for such disobedience and have his day in court,⁵³ and the fact that the bankrupt, upon proceedings for contempt, is allowed to be cross-examined does not cure the defect of want of notice.⁵⁴

contempt. In re Singer (D. C., Pa.), 23 Am. B. R. 28, 174 Fed. 208.

Testifying falsely on hearing before referee.—Evidence on motion to punish a witness for contempt held to sustain a finding that his conduct was contemptuous in testifying falsely in a proceeding wherein an endeavor was made to show that a sale by bankrupt of a stock of goods a few days before bankruptcy was collusive, and that he should be punished therefor. In re Michaels (D. C., N. Y.), 28 Am. B. R. 38, 194 Fed. 552.

49. Matter of Schulman (C. C. A., 2d Cir.), 23 Am. B. R. 809, 177 Fed. 191; United States v. Appel (D. C., N. Y.), 31 Am. B. R. 154, 211 Fed. 495; Matter of Shear (D. C., N. Y.), 32 Am. B. R. 833, 188 Fed. 677.

50. Matter of Shear (D. C., N. Y.), 32 Am. B. R. 833, 188 Fed. 677.

51. In re Gitkin (D. C., Pa.), 21 Am. B. R. 113, 164 Fed. 71.

52. In re Hausman (C. C. A., 2d Cir.), 10 Am. B. R. 64, 121 Fed. 984; In re Cole (C. C. A., 1st Cir.), 16 Am. B. R. 302, 144 Fed. 392; First Nat'l Bank of Biddeford v. Cole (C. C. A., 1st Cir.), 16 Am. B. R. 302, 144 Fed. 392.

53. In re Cole (C. C. A., 1st Cir.), 20 Am. B. R. 761, 163 Fed. 180; In re Rosser (C. C. A., 8th Cir.), 4 Am. B. R. 153, 101 Fed. 562; revg. 2 Am. B. R. 746, 96 Fed. 308; In re Stavrahn (C. C. A., 2d Cir.), 23 Am. B. R. 168, 174 Fed. 330; In re Hausman (C. C. A.,

2d Cir.), 10 Am. B. R. 64, 14 Fed. 984; In re Baum (C. C. A., 8th Cir.), 22 Am. B. R. 295, 169 Fed. 410. See also Am. B. R. Dig. §§ 1171, 1172.

Entitled to hearing.—Where a person has been duly ordered to pay over to the trustee money found to be due the estate and he fails to do so, he is nevertheless entitled to be heard on the question whether he should be committed to jail for such failure, and an *ex parte* order, judging him in contempt, of the application for which he had no notice stating when or where such application would be made, will be reversed. Matter of Banzai Mfg. Co. (C. C. A., 2d Cir.), 25 Am. B. R. 497, 183 Fed. 298. Where an order requiring a bankrupt to turn over property to his trustee was based upon alleged disclosures of the bankrupt when under examination prior thereto, without notice to him that his examination was to be used against him, and upon further testimony taken without notice to him and without giving him an opportunity to appear and cross-examine the witnesses, he being in fact detained elsewhere by order of the referee at the instance of the trustee while such testimony was being taken, such order deprived the bankrupt of his legal rights and should be annulled. In re Frank (C. C. A., 8th Cir.), 25 Am. B. R. 486, 182 Fed. 794.

54. In re Rosser, (C. C. A., 8th Cir.), 4 Am. B. R. 153, 101 Fed. 562.

c. The certificate of the referee.—The judge alone can punish for a contempt committed before the referee.⁵⁵ He is notified of the contempt by a certificate, signed and usually prepared by the referee.⁵⁶ The certification of the record to the district judge is not a jurisdictional condition but only a matter of procedure, and, the court having power under section sixteen, subdivision two, to punish persons for contempts committed before referees an order committing a person for contempt, granted without such certification, is not subject to collateral attack by *habeas corpus*.⁵⁷ This certificate must give "the facts" and show the commission of one of the contempts enumerated in subdivision a. The certificate should be filed with the clerk of the court. Where a referee rules that certain evidence is improper he may refuse to certify the matter for contempt proceedings to the judge.⁵⁸ The certificate is not binding upon the bankruptcy court nor does it conclude the court's action in any way.⁵⁹

d. Pleading and evidence.⁶⁰—On the filing of the referee's certificate, the matter is customarily brought up on petition and order. If by petition, the facts stated should bring it clearly within subdivision a, and the order should be in the nature of an order to show cause.⁶¹ A petition, alleging in substance that bankrupts during their examination knowingly and wilfully committed perjury on many occasions, does not state a case of contempt under this section.⁶² A copy of the petition should be served with the order. Attachment may also be asked, and, in exceptional cases, granted.⁶³ Although, perhaps, the bankrupt or person charged with contempt need not plead, it is often advantageous to set out the defense in a definite manner so that the court may pass on it intelligently with a view of bringing the issues clearly before the appellate tribunal. This, of course, should not be allowed to permit unnecessarily, one set of pleadings after another, or in any way to

55. *Smith v. Belford* (C. C. A., 6th Cir.), 5 Am. B. R. 291, 106 Fed. 658; *Bank of Ravenswood v. Johnson* (C. C. A., 4th Cir.), 16 Am. B. R. 206, 143 Fed. 463; *In re Gitkin* (D. C., Pa.), 21 Am. B. R. 113, 164 Fed. 71, holding that a witness may not be punished for contempt before a referee unless the matter is certified to district judge, as required by this section.

56. *In re Salkey*, Fed. Cas. 12,254; *In re Graves*, 29 Fed. 60; *Ohio Valley Bank Co. v. Mack* (D. C., Ohio), 20 Am. B. R. 919, 163 Fed. 155; *In re Wiesebrock* (D. C., N. Y.), 26 Am. B. R. 745, 188 Fed. 757.

A referee has the right to enter an order directing the bankrupt to surrender to the trustee any money or property which he has found to be in the possession or under the control of the bankrupt, opportunity having been given to such bankrupt to be heard upon this question; upon the refusal or neglect of the bankrupt to obey the order thus made, the referee may enter upon the record the fact of such disobedience, and the fact that the bankrupt is therefore in contempt of court; the facts must then be certified to the district judge, who will then deal with the question as if the case had originally arisen in the district court. *In re Miller* (D. C., Ia.), 5 Am. B. R. 184, 105 Fed. 57. See

also *In re Oliver* (D. C., Cal.), 2 Am. B. R. 73, 96 Fed. 85.

57. *U. S. ex rel. Birbaum v. Henkel* (C. C., N. Y.), 26 Am. B. R. 199, 185 Fed. 553.

58. *In re Romine* (D. C., W. Va.), 14 Am. B. R. 785, 138 Fed. 837.

59. **Conclusiveness of referee's findings.**—A referee's findings that bankrupt was withholding property in a certain sum, deduced from statements of account which were in several respects but an approximation, and which were not based solely upon book entries or other controlling data, or made upon conflicting evidence depending upon the credibility of witnesses, will not operate as an estoppel or otherwise conclude the bankruptcy court, in proceedings to punish bankrupt for contempt in failing to obey an order of the referee to turn over to the trustee the sum so found to be due. *In re Haring* (C. C. A., 6th Cir.), 29 Am. B. R. 387, 203 Fed. 229, affg. 27 Am. B. R. 285, 193 Fed. 168.

60. See also Am. B. R. Dig. §§ 1170, 1173.

61. *Creditors v. Cozzens*, Fed. Cas. 3,378; *U. S. v. Berry*, 24 Fed. 780; *In re Swan*, 150 U. S. 637, 37 L. Ed. 1207.

62. *Magen v. Campbell* (C. C. A., 3d Cir.), 26 Am. B. R. 594, 186 Fed. 675, revg. 24 Am. B. R. 63, 179 Fed. 572.

63. *In re Phelan*, 62 Fed. 817.

cause protracted delay.⁶⁴ The ability to turn over assets is not a matter of affirmative allegation in the petition; the inability to restore is rather a matter of defense.⁶⁵ On the return of the order or appearance of the alleged contemnor, the judge must "in a summary manner, hear the evidence of the acts complained of," and punish or refuse to punish in the same manner as if the contempt had been committed before him. The district judge, in a proceeding for the punishment of a bankrupt for refusing to obey the order of a referee may refer to such order and whatever prior proceedings occurred before the referee. He should also receive all material proofs relating to matters preceding the referee's report, as well as those following it.⁶⁶ In the review of such an order of the referee the ordinary rule as to the force of findings of fact is not applicable for the reason that the determination is not governed by the weight of testimony, as the enforcement of the order devolves upon the reviewing court, and with it the duty of ascertaining if a sufficient cause exists.⁶⁷ Formerly, it was held that the respondent's answer must be taken as true.⁶⁸ This, however, seems not now the law.⁶⁹ The issue raised by the response or answering affidavits may be referred to a referee as special master;⁷⁰ but not, it is thought, to the referee before whom the contempt was committed. Where the district judge allows the bankrupt five days after the entry thereof to comply with the order of the referee, such order is to be deemed affirmed.⁷¹

e. Punishment.—If found guilty, the contemnor may be fined or imprisoned, or both; but not punished in any other way.⁷² There seems to be no limit on the time of imprisonment. Usually the order provides that he stand committed until he performs the act for failure of which he is declared to be in contempt. A commitment of this kind has been held not a violation of the constitutional prohibition against imprisonment for debt.⁷³ But it is not the

64. *In re Goodrich* (C. C. A., 1st Cir.), 25 Am. B. R. 787, 184 Fed. 5.

65. Allegation as to ability.—Where it has been determined, after a full hearing, that a bankrupt has concealed the proceeds of a sale of certain real estate, a petition by the trustee to punish him, as for contempt, for disobedience of an order requiring him to turn over such proceeds, need not allege the bankrupt's present ability to comply with said order. *Matter of Stavrah* (C. C. A., 2d Cir.), 23 Am. B. R. 168, 174 Fed. 330.

66. *In re Goodrich* (C. C. A., 1st Cir.), 25 Am. B. R. 787, 184 Fed. 5; *In re Cole* (C. C. A., 1st Cir.), 20 Am. B. R. 761, 163 Fed. 180, 90 C. C. A. 50.

Notes of testimony given by bankrupts on examination at creditors' meeting which was not completed because of their refusal to answer, are admissible in evidence in a proceeding to punish them for contempt, although neither were read to or signed by them, as required by General Order No. 22, especially where their accuracy is proved by the stenographer who made them. *Matter of Kaplan Bros.* (C. C. A., 3d Cir.), 32 Am. B. R. 305, 213 Fed. 753.

67. *In re Mayer* (D. C., Wis.), 3 Am. B. R. 533, 98 Fed. 839. See also *In re Tudor* (D. C., Col.), 2 Am. B. R. 808, 96 Fed. 942.

68. See the minority opinion of Judge

Shelby in *In re Purvine* (C. C. A., 5th Cir.), 2 Am. B. R. 787, 96 Fed. 192. And see *In re May*, 1 Fed. 737.

69. *In re Pitman*, Fed. Cas. 11,184.

70. *In re McCormick* (D. C., N. Y.), 3 Am. B. R. 340, 97 Fed. 566; *In re Speyer*, Fed. Cas. 13,239. The contempt must be proved beyond a reasonable doubt. *In re Cashman* (D. C., N. Y.), 21 Am. B. R. 284, 168 Fed. 1008.

71. *In re Hershkowitz* (D. C., N. Y.), 14 Am. B. R. 86, 136 Fed. 950.

72. Bankr. Act, § 2 (13).

73. Imprisonment for debt.—*In re Anderson* (D. C., S. Car.), 4 Am. B. R. 640, 103 Fed. 854; *Ripon Knitting Mills v. Schreiber* (D. C., Wash.), 4 Am. B. R. 299, 101 Fed. 810; *In re Schlesinger* (C. C. A., 2d Cir.), 4 Am. B. R. 361, 102 Fed. 117; *Matter of Lator* (C. C. A., 2d Cir.), 15 Am. B. R. 290, 142 Fed. 960; *In re Rosser* (C. C. A., 8th Cir.), 4 Am. B. R. 153, 101 Fed. 562, revg. 2 Am. B. R. 746, 96 Fed. 308; *In re Epstein* (D. C., Pa.), 30 Am. B. R. 387, 206 Fed. 568. Compare *Bogart v. Supply Co.*, 27 Fed. 722.

An order to pay over money, or to surrender other property as the case may be, in the possession of the bankrupt and forming part of his estate, is not an order for the payment of a debt, but an order for the

intention of the law that a contemnor should be perpetually imprisoned where it appears that he is actually unable to respond; he will ordinarily be released after the court is satisfied that he has been adequately punished for his contumacy.⁷⁴ If the offense is a criminal contempt, that is, against the authority of the court, the commitment may be for a specified term.⁷⁵ The practice after the filing of the certificate conforms to that in the Federal courts and the numerous precedents and text-books may be consulted with profit.⁷⁶ The remedy of the contemnor after commitment is habeas corpus.⁷⁷ An order of commitment, granted without the referee certifying to the judge facts constituting a contempt, is not subject to collateral attack by habeas corpus.⁷⁸ Where a bankrupt has been confined for failing to comply with an order requiring him to pay a large sum of money to his trustee, he will be discharged where he shows that he has no money or property, either in possession or under his control, and none is held for his benefit, and that he is never likely to be able to pay.⁷⁹

surrender of assets of the bankrupt placed in *custodia legis* by the adjudication; and his commitment upon refusing to comply with the order is not imprisonment for debt. *Samel v. Dodd* (C. C. A., 5th Cir.), 16 Am. B. R. 163, 142 Fed. 68. And see *Stuart v. Reynolds* (C. C. A., 5th Cir.), 29 Am. B. R. 412, 204 Fed. 709, affg. 27 Am. B. R. 200, 190 Fed. 967.

74. *In re Karp* (D. C., N. Y.), 28 Am. B. R. 559, 196 Fed. 998.

Failure of bankrupt to deliver assets.—A bankrupt, against whom an application for an attachment is made because of his failure to deliver assets to his trustee, should not be subject to an indefinite term of imprisonment based upon the finding of a serious controverted fact reached without the sanction and support of the verdict of a jury. *Matter of Heyman* (D. C., Pa.), 33 Am. B. R. 837.

75. *Matter of Kaplan Brothers* (C. C. A., 3d Cir.), 32 Am. B. R. 305, 213 Fed. 753, holding that a contempt of a bankrupt in refusing to be examined may be punished by a definite term of imprisonment, where the proceeding is carried on against the defendants by and before officials representing the public.

Civil and criminal contempt extinguished.

—The character and purpose of the punishment distinguish civil and criminal contempts, the punishment for a civil contempt being remedial and for the benefit of the complainant in the contempt proceedings, while the punishment for a criminal contempt is punitive, to vindicate the authority of the court; if imprisonment be imposed in a civil proceeding it must be coercive in its nature and the committal must stand only unless and until the defendant performs the affirmative act required by the court's order, but when inflicted in a criminal proceeding it is fixed and certain as a punishment for completed disobedience of orders or for other past wrongdoing. *In re Kahn* (C. C. A., 2d Cir.), 30 Am. B. R. 322, 204 Fed. 581, citing *Gompers v. Buck Stove Co.*, 221 U. S. 418, 55 L. Ed. 797, 31 Sup. Ct. 492.

76. Compare under § 2.

77. Compare *In re Houston* (D. C., Ky.), 2 Am. B. R. 107, 94 Fed. 119.

78. *United States ex rel. Birbaum v. Henkel* (C. C., N. Y.), 26 Am. B. R. 199, 185 Fed. 553.

79. *In re Cummings* (D. C., Pa.), 26 Am. B. R. 477, 188 Fed. 767; *In re Epstein* (D. C., Pa.), 30 Am. B. R. 387, 206 Fed. 568.

SECTION FORTY-TWO.

RECORDS OF REFEREES.

§ 42. **Records of Referees.**—*a* The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States.

b A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case.

c The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court.

Analogous provisions: In U. S.: Act of 1867, § 4, R. S., § 5000.

In Eng.: None.

Cross-references: To the law: Certified copies of proceedings before referee admitted as evidence, § 21-d.

Duty of referee to make up records embodying evidence or substance thereof, § 39-a(5); duty to preserve evidence taken before him, § 39-a(9).

To the General Orders: Referee to indorse papers filed with him, II.

Proof of claims and other papers filed with referee, XX.

Examination of witnesses before referee, how conducted; depositions to be taken and signed by witness, XXII.

Orders of referee to recite as to notice, etc., XXIII.

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SYNOPSIS OF SECTION.

RECORDS OF REFEREES.

I. Records of Referees, 696.

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b. What are records, 697.

c. When and how certified to the clerk, 697.

I. RECORDS OF REFEREES.

a. How kept.—Section 39 (5) (7) requires the referee to keep records and transmit them to the clerk; this section should be construed therewith. The records should conform in general to the records of equity cases in the district courts. The former law required that a short memorandum be made

of the proceedings, and a copy of it sent each day to the clerk.¹ This is not required now. By analogy, however, some referees make typewritten memoranda of meetings or orders on separate sheets of paper, filing them in a temporary cover from time to time and binding the whole into a book at the end of the case.² No papers are actually recorded;³ and formal orders are not inserted in the record books. They should be drawn and filed by the attorneys in charge. After reference, all papers should be filed with the referee,⁴ and he should indorse them with "the day and hour of filing and a brief statement" of their character.⁵

b. What are records.—As provided in subsection *b*, the record of a case consists of the referee's record book and "the papers on file;" all testimony taken should form a part of the record book. Some referees have adopted a record wrapper into which are bound the sheets constituting the record book, the whole, at the conclusion of the case, wrapped about the papers that have been filed, thus making a compact bundle. Others make up what may be called a roll of the proceeding. The records constitute the case and when through, copies, introduced in evidence in other courts, are *prima facie* proof of the facts stated therein.⁶ Testimony taken, as authorized by the referee, is a part of the record in the proceedings, and creditors generally have access to it while it remains in the custody of the referee.⁷

c. When and how certified to the clerk.—Under subsection *c*, when the case is concluded before the referee, his records must be certified to by him and transmitted to the clerk. This means when the case is administered; whether the bankrupt has his discharge or not is not material. It is thought too, that when a trustee is appointed but fails to qualify, or qualifies, and files a report of no assets but does not ask for a final meeting, the case, after a sufficient lapse of time,—as, for instance, when no claims have been filed and a year elapsed⁸—will be deemed "concluded." The records should be accompanied by a brief certificate by the referee to the effect that the case is closed and that the papers handed up constitute his records.⁹ It is often attached to or forms the filing cover of the record books. When thus filed, the referee's records become a part of those of the district court itself. From that time, the referee ceases to have jurisdiction of the case.¹⁰

1. Act of 1867, § 4, R. S., § 5000.

The Bankruptcy Act is strict in requiring a paper constituting a part of the record to be carefully and formally kept. *Matter of Lacey & Co.* (D. C., Sup. Ct.), 35 Am. B. R. 231, 43 Wash. L. Rep. 434.

2. For an elaborate and satisfying system of records, see that suggested in 1 N. B. N. 459-461.

3. Compare R. S., § 4992.

4. General Order XX.

5. General Order II.

6. Bankr. Act, § 21-d. Compare Act of 1867, § 38; *In re Spencer*, Fed. Cas. 13,229; *In re Crane*, Fed. Cas. 3,352.

7. *In re Sammelsohn* (D. C., N. Y.), 23

Am. B. R. 528, 174 Fed. 911, citing *Collier on Bankruptcy* (7th ed.), p. 522.

8. See Bankr. Act, § 57-n.

9. For a form, see 1 N. B. N. 120, Form N.

10. The record to be certified on appeal in bankruptcy cases is the record of the case in the bankruptcy court, and an appeal will not be heard until a complete record, containing, in itself and not by reference, all the papers, exhibits, depositions and other proceedings necessary to the hearing in the appellate court, has been prepared by the clerk at the direction of counsel. *Cook Inlet Coal Fields Co. v. Caldwell* (C. C. A., 4th Cir.), 17 Am. B. R. 135, 147 Fed. 475. See also Am. B. R. Dig. §§ 1242, 1266.

SECTION FORTY-THREE.

REFEREE'S ABSENCE OR DISABILITY.

§ 43. **Referee's Absence or Disability.**—*a* Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy.

Analogous provisions: In U. S.: Act of 1867, § 5, R. S., § 5007.

In Eng.: None.

Cross-references: To the law: Reference of cases after adjudication to referee within territorial jurisdiction, § 22.

Appointment, terms and districts of referees, § 34(1).

Compensation and fees of referee, § 40.

To the General Orders: Filing petitions against bankrupt in two or more districts VI.

I. REFEREE'S ABSENCE OR DISABILITY.

This section supplements § 34 (1), and confers jurisdiction on the judge to appoint a new referee when the referee of a specified jurisdiction is absent or disqualified or the office is vacant. In any of such cases, (1) the judge may act, or he may (2) appoint another referee or (3) he may designate a referee of the same judicial district to fill the vacancy. The section is often availed of when a referee is disqualified¹ in a specified case. It could, it is thought, be used where a referee suffered from a prolonged illness or became insane, he being then "absent" from his duties as much as if out of the country. If not, the judge could remove him under the authority given by § 34. The power to transfer cases from one referee to another,² and the pro-rating of fees³ in that event, are considered elsewhere. This section seems to imply that, subject to the exception in § 22-b, all cases arising in a referee district must in the first instance be referred to that referee.⁴ Except where specially appointed under this section to fill a vacancy temporarily, the jurisdiction of a referee does not extend outside the district of his appointment.⁵

1. See under § 39 of this work.

2. Bankr. Act, § 22-b.

3. Bankr. Act, § 40-b.

4. Compare Bankr. Act, § 22-a.

5. In re Schenectady Engineering & Const. Co. (D. C., N. Y.), 17 Am. B. R. 279, 147 Fed. 868.

SECTION FORTY-FOUR.

APPOINTMENT OF TRUSTEES.

§ 44. **Appointment of Trustees.**—*a* The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so.

Analogous provisions: In U. S.: Act of 1867, §§ 13, 18, R. S., §§ 5034, 5036, 5038, 5039, 5040, 5041, 5042; Act of 1841, § 3; Act of 1800, §§ 6, 7.

In Eng.: Act of 1883, §§ 21, 84; as to official receiver being trustee, §§ 54(1), 121.

Cross-references: To the law. Trustee includes all of the trustees of an estate, § 1(26).

Jurisdiction of bankruptcy court to appoint trustees, § 2(17).

Qualifications, death or removal of trustee, §§ 45, 46.

Duties of trustees, generally, § 47; compensation, § 48.

Accounts and papers; bonds, §§ 49, 50-b, c, k.

Meetings of creditors, how conducted, § 55; voting at creditors' meetings, § 56.

Proof and allowance of claims, § 57; provable debts, § 63.

To the General Orders: Appointment of trustee subject to approval of referee or judge,

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To the Official Forms: Appointment of trustee by creditors, No. 22; by referee, No. 23.

Notice to trustee of his appointment, No. 24; official bond, No. 25; order approving bond, No. 26.

Order that no trustee be appointed, No. 27.

Petition for removal of trustee, No. 52; notice of petition, No. 53; order for removal, No. 54; order for choice of new trustee, No. 55.

See also Supplementary Forms, *post*; Hagar and Alexander's Bankruptcy Forms, 2d Ed., Nos. 173, 194, 195, 197, 198.

SYNOPSIS OF SECTION APPOINTMENT OF TRUSTEES.

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I. HISTORY AND COMPARATIVE LEGISLATION.

a. *Scope of section.*—This section should be read with § 63, on what are provable debts, with § 1 (9), on who are creditors and their agents, proxies, etc., with § 56, on who may vote and what constitutes a voting majority at creditors' meetings, and with § 45, on the qualifications of trustees. None of the matters belonging to those subjects are discussed here. This section has to do only with the kindred topics indicated in the synopsis, *supra*.

b. *Comparative legislation.*—(1) IN ENGLAND.—One of the storm centers of bankruptcy legislation has been the method of appointing the officers of administration.¹ The English system has seen sawed from administration by the court through commissioners of its own appointment,² to that by trustees chosen by the creditors. The present system³ is midway between the two, the official receiver, who is an officer of the board of trade, taking charge of the estate until the creditors can choose; and even then the board of trade may certify objections to their choice to the high court, which the latter may hold sufficient. If no appointment is made by the creditors within four weeks, the board of trade may itself appoint a trustee, subject to the creditors' right

1. For the different methods of appointment in Europe, see "Bankruptcy; a Study in Comparative Legislation," by Dunscomb, Vol. II, No. 2, Columbia College Studies in History, etc.

2. Thus, from 1831 to 1869.

3. Eng. Act of 1883, § 21.

subsequently to appoint some one in his stead. This is, in effect, appointment by the creditors, with a qualified veto by the board of trade. The corresponding officer under the French system is the syndic. As in England, a temporary official syndic is appointed, and the creditors may then advise the court as to their wishes. But their advice is not binding. The result is, as has been said, that the syndic "is generally a person enjoying the confidence of the court who has made the settlement of bankruptcy estates his special profession." This method seems to pertain in most of the continental countries.⁴

(2) IN THE UNITED STATES.—The history of bankruptcy legislation in this country reveals the same changes. Our administrators have been called, successively, either assignees or trustees. Not until our law of 1867 was the principle that insolvent estates are really trusts and the creditors, as beneficiaries, entitled to choose the trustees, recognized by our law.⁵ Even under that law, the recognition was somewhat half-hearted.⁶ The choice in the first instance, though by the creditors as now, was subject to the approval of the judge; and yet, in case an assignee failed to qualify or the office became vacant, the judge or register might ignore the creditors and "fill the vacancy." The judge could "for any cause needful or expedient" either appoint additional assignees or order a new election. We have never adopted the asset-saving device of a temporary official trustee,⁷ but continue to limp along with, when "absolutely necessary for the preservation of estates," a court-chosen receiver.⁸

II. APPOINTMENT OF TRUSTEES.

a. **In general.**—The present law goes further than any bankruptcy statute either here or elsewhere in giving creditors the right to choose the trustees. The section under discussion declares: "The creditors shall . . . appoint one trustee or three trustees." There is nothing here giving the judge or referee the right to approve or disapprove. Nor is there anything in § 2 (17) conferring on them such a power; though some have thought it is inherent in the court under the last sentence of § 2. Trustees in bankruptcy are creatures of the statute. Viewed as Congress left it, therefore, the law of 1898 vests in the creditors an unqualified right to appoint their own trustees.⁹ Indeed § 44, which declares they "shall appoint," under familiar canons of construction, must be taken as controlling on the earlier and more general words of § 2 (17), giving courts of bankruptcy power to "appoint trustees," pursuant to the recommendations of creditors.

b. **By creditors at first meeting.**—Both the statute and the forms indicate that the creditors must appoint a trustee or trustees "at their first meeting."¹⁰ This means the meeting called under the notice known as Form No. 18. It includes any regular continuance of such meeting, a practice often resorted

4. See Mr. Dunscomb's admirable monograph, referred to above.

5. There was even an official assignee appointed by the court, under the laws of 1841.

6. Thus, see Act of 1867, § 13, R. S., § 5034.

7. Eng. Act of 1883, § 66.

8. Compare Bankr. Act, § 2 (3).

9. In re Lewensohn (D. C., N. Y.), 3 Am. B. R. 299, 98 Fed. 576.

10. See In re Jones, Fed. Cas. 7,447; In re Lake Superior, etc., Fed. Cas. 7,997; In re Back Bay Automobile Co. (D. C., Mass.), 19 Am. B. R. 835, 158 Fed. 679, revg. 19 Am. B. R. 33. See also Am. B. R. Dig. §§ 312-317.

to,¹¹ although the selection of a trustee may not be tied up indefinitely by obstructive tactics which are obviously for the purpose of delay.¹² It has been suggested that the provision that trustees be elected at the first meeting is directory and not mandatory.¹³ Form No. 23 should be used when the referee appoints; Form No. 22 may be used when the creditors do the same. If, however, there is no contest among them, a simple order similar to Form No. 23, declaring such fact and that the creditors present appointed the trustee named and that the referee approved their choice, is suggested as time-saving and proper.¹⁴

c. Voting for trustees.—Subsection *a* of § 56, provides that creditors shall pass upon all matters submitted to them by a majority vote "in number and amount of claims of all creditors, whose claims have been allowed and are present."¹⁵ The most important act to be performed by creditors is the election or appointment of a trustee.¹⁶ Creditors may vote in person or they may be represented at the meeting by duly authorized agents, attorneys or proxies.¹⁷ It appears to be established by the weight of authority that an attorney admitted to practice in a court of bankruptcy may not represent his client, who is a creditor of the bankrupt, in the election of a trustee, unless he presents and files a written power of attorney.¹⁸ The method of voting at meetings of creditors generally and the power of proxies to vote is considered elsewhere.¹⁹

11. Meeting continued by adjournments.—Where the vote at a creditors' meeting showed no choice of a trustee, one candidate having a majority in number and another a majority in amount, and the supporters of both candidates informed the referee that an agreement was hopeless, and there was nothing to show that reasonable opportunity for choice by the creditors at the regular time had not been afforded, it was not error for the referee to deny a request, not unanimous, for an adjournment of two weeks for the purpose of allowing the creditors to vote again. In *re Goldstein* (D. C., Mass.), 29 Am. B. R. 301, 199 Fed. 665. In *re Nice & Schreiber* (D. C., Pa.), 10 Am. B. R. 639, 123 Fed. 987, it was expressly held that the first meeting of creditors may be continued by proper and reasonable adjournments so as to give the creditors every reasonable opportunity to exercise the power conferred upon them to choose a trustee; so where a majority of the creditors both in number and amount ask for a reasonable postponement in order that the differences existing among the creditors may be disposed of their request should be granted.

Where the bankrupt proposes an offer of composition at the first meeting of creditors, the referee, in a proper case, should postpone the choice and appointment of a trustee, to give opportunity for the filing of such proposed composition, and, if it is filed, should further postpone such choice and appointment until the entry of an order refusing to confirm such agreement. In *re Rung Bros.* (Ref., N. Y.), 2 Am. B. R. 620.

12. In *re Sumner* (D. C., N. Y.), 4 Am. B. R. 123, 101 Fed. 224; In *re Malino* (D. C., N. Y.), 8 Am. B. R. 205, 118 Fed. 368. The referee should proceed with the election where those who object to claims presented fail to file objections, or to offer evidence in support of those made orally. In *re Syracuse Paper & Pulp Co.* (D. C., N. Y.), 21 Am. B. R. 174, 164 Fed. 275.

13. In *re Fisher* (D. C., N. J.), 14 Am. B. R. 366, 135 Fed. 223, wherein it was held that the election of a third trustee in addition to the two elected at the first meeting was valid, and the three trustees could join in a petition for an order directing the sale of the bankrupt's property.

14. A form will be found in "Supplementary Forms," *post*. See also Hagar and Alexander's Bankruptcy Forms (2d Ed.).

15. See Bankr. Act, § 56a, and discussion thereunder, *post*.

16. *Bollman v. Tobin* (C. C. A., 8th Cir.), 38 Am. B. R. 504.

17. Creditor includes "his duly authorized agent, attorney or proxy." Bankr. Act, § 1 (9). See *Matter of Capital Trading Co.* (D. C., N. Y.), 36 Am. B. R. 339, 229 Fed. 806.

18. *Matter of Capital Trading Co.* (D. C., N. Y.), 36 Am. B. R. 339, 229 Fed. 806; In *re Henschel* (C. C. A., 2d Cir.), 7 Am. B. R. 662, 113 Fed. 443; In *re Lazoris* (D. C., Wis.), 10 Am. B. R. 31, 120 Fed. 716; In *re Scully* (D. C., Pa.), 5 Am. B. R. 716, 108 Fed. 373; In *re Eagles & Crisp* (D. C. N. Car.), 3 Am. B. R. 733, 99 Fed. 733.

19. See under § 56 of this work.

d. Appointment by the court or referee.²⁰—(1) **FAILURE TO AGREE.**—Only in case a majority in number and amount do not appoint can the judge or the referee appoint.²¹ If the creditors are deadlocked, or for any other reason the creditors may not agree upon the selection of a trustee, the statute protects the interests of all the creditors by requiring the court to appoint the trustee.²² Where there is a sharp conflict or a close vote, resulting in a majority in amount one way and in number the other, the choice of one not a candidate and, if possible, who has had experience in the management of estates, is thought the part of wisdom.²³ But there can be, under the present law, no official or general trustee as seems to have been the practice under the law of 1841.²⁴ In making the appointment the court is governed by the limitations as to qualifications of trustees contained in § 45.²⁵

(2) **DELAY IN APPOINTMENT.**—A delay of more than a year cannot have the effect of taking away the power of the court to appoint a trustee.²⁶ When the creditors "neglect to recommend the appointment" of a trustee, the judge or referee may appoint.²⁷

20. See also Am. B. R. Dig. §§ 318, 319.

21. See Bankr. Act, § 56; *Matter of Knox* (C. C. A., 6th Cir.), 34 Am. B. R. 461, 221 Fed. 36; *In re Henschel* (D. C., N. Y.), 6 Am. B. R. 305; 109 Fed. 861.

The word "court" as used in section 44 necessarily includes referee. *In re Brooke* (D. C., Pa.), 4 Am. B. R. 50, 100 Fed. 432.

When court may appoint.—Where defective proofs of debt presented by creditors, representing a majority in number of claims, at a meeting held for the purpose of selecting a trustee, though corrected, are also objected to upon the ground that said creditors are represented in this by the attorney for the bankrupt and the only effect in the end will be to prevent an election, neither of the two persons voted for having a majority in number and amount, the court may appoint a trustee and relieve the referee of that duty. *In re Morris* (D. C., Pa.), 18 Am. B. R. 828, 154 Fed. 211. Where at the first meeting of creditors no creditors were present, no trustee was appointed for want of assets and but one creditor proved his debt, and the final report of the referee recited that the estate had been fully administered and so far as referred to him was closed, the court, after the lapse of more than a year, has jurisdiction to appoint a trustee upon the petition of the assignee of the creditor alleging that the bankrupt had died leaving various properties which he had fraudulently disposed of with intent to defraud creditors. *Clark v. Pidcock* (C. C. A., 3d Cir.), 12 Am. B. R. 309, 129 Fed. 745.

When referee may appoint.—Where the bankrupt's former attorney had a majority in number of the creditors, while his opponent had a majority in amount, and no request was made for a second ballot, the referee may appoint the trustee. *In re Machin* (D. C., Pa.), 11 Am. B. R. 449, 128 Fed. 315; *In re Richards* (D. C., N. Y.), 4 Am. B. R. 631, 103 Fed. 849. Unless it appears that the election has

been so conducted as to jeopardize the interests of the creditors, the choice of a majority of the creditors in number and amount should be permitted to stand. *In re Eastlack* (D. C., N. J.), 16 Am. B. R. 529, 145 Fed. 68. The referee may appoint a trustee upon the failure of the creditors to obtain a majority vote for any one approved. *In re Kennedy & Co.* (D. C., Ind.), 14 Am. B. R. 611, 136 Fed. 451.

22. *Matter of Forestier* (D. C., Cal.) 35 Am. B. R. 51, 222 Fed. 537; *Matter of Knox* (C. C. A., 6th Cir.), 34 Am. B. R. 461, 221 Fed. 36; *In re Stadley & Co.* (D. C., Ala.), 26 Am. B. R. 149, 187 Fed. 285.

23. *In re Machin* (D. C., Pa.) 11 Am. B. R. 449, 128 Fed. 315; *In re Nice & Schreiber* (D. C., Pa.), 10 Am. B. R. 639, 123 Fed. 987. General Order XIV.

24. Compare Rule 51, Southern District of New York, under Act of 1841; *Owen on Bankruptcy*, Appendix, p. 11.

25. *In re Seider* (D. C., N. Y.), 20 Am. B. R. 708, 163 Fed. 139.

Appointment of unsuccessful candidate.—Where neither of the two candidates nominated for trustee had the requisite votes of the majority in number and amount of the creditors, and there was, therefore, no election, the referee has no authority to appoint one of the unsuccessful candidates, as such authority would obviate the purpose and intent of the bankruptcy act requiring that when the creditors act there must be a majority in number and amount in order to make the election effective. *Matter of F. & D. Co.* (D. C., N. Y.), 38 Am. B. R. 285.

26. *Clark v. Pidcock* (C. C. A., 3d Cir.), 12 Am. B. R. 309, 129 Fed. 745.

27. *Matter of Knox* (C. C. A., 6th Cir.), 34 Am. B. R. 461, 221 Fed. 36; *In re Clay* (C. C. A., 1st Cir.), 27 Am. B. R. 715, 192 Fed. 830; *Matter of Forestier* (D. C., Cal.), 35 Am. B. R. 51, 222 Fed. 537; *In re Brooke* (D. C., Pa.), 4 Am. B. R. 50, 100; *In re Kuffler* (D. C., N. Y.), 3 Am. B. R. 162, 97

(3) **DISPUTED CLAIMS.**—If at the first meeting all claims offered for proof are in dispute, and it is impracticable at that time to settle the dispute, it appears to be within the discretion of the referee to appoint a trustee.²⁸ So if the determination of disputes involving claims representing more than a majority in amount, will necessarily delay the election, so that the interests of the estate will be prejudiced, a referee would be justified in appointing a trustee.²⁹

e. Approval or disapproval.³⁰—(1) **BY JUDGE OR REFEREE.**—(I) *In general.*—The bankruptcy act of 1867 contained a provision that: "All elections or appointments of assignees shall be subject to the approval of the judge, and when, in his judgment, it is for any cause needful or expedient, he may appoint additional assignees or order a new election." The present bankruptcy act contains no provision like the one above quoted from the act of 1867, but the Supreme Court has promulgated an order (General Order 13), reading as follows: "The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only." It is evident that the Supreme Court intended by this order to establish a rule concerning the approval or disapproval of elections by creditors similar to that which existed under the act of 1867. The decisions under the present law on this point show that such has been the understanding of our Federal courts.³¹ Judges and referees have ample power to prevent the appointment of incompetent or improper trustees by the discretion given them to determine who are creditors,³² coupled with their power to continue meetings and notify and bring in absent claimants.³³

Fed. 187, holding that, where the creditors of the bankrupt have held two sessions, one lasting six hours, in attempting to choose a trustee, and where at the second session they were still disagreed and unable to make a choice, it appearing that there was immediate need of the appointment of a trustee, it was proper for the referee to make an appointment. Where creditors fail to appoint a trustee and acquiesce in the appointment made by the referee, they cannot complain.

28. *Matter of Cohen* (D. C., Mass.), 11 Am. B. R. 439, 131 Fed. 391.

29. *Matter of Knox* (C. C. A., 6th Cir.), 34 Am. B. R. 461, 221 Fed. 36, in which the court said: "The objections to claims had already caused six weeks' delay, and the end was not in sight. The circumstances demanded an immediate selection of a trustee. The referee was put to a choice of three courses: (1) To continue the existing condition indefinitely, to the detriment of the estate; or (2) to have an election at which the majority of creditors in amount would be disfranchised; or (3) to make an appointment himself. Presumably the testimony thus far taken did not make likely the ultimate rejection of this majority in amount of claims, and, if such was the situation, the referee was not bound by any hard and fast rule to disfranchise this majority. Although the creditors are, by the Bankruptcy Act, given control of the election under normal circumstances, and such control should not

lightly be disturbed, yet in case of emergency the referee has, in our judgment, ample power to appoint a trustee—a power, however, which should be most sparingly exercised. The following authorities sustain more or less effectively the existence of such power: *In re Cohen* (D. C., Mass.), 11 Am. B. R. 439, 131 Fed. 391; *In re Milne, Turnbull & Co.* (D. C., N. Y.), 20 Am. B. R. 248, 159 Fed. 280; *In re Goldstein* (D. C.), 199 Fed. 665."

30. See also Am. B. R. Dig. § 316.

31. *In re Eastlack* (D. C., N. J.), 16 Am. B. R. 529, 145 Fed. 68; *In re Lewensohn* (D. C., N. Y.), 3 Am. B. R. 299, 98 Fed. 576; *In re Rekersdres* (D. C., N. Y.), 5 Am. B. R. 811, 108 Fed. 206; *Falter v. Reinhard* (D. C., Ohio), 4 Am. B. R. 782, 104 Fed. 292, on review in C. C. A. *In re McGill* (C. C. A., 6th Cir.), 5 Am. B. R. 155, 106 Fed. 57; *In re Kreuger* (D. C., Ky.), 27 Am. B. R. 440, 196 Fed. 705; *Kiser Co. v. Georgia Cotton Oil Co.* (C. C. A., 5th Cir.), 31 Am. B. R. 376, 208 Fed. 548.

32. See Bankr. Act, §§ 56, 57 and 63; General Order XXI.

33. The election will be set aside and a new election ordered where a creditor has not been notified of the meeting, although the court had determined that he was entitled to participate in the proceedings. *In re Evening Standard Pub. Co.* (D. C., N. Y.), 21 Am. B. R. 156, 164 Fed. 517.

(II) *Grounds for disapproval.*—The approval or disapproval of the appointment of a trustee rests largely in the discretion of the judge or referee, depending upon circumstances dealing primarily with the competency of the person selected and conditions under which he was selected.³⁴ The purpose of the statute is to secure the election of a "competent" person as trustee; any determination by the referee that a person was prejudiced in favor of the bankrupt, or that fraud might result, should be respected and sustained if the evidence is sufficient. The choice of the creditors is entitled to consideration and should not be overruled without substantial reasons.³⁵ The court or referee should permit free expression of the creditors' will and should not arbitrarily exercise the power of disapproval.³⁶ A determination that the person chosen was disqualified because he had represented creditors, or because he had voted for himself, cannot be upheld.³⁷ The question as to whether there is collusion with the bankrupt should be definitely disposed of before the appointment, and if there is reasonable grounds for the belief that such collusion exists the referee may decline to approve the election.³⁸ The election of a trustee by the creditors is not to be disapproved, unless there is good reason for believing that the election has been directed, managed, or controlled by the bankrupt or his attorney, or by some influence opposed to the creditors' interests.³⁹ The bank-

34. *Matter of Wilson* (D. C., Mass.), 37 Am. B. R. 513; *Matter of Rosenfeld-Goldman Co.* (D. C., Mass.), 36 Am. B. R. 520, 228 Fed. 921, holding that rights of creditors in the selection of a trustee are important, but the decision as to the selection ought to rest largely with the referee.

35. *Ballman v. Tobin* (C. C. A., 8th Cir.), 38 Am. B. R. 504; *Matter of Merritt Construction Co.* (C. C. A., 2d Cir.), 33 Am. B. R. 616, 219 Fed. 555.

36. *Wilson v. Continental Building & Loan Assn.* (C. C. A., 9th Cir.), 37 Am. B. R. 444, 232 Fed. 824.

37. *In re Margolies* (D. C., N. Y.), 27 Am. B. R. 398, 191 Fed. 369.

38. *In re Dayville Woolen Co.* (D. C., Conn.), 8 Am. B. R. 85, 114 Fed. 674, holding that, upon the refusal of counsel for a majority of the creditors, who had been attorney for the bankrupt, to answer whether any of the claims attempted to be devoted by him for trustee were held in the interest of the bankrupt, it is the duty of the referee to put the question and permit a full investigation into the relations of the attorney to the bankrupt and the creditors, and if there appears to be reasonable cause to believe any such collusion exists, the referee should either decline to receive the collusive votes or to approve the election.

39. *In re Eastlack* (D. C., N. J.), 16 Am. B. R. 529, 145 Fed. 68; *In re Lloyd* (D. C., Wis.), 17 Am. B. R. 96, 148 Fed. 92.

Interest of creditors.—Where the person appointed trustee of a bankrupt estate receives his appointment, in part, at least, as a result of the active efforts in the solicitation and voting of claims by a creditor which is his corporate employer and in which he is a stockholder, and such creditor holds security for a part of its debt and is charged with having preferences, such

person's appointment will be disapproved. *Matter of Anson Mercantile Co.* (D. C., Tex.), 25 Am. B. R. 429, 185 Fed. 993. In an involuntary bankruptcy the withholding by the referee of his approval of the trustee chosen by the creditors is not justified because he had incurred the hostility of the bankrupt, or as receiver had unreasonably delayed an accounting and distribution of funds to creditors. *In re Mangan* (D. C., Pa.), 13 Am. B. R. 303, 133 Fed. 1000.

At solicitation of attorneys.—A referee should not refuse to approve the election of a trustee upon the ground that a firm of attorneys who will be employed by the trustee if elected also represent a creditor of the bankrupt who is claiming the return of certain merchandise delivered to the bankrupt upon an alleged consignment, where it was stated to the referee that if it should afterwards appear that there was any conflict between the interests of the creditor and the trustee, the attorneys would not represent the creditor, and that the trustee would be represented also by other attorneys. *Matter of Archbold & Hamilton* (D. C., Cal.), 38 Am. B. R. 256.

Solicitation of claims by receiver for the purpose of being appointed trustee.—In the absence of affirmative evidence of collusion with the debtor, it is no objection to the appointment, as trustee, of the receiver in bankruptcy, who received a majority in number and amount of the claims allowed, that he sent a letter to various creditors signed by him as receiver, asking that they send their proofs of claims, and containing directions as to the manner and form of proof, it appearing that the schedules had been filed and that he had no better opportunity to obtain the proofs than any one else. *In re Crooker Co.* (Ref., Mass.), 27 Am. B. R. 241

rupt's former attorney should not be appointed, especially where it appears that they continue in close relations to each other.⁴⁰ And a referee is justified in disapproving the appointment of a person who was an assignee of the bankrupt under a common law assignment and whose account as assignee is unsettled,⁴¹ and he is likewise justified in disapproving the appointment of a member of a law firm which acted as counsel for such assignee.⁴² An appointment of a trustee by the creditors should not be disapproved by the referee solely upon the ground that he is a non-resident of the county in which the bankrupt's estate is located,⁴³ or because he had an office with an attorney who represented certain stockholders of the bankrupt who claimed to be creditors, but whose claims were to be contested and who were former clients of the trustee.⁴⁴ If the trustee is otherwise competent it does not follow that his election should be disapproved by the referee because of his friendliness to the debtor.⁴⁵

(III) *Effect of disapproval.*—A referee cannot ignore the appointment of a trustee by creditors and proceed summarily to appoint without holding another election. If he disapproves of the appointment it is his duty to make an order in writing to that effect, and direct that another meeting be held to fill the vacancy.⁴⁶ A referee who disapproves of the creditors' choice of trustee may not appoint one of his own selection; but he must call another meeting of the creditors.⁴⁷ A trustee elected by creditors does not take office until his selection is approved, and until that time there is a vacancy which may only be filled by the creditors.⁴⁸ Whenever a referee disapproves of a choice of trustee made by creditors, another opportunity must be permitted them to make a selection of one who is free from any "entangling alliances" that might interfere with the proper discharge of the duties devolving upon him.⁴⁹

(IV) *Review of approval.*—An order of a referee approving the creditors'

40. *In re Wink* (D. C., Md.), 30 Am. B. R. 298, 206 Fed. 348.

The uninfluenced votes of creditors in favor of one for trustee who had formerly been the attorney for the bankrupt are not a nullity so that the opposing candidate for trustee must be declared elected. *In re Machin* (D. C., Pa.), 11 Am. B. R. 449, 128 Fed. 315.

41. *In re Clay* (C. C. A., 1st Cir.), 27 Am. B. R. 715, 192 Fed. 830.

42. *In re Clay* (C. C. A., 1st Cir.), 27 Am. B. R. 715, 192 Fed. 830.

43. *Matter of Jacobs and Roth* (D. C., Pa.), 18 Am. B. R. 728, 157 Fed. 988.

44. *In re Blue Ridge Packing Co.* (D. C., Pa.), 11 Am. B. R. 36, 125 Fed. 619.

45. *Matter of Turner & Co.* (Ref. Mass.), 20 Am. B. R. 646.

The true rule on this subject is well illustrated in the case of *In re Eastlack* (D. C., N. J.), 16 Am. B. R. 529, 537, 145 Fed. 68, 74, in which there is a review of the authorities, and where the court says: "Harmony of action between an honest bankrupt and an honest trustee tends to promote creditors' interests, and there is no law against the election of a person as trustee merely because he is acceptable to the bankrupt."

46. *In re Mackellar* (D. C., Pa.), 8 Am.

B. R. 669, 116 Fed. 547; *In re Mangan* (D. C., Pa.), 13 Am. B. R. 303, 133 Fed. 1,000; *In re Hare* (D. C., N. Y.), 9 Am. B. R. 520, 119 Fed. 246; *In re Van De Mark* (D. C., N. Y.), 23 Am. B. R. 760, 175 Fed. 287.

Effect of disapproval.—Where a referee in bankruptcy disapproves of the appointment as trustee, of the person elected by the creditors, a vacancy exists which calls for a second election, and an immediate appointment of another person, by the referee, cannot be made. *In re Margolies* (D. C., N. Y.), 27 Am. B. R. 398, 191 Fed. 369.

47. *In re Lewensohn* (D. C., N. Y.), 3 Am. B. R. 299, 98 Fed. 576; *In re Mackellar* (D. C., Pa.), 8 Am. B. R. 669, 116 Fed. 547.

48. *Matter of Clay* (C. C. A., 1st Cir.), 27 Am. B. R. 715, 192 Fed. 830.

Vacancy created.—The effect of the disapproval by a referee of the person first selected by creditors as trustee is to vacate the election, not to throw out the votes for the person elected but disapproved. *Matter of Wilson* (D. C., Mass.), 37 Am. B. R. 513.

49. *In re Van De Mark* (D. C., N. Y.), 23 Am. B. R. 760, 175 Fed. 287, citing *Collier on Bankruptcy* (6th ed.), p. 379.

appointment of a trustee is subject to review by the district judge,⁵⁰ but a defeated candidate for trustee is not entitled to a petition for review because of the exclusion of certain votes by the referee, the only persons who can appeal by petition for review are those whose votes have been cast out.⁵¹

(2) **UNDUE ACTIVITY ON THE PART OF THE BANKRUPT.**—Undue activity on the part of a bankrupt in the selection of a trustee has always been discountenanced by the courts, and where it appears the appointment of the trustee should not, as a rule, be approved.⁵² It is well settled by all the authorities that the trustee represents the creditors, and not the bankrupt, in the administration of the estate; and that it is improper that the bankrupt shall actively interfere with the matter of his selection and appointment; and that, if he does interfere and the person aided by him is appointed by votes procured by such interference, the appointment should for that reason be

50. See Bankr. Act, § 38; *In re Hanson* (D. C., Minn.), 19 Am. B. R. 235, 156 Fed. 417.

51. It was so held on a petition for review taken by a receiver who was a candidate for trustee and was defeated by the exclusion of votes cast for him by a commissioner of deeds acting under a power of attorney acknowledged before himself. The commissioner of deeds himself might have appealed by reason of his representation of creditors who were the real parties in interest. *Matter of Grossman* (D. C., N. Y.), 34 Am. B. R. 32, 225 Fed. 1020.

52. "Interference by the bankrupt, the voting of claims in his interest or at his direction has always been discountenanced by the courts and held to invalidate a choice of trustees thus secured." *In re McGill* (C. C. A., 6th Cir.), 5 Am. B. R. 165, 161, 106 Fed. 57, citing *In re Wetmore*, Fed. Cas. No. 17,466 and *In re Bliss*, Fed. Cas. No. 1,543, decided under the act of 1867. Where it appears that the election was a close one, that the person elected received the votes of bankrupt's counsel, brother-in-law and clerk, that, upon objections of the bankrupt, claims, which would have made such selection impossible, were thrown out and it was evident that the person selected had received advance information from the bankrupt that the petition had been filed and who were the general creditors, and, undoubtedly upon the suggestion of the bankrupt or his attorney, had immediately become a candidate for trustee and actively engaged in sending out letters to creditors of the bankrupt, soliciting their claims, his election will be set aside. *In re Ployd* (D. C., Pa.), 25 Am. B. R. 194, 183 Fed. 791. Bankrupt had an estate of only \$3,500, to be divided, after paying expenses, amongst creditors having claims aggregating \$9,000, over \$7,000 of which were claims said to be owing to near relatives of the bankrupt or members of the family. One of the bankrupt's attorneys presented the claims of and had powers of attorney from about 80 per cent. of these claimants at the first meeting of creditors,

thus controlling the appointment of the trustee and he insisted, over the objection of the other creditors upon the selection of an attorney as trustee, who had an office in the building occupied by bankrupt's attorneys. It was held that the referee was justified in disapproving as contrary to public policy, a selection which would allow the bankrupt and his relatives to administer the estate. *In re Sitting* (D. C., N. Y.), 25 Am. B. R. 682, 182 Fed. 917.

Canvassing of creditors to secure votes.—The trustee appointed by the referee, after his election by a majority of creditors, both in number and amount, had offices in the same suite as bankrupt's attorney and the evidence showed that he had prior to the filing of the schedules, solicited votes on claims, a number of claims having been sworn to before him as a notary. It was held, that while the practice of soliciting votes was to be condemned as it did not appear that the selection of the trustee was in the interest of the bankrupt, in order to control the administration of the estate for her benefit without regard for the interests of creditors, the appointment should be confirmed. *Matter of Fisher* (D. C., Pa.), 26 Am. B. R. 793, 193 Fed. 104. The votes of creditors for trustees cast upon proxies solicited by the bankrupt are properly rejected. *In re Machin & Brown* (D. C., Pa.), 11 Am. B. R. 449, 128 Fed. 315. Where it appears that the election of a trustee by a large majority of all the creditors is accomplished by the vote of an attorney in fact holding proxies obtained from creditors, acting in combination with the bankrupt, his election should be disapproved by the referee. *In re Henschel* (Ref., N. Y.), 6 Am. B. R. 25. Where the creditors, all of whom had proved their claims and were unpreferred, had received 100 per cent., the fact that some of them voted for a new trustee at the bankrupt's solicitation is not sufficient to disturb the appointment, the court being satisfied that the person selected will make a suitable trustee and that the bankrupt's solicitation for votes was not by way of improper in-

disapproved.⁵³ However high the character of a proposed trustee may be, the active interference of the bankrupt in his favor will render him ineligible for appointment, and such appointment will for that reason be disapproved.⁵⁴ This does not prevent the appointment of a person who is acceptable to the bankrupt. It is the activity of the bankrupt in bringing about the selection that is prohibited.⁵⁵ The creditors of a bankrupt corporation should be permitted to vote for a trustee without interference from its officers.⁵⁶

f. Appointment to fill vacancies.—(1) **IN GENERAL.**—Here again the policy of the law is different from its predecessor. Immediately a vacancy occurs either, (1) in the office of trustee, or (2) after an estate has been reopened, or (3) a composition has been set aside, or (4) a discharge has been revoked, or (5) “if there is a vacancy in the office of trustee,” the creditors must be summoned in the usual way; and they appoint the trustee.⁵⁷ The value of

ducement. *In re Morton* (D. C., Mass.), 9 Am. B. R. 508, 118 Fed. 908. The election of an apparently competent and indifferent person approved by the referee, sustained, against an objection that the election was the result of a conspiracy between the attorney for a majority of the creditors and an officer of the bankrupt. *In re Ketterer Manfg Co.* (D. C., Pa.), 19 Am. B. R. 225, 155 Fed. 987.

Furnishing list of creditors before filing schedules.—Where, upon the review of an order appointing a trustee whose election was alleged to have been procured by his action in securing the proofs and votes of certain creditors by means of a list of creditors which he solicited from the bankrupt before the filing of the schedules, it is found as a fact that, acting entirely in behalf of creditors, he requested the list of creditors without the solicitation of the bankrupt or for its benefit, and that his action and that of others in procuring claims and voting the same was justifiable, the order of appointment as trustee will not be disturbed. *Matter of James H. Turner & Co.* (Ref., Mass.), 20 Am. B. R. 646, dist’g *In re Lloyd*, 17 Am. B. R. 96, 148 Fed. 92, which held that no attorney should be permitted to vote any claim on the choice of trustee, that has come to him through the instrumentality of the bankrupt, in furnishing him with a list of the creditors before the schedules are filed, but the attorney is not disqualified from voting upon the claims of other creditors who employed him in the regular way and had no concern with the bankrupt in the matter.

53. *In re McGill* (C. C. A., 6th Cir.), 5 Am. B. R. 155, 106 Fed. 57; *In re Hanson* (D. C., Minn.), 19 Am. B. R. 235, 156 Fed. 417; *In re Ployd* (D. C., Pa.), 25 Am. B. R. 194, 183 Fed. 791. The election of a trustee, obtained through the active efforts of the bankrupt, should be disapproved. *Matter of Rothleder* (D. C., N. Y.), 37 Am. B. R. 116, 232 Fed. 398.

“All the creditors of a bankrupt estate have the right to be fairly cared for in the administration of the estate. All the

creditors have the right to a fair and an impartial trustee, one not under the influence of the bankrupt or of his attorney to any substantial degree, especially where there are or may be conflicting interests, questions as to claims and the conduct of the bankrupt prior to and after bankruptcy.” *In re Sitting* (D. C., N. Y.), 25 Am. B. R. 682, 182 Fed. 917. The beneficiaries are not the bankrupt, but the creditors. For that reason the law gives to them alone the choice of trustee; the bankrupt has no part in it because presumably he has no interest in it. *In re Lewensohn* (D. C., N. Y.), 3 Am. B. R. 299, 98 Fed. 576. The trustee should not be nominated in fact by the bankrupt or his attorney, because he must be free from all entangling alliances or associations that might in any way control his independence and responsibilities. *In re Rekersdres* (D. C., N. Y.), 5 Am. B. R. 811, 108 Fed. 206.

54. *In re Hanson* (D. C., Minn.), 19 Am. B. R. 235, 156 Fed. 417; *In re Kreuger* (D. C., Ky.), 27 Am. B. R. 440, 96 Fed. 705.

Interest of bankrupt or others in his behalf.—Neither the bankrupt himself, nor his attorney, nor any assignee, nor his attorney can be permitted to control the selection of a trustee. If creditors knowingly join with such parties in an effort to elect a trustee, the remedy is to reject their selection and permit the creditors who are not in the combination to make the selection. *Matter of Stowe* (D. C., Cal.), 38 Am. B. R. 76.

55. *In re Eastlack* (D. C., N. J.), 16 Am. B. R. 529, 145 Fed. 68; *In re Ployd* (D. C., Pa.), 25 Am. B. R. 194, 183 Fed. 791; *In re Walker & Co.* (D. C., Ala.), 29 Am. B. R. 499, 204 Fed. 132.

56. *In re Day & Co.* (D. C., N. Y.), 23 Am. B. R. 56, 174 Fed. 164, holding that, where the election of a trustee for a bankrupt corporation has been caused by the interference of its officers, an order will be entered declaring that there was a failure to elect a trustee, and ordering a new election.

57. See General Order XXV, and compare *In re Lewensohn* (D. C., N. Y.), 3 Am. B. R.

the words just quoted, unless they refer to a case where at the first meeting no trustee was appointed,⁵⁸ does not seem clear. The purport of the clauses on vacancies is, however, beyond the domain of discussion. All vacancies must be filled as if at a first meeting. It is thought, however, that, when a trustee duly appointed fails to qualify or dies before he can do so, on motion or consent of all the creditors who voted at the meeting when he was chosen, they may appoint a substitute trustee, without calling another meeting for that purpose.⁵⁹ If a trustee embezzles the funds of the estate and absconds, his action amounts to an abandonment of his office and a new trustee may be appointed without proceedings for removal or notice to the absconding trustee.⁶⁰

(2) **AFTER AN ESTATE HAS BEEN REOPENED.**—Where an estate is reopened the office of trustee is vacant and the court may appoint where the creditors have failed to do so;⁶¹ but the appointment of a trustee being vested in the court upon certain conditions, a failure to comply with such conditions does not deprive the court of its jurisdiction, and the validity of the appointment of a trustee after an estate is reopened cannot be attacked in a collateral action.⁶² The continuance of the former trustee in office pending the appointment of a new trustee by the creditors, is an inequality, but does not necessarily affect his official acts.⁶³

g. Number of trustees.—Under the former law, the creditors chose “one or more assignees.”⁶⁴ Now, there can be but one or three trustees. Votes for two trustees should, therefore, be refused.⁶⁵ It seems also that where one of three trustees dies, a meeting should be called to fill the vacancy.⁶⁶ At such a meeting the creditors may of course vote to continue the survivor alone, or elect him as a single trustee.

h. When no trustee.—By General Order XV, in no-asset cases, provided there are no appearances by or for creditors, the judge or referee may “direct that no trustee be appointed.” This practice is new; it is a boon to bankrupts and referees. Its validity may, however, be doubted.⁶⁷ If the creditors do not appoint, “the court shall do so.” If there is no trustee, the difficulty of setting off exempt property is apparent.⁶⁸ Efforts have been made to overcome this difficulty by local rules,⁶⁹ but their validity is also doubtful. If no trustee is appointed at such a first meeting a trustee may still be appointed

299, 98 Fed. 576; *In re Hare* (D. C., N. Y.), 9 Am. B. R. 520, 119 Fed. 246.

Election to fill vacancy caused by removal.—Where a trustee in bankruptcy has been removed because of his employment of the attorney for an assignee for the benefit of creditors, by which attorney he had been employed, such attorney should not be allowed to control the election of a new trustee. *Matter of Forestier* (D. C., Cal.), 35 Am. B. R. 51, 222 Fed. 537.

58. See General Order XV.

59. *In re Wright* (Ref., N. Y.), 2 Am. B. R. 497.

60. *Schofield v. United States ex rel. Bond* (C. C. A., 6th Cir.), 23 Am. B. R. 259, 174 Fed. 1.

61. *In re Newton* (C. C. A., 8th Cir.), 6 Am. B. R. 52, 46 C. C. A. 399, 107 Fed. 429; *Matter of Rochester Sanitarium and Baths Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 355, 222 Fed. 22, quoting the language of the text.

62. *Fowler v. Jenks* (Sup. Ct., Minn.), 11 Am. B. R. 255, 90 Minn. 74, citing *Harvey v. Tyler*, 2 Wall. (U. S.) 238, 17 L. Ed. 871, and *Lamprey v. Nudd*, 29 N. H. 299.

63. *Matter of Rochester Sanitarium and Baths Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 355, 222 Fed. 22.

64. Act of 1867, § 13, R. S., § 5034.

65. See *In re Fisher* (D. C., N. J.), 14 Am. B. R. 366, 135 Fed. 223.

66. See last paragraph. Compare *In re Scheiffer*, Fed. Cas. 12,445.

67. Thus, see, under the former law, *In re Cogswell*, Fed. Cas. 2,959; *In re Graves*, Fed. Cas. 5,709.

68. This must be done by a trustee. Bankr. Act, § 47-a(11). Exempt property does not pass directly to the claimant. See under § 6.

69. Thus see rule in jurisdiction of Referee *Hotchkiss* (Erie Co., N. Y.), 1 N. B. N. 115.

later, "if the court shall deem it desirable."⁷⁰ In cases covered by this general order, further meetings may by order be dispensed with. Form No. 27 should be used, with such additions⁷¹ as to the setting apart of exemptions as the court feels it has power to grant.

i. **Notification, bond, qualification, etc.**—The referee must immediately notify the trustee of his appointment.⁷² Form No. 24 indicates the method. The notice is, however, often given orally, and should be, if the trustee-elect is present at the meeting. The trustee should notify the referee of his acceptance or declination. He rarely does. The presentation of the bond, or a failure to present within the required time is thought sufficient. The requirements as to trustee's bonds⁷³ and duties⁷⁴ are discussed elsewhere.

III. REMOVAL OF TRUSTEES.⁷⁵

a. **For cause.**—The creditors have, however, no control over the removal of trustees, other than to initiate proceedings to that end. The former law⁷⁶ gave them such control "with consent of the court." Now the court is given sole power to remove,⁷⁷ but this must be done by the judge, not the referee.⁷⁸ The district rules which confer on the referees jurisdiction to perform all the functions of the judge usually except such powers as have been withdrawn from them by the General Orders. Numerous cases on the removal of trustees under the former law will be found in point.⁷⁹ The practice on removals is suggested by Forms Nos. 52, 53, 54, and 55.⁸⁰ Removal is a matter of discretion⁸¹ and is, therefore, not reviewable;⁸² but, being a judicial discretion, should be exercised only when there is sufficient cause.⁸³ Where a trustee, by concealment or false representation, induces creditors to agree to a composition contrary to their interests, he should be removed.⁸⁴ It is not necessary

70. *Clark v. Pidcock* (C. C. A., 3d Cir.), 12 Am. B. R. 309, 129 Fed. 745. In this case a trustee was appointed more than a year after the creditors' meeting.

71. See also "Supplementary Forms," *post*; Hagar and Alexander's *Bankruptcy Forms* (2d Ed.).

72. General Order XVI.

73. See under § 50 of this work.

74. See Bankr. Act, § 47. See also Am. B. R. Dig. § 325.

75. See also Am. B. R. Dig. § 323.

76. Act of 1867, § 18, R. S., § 5039.

77. Bankr. Act, § 2 (17).

78. General Order XIII.

Approval of judge.—An order of a referee in bankruptcy removing a trustee, which has not been affirmed by a judge who under General Order No. 13, has sole power of removal, is void, and another provision of the order appointing a new trustee, and a subsequent order directing the old trustee to turn over assets must also fall as having no legal foundation. *Matter of Berree & Wolf* (D. C., Pa.), 34 Am. B. R. 549, 185 Fed. 224.

79. In re *Sacchi*, 43 How. Pr. (N. Y.) 250; In re *Mallory*, Fed. Cas. 8,990; *Ex parte Perkins*, Fed. Cas. 10,982; In re *Blodgett*, Fed. Cas. 1,552; In re *Price*, Fed. Cas.

11,409; In re *Perry*, Fed. Cas. 10,998; In re *Grant*, Fed. Cas. 5,692.

80. A petition seeking the removal of a trustee in bankruptcy and also the revocation of certain orders allowing applications to sell or redeem securities belonging to the bankrupt's customers which had been pledged by the bankrupt, a stockbroker, examined and held, insufficient, the manner and extent of the petitioner's damage not being set forth and it appearing that the petitioners delayed unreasonably in making the application. In re *Carothers & Co.* (D. C., Pa.), 27 Am. B. R. 603, 192 Fed. 691.

81. In re *Day & Co.* (C. C. A., 2d Cir.), 24 Am. B. R. 252, 178 Fed. 545, affg. 23 Am. B. R. 56, 174 Fed. 164.

82. In re *Dewey*, Fed. Cas. 3849; In re *Adler*, Fed. Cas. 82.

83. In re *Mallory*, Fed. Cas. 8,990. See also Am. B. R. Dig. § 323.

Cause for removal.—A trustee in bankruptcy who is employed in the office of the attorney for an assignee for the benefit of creditors, which attorney is also acting for him, should be removed upon the ground that the interests of the trustee and the assignee may conflict. *Matter of Forestier* (D. C., Cal.), 35 Am. B. R. 51, 222 Fed. 537.

84. In re *Wrisley* (C. C. A., 7th Cir.), 13 Am. B. R. 193, 133 Fed. 388.

to justify a trustee's removal that he be guilty of personal dishonesty; he may have so conducted the business or affairs of the estate as to have lost the confidence of the creditors and thus prevented their co-operation with him, in which case it will be for the benefit of the estate that he be removed.⁸⁵ The fact that a trustee has changed his legal residence to another district is not ground for his removal, where the change neither makes it impossible for him to perform his duties as trustee, nor difficult for the creditors to locate and communicate with him.⁸⁶

b. By resignation.—The statute does not, as did its predecessor,⁸⁷ provide for such a contingency. A trustee can unquestionably resign, but, it is thought, his resignation is still ineffectual, save "with the consent of the judge" or referee.⁸⁸

^{85.} *Bullman v. Tobin* (C. C. A., 8th Cir.), 38 Am. B. R. 504, holding that where a trustee has not only failed to carry out the wishes of the creditors by whom he was chosen, but has placed himself in direct antagonism to them without being able to assign any good reason for so doing, he should be removed, especially where the co-operation

of the creditors is indispensable to the efficient administration of the trust.

^{86.} *In re Seider* (D. C., N. Y.), 20 Am. B. R. 708, 163 Fed. 139.

^{87.} Act of 1867, § 18, R. S., § 5038.

^{88.} But see *Hull v. Burr* (Fla. Sup. Ct.), 28 Am. B. R. 837, 64 Fla. 83, 59 So. 787.

SECTION FORTY-FIVE.

I. QUALIFICATIONS OF TRUSTEES.¹

§ 45. **Qualifications of Trustees.**—*a* Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed.

Analogous provisions: In U. S.: Act of 1867, § 18, R. S., § 5035.

In Eng.: Act of 1883, § 21(1) (2).

Cross-references: To the law: Appointment and removal of trustee, § 44.

Bonds of trustees, § 50.

First meeting of creditors, how conducted, § 55.

Voters at meetings of creditors, § 56.

SYNOPSIS OF SECTION.

I. Qualifications of Trustees, 712

a. *In general*, 712.

b. *Statutory qualifications*, 712.

c. *Disqualifications*, 713.

I. QUALIFICATIONS OF TRUSTEES.¹

a. **In general.**—The only statutory disqualification under the former law seems to have been that the proposed trustee had received a preference. At the same time, the action of the creditors being subject to the approval of the judge, many disqualifications were in effect recognized by the courts. Since only those qualified may be appointed, votes should not be received for any nominees not clearly within the terms of this section. When the objection is that the proposed trustee is not competent² to perform the duties of the office, however, votes should be received, and, if they result in his appointment, his ability to perform such duties should be investigated before he is allowed to qualify.

b. **Statutory qualifications; corporations as trustees.**—Trustees may be either individuals or corporations. In either case, they must have offices within the

1. See also Am. B. R. Dig. § 320.

2. Compare, under former law, § 18, R. S., § 5035.

judicial district. Under the former law, it was held that they must reside in such district.³ It is evident that actual presence is intended by the phrase "reside or have an office," rather than a legal or voting residence. The having of a fixed place of abode would seem to be what is intended by the statute.⁴ This restriction seems to make it necessary to appoint a different trustee in an ancillary proceeding in another district.⁵ If a corporation is chosen, only those authorized by charter or by law "to act in such capacity" can be appointed trustee. This manifestly applies to trust companies and other corporations which are permitted by law to do a trustee business. If a trust company is named as trustee, it should appear that the company has no connection or relationship with the bankrupt which would make the position of any particular advantage to the company.⁶ An alien may be chosen as a trustee if he resides or has an office in the district.⁷

c. **Disqualifications.**—So long as General Order XIII continues in force,⁸ certain disqualifications, based on precedent and common sense, rather than the statute, will also be recognized by the courts. Thus, under the present law, it is thought, one who is palpably the bankrupt's choice will be held disqualified, or, more correctly, his appointment will not be approved;⁹ although there is no statute against the election of a trustee merely because he is acceptable to the bankrupt.¹⁰ Mere hostile animus against the bankrupt does not positively disqualify the trustee,¹¹ but he should be a person free from prejudices and entirely disinterested.¹² The fact that a trustee has business

3. In *re Havens*, Fed. Cas. 6,231; In *re Loder*, Fed. Cas. 8,459.

4. Residence or office in judicial district.—In the case of *In re Seider* (D. C., N. Y.), 20 Am. B. R. 708, 163 Fed. 139, Judge Chatfield said: "A person might be domiciled or reside a greater portion of the year, and perhaps pay taxes in the county of Kings and in the eastern district of New York, and vote at a legal residence in another portion of the State, or even in a different State altogether. So with reference to the question of an office. A lawyer might have an office at his home in Brooklyn, and an office in one of the down town buildings in the Borough of Manhattan, and a third office in Jersey City, in the State of New Jersey, and any one of the three might be sufficient to meet the requirements of § 45."

It seems that a person having a place of business within the judicial district may be appointed a trustee although he resides without such district. In *re Loder*, Fed. Cas. 8,459.

5. Compare *In re Boston H. & E. R. R. Co.*, Fed. Cas. 1,678.

6. A trust company named as trustee in many deeds of trust securing obligations owing to the bankrupt, and having as a director the principal counsel of the bankrupt, should not be appointed trustee of the bankrupt as its interests might conflict with those of the other creditors. *Wilson v. Continental Building & Loan Association* (C. C. A., 9th Cir.), 37 Am. B. R. 444, 232 Fed. 824.

7. In *re Coe* (D. C., N. Y.), 18 Am. B. R.

715, 154 Fed. 162, holding that the term "individuals" is very broad and includes aliens as well as corporations.

8. See p. 704, *ante*.

9. See p. 707, *ante*; *Falter v. Reinhard* (D. C., Ohio), 4 Am. B. R. 782, 104 Fed. 292; *In re Rekersdres* (D. C., N. Y.), 5 Am. B. R. 811, 108 Fed. 206. On review in C. C. A., *In re McGill* (C. C. A., 6th Cir.), 5 Am. B. R. 155, 106 Fed. 57.

The active interference of the bankrupt in favor of the appointment of a trustee will render such trustee ineligible to appointment. *In re Hanson* (D. C., Minn.), 19 Am. B. R. 235, 156 Fed. 717.

10. In *re Eastlack* (D. C., N. J.), 16 Am. B. R. 529, 145 Fed. 68, approving an election where it appeared that the name of the trustee was suggested to one of the creditors by the bankrupt's attorney, and such creditor sent letters to all the other creditors recommending the election of the person so suggested.

Office with bankrupt's attorney.—The fact that a party occupies the same suite of offices as the attorney for a bankrupt, does not disqualify him from acting as trustee in the bankruptcy proceedings. *Matter of Fisher* (D. C., Pa.), 26 Am. B. R. 793, 193 Fed. 104.

11. In *re Lewensohn* (D. C., N. Y.), 3 Am. B. R. 299, 98 Fed. 576; *In re Mangan* (D. C., Pa.), 13 Am. B. R. 303, 133 Fed. 1000.

12. *Matter of Ballentine* (D. C., N. Y.), 37 Am. B. R. 111, 232 Fed. 271.

relations with the referee is not sufficient to disqualify him.¹³ The fact that a person appointed trustee was formerly a receiver of the bankrupt estate, designated by the court, is evidence of his fitness and competency,¹⁴ and it has also been held that the fact that the trustee advised an assignment for the benefit of creditors, constituting the act of bankruptcy complained of, and was himself the assignee, does not disqualify him from acting as trustee.¹⁵ A stockholder or officer of a corporation is not *ipso facto* incompetent to act as trustee of the bankrupt corporation,¹⁶ and the fact that the proposed trustee is a stockholder in a corporation appearing as a creditor is not a disqualification,¹⁷ but a stockholder who had been intimately associated as legal adviser with those formerly in control will be deemed disqualified and his appointment should be set aside.¹⁸ A bankrupt who has not been discharged is not a proper person to act as trustee to another bankrupt.¹⁹ The former attorney for the bankrupt, whose relations, business and social, remain close, should not be appointed.²⁰ Under the former law, that the assignee-elect was the bankrupt's choice warranted a refusal to confirm;²¹ so also where the candidate made it a regular business to solicit creditors' votes,²² or was a near relative,²³ or a bookkeeper of one of the bankrupts,²⁴ or had a direct adverse interest to the creditors,²⁵ or where the choice was secured by an agreement to pay certain voting creditors in full. But, it seems, a general creditor was eligible,²⁶ and that the bankrupt's attorney was not positively disqualified, if he at once severed his relations as such.²⁷

13. In re Brown, 2 N. B. 590.

14. In re Huddleston (D. C., Ga.), 21 Am. B. R. 669, 167 Fed. 428. See also In re Crooker Co. (Ref., Mass.), 27 Am. B. R. 241.

15. In re Blue Ridge Packing Co. (D. C., Pa.), 11 Am. B. R. 36, 125 Fed. 619.

16. Matter of Merritt Construction Co. (C. C. A., 2d Cir.), 33 Am. B. R. 616, 219 Fed. 555.

17. In re Lazoris (D. C., Wis.), 10 Am. B. R. 31, 120 Fed. 716.

18. In re Gordon, etc., Co. (D. C., Pa.), 12 Am. B. R. 94, 129 Fed. 622.

19. In re Smith (Ref., N. Y.), 1 Am. B. R. 37.

20. In re Wink (D. C., Md.), 30 Am. B. R. 298, 206 Fed. 348.

21. In re Bliss, Fed. Cas. 1,543; In re Wetmore, Fed. Cas. 17,466.

22. In re Doe, Fed. Cas. 3,957; In re Smith, Fed. Cas. 12,971; In re Haas, Fed. Cas. 5,884.

23. In re Bogart, Fed. Cas. 1,600; In re Zinn, Fed. Cas. 18,216.

24. In re Powell, Fed. Cas. 11,354.

25. In re Clairmont, Fed. Cas. 2,781.

26. Id.

27. In re Barrett, Fed. Cas. 1,043; In re Lawson, Fed. Cas. 8,150; In re Clairmont, Fed. Cas. 2,781. See also cases cited In re Rung (Ref., N. Y.), 2 Am. B. R. 620. The uninfluenced votes of creditors in favor of one for trustee who had formerly been the attorney for the bankrupt are not a nullity so that the opposing candidate for trustee must be declared elected. In re Machin (D. C., Pa.), 11 Am. B. R. 449, 128 Fed. 315.

SECTION FORTY-SIX.

DEATH OR REMOVAL OF TRUSTEES.

§ 46. **Death or Removal of Trustees.**—*a* The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.

Analogous provisions: In U. S.: Act of 1867, §§ 13, 14, 16, 18, R. S., §§ 5036, 5039, 5042, 5048.

Cross-references: To the law: Death or insanity of bankrupt not to abate proceedings, § 8.

Jurisdiction of bankruptcy courts as to suits or proceedings, § 23.

One or three trustees to be appointed, § 44.

I. NO ABATEMENT ON DEATH OR REMOVAL OF TRUSTEE.

This is but a re-enactment of provisions found in the former law.¹ Prior to that law, it had been held that such cause of action vested in his personal representatives;² also that, if the assignee was defendant, the right of action abated.³ It was to meet these rulings that the section was inserted in the present law. It applies to all suits or proceedings, and as well if the trustee is a defendant as if a plaintiff. It applies also no matter how the trustee's removal is brought about, though it is a question whether it would if he resigned.⁴ In that case, the court could doubtless order a resigning trustee to continue such a suit. Removals of trustees are discussed elsewhere;⁵ likewise the effect of the death of one of three trustees.⁶

1. Act of 1867, § 16, R. S., § 5048.

2. *Richards v. Maryland Ins. Co.*, 8 Cranch, 84.

3. *Hall v. Cushing*, 8 Mass. 521.

4. *Hull v. Burr* (Fla. Sup. Ct.), 28 Am. B. R. 837, 64 Fla. 83, 59 So. 787, holding that where a sole trustee of a bankrupt estate institutes a suit to recover property of the estate, and resigns during the pendency

thereof, such suit does not abate on his resignation, but may be proceeded with by his successors when appointed just as though the same had been instituted originally by such successors.

5. See under § 44 of this work. See also Am. B. R. Dig. § 323.

6. *Id.*; also Bankr. Act, § 47-b.

SECTION FORTY-SEVEN.

DUTIES OF TRUSTEES.

§ 47. **Duties of Trustees.**— *a* Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them upon property of such estates; (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; *and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied;** (3) deposit all money received by them in one of the designated depositories; (4) disburse money only by check or draft on the depositories in which it has been deposited; (5) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; (6) keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts; (7) lay before the final meeting of the creditors detailed statements of the administration of the estates; (8) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; (9) pay dividends within ten days after they are declared by the referees; (10) report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and (11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.

b Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

c The trustee shall, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where con-

* Amendments of 1910 in italics.

veyances of real estates are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the costs and disbursements of the proceedings.*

Analogous provisions: In U. S.: As to deposits of money, Act of 1867, § 17, R. S., § 5059; Act of 1841, § 9; Act of 1800, § 54; As to accounting for interest, R. S., § 5062B; As to submission of accounts, Act of 1867, 28, R. S., § 5062B; As to setting apart exemptions, Act of 1867, General Order XIX; Also generally to many sections, prescribing other duties.

In Eng.: Generally to different sections prescribing duties.

Cross-references: To the law: Trustee includes all the trustees of an estate, § 1(26).

Jurisdiction of court of bankruptcy as to collection of estate, § 2(7).

Estates to be closed on approval of final accounts and discharge of trustees, § 2(8).

Allowance of exemptions to trustee, § 6.

Suits by and against trustee; intervention by trustee, § 11-b, c. d.

Certified copy of approval of bond of trustee, evidence of vesting title in him, § 21-e.

Suits by trustee; controversies between trustees and adverse claimants, § 23-a, b.

Arbitration of controversies by trustees, § 26.

Compromise of controversy arising in administration of estate, § 27.

Punishment of trustee for misapplication of property of estate, § 29-a.

Employment of stenographer on application of trustee, § 38(5).

Dividends sheets delivered to trustee by referee, § 39-a(1).

One or three trustees to be appointed, § 44.

Accounts and papers of trustees open to inspection, § 49.

Bonds of trustees, amount to be fixed, § 50.

Proof of claim by trustee against another estate, § 57-m.

Preferential transfer may be recovered by trustee, § 60-b.

Trustees to deposit funds in designated banks, § 61.

Expenses of administering estates; report, § 62.

Debts to be paid; order of payment, § 64.

Dividends, payment when declared, § 65; unclaimed to be paid into court by trustee, § 66.

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I. SCOPE OF SECTION.

a. **In general.**—The duties of the trustee enumerated in this section are not exclusive. Other duties are put on the trustee in many sections scattered through the law.¹ Further additional duties are prescribed in General Order XVII. Besides, the judge or referee, or the creditors by resolution, may direct still other things to be done by the trustee, provided they are within the customary functions of such officers. While the trustee is technically at all times under the direction of the court, he should be ready to act upon his own responsibility and intelligence in the administration of the estate, resorting to the court for advice and instructions where matters of a complicated nature and of great importance have arisen.²

II. COLLECTION OF ASSETS.

a. **Statutory provisions.**—Subdivisions 2 and 3 of this section make it the duty of the trustee to collect the assets of the bankrupt, reduce them to money, and deposit the proceeds in designated depositories. The amendatory act of 1910 amended subdivision 2 by conferring upon the trustee certain rights of creditors in respect to property belonging to the bankrupt estate, and making him more distinctively the representative of the creditor as to assets within and without the custody of the court. By subdivision 1 he must pay over and account for interest on the assets.

1. See "Cross-References," *ante*.

2. The privilege of trustees to apply for advice cannot be abused by running to the court to settle every question that may appear to an irresolute trustee to be desirable to have settled without responsibility of action on his part. Nor can this practice be resorted to for the purpose of carrying on litigation between himself and adverse parties in an informal and irregular way. Trustees in bankruptcy are *sui generis*. In re Baber (D. C., Tenn.), 9 Am. B. R. 406, 119 Fed. 520. It may be safely said that if a trustee bears in mind that he is the repre-

sentative of the estate considered as a whole, is bound to be vigilant and attentive in advancing its interests, and is under obligation to seek to carry out in the strictest good faith the provisions of the bankrupt act where they seem to apply plainly to the estate committed to his charge, he is not likely to go far wrong in doing, or in refusing to do, what may be asked of him by the creditors. In doubtful cases, the referee and the court will solve the perplexities of the trustee. In re Baird (D. C., Pa.), 7 Am. B. R. 448, 112 Fed. 960.

b. **Trustee for creditors.**—Vested with the title of the bankrupt,³ he is also the representative of the creditors,⁴ and should deal fairly between them and the bankrupt.⁵

c. **Quasi officer of court.**—He is, further, a quasi officer of the court.⁶ As in the case of other court officers, payments made to him under a mistake of law are recoverable.⁷

d. **Duties and liabilities of trustees, as to collection of assets.**—(1) **IN GENERAL.**—He must proceed to “collect and reduce to money the property . . . under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest.”⁸ This he may do by, for instance, collecting accounts, even by suit or securing the necessary orders to compel the bankrupt to deliver over property belonging to the bankrupt estate,⁹ or selling goods or lands,¹⁰ or carrying out contracts entered into

3. Compare Bankr. Act, § 70-a.

4. In re Gray, 3 Am. B. R. 647, 47 N. Y. App. Div. 554; In re Griffith, 1 N. B. N. 546; In re Kindt, 2 N. B. N. Rep. 369. Compare Barker v. Bankers' Ass'n, Fed. Cas. 986; In re Rockford, R. I. & St. L. R. Co., Fed. Cas. 11,978; Crooks v. Stuart, 7 Fed. 800; also Eyster v. Gaff, 91 U. S. 521; Glenn v. Langdon, 98 U. S. 20; Dudley v. Easton, 104 U. S. 99; Batchelder & Lincoln Co. v. Whitmore (C. C. A., 1st Cir.), 10 Am. B. R. 641, 122 Fed. 355, where it was held that the trustee represents those who were creditors at the time the petition was filed.

5. In re Wrisley Co. (C. C. A., 7th Cir.), 13 Am. B. R. 193, 196, 133 Fed. 388, 390, the court said: “In all matters between creditors and bankrupt he should stand indifferent. His sole care should be to make the most out of the estate, and that primarily in the interest of the creditors. When he goes beyond that, and seeks to aid the bankrupt at the expense of the creditors, and by concealment or by false representations induces creditors to act contrary to their interest, he violates his duty, and should be removed.”

Representative of creditors.—“By the clearest implication,” says Judge McCormick, “he represents all the creditors, and as such representative has an interest in the just administration of the estate which belongs to the creditors.” Atkins v. Wilcox (C. C. A., 5th Cir.), 5 Am. B. R. 313, 316, 105 Fed. 595.

6. In re Ryan, Fed. Cas. 12,182; United States v. Dewey, 39 Fed. 251.

Trustee as quasi officer.—As was said by Judge Purnell in the case of McLean v. Mayo (D. C., N. Car.), 7 Am. B. R. 115, 113 Fed. 106: “While the Bankruptcy Act creates the office of trustee in bankruptcy such trustee is a quasi officer of the court in a qualified sense. He is in reality elected by, and represents the creditors of, the bankrupt, under the provisions of the Bankruptcy Act. The bankruptcy court will protect the trustee in the discharge of his quasi official duties; but as the representative of the

creditors his duties as such representative must be discharged, not as an officer of the court, strictly speaking, but as provided in the Bankruptcy Act.”

7. Carpenter v. Southworth (C. C. A., 2d Cir.), 21 Am. B. R. 390, 165 Fed. 428.

8. In re Stein (D. C., Ind.), 1 Am. B. R. 662, 94 Fed. 124.

The trustee is an officer of the court, and as such is subject to its direction in all matters concerning money or property which may have come into his possession by virtue of his office. In re Howard (D. C., Cal.), 12 Am. B. R. 462, 130 Fed. 1004.

Trustees in bankruptcy, like executors and administrators, are bound to use due diligence to get in the assets of the estate—to secure possession of the tangible property and collect the debts. If they fail in their duty they may be charged in their accounts with the value of assets thereby lost. If they take no steps to secure property or collect debts, of which they have knowledge, they are presumptively negligent. Matter of Reinboth (C. C. A., 2d Cir.), 19 Am. B. R. 15, 157 Fed. 672.

9. An order that a bankrupt pay over money, which provides that in default thereof he be held guilty of contempt, and the marshal directed to arrest him and confine him in jail until he complies with said order, or is discharged, is erroneous, as leaving the question of default and contempt of court to the marshal, upon which question the bankrupt is entitled to a hearing on the return of an order to show cause upon such default. In re Baum (C. C. A., 8th Cir.), 22 Am. B. R. 295, 169 Fed. 410.

An order to compel a bankrupt jeweler to turn over property to his trustee to cover a shortage in his stock of jewelry, or its proceeds, which the bankrupt explained had been stolen from his rooms in his absence, will not be granted where the evidence is insufficient to substantiate the claim of robbery. In re Chamelin (D. C., Pa.), 25 Am. B. R. 570, 184 Fed. 553.

10. Compare Bankr. Act, § 70-b; General Order XVIII.

by the bankrupt prior to his adjudication,¹¹ or proceeding to set aside fraudulent transfers¹² or preferential liens.¹³ It is his duty, representing both the bankrupt and his creditors, to realize from the estate all that is possible for distribution among the creditors, and to this end he may assert claims, avoid preferences, and collect assets, even in some instances, where the bankrupt could not have acted, had bankruptcy not intervened.¹⁴ His chief duty is to make the estate available for general creditors.¹⁵

(2) **DUE DILIGENCE.**—Trustees, like executors and administrators, are bound to use due diligence to get in the assets of the estate,—to secure possession of the tangible property and collect the debts.¹⁶ An examination of the bankrupt's schedules, and a following up of all the leads naturally suggested thereby is the first step to be taken,¹⁷ and a failure on the part of the trustee in this respect will constitute negligence.¹⁸

(3) **SURCHARGED WITH LOSS CAUSED BY NEGLIGENCE.**—The trustee's failure to use proper efforts to realize upon collectible debts due the estate, subjects him to the risk of being surcharged to the extent of their value less reasonable costs and expenses of collection. His failure to pay taxes, when having in hand sufficient funds, by reason whereof the estate is subjected to interest and penalties, renders him liable to be surcharged to the extent of such interest and penalties.¹⁹ A trustee may be surcharged for loss arising from want of due diligence in reducing the property of the estate into money.²⁰

11. Carrying out bankrupt's contracts.—Where, prior to bankruptcy, the bankrupt had made certain contracts and had then assigned to claimant bank the money to become due under said contracts, and where after bankruptcy, the receiver and trustee had adopted and completed said contracts, it was proper to direct the trustee to pay to said bank the money accruing under the contracts. *In re De Long Furniture Co.* (D. C., Pa.), 26 Am. B. R. 469.

12. See for instance, *Barker v. Franklin*, 8 Am. B. R. 468, 37 Misc. 292, 75 N. Y. Supp. 305, and under § 60.

13. See under Section Sixty-seven of this work.

14. *Matter of Kessler* (C. C. A., 2d Cir.), 37 Am. B. R. 325, 186 Fed. 127, holding that a trustee in bankruptcy may pay a debt out of funds of the estate, where he finds that the collaterals deposited by the bankrupt for the security of the debt were in excess of the debt, and divide the balance realized from the transaction among the general creditors.

15. *Bunch v. Maloney* (C. C. C., 8th Cir.), 37 Am. B. R. 369, 233 Fed. 967.

16. *Matter of Reinboth* (C. C. A., 2d Cir.), 19 Am. B. R. 15, 157 Fed. 672; *Matter of Kuhn Bros.* (C. C. A., 7th Cir.), 37 Am. B. R. 97, 234 Fed. 277; *McMahon v. Pithan* (Ia. Sup. Ct.), 33 Am. B. R. 125, 147 N. W. 920.

Duty of trustee to collect.—It is the duty of the trustee in bankruptcy to seek to recover assets belonging to the estate he represents from every source available and every party liable, when payment or delivery is not voluntarily made and the legal proceedings necessary promise results; that is, a substantial benefit to the estate. *Billings v.*

Millar & Son Co. (D. C., N. Y.), 35 Am. B. R. 846, 227 Fed. 185.

17. *Matter of Kuhn Bros.* (C. C. A., 7th Cir.), 37 Am. B. R. 97, 234 Fed. 277.

18. Negligence; personal liability.—A trustee, who fails to explain his failure to examine the schedules and follow up all leads naturally suggested thereby, must be charged with negligence and must respond for the consequences thereof. *Matter of Kuhn Bros.* (C. C. A., 7th Cir.), 37 Am. B. R. 97, 234 Fed. 277.

19. *Matter of Monsarrat* (D. C., Hawaii), 25 Am. B. R. 820. See Am. Bankr. Dig. § 333.

Duty to account for money received in settlement of criminal prosecution.—Where a trustee, after having successfully prosecuted a bankrupt and his confederates for concealing assets, effected a settlement whereby certain stocks of goods were transferred to him and an agreement made for the payment to him of a sum of money in the event that the defendants received suspended sentences, upon his receiving said sum, it should be considered as part of the bankrupt's general estate, notwithstanding an agreement, acquiesced in by the creditors, that such fund should be kept separate and used to defray the expenses of the prosecution and the cost of the bankruptcy administration; but the trustee should not be surcharged with such sum, it appearing that the fund was regarded by all parties, including the creditors, as a fund to be kept separate and used to defray the expenses of the prosecution and the administration of the bankrupt estate. *Matter of Di Cola* (C. C. A., 3d Cir.), 33 Am. B. R. 389, 217 Fed. 743.

20. Loss in sale of corporate stock.—In the case of assets of corporate stock, the

(4) **COMPELLING TRUSTEE TO ACT.**—He does not act judicially, but only administratively, and if he refuses to oppose a claim or to move for its reconsideration when he ought to do so, he may be compelled to act or to permit the objecting creditors to act in his name.²¹

(5) **WISHES OF CREDITORS.**—It is not necessarily the duty of the trustee to follow the wishes of a majority in number and amount of the creditors in prosecuting or defending suits. He is to exercise his own judgment. But when his own judgment concurs with that of a great majority of all the creditors who speak, all having the opportunity to speak, and also with that of the referee or court in charge, it would seem plain that such judgment should control.²² As a rule, however, save in the common and simpler steps of administration, he should consult the wishes of the creditors; in many matters the law requires him to do this.²³ The creditors usually decide. First meetings should be continued and kept alive for this purpose. The referee in charge may, in extreme cases, disapprove. Such action is, however, not usual.

e. Suits by trustees.—(1) **IN GENERAL.**—A trustee's duty as to suits already pending in the name of or against the bankrupt has already been considered.²⁴ So has the time limitation on suits brought by or against him.²⁵ Rights of action arising upon contracts or from the unlawful taking or detention of, or injury to the property of the bankrupt, pass to the trustee, and he should assert them in the proper tribunal whenever necessary for the collection or preservation of the bankrupt estate.²⁶

(2) **RIGHT TO SUE.**—As a general rule the trustee alone has the power to sue to recover on a claim belonging to the estate.²⁷ The right to sue for the recovery of property transferred fraudulently belongs to the trustee and on his failure to sue, the right may not be transferred to a creditor.²⁸ It has been held in one case that the right to sue to set aside an alleged fraudulent transfer, made prior to the four months' period, may be assigned by the trustee.

court may surcharge for the difference between the amount actually realized from sale and a fair maximum figure reached in the open market, and justified by conditions, during the time when the stock could have been sold by the trustee. *Matter of Omsted* (D. C., Hawaii), 32 Am. B. R. 344.

Liability for loss.—A trustee in bankruptcy, who examines the schedules and fails to discover certain notes listed therein, and, hence, fails to discover that said notes were secured by a mortgage, may be charged with losses sustained through its negligence. *Matter of Kuhn Bros.* (C. C. A., 7th Cir.), 37 Am. B. R. 97, 234 Fed. 277.

21. *In re Stern* (C. C. A., 8th Cir.), 16 Am. B. R. 510, 144 Fed. 956.

A proceeding for the re-examination of claims should be taken in the interests of all the creditors, and not be permitted at the instance of any one creditor unless demanded by the interests of all. If the trustee should without sufficient reason refuse to proceed, the court by its order may compel him to do so, or remove him for disobedience. *In re Lewensohn* (C. C. A., 2d Cir.), 9 Am. Br. 368, 121 Fed. 538.

Where the trustee, upon the request of a

creditor, has declined to appeal, the district court has power to either direct an appeal by the trustee or to make an order permitting the creditor to appeal in the name of the trustee. *Chatfield v. O'Dwyer* (C. C. A., 8th Cir.), 4 Am. B. R. 313, 101 Fed. 797.

22. *In re Kearney Bros.* (D. C., N. Y.), 25 Am. B. R. 757, 184 Fed. 190.

23. Compare Bankr. Act, §§ 11-b-c, 26, etc.; *In re Baber* (D. C., Tenn.), 9 Am. B. R. 406, 119 Fed. 520.

24. See under § 11 of this work.

25. *Id.*

26. See discussion under "Rights of Action" under § 70, *post*.

27. As to when suit should not be brought, *Reade v. Waterhouse*, 52 N. Y. 587; *Dulcher v. Bank*, Fed. Cas. 4203. See also *In re Baird* (D. C., Pa.), 7 Am. B. R. 448, 112 Fed. 960, where referee erroneously refused to direct trustee to sue until the moving creditor should indemnify the estate against expense of a possibly unsuccessful controversy.

28. *Ruhl-Koblegard Co. v. Gillespie* (W. Va. Sup. Ct.), 22 Am. B. R. 643, 61 W. Va. 554, 56 S. E. 898; *McMahon v. Pithan* (Sup. Ct., Iowa), 33 Am. B. R. 125, 147 N. W. 920.

tee to a creditor.²⁹ But this decision does not appear to have been based upon a proper consideration of the statutory limitation of the powers of a trustee, and the purpose and effect of the bankruptcy act. The trustee represents all the creditors. The avails of a suit to recover property alleged to have been fraudulently conveyed belongs to the bankrupt estate and should be distributed equally among the creditors. If a creditor has knowledge of facts which will aid in the prosecution of such a suit, it is his duty to disclose such facts, and he should not be encouraged to conceal them by being permitted to become possessed of the right to sue, and thus be enabled to profit by such knowledge to the exclusion of the other creditors.³⁰

(3) ORDER OF CONSENT OF REFEREE OR COURT.—Before a trustee institutes a suit he ought to submit the reasons for the suit to the creditors and secure an order, based on their action, from the referee.³¹ Such consent seems not to be necessary when a suit is brought against him.³² How far the question at issue shall be gone into on such a preliminary hearing is discretionary with the referee. He should at least be sure that there is a probable cause of action.³³ It would seem also that the proposed defendant, if a creditor and interested in the fund, may appear in opposition to a motion for permission to sue.³⁴ The trustee being required to collect and reduce to money the property of the estate would seem sufficient to justify a suit by the

29. *In re Downing* (D. C., N. Y.), 27 Am. B. R. 309, 192 Fed. 683, *affd.* 29 Am. B. R. 228, 201 Fed. 93.

30. *In re Downing* (D. C., N. Y.), 27 Am. B. R. 309, 192 Fed. 683 (*affd.* 29 Am. B. R. 228, 201 Fed. 93), in which the court recognizes the doubt as to expediency of permitting an assignment to a creditor of a cause of action to set aside such a transfer, by saying: "I think it would be far better practice to allow the creditor to prosecute the action in the name of the trustee at her own expense with an order that the recovery, if any, shall be for the benefit of the estate, but that out of such recovery the creditor shall be fully compensated for all costs and expenses including counsel fees before distribution. It may be and is a serious and close question whether a trustee in bankruptcy vested by statute with the right to prosecute an action to set aside a deed as fraudulent (one executed and delivered more than four months prior to the institution of bankruptcy proceedings) may assign the same. It is a statutory right pure and simple and is conferred on the trustee as such,—as an officer in fact of the court, to be exercised in the interest of and for the benefit of the creditors of the bankrupt. The interest he has in the real estate, if any, is held by him for the benefit of the creditors in the same way." It is difficult to reconcile this statement of the court with the final conclusion that a sale by a trustee of such a right of action may be ordered.

31. *In re Mersman* (Ref., N. Y.), 7 Am. B. R. 46. But compare *Chism v. Bank* (Sup. Ct., Miss.), 5 Am. B. R. 56, 27 So. 610. See also *In re McCallum* (D. C., Pa.), 7 Am. B. R. 596, 113 Fed. 393; *In re Mallory*, Fed.

Cas. 8,990; *Traders' Bank v. Campbell*, 14 Wall. 87.

32. Compare *In re Kelly Dry Goods Co.* (D. C., Wis.), 4 Am. B. R. 528, 102 Fed. 747.

33. Probable cause of action.—When a trustee applies for instruction relative to a suit which the creditors wish him to bring, it is sufficient to show that he will probably succeed; certainty of success need not be demonstrated. If a proposition of settlement has been offered the moving creditors should also show that they are likely to secure a better result by a suit than by accepting the proposed settlement. *In re Phelps* (Ref., N. Y.), 3 Am. B. R. 396.

Duty to sue.—The duties of the trustee are prescribed by the bankruptcy act, and he must institute litigations whenever it is necessary for the purpose of collecting or reducing to money the assets of the bankrupt estate. By this obligation is not meant that he should burden the assets of the estate with costs and expenses arising out of all manner of questions that may be presented for litigation. There should be probable cause at least for believing that a right of action exists before the bankrupt estate is so burdened. *In re Meadows, Williams & Co.* (D. C., N. Y.), 25 Am. B. R. 100, 181 Fed. 911, citing *Collier on Bankruptcy* (7th ed.), p. 541.

34. *In re Mersman* (Ref., N. Y.), 7 Am. B. R. 46, in which Referee Hotchkiss held that a secured creditor whose security is the proposed object of attack, but who is also an unsecured creditor, may object to the granting of the trustee's application; but his objection should be given little weight unless clearly for the benefit of all the creditors.

trustee, even without the order or leave of the court or referee.³⁵ Other parts of the statute imply that the trustee is expected to bring suits,³⁶ and the implication from the statute as a whole is that the trustee may act upon his own responsibility in bringing a suit.³⁷ As above indicated, however, the better practice is to secure an order granting the desired leave.³⁸

(4) **SUITS BY TRUSTEES OF BANKRUPT CORPORATIONS.**—A trustee of a bankrupt corporation succeeds to the rights of the corporation as to all rights, contractual and statutory, existing for the benefit of the corporation, and as such trustee, it is his duty to enforce such rights.³⁹ The right of a corporation to make an assessment upon unpaid corporate stock passes to the trustee.⁴⁰ Where a call or assessment against stockholders for unpaid subscriptions is required, the trustee should petition the court for an order directing the call or assessment to be made.⁴¹ Before making the order the court will investigate the facts to determine whether there is a balance due on the stock, and whether the assets are insufficient to pay the corporate debts.⁴² The stockholders of a bankrupt corporation are in court from the inception of the bankruptcy proceedings and are bound by the finding of the court that there is a want of assets requiring an assessment.⁴³ Upon the order being issued, the trustee must proceed to collect the unpaid subscription, by suit if necessary, and upon such suit the stockholders may interpose any reasonable defense, alleging, for instance, that they have already met their obligations.⁴⁴ The obligations or liabilities of a stockholder or director to creditors of a corporation, under a state statute, are not, as a general rule, assets of the corporation, and are not

35. *Traders' Ins. Co. v. Mann*, 11 Am. B. R. 269, 118 Ga. 381; *Chism v. Friars Point Bank*, 5 Am. B. R. 56, 27 So. 610; *Callahan v. Israel*, 186 Mass. 383, 71 N. E. 812.

36. Bankr. Act, §§ 11c and 23b.

37. *Porter v. Hughes* (Ala. Sup. Ct.), 38 Am. B. R. 596, 73 So. 400. In the case of *Callahan v. Israel*, 186 Mass. 383, 71 N. E. 812, the court said: "It was not the intention of Congress that a trustee could not make a demand for payment, receive money offered in payment, or take any of the usual means to collect and reduce to money the estate, the title of which had vested in him, without some specific directions so to do. The clause was merely intended to give the court power to direct the proceedings of its trustees, if occasion for such direction should arise in any specific instance, and not to place upon the court the burden of giving constant directions as to the reducing of the property to money."

Necessity for order of referee.—It being the duty of a trustee in bankruptcy to bring in everything he believes to be assets of the estate, an order of the referee, authorizing the trustee to collect the amounts due under conditional contracts of sale assigned by the bankrupt, is unnecessary. *Matter of Barker Piano Co.* (C. C. A., 2d Cir.), 37 Am. B. R. 271, 233 Fed. 522.

38. Trustee's right to sue is incidental to the performance of his duties, and it is not thought strictly necessary for him to first obtain the consent of the creditors or leave of the court, though perhaps the better prac-

tice is that he should do so. *In re Meadows, Williams & Co.* (D. C., N. Y.), 25 Am. B. R. 100, 181 Fed. 911, citing *Collier on Bankruptcy* (7th ed.), p. 541.

39. See discussion under § 70, *post*.

40. *In re Remington Automobile & Motor Co.* (C. C. A., 2d Cir.), 18 Am. B. R. 389, 153 Fed. 345; *Kiskadden v. Steinle* (C. C. A., 6th Cir.), 29 Am. B. R. 346, 203 Fed. 375; *In re Newfoundland Syndicate* (D. C., N. J.), 28 Am. B. R. 119, 196 Fed. 443; *In re Monarch Corporation* (D. C., Conn.), 24 Am. B. R. 428, 177 Fed. 464; *Matter of Commonwealth Lumber Co.* (D. C., Wash.), 35 Am. B. R. 202, 223 Fed. 667; *Allen v. Grant* (Ga. Sup. Ct.), 14 Am. B. R. 349, 50 S. E. 494, 122 Ga. 552.

41. *In re Remington Automobile & Motor Co.* (C. C. A., 2d Cir.), 18 Am. B. R. 389, 153 Fed. 345; *Matter of Munger Vehicle Tire Co.* (C. C. A., 2d Cir.), 21 Am. B. R. 395, 168 Fed. 910; *In re Monarch Corporation* (D. C., Conn.), 24 Am. B. R. 428, 177 Fed. 464; *Matter of Miller Electrical Maintenance Co.* (D. C., Pa.), 6 Am. B. R. 70, 111 Fed. 515; *In re Eureka Furniture Co.* (D. C., Pa.), 22 Am. B. R. 395, 170 Fed. 485.

42. *In re Remington Automobile & Motor Co.* (C. C. A., 2d Cir.), 18 Am. B. R. 389, 153 Fed. 345; *In re Monard Corporation* (D. C., Conn.), 24 Am. B. R. 428, 177 Fed. 464.

43. *In re Newfoundland Syndicate* (D. C., N. J.), 28 Am. B. R. 119, 196 Fed. 443.

44. *Matter of Stipp Construction Co.* (C. C. A., 3d Cir.), 34 Am. B. R. 333, 221 Fed. 372.

therefore enforceable in a suit by the trustee for the benefit of all the creditors.⁴⁵ But if directors or officers of a corporation have unlawfully diverted its funds to the detriment of creditors, the trustee should recover the assets so diverted.⁴⁶

(5) **SUITS FOR OTHER PURPOSES.**—It has been held that a trustee of a tenant in common cannot bring and maintain a suit for the partition of real estate in which such bankrupt was a tenant in common with others.⁴⁷ If an agreement be made between a party and a receiver of the bankrupt's property appointed in a State court, the trustee may not sue on such agreement.⁴⁸ It is not the duty of the trustee to bring suit for a small recovery which would not prove beneficial to the estate.⁴⁹ Section sixty should be consulted for suits to avoid preferences; section sixty-seven for suits to annul preferential or fraudulent liens; and section seventy for suits under State laws to avoid fraudulent transfers. The diverse character of the suits which may be brought by trustees is suggested by the cases in the foot-note.⁵⁰

45. Breck v. Brewster (N. Y. App. Div.) 31 Am. B. R. 842, 153 N. Y. App. Div. 800, 138 N. Y. Supp. 821; *In re Beachy & Co.* (D. C., Wis.), 22 Am. B. R. 538, 170 Fed. 825.

Statutory liabilities of directors.—Where, by statute, the directors are personally made liable in case debts are contracted in excess of the fixed amount of the capital stock, or in any other contingency, the existence of this liability is no reason for a refusal to call in and collect unpaid stock subscriptions. Such liability is not an asset of the bankrupt corporations, but is security for the creditors. The trustee in bankruptcy has no right to pursue this remedy. *In re Crystal Springs Water Co.* (D. C., Vt.), 3 Am. B. R. 194, 96 Fed. 945.

The liability of stockholders under the law of Alabama, where subscriptions to the capital stock of the corporation have been paid by the transfer of property, alleged to have been fraudulently overvalued, is enforceable only by the creditors and not by the corporation, and hence does not constitute "property" passing to the trustee and is not enforceable by him. *Matter of Hoffman-Salvan Roofing Paint Co.* (D. C., Ala.), 37 Am. B. R. 426, 234 Fed. 798.

46. Trustee to enforce personal liability of directors.—Where it appears that the directors of a bankrupt corporation, or a majority of them, were also directors of another corporation, and that as directors of such bankrupt they directed the payment of large sums of money to the other corporation knowingly and without any consideration, the trustee in bankruptcy should institute proceedings against them to recover such assets knowingly diverted from the bankrupt. *Billings v. Millar & Son Co.* (D. C., N. Y.), 35 Am. B. R. 846, 227 Fed. 185.

47. Hobbs v. Frazier (Sup. Ct., Fla.), 22 Am. B. R. 684, 56 Fla. 796; *Lindsay, as Trustee, etc., v. Runkle* (Sup. Ct., Ohio), 24 Am. B. R. 612, 92 N. E. 489.

48. Love v. Export Storage Co. (C. C. A., 6th Cir.), 16 Am. B. R. 171, 197, 143 Fed. 1.

49. Suit to recover small amount.—It is not the duty of a trustee in bankruptcy to institute legal proceedings, expensive in their very nature, for the sake of securing a small recovery, which evidently would not cover the expenses of the litigation, or for the purpose of having a legal proposition determined, which, when settled, while of general interest, maybe, would not result in benefit to the estate. *Billings v. Millar & Son Co.* (D. C., N. Y.), 35 Am. B. R. 846, 227 Fed. 185.

50. Mather v. Coe (D. C., Ohio), 1 Am. B. R. 504, 92 Fed. 333; *In re Brodbine* (D. C., Mass.), 2 Am. B. R. 53, 93 Fed. 643; *In re Baudouine* (D. C., N. Y.), 3 Am. B. R. 55, 96 Fed. 536; *In re Cohn* (D. C., N. Y.), 3 Am. B. R. 421, 98 Fed. 75. Action by trustee in bankruptcy of a bank to recover money alleged to have been furnished by it to conduct a business under a contract with a manufacturing corporation. *Monroe v. Bushnell* (Sup. Ct., Mich.), 22 Am. B. R. 587, 122 N. W. 508.

Suit to recover for breach of bond conditioned for turning of assets over to trustee in event of adjudication, see *Moore Bros. v. Cowan* (Sup. Ct., Ala.), 26 Am. B. R. 902, 55 So. 903.

Avoidance of sale of assets by majority stockholders.—The bankrupt was a large stockholder of a corporation which, after the bankrupt's adjudication and before the appointment of his trustee, sold all of its assets with the consent of a majority of the stockholders, who knew of the bankruptcy, and that a trustee was imminent, and that the bankrupt estate had an interest in the property conveyed. Instead of accepting a consideration which was of value to the bankrupt estate, they accepted one which wholly disregarded his interests, except to cancel the debts of the bankrupt to the vendee, which created an illegal preference. It was held that the trustee, after his appointment, became beneficially interested as a stockholder and could file a stockholder's bill in equity to vacate the sale for alleged abuse

(6) **PRACTICE GENERALLY; SECURITY FOR COSTS.**—If a suit is ordered, it should be in the name of "John Doe," as trustee of "Richard Doe," a bankrupt. Whether in no-asset cases security may be demanded by the proposed defendant is for the court in which the suit is brought to determine.⁵¹ Costs may be allowed defendants payable out of the funds in the hands of the trustee, where the conditions warrant.⁵² A trustee will not be allowed to effect a settlement of a suit which a court of equity would not permit the bankrupt to make.⁵³ Compromise by a vote of a majority of the creditors of a suit brought by the trustee need not necessarily be accepted.⁵⁴

by the majority. *Greenhall v. Carnegie Trust Co.* (D. C., N. Y.), 25 Am. B. R. 300, 180 Fed. 812.

Recovery of premium fraudulently paid by bankrupt.—The contract of an insurance company to pay a person an annuity of \$1,000 a year for life, beginning July 1, 1916, in consideration of \$2,830, paid by him in 1901 in fraud of creditors, is wholly executory, and his trustee in bankruptcy, in 1907, may elect to cancel the contract and recover the consideration for the benefit of creditors. *Smith v. Mutual Life Ins. Co.* (C. C.; Mass.), 24 Am. B. R. 514, 178 Fed. 510, s. c., 19 Am. B. R. 707, 158 Fed. 365.

Fraudulent transfers.—A trustee in bankruptcy of a firm and its members may maintain an action to set aside transfers made by the firm and its members with intent to hinder, delay and defraud creditors. *Barker v. Franklin*, 8 Am. B. R. 468, 37 Misc. 292, 75 N. Y. Supp. 305.

Sale of property by bankrupt and partner.—Where a bankrupt and his partner conducting a general soda fountain business sell their entire stock, business and fixtures to the father-in-law of the partner and the father continues the business under the original firm name, the trustee of the bankrupt cannot have the sale set aside because the vendee left the property in the possession of the partner who created a large amount of debts, credit being given on the strength of the possession of the property. *In re Young* (D. C., Ga.), 31 Am. B. R. 82, 206 Fed. 187.

51. Where the suit is on a cause of action antedating the adjudication, security for costs will be required in New York. *Joseph v. Makley*, 8 Am. B. R. 18, 73 N. Y. App. Div. 156.

Security for costs.—Where a trustee in bankruptcy has no assets except a claim upon which he is about to bring an action, and there seems to be no prospect of his succeeding, he should be required to give security for costs. *Uhr v. Coulter et al.* (N. Y. App. Div.), 37 Am. B. R. 795, 172 N. Y. App. Div. 413.

52. *Caten v. Eagle B. & L. Assn.* (D. C., Pa.), 23 Am. B. R. 130, 177 Fed. 996.

Liability of trustee for costs.—Where an action was brought by bankrupts' trustee over eighteen months after adjudication for an indebtedness alleged to be due the

bankrupts, against which a counterclaim was interposed by defendant, who prevailed not only on his counterclaim but also in entirely defeating the claim of the trustee, the trustee is responsible for the costs of the action. *Matter of Havens* (D. C., N. Y.), 25 Am. B. R. 116, 182 Fed. 367.

53. **Settlement by trustee.**—A judgment note was given by a bankrupt and entered within four months of the date of the petition in bankruptcy. The bankrupt thereafter conveyed certain property to another person by warranty deed, subject to certain mortgages, a portion of the purchase money being placed in the hands of the vendee's attorneys to hold in trust for the bankrupt until he had satisfied such judgment and then to turn the same over to the bankrupt less certain interest on the mortgages and unpaid taxes. The trustee in bankruptcy instituted proceedings in the court in which the judgment was entered to have it declared invalid as being an unlawful preference, with the result that the judgment was struck off; but upon appeal the lower court was reversed for lack of a jury trial. Being without funds to continue the litigation, the trustee negotiated for a settlement with the judgment creditor whereby the latter was to pay the costs and in addition a certain sum to the trustee, with a view of eliminating the trustee from the controversy and affirming the validity of the judgment lien upon such property. The effect of such settlement would have been to compel the purchaser to pay more than \$1,200 in addition to the money left in his attorneys' hands, whereas an offer by the purchaser to pay the costs and furnish counsel to proceed with the litigation seemed likely to be successful and for the interest of the bankrupt's creditors ultimately. It was held that as the settlement proposed to do what the bankrupt would never have been permitted to do by a court of equity—to take the money from the judgment creditor at the expense of the vendee in violation of his contract, by not reducing the amount of the judgment lien—it was inequitable to permit the trustee, who had no higher rights than the bankrupt, to do so and that the offer of the vendee should be accepted. *In re Geiselhart* (D. C., Pa.), 25 Am. B. R. 318, 181 Fed. 622.

54. **Compromise.**—Where creditors, representing a majority in number and amount

f. Property vested in trustees.—(1) **IN GENERAL.**—The property which constitutes the estate of the bankrupt, and vests in the trustee, is considered fully in the discussion under section seventy.

(2) **AMENDATORY ACT OF 1910.**—The amendatory act of 1910 amended subdivision 2 of subsection *a* by providing in effect that the trustee should have the same title to property in the custody of the court that a creditor, holding an execution or other lien by legal or equitable proceedings levied against that property, would have under a State law; and, as to property not in the custody of the court, that the trustee should stand in the position of a judgment creditor holding an execution returned unsatisfied, thus entitling him to proceed against the assets in the same manner as a judgment creditor.⁵⁵

(3) **RULE EXISTING PRIOR TO AMENDMENT.**—Prior to the amendment of 1910 the trustee was not clothed with the privileges of a judgment creditor.⁵⁶ The trustee's title as against a claim under an unrecorded conditional sale, though the State law required record, did not prevail.⁵⁷ This rule still applies where property was acquired by the bankrupt on a conditional sale contract prior to the amendment.⁵⁸ The supreme court had held in effect that a trustee in bankruptcy under an unrecorded contract of conditional sale was only vested with the title and interest of the bankrupt in the property acquired by him under such contract.⁵⁹

(4) **AMENDMENT TO BE CONSTRUED WITH § 70.**—Under § 70 of the act the trustee is vested by operation of law with the title of the bankrupt as to all property which belonged to him in his own right, and he takes the same, not as an innocent purchaser, but subject to all valid claims, liens and equities.⁶⁰ Under this statutory limitation, the trustee was held "to stand in the shoes of the bankrupt,"⁶¹ so that where a lien or security existed which was enforceable as against the bankrupt, it must be recognized by the trustee, and could not therefore be attacked by the trustee for the benefit of general creditors. It seems that the language of the amendment might have found a more appropriate place in section 70 of the act, but, however that may be, it is plain that the two sections must now be construed together and that the trustee can no longer be said to have the limited title of the bankrupt.⁶²

of claims, vote at a special meeting in favor of an offered compromise of a suit brought by the trustee, the court will not necessarily, upon the authority of section 56-a of the bankruptcy act, direct the trustee to accept the compromise, but in a proper case will order a bond of indemnity to be executed by the creditors opposing the compromise, saving the bankrupt estate from costs, expenses and counsel fees of such litigation. In *re Meadows, Williams & Co.* (D. C., N. Y.), 25 Am. B. R. 100, 181 Fed. 911.

55. See House Committee Report on Amendatory Act of 1910. See *Bank of North America v. Penn. Motor Co.* (Pa. Sup. Ct.), 31 Am. B. R. 395, 83 Atl. 622; *Sattler v. Sloninsky* (D. C., Pa.), 28 Am. B. R. 729, 199 Fed. 592; In *re Snelling* (D. C., Mass.), 29 Am. B. R. 818, 202 Fed. 259.

56. Privileges of trustee prior to amendment of 1910.—The trustee in bankruptcy of one who, prior to his insolvency, paid the consideration of a conveyance to another is not clothed with the privileges of a judgment creditor, and cannot attack the conveyance

in that the bankrupt never had a fee or any legal or equitable interest in the lands. *London v. Epstein* (Sup. Ct., App. Div., N. Y.), 24 Am. B. R. 557, 38 N. Y. App. Div. 513.

57. *Crucible Steel Co. v. Holt* (C. C. A., 6th Cir.), 23 Am. B. R. 302, 174 Fed. 127.

58. *Holt v. Henley* (Sup. Ct., U. S.), 232 U. S. 637, 32 Am. B. R. 161, 58 L. Ed. 767 (rev. 27 Am. B. R. 578), 193 Fed. 920.

59. *York Manufacturing Co. v. Cassell*, 201 U. S. 344, 15 Am. B. R. 633, 50 L. Ed. 782; *Dunlop v. Mercer* (C. C. A., 8th Cir.), 19 Am. B. R. 361, 156 Fed. 545.

60. See Bankr. Act, § 70-a, and discussion thereunder.

61. *Security Warehousing Co. v. Hand*, 206 U. S. 415, 19 Am. B. R. 291; In *re Standard Telephone & Elec. Co.*, 216 U. S. 544, 24 Am. B. R. 761.

62. In *re Hammond* (D. C., Ohio), 26 Am. B. R. 336, 188 Fed. 1020.

Effect of failure to amend section 70.—Although the amendment of 1910 to the

(5) **GENERAL PURPOSE AND EFFECT OF AMENDMENT.**—It was to obviate the prior limitation upon the right of a trustee to attack unrecorded conditional sale contracts and other like liens, that section 47, clause 2, subsection *a*, of the act was amended by inserting the words "And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon."⁶³ The purpose of the amendment was to give to the trustee the lien of a judgment creditor, enabling him to protect general creditors from unrecorded liens, unlawful transfers, spurious claims and other dissipations of the assets of the estate, which a lien or judgment creditor might have prevented had bankruptcy not intervened.⁶⁴ Decisions holding that a trustee has no other right than belonged to the bankrupt are no longer controlling.⁶⁵ The amendment is not to be given any retroactive effect.⁶⁶ If none of the creditors of the bankrupt had a lien by judgment or otherwise against the property in question, the amendment does not increase the trustee's rights, but as to such property he stands in the shoes of the bankrupt.⁶⁷

(6) **STATUS OF TRUSTEE THAT OF CREDITOR HOLDING LIEN.**—The trustee no longer "stands in the shoes of the bankrupt."⁶⁸ Under the amendment the trustee may attack the validity of any lien, or other claim against the bankrupt's property which a creditor holding a lien by legal or equitable proceedings

bankruptcy act, increasing the rights of a trustee in bankruptcy to those of a lien creditor, should more properly have been made to section 70, which deals with property as to which the trustee acquires title, than to section 47, which relates more particularly to the duties of a trustee, it does not follow that it should necessarily have been so made, or that it is any the less effective because having been made to the latter section, the intention of Congress having been clearly expressed by the terms of the amendment. In *re Williamsburg Knitting Mill* (D. C., Va.), 27 Am. B. R. 178, 190 Fed. 871.

63. Statement of Representative Shirley to the House of Representatives, Congressional Record, 61st Congress, 2d session, pp. 2552-4. It was for the purpose of avoiding the construction of the bankruptcy act by *York Manufacturing Co. v. Cassell*, 201 U. S. 344, 15 Am. B. R. 633, 50 L. Ed. 782, that the amendment was enacted. *Matter of Kruse* (D. C., Iowa), 37 Am. B. R. 687, 689, 234 Fed. 470.

64. *Matter of City Drug Store* (D. C., Ga.), 35 Am. B. R. 335, 224 Fed. 132.

65. In *re Gehris-Herbine Co.* (D. C., Pa.), 26 Am. B. R. 470, 188 Fed. 502.

66. *Arctic Ice Mach. Co. v. Armstrong County Trust Co.* (C. C. A., 3d Cir.), 27 Am. B. R. 562; In *re Schneider* (D. C., Pa.), 29 Am. B. R. 469, 203 Fed. 589.

As to the effect of amendment on rights accruing prior to its passage, see *Hinchman v. Consolidated Arizona Smelting Co.* (D. C., Me.), 29 Am. B. R. 893, 198 Fed. 907.

Rule of interpretation.—The amendment

gives a rule of interpretation rather than a substantive right, and, therefore, such amendment is applicable to a contract of conditional sale made prior to its enactment, which, by State law in force at the time it was made, is invalid because not recorded. In *re Farmers' Co-operative Co.* (D. C., N. Dak.), 30 Am. B. R. 190, 202 Fed. 1008.

67. In *re Flatland* (C. C. A., 9th Cir.), 28 Am. B. R. 476, 196 Fed. 310.

68. *Matter of Sterne & Levi* (Ref., Tex.), 26 Am. B. R. 535, 540.

Trustee no longer in position of bankrupt.—In the case of In *re Nelson* (D. C., S. Dak.), 27 Am. B. R. 272, 275, 91 Fed. 233, the court said: "Under section 47, subd. 'a,' 2 of the Bankruptcy Act, as amended in 1910, if property coming into the custody of the court be claimed by another, the trustee is vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon. Applying its plain interpretation to this section and amendment, it follows that an agreement which would have been binding upon and could have been enforced between the parties hereto prior to the amendment of 1910 no longer necessarily binds the trustee. His position is no longer the same as that of the bankrupt, but he is now in the position of a creditor holding a legal or equitable lien, and in this case the conditional sale of this property and the writing above set forth, termed a 'warehouse receipt,' are to be interpreted exactly as if the trustee were a creditor holding such lien. In *re Franklin Lumber Co.* (D. C., Pa.), 26 Am. B. R. 87, 187 Fed. 281."

might have attacked.⁶⁹ Under this provision of the statute the trustee is not limited to such objections to a transaction between the bankrupt and a creditor as the bankrupt might have had, but he may make any objection that a creditor holding a lien might make.⁷⁰ The class of cases, unprovided for by the original act, and intended to be reached by the amendment, was that in which no creditors had acquired liens by legal or equitable proceedings and to vest in the trustee for the interest of all creditors the potential rights of creditors potential with such liens.⁷¹ The language is readily susceptible of this construction. It recites that such trustee "shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon." This language aptly refers to such rights, remedies and powers as a creditor holding such a lien is entitled to under the law, rather than to the rights, remedies and powers of a creditor who had actually fastened a lien on the property of the bankrupt estate.⁷² The

69. *Pacific State Bank v. Coats* (C. C. A., 9th Cir.), 30 Am. B. R. 655, 205 Fed. 618 (quoting text); *Matter of Shute* (D. C., Wash.), 37 Am. B. R. 554, 233 Fed. 544; *Matter of City Drug Store* (D. C., Ga.), 35 Am. B. R. 335, 224 Fed. 132.

The status of the general creditors was changed by the amendment, and by operation of law a lien was created and established in favor of the trustee for the general creditors. In *re Pacific Elect. Automobile Co.* (D. C., Wash.), 35 Am. B. R. 322, 224 Fed. 220.

Status of trustee.—The trustee, as representative of the general creditors now has the serviceable footing of a judgment creditor holding an execution duly returned unsatisfied or a creditor holding a lien by legal or equitable proceedings. *Matter of Shelly* (D. C., N. Y.), 37 Am. B. R. 514, 235 Fed. 311.

70. *Scandinavian American Bank v. Sabin* (C. C. A., 9th Cir.), 36 Am. B. R. 151, 227 Fed. 579; *Meier & Frank Co. v. Sabin* (C. C. A., 9th Cir.), 32 Am. B. R. 595, 214 Fed. 231; *Brandt v. Mayhew* (C. C. A., 9th Cir.), 33 Am. B. R. 845, 218 Fed. 422; *Matter of Lane Lumber Co.*, (C. C. A., 9th Cir.), 33 Am. B. R. 491, 217 Fed. 550.

71. Potential rights of creditors.—In the case of *Pacific State Bank v. Coats* (C. C. A., 9th Cir.), 30 Am. B. R. 655, 205 Fed. 618, the court quotes the text and says: "The purpose of this amendment is to vest in the trustee for the interest of all creditors the potential rights of creditors possessing or holding liens upon the property coming into his custody by legal or equitable proceedings. The trustee no longer stands in the shoes merely of the bankrupt, with the limited rights of the bankrupt to attack unrecorded liens which may be valid and unimpeachable by the bankrupt; but the amendment by operation of law vests in him a lien equivalent to such as would be acquired by legal or equitable proceedings upon the property coming into his custody by virtue of the bankruptcy proceedings." See *Matter of Thompson* (Ref., N. J.), 37 Am. B. R. 434

(quoting text); *Cooper Grocery Co. v. Park* (C. C. A., 5th Cir.), 33 Am. B. R. 262, 218 Fed. 42 (quoting text with approval).

Liability on note not enforceable by bankrupt.—Where a note signed by defendant as treasurer of the S. Co., could not be enforced against him personally by the payee, under Mass. R. L., c. 73, § 37, the payee's trustee in bankruptcy, who is vested by this section, as amended in 1910, with the rights of an attaching creditor, has no greater rights in respect to the note than the payee himself. *Jump v. Sparling* (Sup. Jud. Ct., Mass.), 33 Am. B. R. 91, 105 N. E. 878.

72. In *re Bazemore* (D. C., Ala.), 26 Am. B. R. 494, 189 Fed. 236; In *re Calhoun Supply Co.* (C. C., Ala.), 26 Am. B. R. 523, 189 Fed. 537; *Sturdivant Bank v. Schade* (C. C. A., 8th Cir.), 27 Am. B. R. 673, 195 Fed. 188; *Matter of Stern* (D. C., Ohio), 30 Am. B. R. 694, 208 Fed. 488; *Matter of Lane Lumber Co.* (D. C., Idaho), 31 Am. B. R. 792, 210 Fed. 82; *Matter of Superior Drop Forge & Mfg. Co.* (D. C., Ohio), 31 Am. B. R. 455, 208 Fed. 813, quoting text, *Matter of Cooper* (D. C., Iowa), 35 Am. B. R. 321, 216 Fed. 309.

The effect of the amendment of 1910 to section 47-a of the bankruptcy act is to collectively put the creditors of a bankrupt in the position of judgment or attaching creditors by representation and enables the trustee to avoid the lien of a chattel mortgage given, prior to the amendment, by the bankrupt on merchandise retained by him under circumstances which made such mortgage void as to creditors. In *re Hammond* (D. C., Ohio), 26 Am. B. R. 336, 188 Fed. 1020.

Petitioner delivered to bankrupt certain farm implements pursuant to agreements, contemplating a sale, wherein bankrupt agreed to hold the property in trust for the petitioner to secure it for the purchase price of same. Certain terms of credit were given, bankrupt, however, agreeing to turn over upon demand all notes, cash, checks, and book accounts received by him or arising out of the sale of the property, which when so surrendered were to be credited to bankrupt.

amendment vests in the trustee, by operation of law, a lien equivalent in all respects to that acquired upon the property coming into the custody of the trustee, by virtue of legal or equitable proceedings instituted against the

as payment on account of the purchase price. It was provided that petitioner could terminate the contract at any time by notice in writing in case it became satisfied that bankrupt was not entitled to the credit extended, and it was further stated that the written agreement contained all the "conditions of the sale." It was held that the agreements were contracts of sale; that the provision therein that title to the property should remain in the vendor until fully paid for was, under the law of Pennsylvania, void as against bankrupt's creditors and so void as against bankrupt's trustee under section 47a, (2) of the bankruptcy act, as amended in 1910. *In re Hartdagen* (D. C., Pa.), 26 Am. B. R. 532, 189 Fed. 546.

In the case of *Matter of Pittsburg-Big Muddy Coal Co.* (C. C. A., 7th Cir.), 32 Am. B. R. 452, 215 Fed. 703, the court said: "Under the amendment the filing of a petition in bankruptcy constitutes an equitable levy and a caveat to the world, for the following reasons: 1. The plain and natural reading of the words gives the trustees the same right to attach or resist secret liens that judgment creditors would have had if bankruptcy had not intervened, no matter whether there are or are not any such creditors when the petition in bankruptcy is filed. 2. If the amendment were to be construed so as to limit the power of the trustee to cases in which there are lien creditors, virtually nothing would be added to the original Act, for under sections 67-c and f liens created within four months prior to the filing of the petition may be used by the trustee for the benefit of the estate. 3. Although extraneous matter cannot properly be looked to in aid of the interpretation of a clear and unambiguous statute (for such a statute carries its own means of interpretation), yet it may not be amiss, as against a contention that this amendment is not unambiguous, to note that it was the intention of the committee in charge of the measure that the rule announced in *York Mfg. Co. v. Cissell* (15 Am. B. R. 633, 201 U. S. 344); should be changed."

It is true that the case of *In re Lausman* (D. C., Ky.), 25 Am. B. R. 186, 183 Fed. 647, conflicts with the view stated in the text. In this case a computing scale had been sold to the bankrupt upon a contract, which was never recorded, that title should remain in the vendor until the agreed price was fully paid, a portion of which was still due at the time of adjudication. Under the settled law of Kentucky, this contract constituted a sale and a mortgage back to the vendor to secure the price, but was valid, whether recorded or not, as between the parties and as against general creditors having no liens. It was

held that it was immaterial whether the other debts of the bankrupt were created before or after the mortgage in question was given, unless a lien on the computing scale in favor of some other creditor was otherwise acquired previous to the adjudication, that it was immaterial that the mortgage was not acknowledged or recorded and that no such lien having been otherwise acquired, the vendor had a preferred claim as against the scale or the proceeds of the sale thereof, under section 64-b (5) of the bankruptcy act.

Bankrupt executed and delivered a bill of sale for a motor truck to petitioner who had paid the full value thereof in cash, bankrupt agreeing to deliver the truck upon directions being given therefor. The truck, which bore bankrupt's name painted on it in large letters, was thus permitted to remain in its possession and use, being kept at a garage where, when bankruptcy intervened, it was being held under an attachment in a suit by the garage company for storage charges and supplies. Upon a petition to reclaim the property it appeared that the law of Massachusetts requires delivery in order to make a purchaser's title good against subsequent purchasers without notice or attaching creditors. *Held*, that the trustee in bankruptcy, being vested with the rights, remedies and powers of a lien creditor by virtue of the amendment of 1910 to section 74 of the Bankruptcy Act, was entitled to the property as against bankrupt's vendee. *In re Waite-Robbins Motor Co.* (D. C., Mass.), 27 Am. B. R. 541, 192 Fed. 47.

Property procured by fraudulent representations.—Where vendors at the earliest opportunity rescind a sale of property to a bankrupt, procured by the latter's fraudulent representations, and under the State law the rights of the defrauded vendor prevail over the claims "of a creditor holding a lien by legal or equitable proceedings thereon," the trustee in bankruptcy acquires no title to such property under section 47-a (2). *Matter of Gold* (C. C. A., 7th Cir.), 31 Am. B. R. 18, 210 Fed. 410.

Warehouse receipts.—Upon the bankruptcy of a cotton factor who stored the cotton in a warehouse and pledged the receipts therefor, there were intervening petitions by consignors and receipt holding pledgees. *Held*, that by virtue of the amendment of 1910 to section 47a (2) of the Bankruptcy Act, the trustee represents creditors not secured by receipts with the same force and effect as if they had levied executions upon the cotton in the warehouse. This property came into the custody of the bankruptcy court, and titles or liens which, under the State law, would have prevailed against such levying creditors are superior to the title of

bankrupt by a creditor.⁷³ This provision of the bankruptcy act puts the trustee, in so far as the assets of the estate are concerned, in the position of a lien creditor,⁷⁴ but does not necessarily give him the status of a purchaser without notice.⁷⁵ His rights in respect to the property against which the lien is asserted flow from the amendment and not from the creditors of the estate, for whose benefit such rights must be exercised.⁷⁶

(7) STATUS DETERMINED AS OF DATE OF FILING PETITION.—The statute does not indicate the time as of which the trustee is to be regarded as having acquired the status of a creditor holding a lien by legal or equitable proceedings. It frequently becomes important to determine the time when the status exists, as where for instance the lien of a creditor becomes effectual under a statute if perfected by execution, attachment or other process before the filing or recording of an instrument affecting or transferring the property in question.⁷⁷ If the instrument was duly recorded or filed prior to bankruptcy the lien of a creditor did not attach at that time and the trustee upon his appointment acquires no right to attack the validity of the instrument. In analogy to the rulings in respect generally to the effect of filing a petition in bankruptcy, it has been authoritatively determined that the status of the trustee as a creditor holding a lien exists as of the date of the filing of such petition.⁷⁸

(8) UNRECORDED LIENS.—One principal object of the statute is to vest

the trustee. *Interstate Banking & Trust Co. v. Brown* (C. C. A., 6th Cir.), 37 Am. B. R. 771, 235 Fed. 32.

73. *Matter of Thompson* (Ref., N. J.), 37 Am. B. R. 434, quoting text; *Pacific State Bank v. Coats* (C. C. A., 9th Cir.), 30 Am. B. R. 655, 205 Fed. 618. But see *Sparks v. Weatherly* (Sup. Ct. Ala.), 32 Am. B. R. 835, 58 So. 280, wherein the court said: "We are of the opinion that the clause of the amendment in question was intended to provide that as to property adversely held the trustee should be entitled to proceed in such cases and in such manner as an individual creditor might have proceeded in subjecting the assets of the bankrupt, had the bankruptcy not intervened to prevent; and that no enlargement of the rights of the trustee representing creditors was intended over and above the rights conferred upon the creditors themselves by the statutes of the State; that as to substantive rights the trustee is in no better position than the bankrupt or his creditors would have been, except that he may come into equity without being required to first exhaust his remedy at law, a matter of advantage to the trustee in some jurisdictions."

State law to control.—The rights of a trustee under section 47a (2) of the Bankruptcy Act to property coming "into the custody of the bankruptcy court," being the "rights * * * of a creditor holding a lien by legal or equitable proceedings" are essentially a matter of State law. *Matter of Floyd-Scott Co.* (D. C., Mass.), 35 Am. B. R. 463, 224 Fed. 987.

74. *In re Hartdagen* (D. C., Pa.), 26 Am. B. R. 532, 189 Fed. 546; *Matter of O'Brien*,

Jr. (D. C., N. J.), 32 Am. B. R. 347, 215 Fed. 129.

75. *Matter of Superior Drop Forge and Mfg. Co.* (D. C., Ohio), 31 Am. B. R. 455, 208 Fed. 813; *Matter of Remson Mfg. Co.* (C. C. A., 2d Cir.), 36 Am. B. R. 799.

76. *In re Farmers Co-operative Co.* (D. C., N. Dak.), 30 Am. B. R. 190, 202 Fed. 1008; *In re O'Callaghan* (Ref., Mass.), 30 Am. B. R. 97.

77. *Martin v. Commercial National Bank* (C. O. A., 5th Cir.), 36 Am. B. R. 25, 228 Fed. 651, in which case it was held that where no creditor of a bankrupt acquired a lien on property covered by a mortgage which was executed before the four months' period antedating the bankruptcy but was recorded within that period, the trustee did not acquire the status of a creditor holding a lien superior to that of the mortgage.

78. *Bailey v. Baker Ice Machine Co.*, 239 U. S. 268, 35 Am. B. R. 814, 60 L. Ed. 275, in which it was stated that the view which accords with other provisions of the act is that the trustee takes the status of a creditor having a lien as of the time when the petition in bankruptcy is filed; *Fairbanks Steam Shovel Co. v. Wills*, 240 U. S. 642, 36 Am. B. R. 754, 60 L. Ed. 841, affg. 32 Am. B. R. 381; *Matter of Anson Mercantile Co.* (D. C., Tex.), 38 Am. B. R. 952. See Am. Bankr. Dig. § 338.

The status of a lien or judgment creditor, conferred upon a trustee in bankruptcy by the amendment of 1910 to this section, dates from the filing of the petition in bankruptcy, and is not retroactive as regards the prior four months' period. *Bunch v. Maloney* (C. C. A., 8th Cir.), 37 Am. B. R. 369, 233 Fed. 967.

in the trustee the same right to attack secret unrecorded liens, where record was required by the State law, as was given to judgment creditors and others under that law.⁷⁹ It was not the purpose of the amendment to enlarge the rights of a trustee as against a lien or under a state statute, but the main purpose was to enable the trustee to avoid secret and unrecorded liens created by the act of the bankrupt.⁸⁰ So that where an instrument conveying real property was not recorded prior to bankruptcy, it has been held that the trustee takes title to the land, under a statute which provides that a purchaser of land who records his deed before a prior purchaser has a superior title.⁸¹ The trustee of a bankrupt chattel mortgagor has all the rights and remedies of a lien or judgment creditor as against an unrecorded chattel mortgage, and the mortgagee may not after the filing of a petition in bankruptcy against the mortgagor take possession of the property under the mortgage.⁸² The recording to be effectual must be such as complies with the requirements of the recording acts, and in case of a failure, as where the instrument was not properly acknowledged, the trustee may avail himself of the defects, in the same manner and to the same effect as a lien or judgment creditor.⁸³ A contract of conditional sale, void under the State law as against judgment creditors of the purchaser unless recorded, is likewise void as against the trustee in bankruptcy of the purchaser in possession of the property.⁸⁴

(9) PROPERTY AFFECTED.—It has been held that the lien thus acquired by the amendment reaches generally all the property which comes into the possession of the court and is not limited specially to property which is subject to unrecorded chattel mortgages or contracts of conditional sale.⁸⁵ The trustee has no right as to property in the possession of the bankrupt which did not belong to him,⁸⁶ nor is the general rule that the trustee takes the

79. *In re Smith* (D. C., Wis.), 29 Am. B. R. 527, 198 Fed. 876, as to effect of failure to refile chattel mortgage.

Unrecorded liens.—It was clearly the intention of Congress in adopting the amendment of 1910 to section 47a (2) of the bankruptcy act that thereafter the trustee should not stand in the shoes of the bankrupt with regard to unrecorded liens depending for their validity upon registration; and that as to the general creditors, such liens should be void. *Matter of Collins* (D. C., Ia.), 37 Am. B. R. 692, 235 Fed. 937.

Unrecorded mortgage.—Under the provisions of this section as amended in 1910, a trustee in bankruptcy has the right to property in the possession of the bankrupt which is superior to the claim of a mortgagee under a mortgage, not recorded as required by law, but which is valid between the parties. *Matter of Social Circle Cotton Mills* (D. C., Ga.), 32 Am. B. R. 567, 213 Fed. 994.

Under the Bankruptcy Act and the Code of Iowa, a mortgage unrecorded, whether written or oral, is of no validity as against the rights of the trustee in bankruptcy of the mortgagor. *Matter of Cooper* (D. C., Ia.), 35 Am. B. R. 321, 216 Fed. 309.

80. *Gates & Co. v. Stevens Construction Co.* (N. Y. Ct. of App.), 38 Am. B. R. 696, 220 N. Y. 38, 115 N. E. 22.

81. Title of trustee as against unrecorded instruments.—The effect of the amendment of 1910 to section 47a of the Bankruptcy Act has been to put trustees in bankruptcy on the same basis as creditors and purchasers for value as against unrecorded instruments. *Lynch v. Johnson* (N. C., Sup. Ct.), 35 Am. B. R. 881, 86 S. E. 995.

82. *Fairbanks Steam Shovel Co. v. Wills*, 240 U. S. 642, 36 Am. B. R. 754, 60 L. Ed. 841, affg. 32 Am. B. R. 381.

83. *Matter of Caslon Press* (C. C. A., 7th Cir.), 36 Am. B. R. 127, 129, 229 Fed. 133; *Matter of Empress Pharmacy* (D. C., Iowa), 38 Am. B. R. 145, in which case there was a failure to index properly a mortgage executed by the bankrupt.

84. *Matter of O'Brien, Jr.* (D. C., N. J.), 32 Am. B. R. 347, 215 Fed. 129.

85. *In re Whatley Bros.* (D. C., Ga.), 29 Am. B. R. 64, 109 Fed. 326.

86. Property subject to valid liens.—A creditor holding an unsatisfied execution cannot attach the property of a third person accidentally in the possession of a bankrupt, hence, the trustee in bankruptcy is not given a superior lien by this section, as amended in 1910, upon money paid to the bankrupt by mistake and upon which a bank had a lien. *Brown Bros. Co. v. Smith Bros. Co.* (D. C., La.), 37 Am. B. R. 30, 231 Fed. 475.

property subject to such liens as may be enforced against it, affected by the amendment.⁸⁷ If the property sold under a contract of conditional sale, not filed as required by a State law, is at the time of bankruptcy in the possession of the vendor, it does not pass to the trustee.⁸⁸

(10) **PRIORITY OF DEBTS.**—The amendment does not conflict with section 64-b (5) relating to priority of debts.⁸⁹ It has been held that a trustee may object to the priority of a claim based upon a mortgage given as security and recorded within the four months' period, and the referee may determine the question of preference in a proper case.⁹⁰ For the purpose of fixing priority as between a trustee in bankruptcy and adversely claiming lien holders, the time of filing the petition is the vital date, and a lien invalid on that date cannot be perfected before adjudication so as to make it valid against the trustee.⁹¹

(11) **CREDITORS HOLDING LIENS; CONDITIONAL SALE CONTRACTS AND CHATTEL MORTGAGES.**—The words "creditor holding a lien by legal or equitable proceedings" include a judgment creditor, holding an execution lien. The purpose of Congress was to embrace within these words every class of creditors with liens by legal or equitable proceedings favored by the varying registration laws of each of the States. The registration laws of some States include but one of many classes of such creditors. In that case the purpose of Congress is not to be frustrated as to the included class because other classes included in the amendment were not included also in the registration act of that particular State. The breadth of language was used for the purpose of gathering in all classes protected by local registration acts.⁹² If property coming into the custody of the court be claimed by another, the trustee is vested with all the rights, remedies, and powers of a creditor holding a lien

87. See discussion under § 70, *post*; *Gates Co. v. Stevens Construction Co.* (N. Y. Ct. of App.), 38 Am. B. R. 396, 220 N. Y. 38, 115 N. E. 22.

88. *Matter of Remson Mfg. Co.* (C. C. A., 2d Cir.), 36 Am. B. R. 799.

89. Construction with section 64-b (5).—*In re Calhoun Supply Co.* (C. C., Ala.), 26 Am. B. R. 528, 189 Fed. 537, and *In re Bazemore* (D. C., Ala.), 26 Am. B. R. 494, 189 Fed. 236, the court said: "The construction, necessary to effectuate the intention of Congress, does not seem to me to make the amended section conflict with section 64-b, clause 5. Under the State law the conditional vendor has no priority over judgment creditors without notice, and the amendment to the Bankruptcy Act places the trustee in that category. As against his right as conferred by the amended section of the Act, the conditional vendor has no priority and the order of payment provided for by section 64 is not therefore interfered with by not allowing the conditional vendor priority of payment." But in *In re Lausman* (D. C., Ky.), 25 Am. B. R. 186, 183 Fed. 647, it has been held that the questions involved do not depend upon what sort of title the trustee may take to the property coming into his custody as provided by the amendment of 1910 to section 47-a (2) of the bankruptcy act, but upon how that property is

required to be distributed under section 64-b (5) thereof.

90. *In re Lorch & Co.* (D. C., Ky.), 28 Am. B. R. 784, 199 Fed. 944.

In respect to real property which is in the possession of a person other than the bankrupt under an oral purchase thereof, the trustee holds no better title than the bankrupt, and is not entitled to the property, since under the amendment he has merely the rights of "a creditor holding an execution." *In re Snelling* (D. C., Mass.), 29 Am. B. R. 818, 202 Fed. 259, *affd.* *Clark v. Snelling*, 30 Am. B. R. 50, 205 Fed. 240.

91. *Massachusetts Bonding & Ins. Co. v. Kemper* (C. C. A., 6th Cir.), 34 Am. B. R. 80, 220 Fed. 847.

92. *In re Calhoun Supply Co.* (C. C., Ala.), 26 Am. B. R. 528, 189 Fed. 537.

If a contract of sale is one of conditional sale, so that the title does not pass out of the vendor and such a contract is not required or permitted by the laws of the State to be recorded, the reservation of title is good as against the trustee; however if it be an absolute sale, whereby the title passes accompanied by a lien given back to the seller to secure the purchase price, the contract amounts to a chattel mortgage, and if not filed, is invalid against the trustee. *Deere Plow Co. v. Mowry* (C. C. A., 6th Cir.), 34 Am. B. R. 384, 222 Fed. 1.

by legal or equitable proceedings thereon. An agreement therefore which would previously have been valid between the parties—such, for example, as a contract of conditional sale⁹³—is no longer necessarily void against the trustee. He is in the position of a creditor holding a legal or equitable lien, and the agreement is to be scrutinized from that point of view. Such an agreement, purporting on its face to be a contract for a lease, may now be shown by the trustee to be a contract of conditional sale, although the bankrupt himself, under the contract, might be estopped from making such assertion.⁹⁴ A trustee may assert his title against the vendor under an unrecorded conditional sale contract.⁹⁵ The section as amended covers the rights of creditors under a chattel mortgage which is void as to such creditors under the laws of the State where made, and the trustee may enforce such rights as against the

93. *Davis v. Crompton* (C. C. A., 3d Cir.), 20 Am. B. R. 53, 158 Fed. 735. See *In re Kreuger*, (D. C., Ky.), 27 Am. B. R. 623, 199 Fed. 367.

Validity of unrecorded conditional sale as against trustee; amendment of 1910; constitutionality.—A contract of conditional sale, reserving title in the conditional vendor until the property sold is paid for, which by State law is invalid unless recorded, as against creditors and lienors of the conditional vendee for value and without notice, is, by virtue of the amendment of 1910 to section 47-a (2), void as against the conditional vendee's trustee in bankruptcy. Such amendment is not unconstitutional as depriving the conditional vendor of his property without due process of law, as it does not violate one's constitutional rights to require him to conform to the recording acts of the State in which he has his property. *In re Williamsburg Knitting Mill* (D. C., Va.), 27 Am. B. R. 178, 191 Fed. 871; *Hart v. Emmerson-Brantingham Co.* (D. C., Mo.), 30 Am. B. R. 218, 203 Fed. 60. But see *Big Four Implement Co. v. Wright* (C. C. A., 8th Cir.), 31 Am. B. R. 125, 207 Fed. 535; *In re East End Mantel & Tile Co.* (D. C., Pa.), 29 Am. B. R. 793, 202 Fed. 275; *In re Nuckols* (D. C., Tenn.), 29 Am. B. R. 867, 201 Fed. 437.

Power to avoid unrecorded contract of conditional sale.—A trustee in bankruptcy, in respect to an unrecorded contract of conditional sale whereby goods have been delivered to the bankrupt and the title retained by the conditional vendor, has the same rights as a creditor holding a lien by legal proceedings; and it is not necessary to his rights that there should, in fact, have been such lien creditors when the petition in bankruptcy is filed. *In re Dancy Hardware & Furniture Co.* (D. C., Ala.), 28 Am. B. R. 444, 198 Fed. 336.

Validity of unrecorded contract as against trustee.—By virtue of the amendment of 1910 to this section a trustee in bankruptcy, as respects property held by a bankrupt under an unrecorded contract of conditional sale, is vested with all the "rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings," and where

property was delivered to bankrupt under a contract of conditional sale, not recorded as required by the Georgia statute, the trustee's rights, as to such property and the proceeds thereof, are superior to those of the conditional vendor. *In re Farmers' Supply Co.* (D. C., Ga.), 28 Am. B. R. 535, 196 Fed. 990.

Bill of sale.—Provisions of a bill of sale to a bankrupt examined and held not to create or reserve a lien superior to the rights of the trustee in bankruptcy. *Matter of Cooper* (D. C., Ia.), 35 Am. B. R. 321, 216 Fed. 309.

94. *In re Franklin Lumber Co.* (D. C., Pa.) 26 Am. B. R. 37, 187 Fed. 281 (revd. on other grounds, 28 Am. B. R. 699, 199 Fed. 1), holding that whenever a judgment creditor may attack a contract, in form a bailment, on the ground that it is really a conditional sale, and may support the attack by competent and relevant evidence that throws light on the true meaning of the contract—the trustee has the same right. The mere form of the agreement does not bind him, as it might bind the bankrupt; see also *In re Gaglione & Son* (D. C., Pa.), 22 Am. B. R. 694, 200 Fed. 81.

The trustee may retain chattels sold to the bankrupt under a conditional sale in a jurisdiction where, if he has really sold it and has also parted with the possession, the conditional vendor cannot enforce against execution creditors a condition that he is to retain the title until the price is paid, and this, even though the transaction has been declared by the parties to be a bailment, if the court is satisfied that a sale with a condition as to title annexed was really intended. *In re Gehris-Herbine Co.* (D. C., Pa.), 26 Am. B. R. 470, 188 Fed. 502; *In re Harrington* (Ref., Mass.), 29 Am. B. R. 690, in which case Referee Olmstead discusses with characteristic clearness the circumstances which lead to the enactment of this amendment, and the rights of trustees in respect to chattels sold on condition, or by bill of sale, the possession remaining in the bankrupt.

95. *Potter Mfg. Co. v. Arthur* (C. C. A., 6th Cir.), 34 Am. B. R. 75, 220 Fed. 843.

mortgagee to the same extent as the creditors might have done.⁹⁶ So too, the trustee may attack a contract, in form a bailment, and show that it is contract for a conditional sale and therefore invalid as to lien creditors.⁹⁷

(12) **FRAUDULENT TRANSFERS.**—Under the section as so amended the trustee becomes vested with all the rights of a judgment creditor as to real property transferred in fraud of creditors more than four months prior to the filing of the petition.⁹⁸ A conveyance or transfer which is invalid because in fraud of creditors may be attacked by a trustee in the same manner and with like effect as could a judgment creditor had bankruptcy not intervened.⁹⁹ The trustee is not required to allege in an action under this clause, to recover property fraudulently transferred, that a deficiency of assets exists.¹⁰⁰

g. Sales by trustees.—The duty of trustees concerning, and the practice on, sales of assets of the estate is considered under section seventy. In the appointment of an auctioneer the trustee is to be guided by the court; the court may disapprove the selection of an auctioneer made by the trustee, and direct him to select another designated by the court.¹⁰¹

h. Employment of attorneys.—This, too, is considered elsewhere.¹⁰² An attorney may be needed to aid the trustee in the collection of the property of the estate. It would be the trustee's duty in such a case to employ such attorney.

i. Rapidity in administration.—This is required not only by subdivision 2 of this subsection, but by other provisions found in the law and the General orders.¹⁰³

j. Accounting for interest.—Subdivision 1 seems unnecessary. The former statute permitted a temporary investment of the funds where it appeared that distribution might be delayed by litigation.¹⁰⁴ The court or referee could doubtless order this now. Thus, there might be some interest earned. The frequency with which dividends must be paid,¹⁰⁵ however, makes any accumulation of interest unlikely. The trustee should, if possible, arrange with the official depository for interest. In any event, all interest received by a trustee must be accounted for. The interest accruing on interest-bearing assets must be collected and accounted for by the trustee.¹⁰⁶

k. Deposits.—Subdivision 3 of this section makes it the duty of the trustee to deposit all the money received by him in one of the designated depositories and General Order XXIX prescribes the method of withdrawal. These

96. *In re Geiver* (D. C., So. Dak.), 28 Am. B. R. 413, 193 Fed. 128; *Massachusetts Bonding & Ins. Co. v. Kemper* (C. C. A., 6th Cir.), 34 Am. B. R. 80, 220 Fed. 847.

97. *In re Gaglione & Son* (D. C., Pa.), 28 Am. B. R. 694, 200 Fed. 81.

98. *In re Downing* (D. C., N. Y.), 27 Am. B. R. 309, 192 Fed. 683, *affd.* 29 Am. B. R. 228, 201 Fed. 93.

Sale of real estate free from claim for dower; law of Pennsylvania.—Since by the amendment of 1910 to section 47-a(2) of the Bankruptcy Act, a trustee in bankruptcy, in so far as the assets of the estate are concerned, is in the position of a lien creditor, and since under the law of Pennsylvania, a lien creditor can issue execution and by a sale thereunder divest the wife of a debtor of her dower interest in real estate, the trustee of a bankrupt may, by a sale in bank-

ruptcy, divest the bankrupt's wife of her interest in her husband's real estate, without her consent. *In re Freedman* (Ref., Pa.), 29 Am. B. R. 135.

99. *Bean v. Parker* (Vt. Sup. Ct.), 38 Am. B. R. 895, 96 Atl. 17.

100. *Kraver v. Abrahams* (D. C., Pa.), 29 Am. B. R. 365, 203 Fed. 782.

101. *In re Benjamin* (C. C. A., 2d Cir.), 14 Am. B. R. 481, 136 Fed. 175.

102. See under Sixty-two of this work.

103. Compare Bankr. Act, §§ 47-a (10), 57-n, 65-b.

104. R. S., § 5060.

105. Bankr. Act, § 65-b, as amended, seems a partial reversal of this policy of the original law.

106. *Johnson v. Norris* (C. C. A., 5th Cir.), 27 Am. B. R. 107, 190 Fed. 459.

provisions of the act and the General Order are mandatory in form and were designed to insure the safety of the funds, rather than an increment by way of interest while they were idle. But it seems that the consent of all the parties interested may justify a departure from the prescribed rules.¹⁰⁷ However, referees in bankruptcy should take the utmost care to see that receivers and trustees comply with the law in reference to the depositing of funds, and that they deposit all funds received by them in a regularly designated depository.¹⁰⁸ A trustee may not deposit funds of the estate in interest-bearing savings accounts instead of a general checking account, without the consent of the creditors.¹⁰⁹

III. ACCOUNTS AND REPORTS.

a. In general.—Subdivisions 6, 7, 8 and 10 relate to accounts and reports which the trustee is required to keep and submit. The subdivisions seem redundant. If a trustee follows them literally, he will spend much of his time in keeping accounts and making reports. Stripped of surplusage and read in with General Order XVII, the trustee is required (1) generally, to keep regular accounts of receipts and disbursements, and, specially, (2) to prepare and file an inventory of the estate "immediately upon entering upon his duties," (3) to report the condition of the estate within the first month after his appointment, and every two months thereafter, unless excused by the referee, and (4) to make and file a final report and account at least fifteen days before the final meeting. All this in addition to the twenty-day report on exemptions.¹¹⁰ But, in effect, the "inventory" may be but a summary of the appraisers' report;¹¹¹ and the bi-monthly reports required by subdivision (10) are rarely made. The purpose—that the trustee shall be always under the eye of the creditors and the referee—is apparent. So long as this is recognized, a trustee will, it is thought, perform his duty satisfactorily, even though he does not always have an accountant at his elbow. A trustee, who fails to obey an order to file his final account, may be committed for contempt.¹¹² Payments to a referee of unauthorized charges rendered by the referee, without an order therefor, should not be allowed in the trustee's account;¹¹³ although if payments made to a referee without formal order may not be considered illegal or improper the court may ratify them.¹¹⁴

107. See Bankr. Act, § 63; *Huttig Mfg. Co. v. Edwards* (C. C. A., 8th Cir.), 20 Am. B. R. 349, 354, 160 Fed. 619.

108. *Matter of Barnett* (D. C., Ga.), 32 Am. B. R. 585, 214 Fed. 263.

109. *Matter of Dayton Coal & Iron Co.* (D. C., Tenn.), 38 Am. B. R. 657.

110. General Order XVII.

111. Bankr. Act, see § 70-b, Form No. 13.

112. *Failure to obey order to file account; contempt.*—The trustee of a bankrupt, in the face of orders requiring him to file his final account, having held up the final settlement of the bankrupt's estate for more than a year, the district court on October 27, 1910, made an order requiring the trustee to file his account by November 15, 1910, or in the alternative to be committed to jail for contempt. On November 14, 1910, a petition to revise such order was allowed. It was held that, it being necessary to consider the peti-

tion as of the date it was granted, it could not be presumed that the court intended to issue a commitment for contempt before judgment of conviction should have been pronounced; that no such judgment being disclosed by the record, and the order, so far as it required the account to be filed, being proper, the petition to revise the order must be dismissed. *O'Connor v. Sunseri* (C. C. A., 3d Cir.), 26 Am. B. R. 1, 184 Fed. 712.

113. *Matter of Borger* (Dist. Col. Sup. Ct.), 35 Am. B. R. 238, 43 Wash. L. Rep. 436.

Duty to consult records.—A trustee in bankruptcy has no right to assume that the referee has obtained an order for the allowance of certain charges to himself. It is his duty to consult the records of the court. *Matter of Borger* (Dist. Col. Sup. Ct.), 35 Am. B. R. 238, 43 Wash. L. Rep. 436.

114. *Matter of Schreiber* (D. C., Sup. Ct.), 35 Am. B. R. 241, 43 Wash. L. Rep. 500.

b. Practice.—The difference between an account and a report should be noted; an account should deal only in dollars and cents;¹¹⁵ a report should be a running summary of the details of administration. The trustee's report that there are no assets seems also to be called a "return."¹¹⁶ The word "statement" is also used of a report where there are no assets. Whatever these papers be called, they should conform as far as possible to the official forms, should always be verified by the trustee, and, if reciting disbursements, usually be accompanied by vouchers. They should be filed with the referee, if the case has been referred. They should also be audited by the referee.¹¹⁷ This seems, however, a precautionary provision, rather than a requirement. Accounts are usually submitted to creditors at meetings called for that purpose,¹¹⁸ and, if passed by them, are approved.

IV. DISTRIBUTION.

a. In general.—Disbursements must be made by check or draft as directed in subdivision 4. Dividends are to be paid within ten days after they are declared as directed in subdivision 9. Some authority must be shown for all disbursements, whether in dividends or otherwise.¹¹⁹

b. Expenses of administration.—What a trustee may be allowed for expenses of administration is considered elsewhere.¹²⁰

c. Payment of priorities.—So also of his duty as to those persons entitled by the law to priority of payment.¹²¹

d. Dividends.—Likewise of dividends to creditors who have proved their claims.¹²² The only provision here is that dividends must be paid within ten days after they are declared.

e. Method of payment.—Subdivision 4 and General Order XXIX should be read together. No moneys can be properly disbursed by a trustee save

Ratification by general creditors of improper allowances by trustee to referee.—Where the general creditors of a bankrupt, after being advised by a special master that payment by the trustee to the referee of certain sums allowed by the latter to himself, is improper, approve the act of the trustee, the trustee should be allowed for such payments, although they were made without an order of the referee which might have been reviewed, and also contrary to a subsequent decision of this court. *Matter of Lacey & Co.* (Dist. Col. Sup. Ct.), 35 Am. B. R. 231, 43 Wash. L. Rep. 434; *Matter of Smith* (Dist. Col. Sup. Ct.), 35 Am. B. R. 237, 43 Wash. L. Rep. 436.

Audit of accounts.—It is the duty of a special master to whom a trustee's account has been referred, on the resignation of the referee, to audit the same and credit him with only such items as were authorized by law. He is not justified in allowing unlawful payments merely because no creditors objected to them. *Matter of Borger* (Dist. Col. Sup. Ct.), 35 Am. B. R. 238, 43 Wash. L. Rep. 436.

115. Forms Nos. 49 and 50.

116. Form No. 48.

117. General Order XVII; *In re Baginsky* (Ref., La.), 2 Am. B. R. 243.

118. See Bankr. Act, § 58-a(6).

119. See under Section Sixty-two of this work.

In "Supplementary Forms," *post*, will be found a final order of distribution, including a dividend sheet, the use of which, instead of Form No. 51, is suggested. See also *Hagar and Alexander's Bankruptcy Forms* (2d Ed.); *In re Rude* (D. C., Ky.), 4 Am. B. R. 319, 101 Fed. 805; *In re Hoyt & Mitchell* (D. C., N. Car.), 11 Am. B. R. 784, 127 Fed. 968.

The district court for the Eastern District of North Carolina has adopted and distributed rule 10 as follows: "All funds belonging to bankrupt estates must be deposited in the designated depository (section 47, cl. 3, Bankr. Act), and disbursed only by check or draft drawn on such depository in accordance with dividend sheet prepared by referee and approved by the judge (section 47, cl. 4). Such checks or drafts must be countersigned as provided by general order 29 of the Supreme Court. Depositories and trustees not observing this rule make themselves liable on their bond and to attachment for contempt."

120. See under Section Sixty-two of this work.

121. See under Section Sixty-four of this work.

122. See under Section Sixty-five of this work.

"by check or draft on the depository." The provisions of the statute and General Order should be strictly followed,¹²³ and where payments have been made without compliance therewith they have been disallowed.¹²⁴ Thus, if deposited in the district court, money can be withdrawn only by a check or warrant, signed by the clerk and countersigned by the judge, or by "a referee designated for that purpose."¹²⁵ The quoted words are usually availed of in composition cases.¹²⁶ While, if the money is deposited by the trustee, the referee must countersign each check. Payments should not be made upon orders drawn by the referee.¹²⁷ The requirements of the General Order as to stub entries, numbering and the like, should be observed. Checks should always run to and be by the trustee mailed or delivered to the creditors, unless the power of attorney specifically authorizes the attorneys to receive and receipt therefor.¹²⁸ In disbursing dividends, a combination check and receipt, the latter attached to the check but marked off from it by a perforated line, and containing a statement that the check will not be paid on presentation unless the receipt is filled out and signed, has been found convenient.¹²⁹ Trustees will also find it time saving to recite on the face of the check the name and number of the estate, whether it is a first, second, or final dividend, and the rate per cent.¹³⁰ To this end, dividend checks, if numerous, should be specially printed; if not, the use of rubber stamps containing the suggested information will be found inexpensive and effective. But checks should not be signed or countersigned by such a stamp.

f. Trustee's supplemental report.—Though not required, safety seems to suggest that the trustee file a supplemental report after the distribution is complete. This should show every allowance or expense paid and every individual disbursement; and vouchers, signed by the creditors and others and numbered, if possible, to correspond to the check numbers, or attached to the returned checks, should be filed at the same time. Not until such report is filed should the trustee be discharged.¹³¹

V. MISCELLANEOUS DUTIES.

a. Setting apart exemptions.—While exemption rights depend upon State statutes, the manner of claiming such exemptions and of setting apart and awarding them is regulated by the bankruptcy act.¹³² Subdivision 11 of this section requires the trustee to set apart and report the value of the bankrupt's exemptions. In this connection section six should also be consulted. Preliminary to this, the trustee must "set apart the bankrupt's exemptions and report on the items and estimated value thereof." He should thereupon surrender possession of such property to the bankrupt.¹³³ This should be done

^{123.} *In re Cobb* (D. C., N. Car.), 7 Am. B. R. 202, 112 Fed. 655.

^{124.} *In re Hoyt & Mitchell* (D. C., N. Car.), 11 Am. B. R. 784, 127 Fed. 968. And see *In re Hoyt* (D. C., N. Car.), 9 Am. B. R. 574, 119 Fed. 987.

^{125.} General Order XXIX.

^{126.} Compare under Section Twelve of this work.

^{127.} *In re Cobb* (D. C., N. Car.), 7 Am. B. R. 202, 112 Fed. 655.

^{128.} See Form No. 20; Form No. 21 is not enough.

^{129.} See "Supplementary Forms," *post*;

Hagar and Alexander's Bankruptcy Forms (2d Ed.).

^{130.} See Rule 14(10) in the district of Western New York, 1 N. B. N. 115.

^{131.} Compare, however, to the contrary, Form No. 51.

^{132.} Bankr. Act, § 2(11); *In re Gerber* (C. C. A., 9th Cir.), 26 Am. B. R. 608, 186 Fed. 693.

^{133.} *In re Soper* (D. C., Nebr.), 22 Am. B. R. 868, 173 Fed. 116. The trustee takes no title to exempt property and it is his duty to set the same apart as soon as practicable. *In re Goodman* (C. C. A., 5th Cir.),

within twenty days after the trustee receives notice of his appointment.¹³⁴ Thus, the trustee acts in a quasi-judicial capacity in the first instance, and, if there is no exception taken, the referee usually approves. But any creditor may take exception to the trustee's action.¹³⁵ If exception is taken, the practice is defined in General Order XVII, which requires it to be taken within twenty days after filing the report and the referee may not extend such time.¹³⁶ This whole subject was also regulated by a general order under the former law.¹³⁷

b. Furnishing information.—The trustee's duty here is similar to the referee's.¹³⁸ He is also liable to the same penalties.¹³⁹ This duty is akin to that of frequent accountings, the latter seeming for the whole body of creditors, the former for any individual who may request. Any person interested in the bankrupt estate has a right to an inspection of the accounts and papers of the trustee,¹⁴⁰ and to any information in respect to the estate which the trustee can impart.¹⁴¹ It is not thought, however, that, in answering inquiries by mail, the trustee can use the "official business" envelope, as can the referee. Cases under the former law are still in point.¹⁴²

c. Other duties.—The trustee also has other miscellaneous duties, as, for instance, the examination and correction of proofs of debt,¹⁴³ attendance on examinations of the bankrupt, and to assist the creditors and the referee generally in the realization and distribution of assets.

VI. CONCURRENCE OF TWO OF THREE TRUSTEES NECESSARY.

Three trustees are rarely appointed. If they are, a majority must always concur. This seems a variance from the rule that a trust to two or more

23 Am. B. R. 504, 174 Fed. 644; *Matter of Vonkee* (D. C., Wash.), 38 Am. B. R. 799; *Matter of Shrimmer* (D. C., N. Car.), 36 Am. B. R. 404, 228 Fed. 794.

Duty of trustee to set apart exemptions. — In the case of *In re Andrews & Simonds* (D. C., Mich.), 27 Am. B. R. 116, 120, 193 Fed. 776, the court said: "There is nothing in the bankruptcy law except the above caption to the official form of schedule, which either requires or even suggests that the bankrupt must specify the articles in a stock of goods which he claims as his exemption. On the contrary, the law expressly lays upon the trustee the duty to select and set apart the exemption. In other words, if the bankrupt has clearly indicated his intention not to waive his exemption and has also specified the particular class of property owned by him from which he claims his exemption, it then becomes the duty of the trustee to select and sever the exemption from the mass of property belonging to the estate of the character and in the class indicated." This view is supported by authority."

In the case of *In re Finkelstein* (D. C., Pa.), 27 Am. B. R. 229, 231, 192 Fed. 738, the court said: "The bankrupt is presumed to be entitled to the exemption which the law allows, until it is otherwise judicially determined, and in this he has a right to be heard. A trustee is not a judicial officer, his functions and duties are merely administrative, and when requested the law com-

mands him accordingly to set aside the exemption schedules, and in this he has no alternative."

Order of state court to turn over exemptions of officers of that court; contempt.— A trustee, who, prior to an order made in a state court directing him to turn over a bankrupt's exemption to a receiver in the state court, has turned the exemption over to the bankrupt, is not guilty of contempt. *Garlington v. Coker* (Sup. Ct., Ga.), 32 Am. B. R. 416, 141 Ga. 678, 81 S. E. 1107.

134. General Order XVII, Form No. 47.

135. For forms, see "Supplementary Forms," *post*. As to the right of a trustee to except to his own formal administrative act setting apart an exemption claimed by the bankrupt, see *In re Rice* (D. C., Pa.), 21 Am. B. R. 202, 164 Fed. 514. As to right of bankrupt to except to the trustee's action, see discussion under Section Six of this work.

136. *Matter of Krecun* (C. C. A., 7th Cir.), 36 Am. B. R. 172, 229 Fed. 711.

137. Act of 1867, General Order XIX.

138. Bankr. Act, § 39-a(3).

139. Bankr. Act, § 29-c(3). See also § 29c.

140. Bankr. Act, § 49, *post*.

141. *Matter of Petersen* (Ref., Minn.), 10 Am. B. R. 355.

142. *In re Perkins*, Fed. Cas. 10,982; *In re Blaisdell*, Fed. Cas. 1,488.

143. Compare under Section Fifty-seven of this work.

is vested in all and that all must, therefore, join in exercising it. The law being mandatory in requiring either one or three trustees,¹⁴⁴ it seems doubtful whether, on the death of one, the survivors can do anything until the vacancy is filled in the regular way.¹⁴⁵

VII. TRUSTEE TO RECORD CERTIFIED COPY OF ADJUDICATION.

The subsection was added in 1903. Section 21-e seems to have been overlooked. There can be no doubt, however, as to the meaning of the new subsection. The trustee is bound within the time limited to file, which doubtless means also to record, in all counties where the bankrupt has real estate, a certified copy of the decree of adjudication. It is unfortunate that this filing is not in words given the effect of actual notice. Thus the recording of the certified copy of the order approving the trustee's bond is still essential.¹⁴⁶ Careful trustees will see that both these copies are recorded. This new duty is put only on trustees in proceedings begun after February 5, 1903.¹⁴⁷

144. Bankr. Act, § 44.

145. Id. But see Bankr. Act, § 46.

146. See under Section Twenty-one of this work.

147. See "Supplementary Section to Amendatory Act," *post*; Hagar and Alexander's Bankruptcy Forms.

SECTION FORTY-EIGHT.

COMPENSATION OF TRUSTEES, RECEIVERS AND MARSHALS.

§ 48. **Compensation of Trustees.**— *a* Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and such commissions on all moneys disbursed or turned over to any person, including lienholders,* by them, as may be allowed by the courts, not to exceed six per centum on the first five hundred* dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition.

b In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

c The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.

d Receivers or marshals appointed pursuant to section two, subdivision three, of this act shall receive for their services, payable after they are rendered, compensation by way of commissions upon the moneys disbursed or turned over to any person, including lienholders, by them, and also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees, as the court may allow, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: *Provided,*

* Amendment of 1910 in italics.

That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such composition: Provided further, That when the receiver or marshal acts as a mere custodian and does not carry on the business of the bankrupt as provided in clause five of section two of this act, he shall not receive nor be allowed in any form or guise more than two per centum on the first thousand dollars or less, and one-half of one per centum on all above one thousand dollars on moneys disbursed by him or turned over by him to the trustee and on moneys subsequently realized from property turned over by him in kind to the trustee: Provided further, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this act.

e Where the business is conducted by trustees, marshals, or receivers, as provided in clause five of section two of this act, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person, including lienholders, by them, and, in cases of receivers or marshals, also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees; such commissions not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: Provided, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such composition: Provided further, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this act.

Analogous provisions: In U. S.: Act of 1867, §§ 28, 47, R. S., §§ 5099, 5124, 5127, 5127A; Act of 1841, § 6; Act of 1800, § 29.

In Eng.: Act of 1883, § 72; Act of 1890, § 15; General Rules 125, 305, 306.

Cross-references: To the law: Jurisdiction of court of bankruptcy to authorize business of bankrupt to be conducted, and allow compensation therefor, § 2(5).

Compensation of receivers, § 2(5).

Compensation of referee, § 40.

Duty of clerks to collect fees of trustees, and pay the same within ten days after closing estate, § 51(2) (4).

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I. COMPENSATION OF TRUSTEES.¹

a. *Comparative legislation*.—In England, the fees of trustees are fixed by resolution of the creditors, subject to a review, under certain conditions, by the board of trade.² Prior to the present law, assignees' fees in this country have been "in the discretion of the court."³ The amendatory act of 1874 reduced the customary fees then paid by one-half.⁴ The present method is doubtless an adaptation of the State systems for compensating executors, administrators, receivers, and the like. The changes made by the amendatory acts of 1903 and 1910 are thought to strike a fair mean between the loose methods of the old law and the niggardly rigidity of the present statute as originally passed.⁵

b. *Amount of compensation*.—Three general considerations as to trustees' compensation should be noted: (1) that fixed by this section is "full compensation for their services," [save that which may be allowed under § 2 (5) as now amended];⁶ (2) the exact percentage, not greater than the prescribed upward limit, is fixed by the court, there being in this a difference between the fees of referees and those of trustees,⁷ and (3) no compensation

1. See also Am. B. R. Dig. §§ 328-331.

2. English Act of 1883, § 72; General Rules, 305, 306.

3. See "Analogous Provisions," *ante*.

4. R. S., § 5127-a.

5. Compare pp. 23-25, Report of Ex. Com. of Nat. Assn. of Referees in Bankruptcy, March, 1900.

6. See General Order XXXV(3).

7. See Bankr. Act, § 40-a.

is payable until after the services are rendered, *i. e.*, when the administration is closed. The compensation is of two kinds, a filing fee and certain commissions, fixed and determined by the amounts which pass through the hands of the trustee.

c. Amount under original act.—Before the amendatory act of 1903 the commissions to be paid to trustees could only be reckoned on "sums to be paid as dividends and commissions,"⁸ and the rate was but about half that customarily allowed corresponding officers even fifty years ago.⁹ The result was that few competent men would serve as trustee the second time, thus crippling the administration of the law. Efforts were made to meet the difficulty in various ways, as by appointing attorneys to be trustees and allowing them compensation for legal services as an expense of administration,¹⁰ by appointing attorneys for trustees in asset cases, with a tacit understanding that the attorney's allowance should be shared with the trustee, or by allowing trustees extra compensation as agents of the creditors when they did more than perform the regular duties required by the law.¹¹ Each of these methods was of doubtful legality and subject to abuse. Since § 72, added by the amendatory act, they are no longer possible.

d. Pauper cases.—In certain cases, the trustee may serve without pay.¹² It has been thought, however, that, unlike the referee, a trustee cannot be compelled to serve in a pauper case, but, if the creditors desire him to do so, they must furnish his fee.¹³

e. Effect of amendatory acts of 1903 and 1910.—(1) **IN GENERAL.**—The amendatory act of 1903 has modified the original law as to trustees' fees in four particulars, all intended to make them more adequate.¹⁴

(2) **COMMISSIONS ON DISBURSEMENTS.**—(I) *In general.*—Commissions are to be computed on "all moneys disbursed or turned over to any person, including lien-holders¹⁵ by them as may be allowed by the courts," and cannot be otherwise fixed by agreement with the creditors.¹⁶ This presupposes that the

8. *In re Utt* (C. C. A., 7th Cir.), 5 Am. B. R. 383, 105 Fed. 754; *In re Smith* (D. C., N. Car.), 5 Am. B. R. 559, 108 Fed. 39; *In re Kaiser* (D. C., Mont.), 8 Am. B. R. 108, 112 Fed. 955; *In re Mammoth Pine Lumber Co.* (D. C., Ark.), 8 Am. B. R. 651, 116 Fed. 731; *In re Goldville Mfg. Co.* (D. C., S. C.), 10 Am. B. R. 552, 123 Fed. 579. *Contra*: *In re Barber* (D. C., Minn.), 3 Am. B. R. 306, 97 Fed. 547. Under the act prior to the amendment it was held that trustees were entitled to commissions on funds arising from sales of mortgaged property and distributable to mortgage creditors. *In re Muhlhauer* (Ref., Ohio), 9 Am. B. R. 80.

9. Compare Rule 59, So. District of New York, under law of 1841, *Owen on Bankruptcy*, Appendix, p. 13.

10. *In re Mitchell* (Ref., Pa.), 1 Am. B. R. 687. *Contra*: *In re Muldauer*, Fed. Cas. 9,905.

11. *In re Plummer* (Ref., N. Y.), 3 Am. B. R. 320; *In re Dimm & Co.* (D. C., Pa.), 17 Am. B. R. 110, 146 Fed. 731, permitting an allowance for the trustee's personal services rendered in connection with sales of the goods belonging to the estate. *Contra*: *In re Epstein* (D. C., Ark.), 6 Am. B. R.

191, 109 Fed. 878. See also *In re Mammoth Pine Lumber Co.* (D. C., Ark.), 8 Am. B. R. 651, 116 Fed. 731.

12. See Bankr. Act, § 51-a(2).

13. *In re Levy* (D. C., Wis.), 4 Am. B. R. 108, 101 Fed. 247.

14. See Bankr. Act, § 51-a(2) (4).

Congress intended by the amendments to sections 40-a and 48-a to provide what it considered ample compensation for services to be rendered by trustees, and by section 72 to relieve the courts of the necessity of determining what constitutes legal compensation for such officers. *American Surety Co. v. Freed & Hoffman* (C. C. A., 3d Cir.), 35 Am. B. R. 103, 224 Fed. 333.

15. Amendatory Act of 1910, § 9.

16. **Agreement with creditors.**—The commissions legally payable to trustee are controlled and measured by the "money distributed" or "moneys disbursed or turned over," within the meaning of sections 40-a and 48-a of the Bankruptcy Act, and cannot be otherwise fixed by agreement with the creditors, *American Surety Co. v. Freed* (C. C. A., 3d Cir.), 35 Am. B. R. 103, 224 Fed. 333. The fact that a trustee in good faith agrees prior to a sale to accept a less amount

money disbursed belonged to the estate of the bankrupt and was rightfully in the hands of the trustee for disbursement. Such funds may come into the possession of the court for this purpose in two ways: (1) By operation of law, and (2) by the consent or acquiescence of those interested therein.¹⁷

(II) *Property not lawfully in hands of trustee.*—Property which comes to the possession of a trustee in bankruptcy through the fraud of the bankrupt, and is adjudged to be returned to the victim of the fraud, is not a part of the estate of the bankrupt, and the referee and trustee may not be allowed their statutory percentages out of it.¹⁸

(III) *"On all moneys disbursed."*—The words "on all moneys disbursed" are substantially the same as "received and paid out," which are found in the New York Code of Civil Procedure,¹⁹ fixing the commissions of executors and administrators, and cases construing that section and its predecessors before the code will be found in point.²⁰ There is a distinction between the basis of the compensation of the referee and the trustee in this respect; that of the former is reckoned only on "moneys disbursed to creditors." The trustee is entitled to commissions on all moneys disbursed by him, whether to creditors, secured or unsecured, or having priority, or to other persons.²¹

(IV) *Secured and priority claims.*—The amendment accords to trustees' commissions on all claims whether secured or entitled to priority under the laws of a State.²² If a secured creditor chooses to realize through the bankruptcy court, and the trustee thereby receives and pays out money, the equities are strongly against the secured creditor, and he should pay the commissions.²³

(V) *Property not converted into money.*—Prior to the amendment of 1910 it was questioned whether, if in such a case property, but not money, is received and turned over by the trustee, the latter was entitled to commissions.²⁴ It is probable that the language of the former statute did not entitle the trustee to commissions on property not converted into moneys,²⁵ but turned over at an

as commissions than he is actually entitled to, is not a bar to his claim for the amount so stated. *Matter of Breakwater Co.* (D. C., Pa.), 33 Am. B. R. 721, 220 Fed. 226.

17. *In re Cramond* (D. C., N. Y.), 17 Am. B. R. 22, 29, 145 Fed. 966.

18. *Gillespie v. J. C. Piles & Co.* (C. C. A., 8th Cir.), 24 Am. B. R. 502, 512, 178 Fed. 886.

19. N. Y. Code Civ. Proc. § 2730.

20. For instance *Hosack v. Rogers*, 9 Paige, 461; *Rundle v. Allison*, 34 N. Y. 180; *Betts v. Betts*, 4 Abb. N. C. 317, 437; *Cox v. Schermerhorn*, 18 Hun (N. Y.), 16.

21. *In re Cramond* (D. C., N. Y.), 17 Am. B. R. 22, 145 Fed. 966. But see *In re Meadows* (D. C., N. Y.), 29 Am. B. R. 165, 199 Fed. 304, holding that such fees are not allowable where the disbursements when made from the proceeds of the sale of stock which had never been in the possession of the court, although the sale was conducted by the trustee under an order of the referee.

Commissions on profits of sale.—Where the volume of business transacted by a trustee amounted to about \$900,000, resulting in a profit of \$50,000, his award should be limited to the statutory percentages on the profits, as it cannot be said that trustee disbursed the moneys received except as to the profits. *Matter of New York Commercial Co.*,

(C. C. A., 2d Cir.), 36 Am. B. R. 496, 231 Fed. 445.

22. *In re Muhlhauser Co.* (Ref., Ohio), 9 Am. B. R. 80; *In re Cramond* (D. C., N. Y.), 17 Am. B. R. 22, 30, 145 Fed. 966; *In re Erie Lumber Co.* (D. C., Ga.), 17 Am. B. R. 689, 701, 150 Fed. 817.

23. *In re Sanford Mfg. Co.* (D. C., N. Car.), 11 Am. B. R. 414, 126 Fed. 888. The reasoning in *In re Farber* (D. C., Minn.), 3 Am. B. R. 306, 97 Fed. 547, is in point. See also *In re Sabine* (Ref., N. Y.), 1 Am. B. R. 222.

24. The distinction between "money" and "property" made by the statute would not here be applicable. The secured creditor makes use of the system because it is apparently less expensive. Whether what he receives is money or land, he should pay the officers through whom it comes for their services, provided he has himself asked the relief. By analogy only, it seems, need these be the commissions fixed by the law.

25. Compare *Burtis v. Dodge*, 1 Barb. Ch. (N. Y.) 77. But see also *Thompson v. Pritchard*, 12 Week. Dig. (N. Y.) 80. Compensation to a receiver may be computed by including as "disbursements" the value of the property delivered by him. *In re Cambridge* (D. C., Mass.), 14 Am. B. R. 168, 136 Fed. 983.

agreed value to a creditor, or any other person. The amendatory act of 1910 inserted the words "or turned over to any person, including lien-holders," and has thus disposed of this question in favor of the allowance of commissions to trustees on account of property turned over to the bankrupt or a person holding a superior lien against the property.²⁶

(VI) *Property or money on which commission allowed.*—A trustee is entitled to commissions on all sums which, but for an outside agreement between the parties and their attorneys, would have been paid through the trustee.²⁷ Thus, he is entitled to commissions on the proceeds of the sale of exempt property, where the bankrupt does not object.²⁸ Likewise, where a corporation is organized for the purpose of taking over the bankrupt's business, the creditors agreeing to take stock in the new corporation in payment of their claims, the trustee is entitled to commission on the amount disbursed through the corporation by means of shares of its stock.²⁹ Commissions are payable on sums disbursed to lienors from the funds in the hands of the trustee which were subject to the liens.³⁰ And where a mortgagor did not prove his claim, but purchased the mortgaged premises on a sale by the trustee subject to the mortgage, the trustee is only entitled to commissions on the sale price of the equity of redemption.³¹ But the trustee is not entitled to compensation for his services from the lienors, where the proceeds of a sale of a bankrupt's assets, after distribution to the lienors, leave no surplus for the bankrupt estate.³² Such commissions should be paid out of the estate upon the assumption that the trustee would not have administered incumbered property unless for the interest of the estate.³³

(VII) *Partnership and individual bankruptcy estate.*—Where a partnership and the individuals comprising it join in a single involuntary petition and are

26. As in a subsequent clause of subsection. See also §§ 1(25), 60-d. Compare *American Surety Co. v. Freed & Hoffman* (C. C. A., 3d Cir.), 35 Am. B. R. 103, 224 Fed. 333.

27. In re *Sanford Mfg. Co.* (D. C., N. Car.), 11 Am. B. R. 414, 126 Fed. 888.

28. In re *Castleberry* (D. C., Ga.), 16 Am. B. R. 430, 143 Fed. 1018.

29. *Matter of Breakwater Co.* (D. C., Pa.), 33 Am. B. R. 721, 220 Fed. 226, revd. 224 Fed. 333.

30. In re *Cramond* (D. C., N. Y.), 17 Am. B. R. 22, 145 Fed. 966.

31. *Matter of Old Oregon Mfg. Co.* (D. C., Wash.), 38 Am. B. R. 409.

32. *Smith v. Township of Au Gres* (C. C. A., 6th Cir.), 17 Am. B. R. 745, 150 Fed. 257. This case was decided before the amendment of 1910, but *Matter of Meadows* (C. C. A., 2d Cir.), 33 Am. B. R. 649, 211 Fed. 948, decided since 1910, is to the same effect.

33. Payment out of estate.—*Matter of Huggins* (C. C. A., 8th Cir.), 24 Am. B. R. 715, 179 Fed. 490, in which the court said: "A court of bankruptcy should not assume charge of incumbered property and liquidate the liens on it, unless there are reasonable grounds for believing some advantage will accrue to the bankrupt's estate. If the validity of the liens is unquestioned, and their amount is such that there is probably no excess of value in the property, it should

be surrendered to the lienholders or others entitled, unless some other reason appears for retaining control. A court of bankruptcy is not a court of general jurisdiction for the adjudication of controversies or the administration of assets in which the bankrupt's estate is in no wise interested. If, however, cognizance is taken, it should be assumed some benefit or advantage was expected to accrue to the general creditors, and if it results otherwise it is equitable to make the general estate bear the cost of the proceeding. Here the proceeds of sale did not equal the admitted incumbrance, and the deficiency should not be further increased by deducting the commissions of the officers, if there is a general estate against which they can be charged. This is in analogy to the general practice in equity in foreclosure cases, where, if possible, the judgment lien creditors are paid in full, and if a deficiency results from deducting the costs from the proceeds it goes as a judgment against the debtor. It appears here that there was a general estate of the bankrupt out of which the commissions might be paid. Therefore we need not determine what should be done in case of a sale by a trustee in bankruptcy at the instance or with the concurrence of a lien creditor, a deficit of proceeds, and no general estate."

adjudged bankrupt, there is only one case for the purpose of computing the trustee's fees and commissions, and he should not be given an allowance on both the partnership estate and the individual estate separately computed.³⁴

(3) **RATE OF COMMISSION.**—The rate per cent. of commissions was considerably increased by the amendment of 1903, but only in small or medium-sized cases. On estates of over ten thousand dollars it remains unchanged. The purpose clearly is, on the one hand, an additional incentive to the discovery of assets in estates where the schedules show little or nothing, and a moderate increase in compensation in larger estates which, being spread over a goodly total, will not be felt. Thus, the rate on the first five hundred dollars is now six per cent. instead of three per cent., on the next one thousand dollars four per cent. instead of three per cent., on the next eight thousand five hundred dollars two per cent. instead of about two and two-fifths per cent.,³⁵ and, on the balance, one per cent., as now. That these fees are reckoned on "moneys disbursed," will also add materially to a trustee's emoluments in small cases.

(4) **COMMISSION IN CASE OF COMPOSITION.**—When a trustee has been appointed and qualified in a case resulting in a composition, he may be allowed "not to exceed one-half of one per centum of the amount to be paid to creditors." A trustee is rarely appointed in such cases,³⁶ but may be. As the law stood before the amendatory act of 1903, he could be allowed nothing. This is now corrected, and he is paid the same rate as is the referee.

(5) **ADDITIONAL COMPENSATION FOR CONDUCT OF BUSINESS.**³⁷—Prior to the amendment of this section in 1910 by the addition of subsection *e* a trustee in bankruptcy was not entitled to an allowance of extra compensation,³⁸ but since the addition of that subsection, where the business of a bankrupt is ordered continued by a trustee, the court may allow additional compensation to him.³⁹ The maximum amount is fixed by the amendment. General Order XXXV (3) is, however, in no wise changed by the amendments. Under it, the compensation of trustees cannot be other or more than that fixed by § 48. This is emphasized by § 72, added by the amendatory act of 1903. A contract for extra compensation, made with a creditor owning more than ninety per cent. of the unsecured claims against the bankrupt, is void as against

34. *Matter of Rider* (D. C., Mont.), 34 Am. B. R. 280, 220 Fed. 193.

35. This apparent decrease is not actual because of the changed basis of computation, and the larger rates on the first \$500 and \$1,500.

36. See *In re Rung* (Ref., N. Y.), 2 Am. B. R. 620.

Commissions on deductions.—Where, under the terms of an order for the sale of assets requiring ten per cent. to be paid in cash at the time of the sale, it was provided that in case the property was purchased by a creditor there might be deducted from the balance of the purchase price the amount of the distributive share thereof to which he might be entitled, the trustee is entitled to commissions upon the amount deducted. *In re Morse Iron Works & Dry Dock Co.* (D. C., N. Y.), 18 Am. B. R. 846, 154 Fed. 214.

37. See also Am. B. R. Dig. § 330.

38. *In re Epstein* (D. C., Ark.), 6 Am. B. R. 191, 109 Fed. 879; *In re Carolina Cooper-*

age Co. (D. C., N. Car.), 3 Am. B. R. 154, 96 Fed. 950; *Matter of Shiebler & Co.* (C. C. A., 2d Cir.), 23 Am. B. R. 162, 174 Fed. 336; *In re Coventry Evans Furniture Co.* (D. C., N. Y.), 22 Am. B. R. 623, 166 Fed. 516. Compare *In re Plummer* (Ref., N. Y.), 3 Am. B. R. 320.

39. *Matter of Pequod Brewing Co.* (Ref., N. Y.), 18 Am. B. R. 352.

The "additional compensation" for conducting the bankrupt business as a going concern is realized by the allowance of commissions on the disbursements made in such conduct of the bankrupt business as well as on other disbursements. *Matter of Hart & Co.* (D. C., Hawaii), 17 Am. B. R. 480. The trustee may be allowed compensation for his services and expenses in attending and conducting a sale of the assets. *In re Dimm & Co.* (D. C., Pa.), 17 Am. B. R. 119, 146 Fed. 402. See *In re Knosher & Co.* (C. C. A., 9th Cir.), 28 Am. B. R. 747, 197 Fed. 136.

public policy.⁴⁰ A trustee who is also an attorney may not receive, in addition to the trustee's fees, compensation for legal services performed.⁴¹ And where the volume of business transacted by a trustee amounted to a large sum, resulting in considerable profits, his commission must be computed on the profits and not on the business transacted.⁴² The amendment does not affect the compensation of a trustee appointed before it took effect.⁴³

(6) ALLOWANCE BY COURT.—The amount allowed as commissions may be less than those fixed by this section. It should always be borne in mind that no commissions can be paid or withheld until allowed by the court,⁴⁴ and in any event, only in such amount "as may be allowed by the court." The allowance rests in the sound discretion of the court and is not reviewable except where it appears from the record that such discretion has been abused.⁴⁵

II. APPORTIONING COMPENSATION BETWEEN SEVERAL TRUSTEES.

Whether there be three trustees or one, the compensation to all cannot be more than to one. But the court must apportion the amount between the trustees "according to the services actually rendered." This is contrary to the usual rule.⁴⁶

III. WITHHOLDING COMPENSATION WHEN TRUSTEE REMOVED.

The rule stated in subsection *c* needs no comment.⁴⁷ Within the limits fixed by law the amount to be allowed as commissions is subject to the sound judicial discretion of the court. Where a trustee has been negligent in the performance of his duty, the court may, in a proper case, without the filing of any exceptions, deny him any commissions.⁴⁸ A mere resignation or a vacancy because of disqualification discovered after appointment would not bar the trustee from compensation. Where a trustee is permitted to resign to avoid the odium of removal, the court may reduce his claim for compensation.⁴⁹ In all such cases, the proportion should be fixed in accordance with subsection *b*.⁵⁰

40. *Devries v. Orem*, 17 Am. B. R. 876, 104 Md. 648, 65 Atl. 430.

41. *In re Felson* (D. C., N. Y.), 15 Am. B. R. 185, 139 Fed. 281; *In re McKenna*, (D. C., N. Y.), 15 Am. B. R. 4, 137 Fed. 611; *Matter of Van Denberg* (D. C., Ohio), 34 Am. B. R. 521, 221 Fed. 449.

42. *Matter of New York Commercial Co.* (C. C. A., 2d Cir.), 36 Am. B. R. 496, 231 Fed. 445.

43. *In re Screws* (D. C., Ga.), 17 Am. B. R. 269, 147 Fed. 989.

44. *In re Hughes*, Fed. Cas. 6,841; *In re Noyes*, Fed. Cas. 10,371; *In re Dean*, Fed. Cas. 3,699.

45. *Matter of Cash-Papworth* (C. C. A., 2d Cir.), 31 Am. B. R. 709, 210 Fed. 24.

46. Compare *White v. Bullock*, 15 How. Pr. (N. Y.) 102. For similar rules as to the referee, see § 40-b.

47. See generally under § 46.

Personal expenses and commissions will be denied a trustee removed by the court for due cause. *In re Leverton* (D. C., Pa.), 19 Am. B. 434, 155 Fed. 925, 931.

48. *In re Schoenfeld* (C. C. A., 3d Cir.), 25 Am. B. R. 748, 183 Fed. 219.

49. *In re Fidler & Son* (D. C., Pa.), 23 Am. B. R. 16, 172 Fed. 632.

50. A similar rule is applied to the referee, Bankr. Act, § 40-c.

SECTION FORTY-NINE.

ACCOUNTS AND PAPERS OF TRUSTEES.

§ 49. **Accounts and Papers of Trustees.**—*a* The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest.

Analogous provisions: In U. S.: R. S., § 5062B.

In Eng.: Generally to the General Rules, as Rules 217, 225, 226, 244, 273(10), 290.

Cross-references: To the law: Punishment of trustee for secreting or destroying papers, § 29-a.

Trustee to keep accounts of receipts and disbursements, § 47-a(6); to lay before creditors detailed statements of administration of estate, § 47-a(7); to make final reports and file final accounts, § 47-a(8); to report to court as to condition of estate, § 47-a(10).

To the General Orders: Report as to exemptions, XVII.

Failure of trustee to file report or statement required by the act; order to show cause, XVII.

I. ACCOUNTS AND PAPERS OF TRUSTEES.

That the accounts and papers of trustees shall always be open to the inspection of officers and all parties in interest, seems to follow from § 47-a.¹ This section is, therefore, of little importance. "Accounts and papers" includes the books of the bankrupt in the possession of the trustee; in fact, any documents whether originated by him or received by him from the bankrupt. The penalties for secreting documents and for refusing to permit inspection are discussed elsewhere.²

1. See pp. 663, 664, *ante*.

2. See under § 29.

SECTION FIFTY.

BONDS OF REFEREES AND TRUSTEES.

§ 50. **Bonds of Referees and Trustees.**—*a* Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties.

b Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties.

c The creditors of a bankrupt estate, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so.

d The court shall require evidence as to the actual value of the property of sureties.

e *There shall be at least two sureties upon each bond.*

f The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond.

g Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected.

h Bonds of referees, trustees, and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.

i Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this act, of whose estates they are respectively trustees.

j Joint trustees may give joint or several bonds.

k If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office.

l Suits upon referees' bonds shall not be brought subsequent to two years after the alleged breach of the bond.

m Suits upon trustees' bonds shall not be brought subsequent to two years after the estate has been closed.

Analogous provisions: In U. S.: As to registers' bonds Act of 1867, § 3, R. S., § 4995; As to assignees' bonds, Act of 1867, § 13, R. S., § 5036; Act of 1841, § 9.

In Eng.: As to trustees, § 21(2); General Rule 342.

Cross-references: To the law: Certified copy of order approving bond evidence of vesting title in trustee, § 21-e.

Bond not required on appeals or writs of error by trustee, § 25-c.

To the General Order: Notice to trustee of his appointment to state penal sum of bond, XVI.

To Official Forms: Bond of referee, No. 17; bond of trustee, No. 25; order approving trustee's bond, No. 26.

SYNOPSIS OF SECTION.

I. Bonds of Referees and Trustees, 751.

- a. *Of referees*, 751.
- b. *Of trustees*, 751.
- c. *Sureties on bonds; forms*, 752.
- d. *Where filed*, 752.
- e. *Suits on bonds*, 752.
- f. *Effect of failure to give bond*, 753.

I. BONDS OF REFEREES AND TRUSTEES.

a. **Of referees.**—The referee, though a judicial officer, is required to give a bond. So was the assignee under the former law.¹ The amount, the sufficiency of the sureties, and the time within which the bond must be filed are usually fixed in the order of appointment. The condition is "the faithful performance of their official duties." The amount cannot be larger than five thousand dollars. A referee cannot act as such until he has filed his bond. Form No. 17 should be used. There are no adjudicated cases under either law.

b. **Of trustees.**²—A trustee, too, must give a bond. This was not necessarily so under the former law; the judge might order the assignee to give a bond and, on the request in writing of a creditor, was required so to order.³ Trus-

1. Act of 1867, § 3, R. S., § 4495.
2. See also Am. B. R. Dig. § 321.

3. Act of 1867, § 13, R. S., § 5036. Compare *In re Sands*, Fed. Cas. 12,301.

tees' bonds must be given within ten days after appointment, or within five days additional if permitted by the court. This seems mandatory, but the practice of extending the time still further when no objection is made is quite general. Where the question of the trustee's failure to give a bond is raised in a State court, the presumption is that the trustee duly qualified by complying with the provisions of the statute relating to a bond.⁴ The condition is the same as that in the referee's bond. But the creditors, not the court, fix the amount of a trustee's bond. This should be done at the first meeting, immediately after the appointment of the trustee. If the creditors fail so to do, the judge or referee fixes it. The amount is specified in the notice of appointment.⁵ Upon the approval of the bond by the referee the trustee takes title to the bankrupt's property, and the order of approval when duly certified and recorded is conclusive evidence of the vesting of the title.⁶

c. Sureties on bonds; forms.—Where bonds are given by individuals, there must be two sureties; if by a bonding company, there need be but one.⁷ The sureties, if individuals, must be worth "above their liabilities and exemptions," the penal sum mentioned in the bond. As to this, the "court shall require evidence." In actual practice, this is often done by adding affidavits of justification to the bond.⁸ This is, of course, not required of bonding companies in good standing. Joint trustees should give joint and several bonds. The form of the bond is prescribed.⁹ But, as has been suggested elsewhere, Form No. 26, the order approving the bond, should usually be modified by inserting certain dates, that when a certified copy is recorded in a local registry office parties interested in titles passing from a bankrupt to his trustee may have the same information that would be given had the bankrupt actually executed a deed.¹⁰ The practice of giving surety company bonds is now quite general. They are sufficient if the company is within the terms of subsection *g*. The liability of a surety extends to the expenditure of such funds of the bankrupt estate as becomes necessary as the immediate result of embezzlement by the trustee, but not including the premium of the bond of the new trustee.¹¹

d. Where filed.—Referees' and trustees' bonds must be filed and recorded in the office of the clerk. A trustee's bond is usually approved by the referee, whose duty it is forthwith to transmit the bond and the order of approval to the clerk.

e. Suits on bonds.—Though the bond runs to the United States, a suit may be brought thereon "in the name of the United States for the use of any person injured." Leave of court is not necessary for the bringing of such an action in the name of the United States.¹² No order need be made directing an absconding trustee to account, prior to bringing suit on his bond.¹³ Such

4. *Breckons v. Snyder* (Pa. Sup. Ct.), 15 Am. B. R. 112, 211 Pa. St. 176.

5. See General Order XVI and Form No. 24.

6. *Anderson v. Stayton State Bank* (Ore. Sup. Ct.), 38 Am. B. R. 4, 159 Pac. 1033, citing text.

7. *In re Kalter* (Ref., Pa.), 2 Am. B. R. 590. Compare Act of August 13, 1894.

8. See form in "Supplementary Forms," *post*.

9. Form No. 25.

10. See § 21, *ante*. See also requirement of § 47-c which was added by the amendatory act of 1903.

11. *Matter of Kajita* (D. C., Hawaii), 13 Am. B. R. 19, 2 U. S. D. C., Hawaii, 194.

12. *Alexander v. Union Surety & Guar. Co.* (N. Y. Sup. Ct.), 11 Am. B. R. 32, 89 N. Y. App. Div. 3.

13. An order directing an absconding trustee to account is said to be an indispensable prerequisite to an action on his bond. It might, and probably would, be proper in conditions where practicable. But an order upon a person lurking in an unknown place, and purposely keeping out of the reach of any legal notice of an order, if one should be made, would be of no avail. *Scofield v. United States ex rel. Bond* (C. C. A., 6th Cir.), 23 Am. B. R. 259, 174 Fed. 1.

an action may be brought in a district court of the United States;¹⁴ such action is not, however, a proceeding in bankruptcy, but a plenary suit, and therefore an order dismissing it is not reviewable by a petition to revise under § 24-b.¹⁵ The limitation on such suits is short: as to referees, two years after the alleged breach; as to trustees, two years after the estate has been closed. The closing of an estate here is probably the date of the order discharging the trustee. Subsection *i* provides, however, that trustees shall not be liable, personally or on their bonds, for any penalties or forfeitures incurred by bankrupts under the act. The bond continues in force notwithstanding a recovery thereon for two years after the estate is closed.¹⁶

f. Effect of failure to give bonds.—Failure to give a bond within the time limited amounts to a declination of office and creates a vacancy. As above suggested, this requirement has not been very strictly construed. The time would probably run from the date of the receipt of the notice, rather than from the date of the order fixing the amount.

14. United States ex rel. Schauffler v. Union Surety & Guar. Co. (D. C., N. Y.), 9 Am. B. R. 114, 118 Fed. 482, containing form of complaint.

15. United States v. Ruggles (C. C. A., 6th Cir.), 34 Am. B. R. 91, 221 Fed. 256.

16. Matter of Kajita (D. C., Hawaii), 13 Am. B. R. 19, 2 U. S. D. C., Hawaii, 194.

SECTION FIFTY-ONE.

DUTIES OF CLERKS.

§ 51. **Duties of Clerks.**—*a* Clerks shall respectively (1) account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers; (2) collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and cannot obtain, the money with which to pay such fees; (3) deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns, as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used; (4) and within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition.

Analogous provisions: In U. S.: None.

In Eng.: None.

Cross-references: To the law: Clerk to refer case to referee in case of absence or disability of judge, § 18-f, g.

Duty of referee when case is referred to him by clerk, § 38(3).

Referee to transmit papers to clerk, when required in proceeding in court, § 39-a (8); to call upon and receive papers from clerks, § 39-a(10).

Fees of referee, § 40; of trustees, § 48.

Compensation of clerks and marshals, § 52.

Petitions in bankruptcy to be in duplicate, one copy for clerk and one for service, § 59-c.

Fees for filing petitions to have priority, § 64-b(2).

Indexes to be prepared and searches to be made by clerks, § 71.

To the General Orders: Clerk to keep docket of cases, I.

Clerk to indorse each paper filed with time of filing and statement of character, II.

Process, summons and subpoenas to be tested by clerk, III.

Clerk may require indemnity for expenses, X.

Proofs of claims and other papers filed with clerk, XX.

List of proved claims to be transmitted to clerk, XXIV.

Checks or warrants for payment of money may be countersigned by clerk, XXIX.

Fees allowed to clerk are in full compensation for services, XXXV(1); judge may order paid out of estate in certain cases, XXXV(3).

To Official Forms: Adjudication of bankruptcy to be signed by clerk, No. 12.

Order of reference by clerk, No. 14; in case of absence or disability of judge, No. 15.

SYNOPSIS OF SECTION.

I. Duties of Clerks, 755.

- a. *Under general orders and forms*, 755.
- b. *Account for fees; collection of fees*, 755.
- c. *Payment of fees to referee and trustee*, 756.
- d. *Pauper affidavits*, 756.
- e. *Additional duties*, 757.

I. DUTIES OF CLERKS.¹

a. **Under general orders and forms.**—In addition to the duties prescribed by this section the clerk is required to keep a docket in the form specified in General Order I. He is required by General Order II to indorse on each paper filed the day and hour of filing. Under General Order III he is required to attest each process, summons and subpoena issued out of the court. Besides these specific duties the clerk has his usual duties as to the keeping of a docket of bankruptcy cases, the filing of papers,² and the issue of process.³ In the absence of the judge, he refers cases to the referee for adjudication,⁴ and the deputy clerk has like authority.⁵ It seems also he should give notice to creditors of the order to show cause on discharge,⁶ though, as has been indicated,⁷ this is often done by the referee. For any disbursements he may be called on to make, he, like the referee, can demand indemnity.⁸ It is not the duty of the clerk to furnish referees with blank forms.⁹

b. **Account for fees; collection of fees.**—The duty enjoined by subdivision 1 to account for fees received by him is similar to that required of him as to all other fees, and indicates that fees in bankruptcy are not in addition to his salary as fixed by law. By subdivision 2 the clerk is also required "to collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition," except in pauper cases. The amounts of these fees are fixed in other sections.¹⁰ Unless the fees are paid, no pauper affidavit being filed, the petition need not be received. Early in the history of the law, it was a question whether partners who had no assets, and sought bankruptcy merely to secure a discharge, should not be required to deposit separate fees for the individual estates and that of the copartnership.¹¹ The better opinion is that they need not;¹² such a petition is but one proceeding. There is a recorded

1. See also Am. B. R. Dig. § 115.

2. Compare Bankr. Act, §§ 39(5) (7) (8) (10), 59-c.

3. See Forms Nos. 5, 30. See also § 71 of this work.

4. Bankr. Act, § 18-f-g. See also § 38-a (3).

5. *Gilbertson v. United States* (C. C. A., 7th Cir.), 22 Am. B. R. 32, 168 Fed. 672, holding that a deputy district court clerk under § 558 of the U. S. Revised Statutes, is authorized to make an order of reference, a mere ministerial act, upon the filing of a petition for adjudication. Compare *Bray v. Cobb* (D. C., N. C.), 1 Am. B. R. 153, 91 Fed. 102.

6. Form No. 57; *Matter of Longhney* (D. C., Wash.), 34 Am. B. R. 206, 218 Fed. 980.

7. See pp. —, *ante*.

8. General Order X.

9. *United States v. Mason* (C. C. A., 1st Cir.), 129 Fed. 742.

10. For the referee's, see Bankr. Act, § 40-a; for the trustee's § 48-a; for the clerk's, § 52-a.

11. Compare *In re Barden* (D. C., N. C.), 4 Am. B. R. 31, 101 Fed. 553. See also *Mahoney v. Ward* (D. C., N. C.), 3 Am. B. R. 770, 100 Fed. 278.

12. *In re Langslow* (D. C., N. Y.), 1 Am. B. R. 258, 98 Fed. 869; *In re Gay* (D. C., N. H.), 3 Am. B. R. 529, 98 Fed. 870. Contra, however, is the case of *In re Farley* (D. C., Va.), 8 Am. B. R. 266, 115 Fed. 359, which follows *In re Barden* (D. C., N. C.), 4 Am. B. R. 31, 101 Fed. 553.

instance of husband and wife filing a petition together and being permitted to proceed on the deposit of one fee; but they were to an extent partners in business as well. The rule is indicated in the words "in each case." If a single adjudication can be made affecting all petitions, one fee is sufficient; but not otherwise.¹³

c. Payment of fees to referee and trustee.—The clerk's fee seems to be earned on the filing of the petition; the referee's and the trustee's when the case is closed. As to trustees, an estate is closed when the trustee is discharged; as to the referee, when he has transmitted his records. These restrictions on payment, however, are not always strictly observed.¹⁴ Payments are made by check or order in accordance with General Order XXIX. In the larger districts, the referees often certify each week or month for fees due the trustees and themselves. Provision is elsewhere made for the return out of the estate of fees deposited by petitioning creditors in involuntary cases.¹⁵ There is, however, no provision for the repayment of the trustee's fee when no trustee is appointed. This is usually done by a check to the bankrupt or his attorney, after the case is closed.

d. Pauper affidavits.¹⁶—A "poor person" may avail himself of the bankruptcy law, by filing with his petition a pauper affidavit. Contrary to the usual practice, he may get into court and become entitled to adjudication and, it seems, protection, without the usual preliminary inquiry as to his alleged property. The fees referred to are the statutory fees to be paid to the clerk, referee and trustee as compensation for their services, and do not include or refer to the expenses incurred by the officers of the court in the bankruptcy proceeding.¹⁷ Before the adoption of the General Orders, this provision was much abused.¹⁸ Various means were devised to check the practice of filing pauper affidavits in unworthy cases. It is not thought, however, that a refusal to discharge until the fees are paid is any more defensible than would be a refusal to file for the same reason.¹⁹ Under General Order X the clerk, referee or marshal may require indemnity before incurring any expense in publishing or mailing notices, traveling, procuring the attendance of witnesses or perpetuating testimony and may refuse to proceed without such indemnity, notwithstanding the so-called pauper affidavit; the money advanced for this purpose by the bankrupt or other person may be repaid to him as a part of the cost of administration.²⁰ The clerk is not given any option as to filing such petition, and where it appears from the schedules offered therewith that the petitioner has either in his hands or otherwise subject to his order money with which to pay the fees, his petition should be filed, and such money subjected to an order for the payment of such fees.²¹ Ample power is now given

13. *In re Langslow* (D. C., N. Y.), 1 Am. B. R. 258, 98 Fed. 869.

14. In the Western District of N. Y., the word "closed" is liberally interpreted by rule. See 1 N. B. N. 110.

15. Bankr. Act, § 64-b(2). See also *In re Matthews* (D. C., Iowa), 3 Am. B. R. 265, 97 Fed. 772; *In re Silverman* (D. C., N. Y.), 3 Am. B. R. 227, 97 Fed. 325.

16. See also Am. B. R. Dig. § 285.

17. *Matter of Crisp* (D. C., Tenn.), 38 Am. B. R. 557.

18. Of one of the districts in Alabama, it was, early in 1900, stated: "It (the pauper

petition clause) has induced much perjury in this district. One lawyer has been disbarred because of it, and several others have been led into unprofessional conduct."

19. *In re Mason* (D. C., Ala.), 25 Am. B. R. 73, 181 Fed. 899. See rule in District of Washington, 1 N. B. N. 376, 95 Fed. 120. And compare *In re Langslow* (D. C., N. Y.), 1 Am. B. R. 258, 98 Fed. 869; *In re Plimpton* (D. C., Vt.), 4 Am. B. R. 614, 103 Fed. 775.

20. *Matter of Crisp* (D. C., Tenn.), 38 Am. B. R. 557.

21. *In re Mason* (D. C., Ala.), 25 Am. B. R. 73, 181 Fed. 899.

to investigate the truth of the pauper affidavit,²² and to report that it is not true, if it appears that a fraud on the court has been attempted.²³ It is suggested also that through an examination had to test the truth of the affidavit, the bankrupt will often be found able to make the deposit. The affidavit must state that "the petitioner is without, and cannot obtain, the money with which to pay such fees." On examination as to its truth, it will usually be held false if it appears that he has exempt property,²⁴ or has paid an attorney for services in preparing the petition and schedules, or, it has been held, if the bankrupt is at the time earning fair wages.²⁵ A proposed voluntary bankrupt, who has not money enough to pay the filing fees, is not required to solicit loans from his friends for that purpose.²⁶ The necessity of, in some way, securing the fee of the trustee when one is appointed has already been considered.²⁷

e. Additional duties.—The amendatory act of 1903 has added § 71 to the original law. It prescribes other duties for the clerk.²⁸ It might well have been subdivision *b* of this section. It should be read with it.

22. General Order XXXV (4).

23. The practice suggested by the following rule adopted by Judge Coxe of the Northern District of New York, has proven effective:

"V. In case a petition is filed by a proposed voluntary bankrupt which is accompanied by an affidavit under subdivision 2 of § 51 of the act, it shall be the duty of the clerk to file said petition without the payment of the fees provided for by law. If the clerk, or the referee to whom said petition is referred, has reason to believe such affidavit is false, he may file a certificate to that effect and cause the bankrupt to be examined. If upon such examination the referee reports in writing that the statements contained in such affidavit are false, and that the bankrupt has or can obtain money with which to pay said fees, such report shall be sufficient proof upon which to base proceedings under subdivision 4 of general order No. XXXV." See also "Supplementary Forms," *post*.

24. Exemptions allowed by the statute were not intended to cover exonerations from the payment of such filing fees. In *re* Mason (D. C., Ala.), 25 Am. B. R. 73, 181 Fed. 899; In *re* Hines (D. C., W. Va.), 9 Am. B. R. 27, 117 Fed. 790; In *re* Bean (D. C., Vt.), 4 Am. B. R. 53, 100 Fed. 262.

25. In *re* Collier (D. C., Tenn.), 1 Am. B. R. 182, 93 Fed. 191, holding that the court has the right to demand some evidence which shows that it is reasonable to conclude that the petitioner cannot really obtain the money, and where it appeared that one had filed a petition without paying fees and had filed the statutory affidavit, but it also appeared that he was earning \$30 per month, this was held to be conclusive evidence of his

ability to obtain his \$25 for government fees, notwithstanding that he had a family to support out of his earnings. Compare also In *re* Williams, 2 N. B. N. Rep. 206.

26. *Sellers v. Bell* (C. C. A., 5th Cir.), 2 Am. B. R. 529, 94 Fed. 801, 36 C. C. A. 502.

Borrowing money to pay costs.—In the case of In *re* Hines (D. C., W. Va.), 9 Am. B. R. 27, 117 Fed. 790, the court said: "If the bankrupt . . . was able to borrow from his friends money with which to pay the court costs, he could not properly make the affidavit required in this case, and it would be his duty to pay the fees." In *re* Mason (D. C., Ala.), 25 Am. B. R. 73, 181 Fed. 899, the court in commenting on these cases said: "I concur in the views of the courts expressed in the foregoing quotations from the cases cited, except that in *re* Hines, *supra*, where the court in effect declares that, if the bankrupt was able to borrow from his friends money with which to pay the court costs, he could not properly make the affidavit required, and it would be his duty to pay the fees. I think the rule announced by Judge McCormick in *Sellers v. Bell*, *supra*, which in substance is that a proposed voluntary bankrupt, who has not money enough to pay the filing fees, is not required to solicit loans from his friends for that purpose, is more reasonable and just. He says that such a requirement would inflict a humiliation on any citizen to require that he solicit or accept alms of his kindred or friends. Moreover, it would raise an issue not contemplated by the bankruptcy act, and which would be embarrassing and difficult to determine."

27. See p. 744, *ante*.

28. See under § 71 of this work.

SECTION FIFTY-TWO.

COMPENSATION OF CLERKS AND MARSHALS.

§ 52. **Compensation of Clerks and Marshals.**—*a* Clerks shall respectively receive as full compensation for their services to each estate, a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.

b Marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their service in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with the laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals.

Analogous provisions: In U. S.: Act of 1867, § 47, R. S., §§ 5124, 5125, 5127, 5127A; Act of 1841, § 13; Act of 1800, §§ 46, 47.

Cross references: To the law: Marshals may be appointed to take charge of bankrupt's property, § 2(3).

Compensation of marshals for services rendered in taking charge of property, § 48-d. Clerks to collect fees, and account for same, § 51(2).

Fees of clerks for certificates of searches, § 71.

To the General Orders: Clerk or marshal may require indemnity before incurring expense, X.

Accounts of marshal as to expenses, XIX.

Fees of clerk in full compensation for services, XXV(1).

SYNOPSIS OF SECTION.

COMPENSATION OF CLERKS AND MARSHALS.

I. Compensation of Clerks, 759.

a. *The filing fee*, 759.

b. *Other fees*, 759.

II. Compensation of Marshals, 759.

a. *Fixed by general law*, 759.

b. *While acting as receiver*, 760.

c. *Accounts of marshals*, 760.

I. COMPENSATION OF CLERKS.¹

a. **The filing fee.**—By subsection *a* the filing fee of the clerk is fixed at ten dollars, and must be paid before a petition is filed.² It is in “full compensation” for the services of the clerk to each estate. General Order XXXV (1) interprets the quoted words by providing that the fees allowed to clerks “shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money.”

b. **Other fees.**—But clerks may charge the fees allowed them by law for copies of papers in bankruptcy proceedings furnished to persons other than the referees or other officers, or expenses necessarily incurred in publishing or mailing notices or other papers. In some districts, it is even prescribed by rule that clerks may charge a fee for copying and mailing the petition for discharge and order thereon known as Form No. 57.³ The validity of such a rule is doubted, and in fact it has been held in some districts that clerks are not entitled to a fee for mailing notices of an application for a discharge.⁴ It is a severe stretch of meaning to declare such mandates “copies furnished to other persons.” Money so collected is not for “expenses,” but for fees pure and simple. The clerk is also entitled to disbursements for postage, stationery and clerical work.⁵ It is thought that General Order XXXV (1) is not in accord with § 52-a; if not, the latter must control. What has been said elsewhere as to pauper cases⁶ and the right to demand indemnity applies⁷ to clerks as well. The clerks are now salaried officers.⁸ Any surplus of fees collected must be turned into the treasury.⁹ Section 71, added by the amendatory act of 1903, also authorizes the clerks to charge fees for bankruptcy searches.

II. COMPENSATION OF MARSHALS.¹⁰

a. **Fixed by general law.**—The marshals and their field deputies are now also salaried officers.¹¹ They play small parts in the administration of the

1. See also Am. B. R. Dig., § 116.

2. Bankr. Act, § 51 (2).

Partnership case.—Where under a partnership petition the partners seek and obtain discharges both as against the firm creditors and as against their respective individual creditors, the several estates must be administered and in each the clerk's fees are allowable. In re Farley & Co. (D. C., Va.), 8 Am. B. R. 266, 115 Fed. 359.

3. See In re Durham, 2 N. B. N. Rep. 1104. See also under § 39, *ante*.

4. In re Dunn Hardware & Furniture Co. (D. C., N. C.), 14 Am. B. R. 186, 134 Fed. 977; Matter of Longhney (D. C., Wash.), 34 Am. B. R. 206, 218 Fed. 980, holding that clerks should prepare, or cause to be prepared, copies of petitions and notices of application for discharge, and mail them to creditors as directed by the court, the expense to be paid by the bankrupt, and that a charge of forty cents for such notices based upon §§ 828, 840 of the U. S. Rev. St., is unauthorized.

Special or extra compensation is not allowable to the clerks under General Order No. XXXV, sec. 1, for mailing notices to creditors; his clerical services in such matters—so far at least as no extraordinary expense is involved—being covered by the filing fee of ten dollars provided by section 52, subd. a. Matter of Iwanaga (D. C., Hawaii), 36 Am. B. R. 285.

5. In re Dunn Hardware & Furniture Co. (D. C., N. Car.), 14 Am. B. R. 186, 134 Fed. 997.

6. See under § 51.

7. General Order X.

8. Under the former statute, their fees were limited to those fixed by the general law. See “Analogous Provisions,” *ante*.

Per diem compensation allowed by statute for services under U. S. R. S., §§ 574, 638, 828, see United States v. Marvin (U. S. Sup. Ct.), 212 U. S. 275, 22 Am. B. R. 717.

9. Act of May 28, 1896; U. S. Compiled Laws.

10. See also Am. B. R. Dig., § 120.

11. This only since act of May 28, 1896.

present bankruptcy law. Under the former law, they acted as messengers as well as custodians, and their fees were fixed by the statute.¹² Under the present statute, the only duties they are usually called upon to perform are the service of subpoenas and writs of injunction,¹³ and the taking possession of and caring for property.¹⁴ Their fees in either case are those fixed by the general law.¹⁵ They also may demand indemnity.¹⁶ When a petition accompanies an order, the statutory fee, it seems, can be charged for each paper, though they are bound together.¹⁷

b. While acting as receiver.—The compensation of a marshal while performing the duties of a receiver is considered elsewhere.¹⁸ His fees by way of commissions upon moneys disbursed or turned over to any person, including a lienholder, and upon moneys realized by the trustees from property turned over in kind to such trustees are fixed by § 48-d. It seems that a marshal cannot act as a receiver in bankruptcy.¹⁹

c. Accounts of marshals.—Marshals are required to account for their fees in bankruptcy cases. This is regulated by General Order XIX which requires no comment.²⁰

12. See "Analogous Provisions," *ante*.

13. Compare Bankr. Act, §§ 11-a, 18-a; Equity Rules XIII, XV.

14. See Bankr. Act, §§ 2(3), 3-e, and 69.

15. U. S. R., § 829.

16. General Order X.

17. In re Damon (D. C., N. Y.), 5 Am. B. R. 133, 104 Fed. 775.

18. See under § 2 and § 48-d. See also

In re Woodard (D. C., N. Car.), 2 Am. B. R. 692, 95 Fed. 955; In re Scott (D. C., N. Car.), 3 Am. B. R. 625, 99 Fed. 404; In re Adams, etc. (D. C., Col.), 4 Am. B. R. 107, 101 Fed. 215.

19. Act of May 28, 1896, § 20.

20. The referee has a similar duty. General Order XXVI.

SECTION FIFTY-THREE.

DUTIES OF ATTORNEY-GENERAL.

§ 53. **Duties of Attorney-General.**—*a* The Attorney-General shall annually lay before congress statistical tables showing for the whole country, and by States, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important.

Analogous provisions: None.

Cross-references: None.

I. ATTORNEY-GENERAL'S REPORTS.

The statistical tables required by this section will be found in the annual reports of the attorney-general beginning with that of 1898. The statistics required will be furnished by the proper officers on demand by the attorney-general.

SECTION FIFTY-FOUR.

STATISTICS OF BANKRUPTCY PROCEEDINGS.

§ 54. **Statistics of Bankruptcy Proceedings.**—*a* Officers shall furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the attorney-general, for statistical purposes, within ten days after being requested by him to do so.

Analogous provisions: In U. S.: R. S., § 5127B.
Cross-references: To the law: None.

I. STATISTICS.

These reports are called for by the clerks at the request of the attorney-general, and are made on blanks furnished by the Department of Justice. From them the attorney-general's annual report, required by section 53, is compiled. He can also ask for other or special reports from all the districts or a single district. There are no recorded cases construing this section.

SECTION FIFTY-FIVE.

MEETINGS OF CREDITORS.

§ 55. **Meetings of Creditors.**—*a* The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held.

b At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor.

c The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this act.

d A meeting of creditors, subsequent to the first one, may be held at any time and place when all the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place.

e The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request.

f Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered.

Analogous provisions: In U. S.: As to time and place of first meeting, Act of 1867, § 11, R. S., §§ 5019, 5032; Act of 1841, § 7; Act of 1800, § 6; As to presiding officer at first meeting, Act of 1867, § 12, R. S., § 5033; As to allowance of claims at first meeting, see Analogous Provisions under Section Fifty-seven, *post*; As to other meetings, Act of 1867, §§ 27, 28 R. S., §§ 5092, 5093, 5098; As to the final meeting, Act of 1867, § 28, R. S., §§ 5093, 5096.

In Eng.: As to first meeting, Act of 1883, Schedule I, Rules 1-4; As to subsequent meetings, Act of 1883, § 89(2); Act of 1890, § 18; Act of 1883, Schedule I, Rules 5-7; and, generally, as to meetings of creditors, General Rules 249-257.

Cross-references: To the law: Adjudication of bankruptcy, when to be made, § 18-a; order of reference to referee when judge is absent, § 18-f, g.

Notice of meetings of creditors to be given, § 58.

Proof and allowance of claims, § 57.

Who entitled to vote at meetings of creditors, § 56.

Creditors to choose trustee, § 44; as to final meetings of creditors, §§ 47-a(8), 65.

To the General Orders: Appointment of trustee subject to approval by court, XIII.

If no creditor appears at first meeting, no trustee appointed, XV.

Special meetings of creditors, court may call, XXV.

To Official Forms: Notice of first meeting of creditors, No. 18.

List of debts proved at first meeting, No. 19.

Appointment of trustee by creditors, No. 22; order that no trustee be appointed, No. 27.

Petition for meeting to consider composition, No. 60.

See Supplementary Forms, *post*; Hagar and Alexander's Bankruptcy Forms, 2d Ed.

SYNOPSIS OF SECTION.

MEETINGS OF CREDITORS.

I. Scope of section, 764

II. First meeting, 765

a. *In general*, 765

b. *Order of business; procedure*, 765

III. Special meetings, 766

a. *In general*, 766

b. *On call of creditors*, 767

IV. Final meetings, 767

a. *In general*, 767

I. SCOPE OF SECTION.

Scope of section.—The cross-references, *supra*, indicate the limited scope of the section. It has to do only with the time and place of holding the first meeting of creditors, who shall preside, and what in general may be done thereat, the calling of special meetings by creditors, and when final meetings shall be held. It is clearly a section on practice, not law, a distinction recognized in the English system by putting the corresponding rules of practice at the end of the section as a "schedule."¹ The procedure under § 55 is so different from that under the law of 1867² as to make the cases and sug-

1. See Eng. Act of 1883; Schedule I.

2. Act of 1867, §§ 11, 12, R. S., §§ 5019, 5032, 5033.

gestions under that law of little value. It will be observed, however, that then the place and time of meeting could be arbitrarily fixed, and there were usually three stated meetings,³ while, save for meetings called specially, there can now be but two.

II. FIRST MEETING.

a. In general.—Subsection *a* makes it the duty of the court to cause the first meeting of the creditors to be held as therein provided. It is the practice for the referee to call the first meeting upon the order of reference having been submitted to him after an adjudication.⁴ On receipt from the clerk of an order of reference,⁵ the referee forthwith calls a first meeting,⁶ setting the time, “not less than ten nor more than thirty days after the adjudication,” and the place “at the county seat of the county in which the bankrupt has had his principal place of business, resided or has his domicile.” These provisions are, in effect, directory; for, by subsequent clauses, the time may be somewhat indefinitely lengthened, and, if, as is often the case, the county seat is “manifestly inconvenient as a place of meeting for the parties in interest,” another place may be selected. The first meeting of creditors cannot be had until after adjudication.⁷ The practice of keeping first meetings alive by successive continuances is general, and to be recommended;⁸ it saves delay and expense in calling creditors together to consider special matters. Indeed, through the use of short notices, addressed to and served on the creditors or attorneys who have appeared, it often alone makes prompt action possible. That all meetings should be held in court-rooms and on regular days and at regular hours,⁹ and be conducted with dispatch, dignity and impartiality on the part of the presiding officer, in short, as a court of justice, seems to be the purpose of the statute.¹⁰

b. Order of business; procedure.—Subsection *b* provides that the referee, or, if there has been no reference, the judge, must preside at all first meetings. The following order of business is suggested:¹¹

1. Call for and noting of appearances in person or by powers of attorney.
2. Application for *ex parte* amendments.
3. Allowance or disallowance of claims.
4. Election of trustee, and fixing of amount of bond.
5. Examination of the bankrupt.
6. Miscellaneous motions, orders and instruction.
7. Continuance to a place, day and hour certain.

This order will often be changed, as, where there has been a receiver,¹² who should report as soon as the creditors entitled to vote are ascertained or where

3. Act of 1867, §§ 27, 28.

4. Official Form, No. 18, prescribes the form of the notice to be given to creditors of the first meeting and is to be signed by the referee. See also Am. B. R. Dig., §§ 313-315, 571.

5. Bankr. Act, § 18-f-g. See also where the referee makes the adjudication, § 38(1).

6. This is usually done by the entry of the fact in his record book, though a formal order may be drawn and signed. As to the method of giving notice, see Bankr. Act, § 58.

7. In re Back Bay Automobile Co. (D. C.,

Mass.), 19 Am. B. R. 835, 158 Fed. 679, revg. 19 Am. B. R. 33.

8. Compare In re Norton, Fed. Cas. 10,348; In re Phelps, Fed. Cas. 11,071.

9. In re Eagles (D. C., N. Car.), 3 Am. B. R. 733, 99 Fed. 695.

10. Compare In re Merchants' Ins. Co., Fed. Cas. 9,442.

11. See also 1 N. B. N. 112, 113; Rules 1, 5, 6, 8, 9.

Opening and conducting meeting.—See In re Eagles and Crisp (D. C., N. Car.), 3 Am. B. R. 733, 99 Fed. 695.

12. Consult Section Two of this work.

the appointment of appraisers¹³ is necessary, an order of business which should follow the appointment of a trustee. Appearances may be either in person or by attorney; if the latter, by an attorney or counselor authorized to practice in the circuit or district court.¹⁴ Subsection *b* also provides that the judge or referee shall, before proceeding with the other business, allow or disallow claims and conduct an examination of the bankrupt. This is evidently for the purpose of determining the right of creditors to vote. The bankrupt may be required to attend the first meeting and submit to an examination for the purpose of aiding the court in ascertaining who are creditors.¹⁵ The proof and allowance of claims is especially provided for under § 57, to which reference should be made in this connection. A creditor included in the schedules, whose identity is established satisfactorily to the referee, is entitled to an opportunity to examine the bankrupt before he decides to become a party to the proceeding.¹⁶ Where claims are objected to, they should, as far as possible, be heard summarily on an oral motion to reject—the mere filing usually amounts to an allowance¹⁷—and their right to vote determined. Only when clearly fictitious or preferential, should this right be denied them.¹⁸ The determination of a referee as to the allowance or disallowance of a claim presented at such a meeting is a judicial act which cannot be reviewed, revised or reversed by a State court.¹⁹ Other general regulations as to papers and practice will be found in General Order IV. The cross-references, *ante*, to other sections and general orders, should be read in anticipation of a first meeting of creditors. The very broad range that business at meetings of creditors may take is indicated by subsection *c*.

III. SPECIAL MEETINGS.

a. In general.—While this section provides only for first and final meetings in each case, special meetings can be called and held for a variety of purposes.²⁰

13. See discussion under Section Seventy of this work.

14. General Order IV.

15. Bankr. Act, § 7 (1) (3), and discussion thereunder.

16. **Examination of bankrupt by creditor before proving claim.**—A creditor who has not filed a claim is privileged to examine the bankrupt, in order to see if it is worth while so to do. In *re Walker* (D. C., N. Dak.), 3 Am. B. R. 35, 96 Fed. 550; In *re Jehu* (D. C., Iowa), 2 Am. B. R. 498, 94 Fed. 638, the court said: "The creditors may properly decline to incur the expense of proving their claims until it appears that some good will result from so doing. The referee should be satisfied that the party applying for the order is in fact a creditor of the bankrupt; but, if this fact be shown, no good reason exists why the examination should not be had, even though the creditor may not have proved his claim in set form."

Examination at adjourned meeting.—Where a bankrupt, in his schedules, claims the bar of the statute of limitations as a defense to a particular provable debt, the creditor, who had not filed proof of claim, is entitled to examine the bankrupt, at an adjourned meeting of the creditors, in order to determine whether he will take an affirmative part in the bankruptcy proceedings,

although a rule of court requires a creditor to file a formal claim with the referee before any examination. In *re Kuffler* (D. C., N. Y.), 18 Am. B. R. 587, 155 Fed. 1018.

17. In *re Summer* (D. C., N. Y.), 4 Am. B. R. 123, 101 Fed. 224. Claims so filed may, however, be objected to and allowance thus postponed. See Bankr. Act, § 57-d.

18. See Bankr. Act, § 56.

19. *Clendening v. Red River Valley Nat. Bank* (Sup. Ct., N. Dak.), 11 Am. B. R. 245, 94 N. W. 901.

When the referee acts instead of the judge, his duties are judicial in their nature and he is to pass upon such questions as may arise in carrying forward the objects and purposes of the meeting. In *re McGill* (C. C. A., 6th Cir.), 5 Am. B. R. 155, 106 Fed. 57.

20. Bankr. Act, § 44; General Order XXV.

Subsections *d* and *e* provide the method of calling such meetings. When all the creditors whose claims have been allowed agree in writing that such a meeting shall be held, it may be held at any time or place agreed upon. The court is required to call such a meeting when one-fourth or more in number of those "who have proven their claims" shall file a written request to that effect.

The phrase "special meeting" occurs only in General Order XXV. Special meetings are usually called to consider proposed sales of property, or the compromises of controversies, or for the declaration and payment of dividends.²¹ "Proven" does not necessarily mean "obtained the allowance" of their claims.²² It seems that "whenever" in subdivision *e* means "whenever after the first meeting" previously provided for in subdivision *a*.²³ The creditors can only take such steps at the special meeting as will tend to the promotion of the best interests of the estate.²⁴ Almost invariably the referee presides over such meetings, though this is not necessary, as at first meetings.²⁵

b. On call of creditors.—Creditors' meetings, after the first, while always called by the referee, are usually the result of a report or a petition filed, or motion made, by the trustee. Subdivisions *d* and *e* provide a means to call the creditors together, if the trustee will not act, or the referee refuses to order the meeting. The former of these subsections seems, however, in conflict with § 58-a, and its value or validity has not yet been determined. The policy of the law seems to be to give all creditors the absolute right to ten days' notice of all important steps, nay, even of all "meetings of creditors."²⁶ The practice on the call of a creditors' meeting by written request of a majority in number and amount of claims proven is sufficiently explained in the statute.²⁷

IV. FINAL MEETINGS.

a. In general.—Final meetings must be ordered when "the affairs of the estate" are ready to be closed.²⁸ This seems to imply that there need be no final meeting unless there is an estate. Where there are dividends for creditors a final meeting, as distinguished from a first meeting, must, since the proviso clauses added to § 65-b, be held.²⁹ The safer practice is to hold such a final meeting even in no-asset cases. It should be called as soon as the trustee's final report is filed.³⁰ Creditors must also have the usual notice of the filing of a trustee's final account.³¹

21. *Matter of Cutler & John* (D. C., N. Car.), 36 Am. B. R. 420, 228 Fed. 771, holding that where it appears that the bankrupt owns property subject to valid liens, the referee may, if in his judgment it is advisable, call a meeting of the creditors in order that they may be heard before action is taken subjecting the estate to possible cost and expense in the administration of such property. In *re Meadows, Williams & Co.* (D. C., N. Y.), 25 Am. B. R. 100, 181 Fed. 911 (meeting to consider proposed compromise of action by trustee). For a suggested practice, resulting in combining three or four special meetings in one, see under § 58 of this work, *post*.

22. In *re Back Bay Automobile Co.* (D. C., Mass.), 19 Am. B. R. 835, 158 Fed. 679, revg. 19 Am. B. R. 33.

23. In *re Back Bay Automobile Co.* (D. C., Mass.), 19 Am. B. R. 835, 158 Fed. 679, revg. 19 Am. B. R. 33.

24. In *re Meadows, Williams & Co.* (D. C., N. Y.), 25 Am. B. R. 100, 181 Fed. 911.

25. Frequently, however, the trustee pre-

sides over meetings to consider the sale of property.

26. See Bankr. Act, § 58-a(3). Compare In *re Stoeve* (D. C., Pa.), 5 Am. B. R. 256, 105 Fed. 355; *Matter of Cutler & John* (D. C., N. Car.), 36 Am. B. R. 420, 228 Fed. 771, citing text.

27. See subsection *e* of this section.

28. In *re Sarah Michel* (D. C., Wis.), 1 Am. B. R. 665, 95 Fed. 803.

29. A meeting for the declaration of a dividend should be combined with that for the payment of the dividend so declared, and, if there is to be but one dividend, the final meeting can and should, in proper cases, be combined with such dividend meetings. In *re Marshall N. Smith* (Ref., N. Y.), 2 Am. B. R. 648.

30. Bankr. Act, § 47-a(8). See also for the necessity of a supplemental report of distribution by the trustee, discussion under Section Forty-seven of this work, sub-title, "Trustee's Supplemental Report."

31. Bankr. Act, § 58-a(6).

SECTION FIFTY-SIX.

VOTERS AT MEETINGS OF CREDITORS.

§ 56. **Voters at Meetings of Creditors.**—*a* Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided.

b Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess.

Analogous provisions: In U. S.: As to voters, generally, Act of 1867, § 13, R. S., § 5034; As to preferred creditors, Act of 1867, § 18, R. S., § 3035.

In Eng.: As to voters, generally, Act of 1883, Schedule I, Rules 8–10, 14; As to voting by proxy, Act of 1883, Schedule I, Rules 15, 17, 19, 21; Act of 1890, § 22, General Rules 245–248.

Cross-references: To the law: Creditors, term defined, § 1(9); secured creditors, term defined, § 1(23).

Meeting of creditors; first meeting; other meetings, how called, § 55.

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SYNOPSIS OF SECTION

VOTERS AT MEETINGS OF CREDITORS.

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I. IN GENERAL.

a. Comparative legislation.—The English statute regulates voting at creditors' meetings with great particularity,¹ and proxy voting at such meetings is so restricted as to make impossible many of the evils complained of under previous statutes. Valuable suggestions as to their orderly conduct will, therefore, be found in the English law and general rules. Our law of 1867 was not, in this particular, essentially different from that of 1898. Creditors then took action by a majority in number and amount, though all claims proven were counted, whether present or represented or not;² the voting of secured creditors was prohibited, not by statute, but by the courts.

b. Scope of section.—The present law, in effect, gives voting power only to creditors holding claims neither preferred nor secured nor entitled to priority, which have been allowed and are present; and declares that a majority shall consist in the concurrence of the larger amount as to dollars and the larger number as to individuals.

c. Election of trustees.³—(1) **IN GENERAL.**—In general, the election of trustee should take place at the time and place fixed in the notice, and objections, technical in their nature, or motions manifestly for the purpose of delay, will usually be denied. It is to be regretted that the prevailing tendency is to construe the law and general orders technically.⁴ A broad, perhaps, rather, a shrewd discretion, seems a rule more in harmony with the purpose of the statute—that “the creditors of a bankrupt estate shall . . . appoint” the trustee. In the nature of things, all creditors who entitle themselves to vote before the result is announced, should be counted; conversely, no others should.⁵ It has been held that provisional allowances or disallowances may be made in proper cases to permit the prompt selection of a trustee,⁶ and this may be permissible where the only other possible course would be to postpone the election of a trustee until intricate questions of law and fact pertaining to the claim were determined.⁷

(2) **POSTPONEMENT OF ELECTION.**—If possible, there should be no postponement of an election of trustee,⁸ but a referee may, in his discretion,

1. See “Analogous Provisions,” *ante*.

2. Act of 1867, § 13, R. S., § 5034.

3. See Am. B. R. Dig. §§ 312–315, and discussion under § 44, which should always be construed with this section.

4. See footnotes 47 and 48, *post*. Compare, however, *In re Henschel* (C. C. A., 2d Cir.), 7 Am. B. R. 662, 113 Fed. 443; *In re Sugenheimer* (D. C., N. Y.), 1 Am. B. R. 425, 91 Fed. 744.

5. *In re Lake Superior, etc., Co.*, Fed. Cas. 7,997.

6. *In re Malino* (D. C., N. Y.), 8 Am. B. R. 205, 118 Fed. 368. But compare *In re Columbia Iron Works* (D. C., Mich.), 14 Am. B. R. 526, 142 Fed. 242.

7. **Postponement until determination of question of preference.**—Where the referee, after twice adjourning the election of trustee and affording an opportunity to creditors to examine the bankrupt in support of their objection that a certain creditor was not entitled to vote for trustee unless it surrendered a preference alleged to have been received by it, finds from the evidence

adduced that the alleged preference had not been established, no error is committed in refusing to postpone the election of trustee until the final determination of the question of preference and permitting the creditor to vote. *In re Milne* (D. C., N. Y.), 20 Am. B. R. 248, 159 Fed. 280.

8. *In re Richards* (D. C., N. Y.), 4 Am. B. R. 631, 103 Fed. 849. See also *In re Henschel* (C. C. A., 2d Cir.), 7 Am. B. R. 662, 113 Fed. 433.

Postponement to bring in other creditors.—Where, at the time stated for the election of a trustee, a majority in number of the creditors are ready and opposed to delay, but a minority requested a postponement of an hour in order that others favorable to their candidate might be present, the referee was justified in denying the postponement, no good reason therefor being shown. *Matter of Grat* (D. C., Mass.), 36 Am. B. R. 524, 228 Fed. 925.

An adjournment on the ground of surprise will not be granted where the surprise relied upon is not as to a fact, but arises from

adjourn a first meeting of creditors for a few hours in order that claims may be presented and allowed,⁹ or that the creditors may compose their differences in the case of a no-choice vote.¹⁰ If there is a postponement, all claims proven in the interval have the same rights as those previously allowed. When, after the first meeting, proper amendments are granted bringing in new creditors, such creditors, it seems, may, if it appears that their votes would have changed the result, petition for a new election and, if successful thereat, oust the elected trustee.¹¹ The referee's power to approve or disapprove has already been considered.¹²

II. VOTES BY CREDITORS.

a. Majority in number and amount.—Subsection *a* provides that creditors shall pass upon all matters submitted to them by a majority vote "in number and amount of claims of all creditors whose claims have been allowed and are present." All questions duly submitted at a meeting must depend upon such a majority vote for their determination.¹³ Nor is it necessary that there be any definite quorum, as in England; one creditors present or duly represented and entitled to vote may choose a trustee.¹⁴ The meaning of "present" has been somewhat discussed. The better opinion is that, if excluded from voting for any reason, a creditor, though actually present, is not present for the purpose of ascertaining the total of claims.¹⁵ A partnership creditor can be counted only as a single individual.¹⁶

b. Who entitled to vote.—(1) **IN GENERAL.**—Creditors only are entitled to vote.¹⁷ Creditors may appear and vote personally, or by attorney or proxy as

oversight of a provision of law as to the correct execution of a letter of attorney. In *re Finlay* (D. C., N. Y.), 3 Am. B. R. 738, 104 Fed. 675.

9. *Matter of Rosenfeld-Goldman Co.*, (D. C., Mass.), 36 Am. B. R. 520, 228 Fed. 921.

10. **When postponement permitted.**—But where the vote for trustee results in no choice, the unanimous request of the creditors for an adjournment of the meeting for twenty-four hours to enable them to compose their differences, if possible, should be granted, and the appointment of a trustee by the referee after denying such request will be set aside and an election ordered. In *re Nice and Schreiber* (D. C., Pa.), 10 Am. B. R. 639, 123 Fed. 987.

11. In *re Perry*, Fed. Cas. 10,998; In *re Ratcliffe*, Fed. Cas. 11,578; In *re Morgenthal*, Fed. Cas. 9,813.

12. See pp. 704-708, *ante*. Compare also generally, §§ 44 and 55.

13. **Majority in number and amount controls**, *Bollman v. Tobin* (C. C. A. 8th Cir.), 38 Am. B. R. 504. In this case the court said: "At these meetings a majority of the general creditors in number and amount controls. See sections 55 and 58 of the Bankruptcy Act, and General Order No. 13. In *re Lewensohn* (D. C., N. Y.), 3 Am. B. R. 299, 98 Fed. 576; In *re McGill* (C. C. A., 6th Cir.), 5 Am. B. R. 155, 106 Fed. 57. The courts have uniformly enforced these distinctive features of the law. It is true that the administration of the estate is by the court and not by creditors, but on questions of general business policy, the wishes of a

majority of the creditors ought not to be disregarded except for good cause arising out of some special feature affecting the particular estate. If the majority seeks a factional advantage to the injury of the minority, it is the duty of the court to interfere and protect the rights of all. But so long as the majority seeks no advantage except such as will accrue to the benefit of all creditors, their judgment should prevail, unless the circumstances are quite exceptional."

14. In *re Mackellar* (D. C., Pa.), 8 Am. B. R. 669, 116 Fed. 547; In *re Haynes*, Fed. Cas. 6,209. Compare *Matter of Continental Building and Loan Assoc.* (D. C., Cal.), 36 Am. B. R. 412.

15. **Creditors; when "present."**—Creditors whose claims have been allowed are not present at a meeting within the meaning of section 56-a of the bankrupt act, when they are not permitted to participate in its proceedings. . . . The meaning of the clause is to vest the power of creditors in those who are present, and not allow the proceedings to be delayed by the absence of those creditors who do not take sufficient interest to participate; but it is not its meaning to treat those as present who are excluded from voting by the referee. In *re Henschel* (C. C. A., 2d Cir.), 7 Am. B. R. 662, 113 Fed. 443, *revg. s. c.* (Ref., N. Y.), 6 Am. B. R. 25, and (D. C., N. Y.), 6 Am. B. R. 305, 109 Fed. 861.

16. In *re Purvis*, Fed. Cas. 11,476.

17. Bankr. Act, § 1(9), defines the term "creditor." See also Am. B. R. Dig. § 314.

will hereafter appear.¹⁸ Relatives and friends of the bankrupt who are legitimate creditors must be permitted to vote like other creditors.¹⁹ A member of a partnership or an officer of a corporation, presenting a proof of debt, should be allowed to vote,²⁰ though if represented by an attorney, the former must show the attorney's authority to act,²¹ and the mere fact that a claimant is a director and stockholder of a bankrupt corporation does not, in the absence of collusion or improper influence, disqualify him from voting for a trustee.²² The shareholders in a building and loan association are creditors entitled to vote for trustee upon the bankruptcy of the association.²³ A receiver in a State court appointed in an action by a corporation against a delinquent stockholder may be deemed a "creditor" of such stockholder within the meaning of this section.²⁴ Creditors sometimes appear specially, so as to assert title to goods sold on consignment, or to save their rights by having objections to the jurisdiction noted; but these are not creditors in the sense used in this section. That the creditors of a partnership, as distinguished from the creditors of an individual, are the only voters on matters involving the administration of partnership estates, seems to follow by analogy from § 5-b.²⁵

(2) PROOF AND ALLOWANCE OF CLAIM.—A creditor cannot vote until his claim has not only been "proved,"²⁶ which means the mere verification of it in accordance with the law and one of the forms prescribed by the Supreme Court, but also "allowed,"²⁷ which means the filing of such proved claim, without objection, with the proper referee. Even if filed, it seems that the referee has the right to determine its voting power, if the same is called in question.²⁸ The mere filing of objection will not, however, be sufficient to

18. General Order IV. See Bankr. Act, § 1(9).

19. Matter of Rothleder (D. C., N. Y.), 37 Am. B. R. 116, 232 Fed. 398.

20. The managing officers of a bankrupt corporation may vote, if they are *bona fide* creditors. In re Northern Iron Co., Fed. Cas. 10,322, 14 N. B. R. 356.

An officer of a bankrupt corporation and its attorney are entitled to vote for trustee on any allowed claims of their own and may not be summarily deprived of that right on the ground of interference of bankrupt's officers with appointment of trustee. In re Day & Co. (C. C. A., 2d Cir.), 24 Am. B. R. 252, 178 Fed. 545, affg. 23 Am. B. R. 56, 174 Fed. 164.

21. Compare In re Finlay (D. C., N. Y.), 3 Am. B. R. 738, 104 Fed. 675.

22. In re Stradley & Co. (D. C., Ala.), 26 Am. B. R. 149, 187 Fed. 285.

23. Merchants' National Bank v. Continental Bldg. & Loan Association (C. C. A., 9th Cir.), 37 Am. B. R. 439, 232 Fed. 828.

24. Dight v. Chapman, 12 Am. B. R. 743, 44 Oreg. 265, 75 P. 585, citing Collier on Bankruptcy (3d ed.), p. 304.

25. In re Beck (D. C., Mass.), 6 Am. B. R. 554, 110 Fed. 140, holding that in case of the separate bankruptcy of one member of a partnership, his individual creditors are entitled to vote for trustee, though all the assets belong to the partnership, and there is but one joint creditor; In re Purvis, Fed.

Cas. 11,476, 1 N. B. R. 163, holding that one of several joint creditors, who are not partners, cannot vote without the consent of the others.

26. Compare Bankr. Act, § 57-a; In re Walker (D. C., N. Dak.), 3 Am. B. R. 35, 96 Fed. 550.

27. See Bankr. Act, § 57-b; In re Eagles (D. C., N. Car.), 3 Am. B. R. 733, 99 Fed. 696; Clendening v. National Bank (Sup. Ct., N. Dak.), 11 Am. B. R. 245, 94 N. W. 901; In re Henschel (C. C. A., 2d Cir.), 7 Am. B. R. 662, 113 Fed. 443.

28. Determination of validity of claims.—If, at a meeting for the election of a trustee, objections are made to a claim, the referee has either to disfranchise the claim or go forward and ascertain in a summary manner whether or not the claim ought to be voted upon, and his decision ought not to be set aside, unless so plainly unjust as to amount to an abuse of discretion. Matter of Rosenfeld-Goldman Co. (D. C., Mass.), 36 Am. B. R. 520, 228 Fed. 921; Matter of Grat (D. C., Mass.), 36 Am. B. R. 524, 228 Fed. 925.

Referee must entertain objections.—Where the referee in proceedings which resulted in the election of trustee overrules objections of certain claims, preferred upon the ground that the claimants were preferred creditors and not entitled to have their claims allowed until the preferences were surrendered, and accepts the proofs of such claims as presented and a trustee is elected thereupon, the pro-

exclude a claim which, on an examination—often mere oral statements of counsel—seems to be *bona fide*.²⁹ If objection is made and a *prima facie* case is presented, and it appears that the vote of the claim objected to will be decisive of any matter submitted to the creditors, the referee should postpone the vote until the validity of the claim can be determined.³⁰ In such a case it may even be necessary to appoint a receiver *ad interim*.³¹

(3) COMBINATIONS AND ASSIGNMENTS.—Combinations of creditors to control judicial proceedings in their own interests will not be favored.³² A single interest should vote as a single interest, and not otherwise.³³ Where a number of claims have been assigned to one person, all of which are allowed, he is entitled only to one vote.³⁴

c. Creditors not entitled to vote.—(1) SECURED CREDITORS.—Subsection *b* provides that creditors holding claims which are secured may not vote. Secured claims are defined in section 1 (23).³⁵ In this connection §§ 57-e-h should be consulted. Such claims are not to be counted, only as to the excess of the claim over the value of the security. The voting power of a secured debt depends on the value of the security.³⁶ This is often ascertained summarily; indeed, is sometimes stipulated. Again, technicalities should be avoided. At the same time, the burden clearly rests on the secured creditor to show that the security is not sufficient to pay his debt. Such a creditor cannot be counted or allowed to vote, unless it appears that there will

ceedings are erroneous and the election must be set aside. *In re Malino* (D. C., N. Y.), 8 Am. B. R. 205, 118 Fed. 368.

Claims not affecting result.—The referee, at a meeting for the election of a trustee, is not bound to pass upon objections to a claim presented, where it would have been so voted as not to affect the result. *Matter of Rosenfeld-Goldman Co.* (D. C., Mass.), 36 Am. B. R. 520, 228 Fed. 921. Where no harm has been done to a creditor by denying it the right to vote for trustee, it has no cause for complaint. *Merchants' National Bank v. Continental Building & Loan Association* (C. C. A., 9th Cir.), 37 Am. B. R. 439, 232 Fed. 828.

29. *In re Kelly Dry Goods Co.* (D. C., Wis.), 4 Am. B. R. 528, 102 Fed. 747.

30. Postponement of vote.—Consult *In re Lake Superior, etc., Co.*, Fed. Cas. 7,997; *In re Herrman*, Fed. Cas. 6,425; *In re Frank*, Fed. Cas. 5,050; *Matter of Rosenfeld-Goldman Co.* (D. C., Mass.), 36 Am. B. R. 520, 228 Fed. 921. Postponement of proof was required under the former law (R. S., § 5083), but this is not so under the present statute. Compare also *In re Jackson* Fed. Cas. 7,123; *In re Milne* (D. C., N. Y.), 20 Am. B. R. 248, 250, 159 Fed. 280, citing *Collier on Bankruptcy* (6th ed.), p. 424.

31. Bankr. Act, § 2(3) (15).

32. A combination of creditors for the control of judicial proceedings in their own interests, as distinguished from the interests of the general creditors, is clearly against public policy; as where certain creditors of several allied corporations, prior to bankruptcy proceedings, assigned, for value, their claims against these corporations, in trust, to a so-called committee, and especially

where it was a part of the undertaking and purpose of the committee to purchase in the interest of these particular creditors, as a single interest, from the trustee who represents all the creditors, the property of the bankrupt, and the committee should not be allowed to cast more than one vote for trustee instead of a vote for each claim represented by them. *In re Kenney Co.* (D. C., Ind.), 14 Am. B. R. 611, 136 Fed. 451.

33. *In re Kenney & Co.* (D. C., Ind.), 14 Am. B. R. 611, 136 Fed. 451.

34. *In re Messengill* (D. C., N. Car.), 7 Am. B. R. 669, 113 Fed. 366; *In re Frank*, Fed. Cas. 5,050.

35. *In re Coe* (Ref., Ohio), 1 Am. B. R. 275.

36. Bankr. Act, § 57-e. Compare also *In re Cram*, Fed. Cas. 3,343; *In re Davis*, Fed. Cas. 3,614; *In re Hanna*, Fed. Cas. 6,027. And see *In re Hunt*, Fed. Cas. 6,884; *Emerine v. Tarault* (C. C. A., 6th Cir.), 34 Am. B. R. 55, 219 Fed. 68.

The right of a secured or priority creditor to vote for trustee upon the excess of his claim over his security or priority should be correctly determined and limited to the proper amount, and where no petition for re-examination of such a claim or the determination of its value has been filed and it is claimed that the value of the security greatly exceeds that placed upon it by the referee, exceptions to his ruling will be overruled without prejudice to the right of the trustee or creditors to the appointed method under General Order 21, subd. 6, to review the ruling. *Matter of Columbia Iron Works* (D. C., Mich.), 14 Am. B. R. 526, 142 Fed. 234.

be a deficiency, and then only to the amount of the deficit. Secured creditors often consider their security of so little value that they surrender it, or offer so to do, in their proof of debt. If so, they vote on the entire amount.³⁷ Even if the security is upon exempt property, the creditor is only allowed to vote on the unsecured balance.³⁸

(2) CREDITORS ENTITLED TO PRIORITY.—The preceding paragraph is equally applicable here. Sections 64-a-b should also be read. As priority creditors may reasonably expect to be paid in full, instances where they may participate in votes at creditors' meetings will be rare.

(3) PREFERRED CREDITORS.—A preferred creditor cannot vote without surrendering his preference.³⁹ It is necessary for a creditor in order to prove a claim and take part in a creditors' meeting to waive any lien or preference or security in his favor.⁴⁰ He is not even a creditor in the sense here used until he surrenders his advantage. When he does so voluntarily,⁴¹ he is entitled to vote the full amount of his claim. In this connection, the changes in the definition of "preference" made by the amendatory act of 1903 should be observed.⁴² Whether the obtaining of a lien through legal proceedings,⁴³ within four months of the bankruptcy, constitutes the creditor obtaining it a "preferred creditor" may be doubted.⁴⁴ It has been held that it does not because the lien is avoided by section 67-f.⁴⁵ It is not, however, important in this connection; the claims of such creditors can be objected to and postponed:

d. Votes by attorneys in fact.—The law permits proxy voting, provided the agent, attorney or proxy is duly authorized.⁴⁶ The meaning of these last words seems to be indicated by General Order XXI (5), supplemented by Forms Nos. 20 and 21.⁴⁷ Attorneys at law representing creditors of a bank-

37. See *In re Parks*, Fed. Cas. 10,754; *In re High*, Fed. Cas. 6,473.

38. *In re Lantzenheimer* (D. C., Iowa), 10 Am. B. R. 720, 124 Fed. 716.

39. Bankr. Act, § 57-g. *Stevens v. Nave-McCord Mercantile Co.* (C. C. A., 8th Cir.), 17 Am. B. R. 609, 150 Fed. 71. For a case where a preferred creditor was improperly allowed to vote, see *In re Malino* (D. C., Iowa), 8 Am. B. R. 205, 118 Fed. 368.

40. Waiver of lien by proving claim and voting at creditors' meeting to elect trustee.—One who claims a mechanic's lien but waives it on proving a claim in bankruptcy against the contractor, having voted upon the claim and transacted other business as a creditor at a meeting of creditors for the election of a trustee, may not thereafter assert that through the mistake made by a clerk of the lawyer who drew the proof of claim the waiver therein was broader than he intended, where the lien sought to be preserved must have been collected out of the proceeds of a contract which were the property of bankrupt. *Brown v. City National Bank* (Sup. Ct., N. Y.), 26 Am. B. R. 638, 72 N. Y. Misc. 201.

41. See under Section Fifty-seven of this work.

42. See under Section Sixty of this work.

43. See under Section Sixty-seven of this work.

44. Bankr. Act, § 57-d.

45. *In re Scully* (D. C., Pa.), 5 Am. B. R. 716, 108 Fed. 372.

46. Bankr. Act, § 1 (9). See also Am. B. R. Dig. § 315.

Revenue stamp.—Letters or power of attorney giving authority to vote for a trustee must bear a revenue stamp under the Emergency Revenue Law of October 22, 1914. *Matter of Capital Trading Co.* (D. C., N. Y.), 36 Am. B. R. 339, 229 Fed. 806.

Power of referee to pass upon validity of powers of attorney.—The referee, presiding at the first meeting of creditors for the election of a trustee, must determine who are to make up its constituent members, and he has the right to refuse to allow one offering to qualify, who acts under a power of attorney nominally executed by the creditors, but in fact procured by the bankrupt in order to vote for his choice of trustee. *In re McGill* (C. C. A., 6th Cir.), 5 Am. B. R. 155, 106 Fed. 57, affg. *Falter v. Reinhard* (D. C., Ohio), 4 Am. B. R. 782, 104 Fed. 292. See also *In re Rekersdres* (D. C., N. Y.), 5 Am. B. R. 811, 108 Fed. 206; *In re Dayville Woolen Co.* (D. C., Ct.), 8 Am. B. R. 85, 114 Fed. 674; *In re Pfrohm*, Fed. Cas. 11,061.

47. Powers must be executed as indicated in the forms. *In re Henschel* (C. C. A., 2d Cir.), 7 Am. B. R. 662, 113 Fed. 443. A commissioner of deeds should not be permitted to

rupt, although in good standing and duly admitted to practice in the United States courts, must, before being entitled to vote for a trustee, present a duly executed power of attorney in the form prescribed,⁴⁸ also, where the attorney represents a partnership or corporation, the power must be accompanied by the oath called for by General Order XXI (5).⁴⁹ The cases under the former law are to the same effect.⁵⁰ Perhaps caution requires this, and it is quite apparent that recognized practice and the weight of authority requires attorneys at law to obtain letters or other instruments showing authority to represent their client creditors. It is suggested that these cases have not given proper force to the words "when a creditor is not represented by attorney-at-law,"⁵¹ in the caption of Form No. 20, or the second sentence of General Order IV. Unless there is strong reason—and, save in the large cities where perhaps disbarment means little, there seems to be none—it is submitted that the ancient practice of recognizing for all purposes an attorney who appears for a party might well be followed. Written appearances should, however, be required.⁵² An attorney, who prepared the bankrupt's petition, his services then terminating, may vote upon claims sent to him without his solicitation or the procurement of the bankrupt.⁵³ An attorney, who holds a power of attorney from a creditor, jointly with the bankrupt's attorney, should not be permitted to vote.⁵⁴ Such powers of attorney to be effectual as a grant of right to vote must be secured in good faith without collusion with the bank-

cast votes for a trustee under a power of attorney acknowledged before himself. *Matter of Grossman* (D. C., N. Y.); 34 Am. B. R. 32, 225 Fed. 1020. Compare, for rulings, under former law, *In re Christley*, Fed. Cas. 2,702; *In re Barrett*, Fed. Cas. 1,043.

48. *In re Blankfein* (D. C., N. Y.), 3 Am. B. R. 165, 97 Fed. 191; *In re Richards* (D. C., N. Y.), 4 Am. B. R. 631, 103 Fed. 849; *In re Scully* (D. C., Pa.), 5 Am. B. R. 716, 108 Fed. 372; *In re Lazoris* (D. C., Wis.), 10 Am. B. R. 31, 120 Fed. 716; *In re Eagles & Crisp* (D. C., N. Car.), 3 Am. B. R. 733, 99 Fed. 696; *In re Henschel*, (D. C., N. Y.), 6 Am. B. R. 305, 109 Fed. 861; *Matter of Capital Trading Co.*, (D. C., N. Y.), 36 Am. B. R. 339, 229 Fed. 806. See also *In re Hawley* (D. C., N. Y.), 220 Fed. 372; *In re Henschel*, (C. C. A., 2d Cir.), 7 Am. B. R. 762, 113 Fed. 443. *Contra*: *In re Crooker Co.*, (Ref. Mass.), 27 Am. B. R. 241; *In re Brown*, 2 N. B. N. Rep. 590; *In re Pauly* (Ref., N. Y.), 2 Am. B. R. 333, holding that an attorney in good standing need not present a passport, in the nature of a power of attorney, every time he, in his professional capacity, approaches the domain of bankruptcy. His authority to make a reasonable request or motion will ordinarily be presumed. See Am. Bankr. Dig. § 315.

Representation by attorney.—The fact that a relative of the bankrupt sought to have the attorney for the bankrupt vote his claim and the claims of other relatives but

the attorney stated it was inconsistent and suggested that another attorney in the same office represent him and that the present receiver would be a proper man for trustee, does not warrant the rejection of the votes of such creditors, especially where it appears that the bankrupt neither openly nor secretly endeavored to control or influence the selection of a trustee. *Matter of Rothleder* (D. C., N. Y.), 37 Am. B. R. 116, 232 Fed. 398.

49. *In re Finlay* (D. C., N. Y.), 3 Am. B. R. 738, 104 Fed. 675; *In re Blue Ridge Packing Co.* (D. C., Pa.), 11 Am. B. R. 36, 125 Fed. 619, holding that the General Order is sufficiently complied with where the oath is contained in the proof of debt.

50. *In re Purvis*, Fed. Cas. 11,476; *In re Kneopfel*, Fed. Cas. 7,891; *Martin v. Walker*, Fed. Cas. 9,170.

51. Form No. 26, under the former law, was not so captioned. Consult *In re Gasser* (C. C. A., 8th Cir.), 5 Am. B. R. 32, 104 Fed. 537.

52. Compare, for practice in accordance with these views, 1 N. B. N. 113 (rule 6), and p. 116, Form A. See also *In re Gasser* (C. C. A., 8th Cir.), 5 Am. B. R. 32, 104 Fed. 537, and *In re Northern Iron Co.*, Fed. Cas. 10,322.

53. *In re Cooper* (D. C., Pa.), 14 Am. B. R. 320, 135 Fed. 196.

54. *Matter of Columbia Iron Works* (D. C., Mich.), 14 Am. B. R. 526, 142 Fed. 234.

rupt or his attorney.⁵⁵ A power of attorney must be produced before the close of the meeting.⁵⁶

e. Practice.—The practice in voting at creditors' meetings is indicated in what goes before. Claims are called for allowance at the first meeting, and should be at every continuance day. At the same time, appearances, either in person, by attorneys, or by agents or proxies, should be noted. If any power of attorney or proof of debt is objected to, the referee will often determine the question summarily. Sometimes such matters are postponed until all other claims are called, to determine whether the objections will affect the result. Votes are usually taken *viva voce*,⁵⁷ and, at the conclusion, the result announced by the referee, he at the same time noting in his minute-book the vote taken and the subject decided.⁵⁸ After this is done, other votes cannot be received, nor should a creditor be allowed to change his vote.⁵⁹ Referees usually have filing and approval stamps, which, when imprinted on the proofs or powers, indicate the action taken. There are, of course, slight variances in practice in every referee district. Any method which will permit an expression of the wishes of all creditors entitled to vote, without suggestion from or interference by the presiding referee, is all that is required. The effect of a disagreement of creditors on an election of trustee is considered elsewhere.⁶⁰

55. Good faith in securing powers of attorney.—Powers of attorney obtained through the influence of the attorneys for creditors who have received alleged preferences may not be used in the selection of a trustee, especially in a case where the unsecured creditors have no possible way of realizing on their claims unless the trustee is able to recover the illegal preference. *Matter of Law* (Ref., Ill.), 13 Am. B. R. 650, *affd.* by district court. No attorney should be permitted to vote any claim that has come to him through the instrumentality of the bankrupt, in furnishing him with a list of

the creditors before the schedules are filed. *In re Lloyd* (D. C., Wis.), 17 Am. B. R. 96, 148 Fed. 92.

56. *In re Blue Ridge Packing Co.* (D. C., Pa.), 11 Am. B. R. 36, 125 Fed. 619, holding that the production of a missing power of attorney after the election of a trustee and the close of the meeting comes too late.

57. Compare *In re Pearson*, Fed. Cas. 10,878.

58. The use of Form No. 22 is not general.

59. *In re Scheiffer*, Fed. Cas. 12,445; *In re Lake Superior, etc., Co.*, Fed. Cas. 7,997.

60. See Bankr. Act, § 44.

SECTION FIFTY-SEVEN.

PROOF AND ALLOWANCE OF CLAIMS.

§ 57. **Proof and allowance of claims.**—*a* Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so, what securities are held therefor, and whether any, and, if so, what payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.

b Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.

c Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending, or before the referee if the case has been referred.

d Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.

e Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.

f Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimant will permit.

g The claims of creditors who have received preferences, *voidable under section sixty, subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made or given,** shall not be allowed unless such creditor shall surrender such preferences, conveyances, transfers, assignments, or incumbrances.*

*Amendments of 1903 in italics.

h The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.

i Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.

j Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.

k Claims which have been allowed may be reconsidered for cause and reallocated or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.

l Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part.

m The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors.

n Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, and then within sixty days after the rendition of such judgment: *Provided*, That the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer.

Analogue provisions: In U. S.: As to who may make proof, Act of 1867, § 22, R. S., § 5078; Act of 1841, § 5; and take proof, Act of 1867, § 22, R. S., § 5079; Act of 1841, § 5; As to manner of proof, Act of 1867, § 22, R. S., § 5077; Act of 1841, §§ 5, 7; As to inspection and allowance of claims, Act of 1867, § 22, R. S., §§ 5080, 5081; Act of 1841, §§ 5, 7; Act of 1800, §§ 16, 37, 39; As to postponing allowance of claims objected to, Act of 1867, § 23, R. S., § 5083; As to proof of preference claims, Act of 1867, § 23, R. S., § 5084.

In Eng.: Act of 1883, Schedule II, General Rules 219-231.

- Cross-references:** To the law: Definitions of creditor, § 1(9); of debt, § 1(11); of secured creditor, § 1(23).
 Jurisdiction to allow, disallow and reconsider claims, § 2(2).
 Bankrupt to examine claims and to notify trustee of proof of false claim, § 7-a(3) (7).
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PROOF AND ALLOWANCE OF CLAIMS.

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I. PROOF AND ALLOWANCE IN GENERAL.

a. **Scope of section.**—This section is the guide to the practice upon the proof and allowance of claims against the bankrupt. It prescribes with some definiteness what is to be done by the creditor to secure an allowance of his claim. It determines what those creditors, who have security or priority in part for their claims, may do to secure an allowance of their unprotected balances. It states the duty to be performed by those creditors who have received void or voidable preferences in order that their claims may be allowed. In case of a contest on claims, it sets out the practice in hearing objections, and provides for a rejection of a claim presented, and the reconsideration of a claim allowed. It will be noticed by references hereafter

noted that the practice herein prescribed is largely supplemented by the general orders,¹ and the official forms also indicate the essential requirements for a due presentation and allowance of claims against the bankrupt's estate.² The section does not attempt to declare what are and what are not provable debts; this is left for a subsequent section and will be hereafter considered.³

b. *Comparative legislation.*—The English bankruptcy law goes into great detail on the subject of the proof and allowance of claims.⁴ Its practice on proving debts is not essentially different from our own, and will, therefore, be found suggestive. So also of our law of 1867. The facts necessarily shown in a proof of debt were more numerous⁵ and, early, in its administration, the taking of proofs was limited to certain Federal officers;⁶ but then, as now, proof was made by an affidavit in the nature of a deposition,⁷ the general orders⁸ and forms⁹ and were practically identical with those now in use. Precedents under that law are still valuable.

c. *Distinction between proof and allowance of claims.*—The language of the act in relation to the distinction between the allowance of claims and the proof of claims is carefully observed throughout §§ 55, 57 and elsewhere. The proof of a claim is one thing, its allowance by the court is quite a different step. When the act refers to a proof of a claim it means the deposition or statement of the creditor. When it refers to its acceptance by the courts, it uses the word allowed or allowance.¹⁰ The distinction between

1. See General Orders, XX, XXI, XXIV and XXVIII.

2. See Official Forms, Nos. 19–21, 31–39.

3. Bankr. Act, § 63, and discussion thereunder. It should be noticed, however, that subsection *g* prevents the allowance of claims of creditors who have received void or voidable preferences, except when the preferences are surrendered; that subsection *j* limits the allowance of claims for penalties and forfeitures; that subsection *m* permits the proof of a claim of one bankrupt estate against another, and that subsection *n* places a time limitation upon the provability of debts. These subsections are closely related to the subject of the provability of debts.

4. See "Analogous Provisions," *supra*.

5. Act of 1867, § 22; R. S., § 5077.

6. Act of 1867, § 22, R. S., §§ 5076, 5079. See also R. S., §§ 5076-A, 5076-B.

7. Compare *In re Strauss*, Fed. Cas. 13,532; *In re Elder*, Fed. Cas. 4,326; *In re Port Huron Dry Dock Co.*, Fed. Cas. 11,293; *Dutton v. Freeman*, Fed. Cas. 4,210.

8. Act of 1867, General Order XXXIV.

9. Act of 1867, Forms Nos. 21, 22, 23, 24, 25.

10. *Matter of Back Bay Automobile Co.* (Ref., Mass.), 19 Am. B. R. 33.

Proof and allowance of claims are separate and distinct steps.—In the case of *In re Mertens* (C. C. A., 2d Cir.), 16 Am. B. R. 825, 147 Fed. 177, 77 C. C. A. 473, the court considered the various subsections of section 57 and concludes: "From these various sections we deduce the following propositions: that proof and allowance of claims are two separate and distinct steps; that a clear statement of a claim in writing, duly

verified and filed with a referee, if made within a year, is sufficient to take the claim out of the statutory limitation, even though it may be allowed or liquidated and allowed afterward. We think that section 63-b must be interpreted in the light of the other sections of the law and that to construe it as meaning that no proof of unliquidated claims can be filed until the precise amount due thereon is established will, in practical operation, make an allowance of such claims impossible for the reason that a hostile trustee or creditor can easily delay the liquidation until after the expiration of the year. The more reasonable and sensible construction is, that the filing of the proof, like the filing of a declaration at common law, if made within the time, takes the claim out of the statute of limitations, and that after such proof is made, the claim is before the court to be dealt with as the interests of the bankrupt and the creditor may require." See also *In re Standard Telephone & Electric Co.* (D. C., Wis.), 26 Am. B. R. 601, 186 Fed. 586; *In re Fairlamb Co.* (D. C., Pa.), 28 Am. B. R. 515, 199 Fed. 278.

This distinction has been lucidly maintained by Judge Ray, in *In re Horstein* (D. C., N. Y.), 10 Am. B. R. 308, 122 Fed. 266, where he says: "It will be noted that the proof of a claim is one thing, and the allowance of such claim is quite another thing. Claims may be proved, but not allowed. They may be provable, not allowable. They may be provable, and then allowed in part only, or on conditions only. The statute does not say that the claims of creditors who have received preferences shall not be proved; but it does say that such claim shall not be

proof and allowance is much the same as that between evidence and judgment.¹¹ Before a claim can be regarded as proven the written proof called for by § 57-n must at least have been filed or lodged with the court or some officer thereof. That such written proof has been completed is not enough so long as the proof remains in the hands of the creditor or his attorney.¹²

II. PROOF OF CLAIMS.

a. General requirements.—Claims in bankruptcy must be proven in the manner prescribed in the bankruptcy law as supplemented by the general orders and official forms.¹³ Affidavits used in insolvency or general assignment proceedings under State laws are not enough; though, where the facts and amounts tally with the schedule and include those called for by § 57-a, they will, provided there is no objection, usually be accepted and filed. Proofs of

allowed unless or until the creditor surrenders his preference. By plain implication, the proof of the claim is permitted. The claim of a creditor who has received a preference may be proved; but it cannot be allowed, unless he shall surrender the preference. Strange, indeed, is that construction of this law, in the face of those provisions, which will prevent a creditor from coming into court and proving his claim, having the amount of the preference received by him, if any (and that may be a serious and necessary question for determination, both to the fact of preference and its amount), determined by the court, and then having his proved claim allowed on surrendering the preference. Any creditor has the right to come into court for that very purpose. To hold otherwise will logically prevent a creditor who has in fact received a preference, by way of lien or otherwise, for only a small part of his claim, coming into court and proving his claim, and then having it allowed on surrendering the preference—a mode of procedure the statute expressly permits.”

“Debts are not the less provable, within the meaning of the Bankrupt Act, because the statute of limitations may be successfully pleaded against their allowance. As well say that a debt was not suable because the statute of limitations might be pleaded to an action upon it.” *Hargardine-McKittrick Dry Goods Co. v. Hudson* (C. C. A., 8th Cir.), 10 Am. B. R. 225, 122 Fed. 232, affg. 6 Am. B. R. 657. See also *In re Scruggs* (D. C., Ala.), 31 Am. B. R. 94, 97, 205 Fed. 673, citing text.

Right to prove a secured claim.—There is apparently a distinction between the proving of a claim under § 57a and its allowance under § 57c, resulting in the right to prove a secured claim when the ultimate necessity for its allowance appears reasonably possible, even though it may turn out to be unnecessary because the security proves adequate to pay the debt in full. *Emerine v. Tarault* (C. C. A. 6th Cir.), 34 Am. B. R. 55, 219 Fed. 68.

A proved claim does not become “allowed” by the filing thereof, since the allowance of a claim, different from the party’s

act of proving and the ministerial act of filing, is a judicial act; and until a direct or indirect order of allowance is made, objections to a claim may properly be filed, it being unnecessary, until such order is made, to proceed under section 57k or l for a reconsideration of the claim and a recovery of dividends already paid. *In re Two Rivers Woodenware Co.* (C. C. A., 7th Cir.), 29 Am. B. R. 518, 199 Fed. 877.

A disallowed claim and a nonprovable debt are not identical things; and where a debt is disallowed because without foundation the claimant does not have a nonprovable debt. *Lesser v. Gray*, 236 U. S. 70, 34 Am. B. R. 8.

11. Compare *In re Wise*, 2 N. B. R. Rep. 151. See *In re Merrick*, Fed. Cas. 9,463.

12. *In re Back Bay Automobile Co.* (D. C., Mass.), 19 Am. B. R. 835, 158 Fed. 679, revg. 19 Am. B. R. 33.

13. *In re Dunn Hardware & Furniture Co.* (D. C., N. Car.), 13 Am. B. R. 147, 132 Fed. 719; *In re Coventry-Evans Furniture Co.* (D. C., N. Y.), 22 Am. B. R. 272, 166 Fed. 516. The practice covering the presentation of claims of creditors to the referee in bankruptcy is outlined in *In re Sumner* (D. C., N. Y.), 4 Am. B. R. 123, 101 Fed. 224.

Verified proofs of claim.—A wife who, in her verified proofs of claims against the bankrupt estate of her husband, makes no reference to any payment on account of loans which were the subject-matter of her claims, but expressly states that “no part of said debt has been paid,” and scratches out from the blank form the word “except,” violates the express requirements of this section. *In re Girvin* (D. C., N. Y.), 20 Am. B. R. 490, 160 Fed. 197, 206.

Necessity that forms be followed with exactness.—Bankrupt forms have been provided to expedite proper and prompt administrations according to the very right of parties and by no means for the purpose of creating purely technical defenses, hence the court is not bound by any hard and fast rule to these forms, but on the contrary any form of proof used, if sufficient to show the nature of the claim and the bankrupt’s liabil-

debt must show at least (1) the claim; (2) the consideration therefor;¹⁴ (3) whether any, and, if so, what, securities are held therefor; (4) whether any, and if so, what, payments have been made thereon; and (5) that the sum claimed is justly owing from the bankrupt to the creditor.¹⁵ Proofs must be (a) in writing, (b) under oath, and (c) signed by the creditors.¹⁶ There must be a sufficient verification, otherwise there is a failure of proof.¹⁷ As will be noticed hereafter, a defective proof of a claim, or an informal presentation of a claim may be corrected by amendment even if after the expiration of the time limit,¹⁸ provided there enough is presented to show that a demand is made against the estate, and that it is the creditor's intention to hold the estate liable.¹⁹

b. Proof as evidence; prima facie case.—A claim proven as required by the act should be received and filed by a referee receiving it, and amounts to a *prima facie* case;²⁰ thus proving the debt for all purposes in the proceeding, unless objected to or continued for consideration. If objections are made to the allowance of a claim, the formal proof of it raises a presumption as to its validity which must be rebutted by affirmative proof.²¹ Even if objected to, the sworn proof of claim is *prima facie* evidence of its validity; when objection is made, clause *f* provides that the objection shall be heard and determined,

ity therefor supported by the legal affidavit of the claimant is sufficient. *Matter of Collins* (D. C., W. Va.), 32 Am. B. R. 785, 215 Fed. 247; *Matter of Booth* (D. C., N. Y.), 33 Am. B. R. 183, 216 Fed. 575; *Matter of Hudson Porcelain Co.* (D. C., N. Y.), 35 Am. B. R. 18, 225 Fed. 325.

14. *In re Stevens* (D. C., Vt.), 5 Am. B. R. 806, 107 Fed. 243, holding that the statement of consideration should be sufficiently specific and full to enable creditors to pursue proper and legitimate inquiry as to the fairness and legality of the claim, and if it be so meagre and general in character as not to do this it is insufficient. *In re Creasinger* (Ref., Cal.), 17 Am. B. R. 538, 543.

15. Claims which do not comply with the requirements of the bankruptcy act are not "duly proved" within the meaning of section 57d of the Bankruptcy Act. *Matter of Hudson Porcelain Co.* (D. C., N. J.), 35 Am. B. R. 18, 225 Fed. 325.

16. As to propriety of permitting attorney for trustee to make out and present formal proof of creditor's claim, see *In re McKenna* (D. C., Ark.), 15 Am. B. R. 4, 137 Fed. 611; *In re Kimball* (D. C., Mass.), 4 Am. B. R. 144, 100 Fed. 177, in which it was held that the fact that the attorney for a party takes the oath of his client to the proof of claim does not justify its disallowance.

17. *In re Coventry-Evans Furniture Co.* (D. C., N. Y.), 22 Am. B. R. 272, 116 Fed. 516; *In re Carter* (D. C., Ark.), 15 Am. B. R. 126.

18. *Matter of Kessler* (C. C. A., 2d Cir.), 25 Am. B. R. 512, 184 Fed. 51. See under heading "Amendment of proof of claims," *post*.

19. *Matter of Thompson* (C. C. A., 3d Cir.), 36 Am. B. R. 190, 227 Fed. 981, *affg.* 34 Am. B. R. 242, 222 Fed. 167.

20. *In re Sumner* (D. C., N. Y.), 4 Am. B. R. 123, 101 Fed. 224; *In re Shaw* (D. C., Pa.), 6 Am. B. R. 499, 109 Fed. 780; *Whitney v. Dresser*, 15 Am. B. R. 326, 200 U. S. 532; *Matter of McIntyre & Co.* (C. C. A., 2d Cir.), 24 Am. B. R. 1, 174 Fed. 627. But where not so proven until after the bankrupt's death, the proof does not have this effect. *In re Shaw* (D. C., Pa.), 7 Am. B. R. 458, 112 Fed. 947.

A sworn proof of claim is *prima facie* evidence of its allegations, even if objected to; and it is regarded as a deposition rather than as a pleading, and has the force of evidence. *In re United Wireless Telegraph Co.* (D. C., Me.), 29 Am. B. R. 348, 201 Fed. 445.

Compliance with statute—A proof of claim is not *prima facie* evidence of its allegations and entitled to allowance, unless it complies with the requirements of the bankruptcy act, as to the statement of the claim and its consideration. *Matter of Hudson Porcelain Co.* (D. C., N. J.), 35 Am. B. R. 18, 225 Fed. 325.

Claim against bankrupt on stock subscription.—A claim by a receiver of an insolvent insurance company against the bankrupt estate of a stockholder, based on the contention that it is necessary to enforce the liability of stockholders on their subscriptions in order to equalize claims between various stockholders who had paid their subscriptions in various proportions, should not be allowed where it does not appear how much the bankrupt has paid on his subscription. *Matter of Bass* (D. C., Ga.), 32 Am. B. R. 766, 215 Fed. 275.

21. See under heading "Objection before Allowance," *post*.

and not the claim.²² If the proof of debt is not relied upon by the creditor, but he attempts to establish his claim by other evidence, he cannot, on appeal, use the allegations of his proof of debt to supply deficiencies in his testimony.²³ If proof is properly made by witnesses who are competent to testify, the claim may be received. It is a serious matter to reject a claim upon the ground that the witnesses are unworthy of belief.²⁴

c. **Allegations of proof.**—The proof of claim is not a pleading, but a deposition which must set forth the evidence with particularity.²⁵ While strict rules of pleading do not apply, it is nevertheless necessary that the claim and its consideration should be so set forth as to enable the trustee and the creditors to make proper investigation as to its fairness and legality without undue trouble or inconvenience.²⁶ If the allegations of the proof do not set forth all of the necessary facts to establish a claim, or are self-contradictory, the

²² In re Castle Braid Co. (D. C., N. Y.), 17 Am. B. R. 143, 145 Fed. 224; In re Carter (D. C., Ark.), 15 Am. B. R. 126, 138 Fed. 846, holding that when the creditor presents a properly verified claim, the burden of proof is shifted upon the objector; In re Cannon (D. C., Pa.), 14 Am. B. R. 114, 133 Fed. 837. But see In re Blue Ridge Packing Co. (D. C., Pa.), 11 Am. B. R. 36, 125 Fed. 319; In re Scott (D. C., Tex.), 1 Am. B. R. 553, 93 Fed. 418; In re Wooten (D. C., N. Car.), 9 Am. B. R. 247, 118 Fed. 670, holding that every creditor should establish his claim by a preponderance of evidence; In re Dunlap Carpet Co. (D. C., Pa.), 22 Am. B. R. 788, 171 Fed. 532.

Proof of claim as evidence.—The Supreme Court in the case of *Whitney v. Dresser*, 200 U. S. 532, 15 Am. B. R. 326, has sustained the principle declared in the text, holding that the words of section 57-f suggests, if they do not distinctly import, that the objector is to go forward; it is the objection, and not the claim, which is there pointed out for hearing and determination, indicating that the claim is regarded as having a certain standing already established by the oath.

The proof of claim is *prima facie* evidence that the allegations made therein are correct, and the petitioner's status as a creditor must stand until it shall be properly and successfully attacked. In re Roanoke Furnace Co. (D. C., Pa.), 18 Am. B. R. 661, 152 Fed. 846; In re Coventry-Evans Furniture Co. (D. C., N. Y.), 22 Am. B. R. 272, 166 Fed. 516.

Negative averment.—In the case of *Board of Commerce v. Security Trust Co.* (C. C. A., 6th Cir.), 34 Am. B. R. 762, 225 Fed. 454, a claim was filed which was based on the alleged breach of contract between the bankrupt and a chamber of commerce consisting of a failure to maintain its factory as agreed, and objection was made as to the proof presented. The court said: "The objection that the claim is not sufficiently proved is based upon the fact that from the evidence it does not appear the breach of contract by the Company was not brought about by strikes, labor difficulties, fires, acts of the elements, panics, or other causes beyond its control. In the sworn proof of claim these

negatives were clearly alleged, and, in the absence of proof to the contrary, are held to be sufficiently proved under the Bankruptcy Act, since such allegations are *prima facie* evidence and the sworn proof of claim is some evidence, even when it is denied. *Whitney v. Dresser*, 200 U. S. 532, 15 Am. B. R. 326, 26 Sup. Ct. 316, 50 L. Ed. 584. These designated exceptions and contingencies are all matters which were peculiarly within the knowledge of the company. Under such circumstances the *prima facie* proof of the proof of claim itself must stand, unless the one against whom the averment was made shows an excuse from compliance by proving the causes named."

²³ *Matter of McIntyre & Co.* (C. C. A., 2d Cir.), 24 Am. B. R. 1, 174 Fed. 627.

²⁴ *Matter of Rome* (D. C., N. J.), 19 Am. B. R. 820, 162 Fed. 971.

²⁵ *Matter of Creasinger* (D. C., Cal.), 17 Am. B. R. 538, 145 Fed. 224. All the formalities required in ordinary pleadings do not apply to the filing of proof of a claim in bankruptcy. *Kelsey v. Munson* (C. C. A., 8th Cir.), 28 Am. B. R. 520, 198 Fed. 841.

What proof of claim should contain.—A proof of claim is not a pleading but a deposition and should inform to a certain extent of the origin and character of the debt, and the items of which it is made up should be given, and the statement of the consideration ought to be such as, if true, not to put the creditors or trustee upon proof or require oral explanation from the claimants, and should be sufficiently full to enable the trustee or creditors to pursue any legitimate inquiry as to the fairness and legality of the claim. *Matter of Creasinger* (Ref., Cal.), 17 Am. B. R. 538, 145 Fed. 224.

Statement upon information and belief.—The vital facts to support a proof of claim should be made to appear by positive averments, founded upon deponent's knowledge, and not upon his belief; and an allegation upon information and belief upon a vital point in a proof of claim is not sufficient to sustain such proof. In re *United Wireless Telegraph Co.* (D. C., Me.), 29 Am. B. R. 848, 201 Fed. 445.

²⁶ *Matter of Griffin* (D. C., Mass.), 33 Am. B. R. 894, 188 Fed. 389.

claim may be disallowed; or the referee may unquestionably order proper and legitimate inquiries into the fairness and legality of such claim so that he may pass upon it intelligently and judicially.²⁷ The proof presented to sustain the claim should conform to the statement, at least as to amount and grounds.²⁸

d. Statement as to consideration.—The statement as to consideration must be sufficiently full and explicit to enable the trustee and other creditors to investigate as to the fairness and legality of the claim.²⁹ It must be sufficient to enable the referee passing on it to do so intelligently and judicially.³⁰ It will not be sufficient to merely state that the consideration was “for legal services,”³¹ or “for goods, wares and merchandise.”³² The statement of the

27. *Orr v. Parke* (C. C. A., 5th Cir.), 25 Am. B. R. 544, 183 Fed. 683; *In re Castle Braid Co.* (D. C., N. Y.), 17 Am. B. R. 143, 145 Fed. 224.

28. *In re Lansaw* (D. C., Mo.), 9 Am. B. R. 167, 118 Fed. 365.

29. *Orr v. Parke* (C. C. A., 5th Cir.), 25 Am. B. R. 544, 183 Fed. 683, in which the court quoted the language of the text; *In re Scott* (D. C., Tex.), 1 Am. B. R. 553, 93 Fed. 418; *In re Stevens* (D. C., Vt.), 5 Am. B. R. 806, 104 Fed. 325; *Matter of Hudson Porcelain Co.* (D. C., N. J.), 35 Am. B. R. 18, 225 Fed. 325.

Statement of consideration.—This provision with reference to consideration relates only to the proof of claim and not to the averments of the petition. *In re Brett* (D. C., N. J.), 12 Am. B. R. 492, 130 Fed. 981. “For legal services” has been held to be an insufficient statement of consideration. *In re Scott* (D. C., Tex.), 1 Am. B. R. 553, 93 Fed. 418. A statement that the claim is “for goods, wares and merchandise” is insufficient. *In re Blue Ridge Packing Co.* (D. C., Pa.), 11 Am. B. R. 36, 125 Fed. 619. A statement that the consideration is a written promise to pay a certain sum, “for value received,” is not sufficient. *In re Coventry-Evans Furniture Co.* (D. C., N. Y.), 22 Am. B. R. 272, 166 Fed. 516. In the case of *In re Watertown Paper Co.* (C. C. A., 2d Cir.), 22 Am. B. R. 190, 169 Fed. 252, it was held that the rejection of a claim is not justified because the consideration of the debt was stated to be for “wood pulp sold and delivered,” when it really was for the balance of a running account though wood pulp sold did in fact constitute a large part of the consideration, where it appeared that the whole matter of the account had been fully inquired into before the special master, and the claim which was irregular in form had been amended to conform to the proof and the amount was clearly stated. In the case of *In re United Wireless Telegraph Co.* (D. C., Me.), 29 Am. B. R. 848, 201 Fed. 445, it was held that a proof of claim which merely states that deponent was in the employ of bankrupt’s predecessor from on or about November 1, 1903, to on or about November 1, 1906, and that a specified sum was due him for salary when he left its employ on the latter date, but which does not state the character of the services, or otherwise give the consideration for them is insufficient.

Where claim is for money had and received.—A proof of claim, setting forth the amount of the debt and alleging the consideration to have been a loan by the claimant to the bankrupt of a certain sum of money, and further unnecessarily alleging that the money was received, accepted, and used by the bankrupt for its own use and benefit is a sufficient compliance with the act, and where it is sustained by the proof it is immaterial whether or not the allegations amount to a count in assumpsit for money had and received. *Flower v. Commercial Trust Co.* (C. C. A., 8th Cir.), 35 Am. B. R. 74, 223 Fed. 318.

30. *Orr v. Parke* (C. C. A., 5th Cir.), 25 Am. B. R. 544, 183 Fed. 683; *In re Wooten* (D. C., N. C.), 9 Am. B. R. 247, 118 Fed. 670; *In re Eagles* (D. C., N. C.), 3 Am. B. R. 733, 99 Fed. 695.

31. *Matter of Creasinger* (D. C., Cal.), 17 Am. B. R. 538, 145 Fed. 224; *In re Scott* (D. C., Tex.), 1 Am. B. R. 553, 93 Fed. 418.

Sufficiency of claim for legal services.—A general statement that the consideration of a claim is for legal services rendered during a certain period, without stating the nature of the services except in one particular, without specifying the dates or the number of times the claimant appeared for the bankrupt, and fails to state whether the amount claimed is the reasonable value of the services performed, is insufficient. *Matter of Hudson Porcelain Co.* (D. C., N. J.), 35 Am. B. R. 18, 225 Fed. 325.

32. *In re Blue Ridge Packing Co.* (D. C., Pa.), 11 Am. B. R. 36, 125 Fed. 619.

Goods, wares and merchandise.—In *re Elder*, Fed. Cas. 4,326, it was said: “Looking then at the object of the law and the reasons for requiring a statement of the consideration in the deposition, I consider that a general statement that the consideration of a demand is ‘goods, wares and merchandise,’ or hay, barley and board, is not sufficient; that the kinds of goods, the quantity, the price and near the date of sale should be stated; that the quantity of hay or barley, the price and the time of delivery if delivered at one time, or if delivered continuously through a period of time, that period should be stated. If the proof falls short of this the register ought not to consider it satisfactory and should withhold his approval.”

claim should be itemized and set forth the dates of the several items where possible.³³

e. Requirements of General Order XXI.—Strict practice requires, however, that proofs of debt conform to General Order XXI (1) (2) (3). Thus, proofs (1) should be entitled in the court and in the cause,³⁴ (2) should contain a clause to the effect that “no note has been received for such account, nor any judgment rendered thereon;” (3) if an open account, should state when the debt became or will become due, and (4) if on items maturing at different dates, the average date should be stated.³⁵ A proof of claim is not vitiated merely because the caption incorrectly states the court.³⁶ If made (a) by a partnership, it must appear by oath that the affiant is a member of the partnership; if (b) by agent, the reason why it is not made by the claimant must be stated; and if (c) on behalf of a corporation, it must be sworn to by the treasurer, or if none, the corresponding fiscal officer of such corporation.³⁷

f. Requirements of official forms.—Several forms have been officially adopted by the Supreme Court governing the practice on proof of claims. The forms prescribed are : (1) for an unsecured debt (No. 31); (2) for a secured debt (No. 32); (3) for a debt due a corporation (No. 33); (4) for a debt due a partnership (No. 34); (5) for proof by agent or attorney (No. 35); (6) for proof of secured debt by agent (No. 36). Blanks are not supplied by the government, but are on sale in law book or stationery stores. Each of them contains an allegation which is not required by law,³⁸ none of them contains the allegation to the effect that the claimant has no note or judgment.³⁹ When none of these forms fit a given case, they should be varied or combined, reference being had chiefly to the requirements of the statute as to what constitutes a proof of debt. Some of these variations are considered later. Illustrative cases will be found in the foot-note.⁴⁰

33. *In re Wooten* (D. C., N. Car.), 9 Am. B. R. 247, 118 Fed. 670. See *In re Ferguson* (D. C., Pa.), 11 Am. B. R. 371, 127 Fed. 407. In the case of *In re Blue Ridge Packing Co.* (D. C., Pa.), 11 Am. B. R. 36, 125 Fed. 619, it was held that a claim which specified the consideration to be for “printing done for said bankrupt at its request heretofore, to wit, in September, 1903, as per bill rendered” is insufficient; it may inform to a certain extent of the origin and character of the debt, but the items by which it is made should be given; *In re Elder*, Fed. Cas. 4326; *In re Scott* (D. C., Tex.), 1 Am. B. R. 553, 93 Fed. 418.

Claim based on open account.—In the case of *In re Globe Boat Co.* (D. C., N. Y.), 27 Am. B. R. 48, 190 Fed. 92, there was attached to the claim a statement of account substantially as follows: “To money advanced and salary due from Sept. 18, 1909, to Dec. 19, 1910, \$2,295.96,” crediting the bankrupt with \$801.13, “By money drawn from firm,” thus leaving a balance of \$1,494.83, the amount of the claim. The claim was in no manner itemized nor did the proof of claim state when the salary became due, or that no note had been received for such account or judgment rendered thereon. It was held that the claim being on an open account, the proof of claim

was defective as not complying with General Order XXI.

34. General Order XXI (1). See “Supplementary Forms,” *post*, and also Hagar & Alexander’s *Bankr. Forms* (2d Ed.); Am. Bankr. Dig. § 735.

35. A proof of claim by a surety which is in the form of a petition for the establishment of its subrogated rights and which very elaborately sets forth a history of the entire transaction, substantially complies with General Order 21, § 3, regarding the proof of assigned claims. *Kilpatrick v. United States Fidelity & Guaranty Co.* (C. C. A., 5th Cir.), 37 Am. B. R. 36, 228 Fed. 587.

36. *In re Blue Ridge Packing Co.* (D. C., Pa.), 11 Am. B. R. 36, 125 Fed. 619.

37. General Order XXI(1).

Officer of corporation.—Sufficient reason should be given why a claim by a corporation is not made by the officer designated. *Matter of Reboulin Fils & Co.* (Ref., N. J.), 19 Am. B. R. 215.

38. That relative to set-offs and counter-claims.

39. Required by General Order XXI(1).

40. *In re Ankeny*, 1 N. B. N. 511; *In re Scott* (D. C., Tex.), 1 Am. B. R. 553, 93 Fed. 418; *In re Wise*, 2 N. B. N. Rep. 151; *In re Stevens* (D. C., Vt.), 5 Am. B. R. 11, 104 Fed. 325; *In re Sumner* (D. C.,

g. Before whom proofs taken.—Proofs of debt can be taken before any of the officers designated in § 20 of the act.⁴¹ This is a marked change from the law of 1867. They are not now usually taken before the referee. There being no requirement to that effect, the mere signature of the officer, without a certificate as to his authority or even a seal, seems enough,⁴² though referees can perhaps by rule require a certificate as evidence that the officer is “authorized to administer oaths.” The proof being in the nature of a deposition and, if objected to, amounting to a pleading also, claims should not be sworn to before the attorney for the bankrupt,⁴³ although this would not of itself be sufficient to justify the disallowance of a claim.⁴⁴

h. Who may make proof.—(1) **IN GENERAL.**—Claims must be made by the creditor.⁴⁵ The proof of claim should show on its face the true interest of the person presenting it.⁴⁶ The status of creditors for the purpose of determining their rights to prove their claims is fixed as of the date of filing the bankruptcy petition.⁴⁷ An endorser or surety for a bankrupt is a creditor.⁴⁸ The executor or administrator of a deceased creditor may prove a claim against the bankrupt in behalf of the decedent’s estate.⁴⁹ In the case of embezzlement or misappropriation of funds by a bankrupt, the person defrauded may at his option prove a claim founded upon an implied contract to repay.⁵⁰ A creditor who is indebted to the bankrupt in an amount much larger than his claim will not be allowed to prove such claim.⁵¹ It has been held if proof is made of an equitable claim, as by a *cestui que* trust, it must be not only of his claim but of all others similarly situated.⁵²

(2) **RELATIVES AS CREDITORS.**—A father may prove a claim against the estate of his son who is a bankrupt.⁵³ Where the wife’s common law disability to enter into contracts in respect to her separate property has been removed, she is entitled to prove a claim against her husband’s estate in bankruptcy, in the absence of deception on her part or conduct inconsistent with such claim.⁵⁴ Where a creditor is related to a bankrupt his claim will be subjected to a more rigid scrutiny than it would be if no such relation existed; but the

N. Y.), 4 Am. B. R. 123, 101 Fed. 224; In re Shaw (D. C., Pa.), 6 Am. B. R. 499, 109 Fed. 780; In re Stevens (D. C., Vt.), 5 Am. B. R. 806, 107 Fed. 243.

41. See discussion under § 20, *ante*. See also In re Sugenhimer (D. C., N. Y.), 1 Am. B. R. 425, 91 Fed. 744.

42. Not so under the law of 1867. In re Nebe, Fed. Cas. 10,073. See also for instances of the strict practice under the former law, In re Haley, Fed. Cas. 5,918; In re Strauss, Fed. Cas. 13,532; In re Lynch, Fed. Cas. 8,635.

43. In re Keyser, Fed. Cas. 7,748; In re Nebe, Fed. Cas. 10,073.

44. In re Kimball (D. C., Mass.), 4 Am. B. R. 144, 100 Fed. 177.

45. See Am. B. R. Dig. §§ 725-729.

46. Matter of Collins (D. C., Ia.), 37 Am. B. R. 692, 235 Fed. 937.

47. In re O’Callaghan (Ref., Mass.), 30 Am. B. R. 97.

48. Kobusch v. Hand (C. C. A., 8th Cir.), 19 Am. B. R. 379, 156 Fed. 660; Bank of Wayne v. Gold (N. Y. Sup. Ct.), 26 Am. B. R. 722, 146 App. Div. 296, 130 N. Y. Supp. 942; In re Lyon (C. C. A., 2d Cir.), 10 Am. B. R. 25, 121 Fed. 723.

49. In re Woods (D. C., Pa.), 13 Am. B. R. 240, 133 Fed. 82, holding that the right of the executors of the bankrupt’s father who died after the adjudication, to prove a debt against her estate in bankruptcy cannot be affected by a provision of his will that “any indebtedness that either she or her husband might then owe him,” should be deducted from her share in his estate.

50. Burgoyne v. McKillip (C. C. A., 8th Cir.), 25 Am. B. R. 387, 182 Fed. 452.

51. In re Gerson (D. C., Pa.), 5 Am. B. R. 850, 105 Fed. 891.

52. In re Kenney & Co. (D. C., Ind.), 14 Am. B. R. 611, 136 Fed. 451.

53. In re Rider (D. C., N. Y.), 3 Am. B. R. 192, 96 Fed. 811.

54. In re Neiman (D. C., Wis.), 6 Am. B. R. 329, 109 Fed. 113. Thus, she may prove a claim against her husband’s estate for services rendered in his saloon. In re Domenig (D. C., Pa.), 11 Am. B. R. 552, 128 Fed. 146. Or for money loaned. James v. Gray (C. C. A., 1st Cir.), 12 Am. B. R. 573, 131 Fed. 401. See also Clarke v. Rogers (C. C. A., 1st Cir.), 26 Am. B. R. 413, 418, 183 Fed. 518.

honest or dishonest character of a debt is not to be determined by the existence of a relationship between the parties.⁵⁵

(3) CLAIMS BY CORPORATIONS, STOCKHOLDERS OR BONDHOLDERS.—If a firm having a corporation as a partner *de facto* is adjudicated a bankrupt, the corporation as a general creditor may not prove a claim against the estate for money advanced and goods sold to the firm, upon the ground that the partnership agreement was *ultra vires*.⁵⁶ The fact that the stockholders of two corporations are identical will not prevent one corporation from proving a claim against the other.⁵⁷ The bondholders of a bankrupt corporation whose bonds are secured by trust mortgage on all the property of the corporation, are creditors of the bankrupt notwithstanding the rights of the trust mortgagee under the mortgage.⁵⁸

(4) PROOF BY AGENT, ATTORNEY OR PROXY.—The method of proof where the claim is made by agent, attorney, or proxy, is indicated above.⁵⁹ The

55. Relationship of creditor.—*Baumhauer v. Austin* (C. C. A., 5th Cir.), 26 Am. B. R. 385, 186 Fed. 260, revg. 24 Am. B. R. 750, 179 Fed. 966; *Ohio Bank v. Mack* (C. C. A., 6th Cir.), 20 Am. B. R. 40, 163 Fed. 155, 89 C. C. A. 605, 24 L. R. A. (N. S.) 184, in which the court said: "The fact that the bankrupt is closely related to a creditor is a circumstance which justifies a more rigid scrutiny than would be the case if no such relation existed. Nevertheless the honest or dishonest character of a debt is not to be determined by any mere question of relationship; *Matter of Brewster* (Ref., N. Y.), 7 Am. B. R. 486; *In re Wooten* (D. C., N. C.), 9 Am. B. R. 247, 118 Fed. 670.

56. *Wallerstein v. Ervin* (C. C. A., 3d Cir.), 7 Am. B. R. 256, 112 Fed. 124, affg. *In re Ervin*, 6 Am. B. R. 356, 109 Fed. 135.

57. Stockholders of two corporations identical.—In the case of *In re Watertown Paper Co.* (C. C. A., 2d Cir.), 22 Am. B. R. 190, 169 Fed. 252, the court said: "The case thus presented is one in which the stockholders of two corporations are largely the same, in which both corporations have been under the same management and in which their affairs have for years been involved and intermingled; and the legal question is whether these relations prevent the one corporation from enforcing against the bankrupt estate of the other a claim which in case the latter corporation had remained solvent would have been both valid and enforceable. It must be clearly borne in mind that this is not a case in which a creditor is suing a corporation upon the ground that it has so held itself out with another corporation as, upon principles of estoppel, to render it responsible for the particular debt of the latter. It is an elementary and fundamental principle of corporation law, that a corporation is an entity, separate and distinct from its stockholders and from other corporations with which it may be connected. The fact that the stockholders of two separate char-

tered corporations are identical, that one owns shares in another and that they have mutual dealings, will not as a general rule merge them into one corporation, or prevent the enforcement against the insolvent estate of one of an otherwise valid claim of the other."

58. *United States Trust Co. v. Gordon* (C. C. A., 6th Cir.), 33 Am. B. R. 300, 216 Fed. 929; *Mackay v. Randolph Macon Coal Co.* (C. C. A., 8th Cir.), 24 Am. B. R. 719, 178 Fed. 881.

Bondholders of an insolvent corporation deposited their bonds with a bondholders' committee pursuant to a plan of reorganization and vested in such committee the legal title to the bonds, with authority to do with them as they saw fit toward conserving the property of the insolvent company and providing means for the protection of the bondholders, who subsequently accepted bonds and stock of the new corporation which purchased the assets of the bankrupt corporation, using the bonds in part payment therefor, namely, to the extent to which said bonds were entitled to share in the distribution of the amount realized on the sale. *Held*, that the acceptance of these bonds and stock of the new company by the bondholders did not constitute a novation, and did not preclude the bondholders' committee from making a claim against the bankrupt estate as an unsecured creditor for the difference between the amount allowed as dividends and the par value of the bonds. *In re Medina Quarry Co.* (D. C., N. Y.), 24 Am. B. R. 769, 179 Fed. 929.

59. See Am. B. R. Dig. § 730. For illustrative cases under the former law, see *In re Barnes*, Fed. Cas. 1,012; *Ex parte Norwood*, Fed. Cas. 10,364; *In re Whyte*, Fed. Cas. 17,606; *In re Watrous*, Fed. Cas. 17,270; *In re Ford*, Fed. Cas. 4,932; *In re South Boston Iron Co.*, Fed. Cas. 13,183. But the former law differs materially from the present as to when proof could be made by an agent.

term "creditor" includes a duly authorized agent, attorney or proxy.⁶⁰ In view of the provisions of General Order IV to the effect that a creditor "will only be allowed to manage before the court his individual business," and the further provision authorizing a party to appear by attorney authorized to practice in a bankruptcy court, it has been held that a person who is not an attorney of the court may not represent a creditor other than himself and present his claim.⁶¹ If proof is made by an agent or attorney in behalf of a creditor it must appear why it was not made by the creditor.⁶² Claims should not be proved by an agent when the principal is present and able to file his own proof.⁶³

i. Against whom made.—This question becomes sometimes important when a copartnership is bankrupt and the creditor holds obligations against it and its members.⁶⁴

j. Proof of assigned claims.⁶⁵—(1) **IN GENERAL.**—Assigned claims may be proven in the same manner, within the same time and under the same conditions as other claims.⁶⁶ If the claim was assigned after bankruptcy General Order XXI (3) controls. The requirement that the referee give immediate notice to the original creditor, and the ten-day limit on the filing of objections by such creditor, should be noted.

(2) **RIGHTS OF CLAIMANTS OF ASSIGNED CLAIMS.**—Claims assigned before the commencement of bankruptcy proceedings may be proved by the assignee upon a proper showing that he is the owner of the claim.⁶⁷ An assigned claim may be proved although assigned as collateral security for a loan.⁶⁸ Claims which have been assigned before proof or after adjudication must be supported by a deposition of the owner at the time of the commencement of proceedings setting forth the true consideration of the debt and that it is entirely unsecured or, if secured, it must state the security, as is required in proving secured claims.⁶⁹ The assignee cannot prove his claim unless it appears that the assignor could have done so if there had been no assignment.⁷⁰ If the assignee is also the claimant, the ordinary proof of debt

60. Bankr. Act. § 1 (9).

61. *Mater of Ploof Mfg. Co.* (D. C., Fla.), 38 Am. B. R. 795.

62. *Matter of Reboulin Fils & Co.* (Ref., N. J.), 19 Am. B. R. 215; *In re Medina Quarry Co.* (D. C., N. Y.), 24 Am. B. R. 769, 179 Fed. 929; *In re McCarthy Portable Elevator Co.* (D. C., N. J.), 30 Am. B. R. 247, 205 Fed. 986.

Claim by attorney.—A claim should not be presented by the attorney for the bankrupt where it is contested. *In re Wooten* (D. C., N. Car.), 9 Am. B. R. 247, 118 Fed. 670. But it seems that the referee is not bound to reject a claim merely because it is filed by a bankrupt's attorney. *In re Kimball* (D. C., Mass.), 4 Am. B. R. 144, 100 Fed. 777.

63. *Matter of Collins* (D. C., Ia.), 37 Am. B. R. 692, 235 Fed. 937.

64. See discussion under Section Sixty-three, *post*. Compare subtitle "Subrogation Claims," in this section. Consult also *Wallerstein v. Ervin* (C. C. A., 3d Cir.), 7 Am. B. R. 256, 112 Fed. 124.

65. See Am. Bankr. Dig. § 737.

66. *Matter of Breakwater Co.* (D. C., Pa.), 36 Am. B. R. 752.

67. *In re Miner* (D. C. Ore.), 8 Am. B. R. 248, 117 Fed. 954, holding that in such a case the form of the assignment of a claim is immaterial, and the proof of the claim need only be such as will estop the assignor from making the same claim.

Claims assigned before bankruptcy are proved by the assignee. The original assignor is not entitled to be recognized. *In re Worcester County* (C. C. A., 1st Cir.), 4 Am. B. R. 496, 504, 102 Fed. 808; *In re Fortune*, Fed. Cas. 3,586.

68. *In re American Specialty Co.* (C. C. A., 2d Cir.), 27 Am. B. R. 463, 191 Fed. 807.

69. General Order XXI (3). See in re *McCarthy Portable Elevator Co.* (D. C., N. J.), 30 Am. B. R. 247, 205 Fed. 986.

70. *In re Goodman Shoe Co.* (D. C., Pa.), 3 Am. B. R. 200, 96 Fed. 949, holding that a person to whom a non-negotiable note has been assigned; and who, under the law of the State, takes it subject to all defenses and equities which could have been

would seem enough.⁷¹ It has been held that the assignee of a chose in action must state the consideration which passes between the original parties unless the instrument be negotiable.⁷² The proof of a claim which has been assigned should set forth the date and facts of transfer and the name of the original creditor.⁷³ The failure of a wife to register an assignment to her of a claim against her husband, as her separate property, under a State statute, does not preclude her from proving the claim against his estate.⁷⁴ If the assignor was entitled to priority in payment based upon the character of the claim the assignee is entitled to the same priority.⁷⁵ If the right to priority attaches to the claim rather than to the claimant there can be no question as to the priority right of the assignee.⁷⁶ The priorities here referred to are those prescribed under section 64-b of the act and will be further discussed under that section.

k. How proven, if evidenced by a written instrument.—This is regulated by subsection *b*. If founded on a note or bond, or written contract, the original instrument must be attached to the proof of debt; otherwise, it will not be allowed.⁷⁷ But the failure to file a written instrument with the proof of claim thereof raises no presumption against the existence of such instrument.⁷⁸ The attaching of the note does not relieve the creditor of stating the consideration in his proof of debt.⁷⁹ When the claim is allowed, the written evidence may be withdrawn, upon leaving a copy in its place.

raised against it in the hands of the assignor of the note, cannot prove the same in bankruptcy unless the assignor could have done so.

71. *Ex parte Davenport*, Fed. Cas. 3,586. See also *In re Mills*, Fed. Cas. 9,612; *In re Pease*, Fed. Cas. 10,880. Where a claim has been proven and allowed, and upon which dividends have been paid, an assignee need not and ought not make proof of the same claim in his own name as the then owner and assignee thereof. *Matter of Bergdall Motor Co.* (D. C., Pa.), 36 Am. B. R. 265, 230 Fed. 248; *Matter of Breakwater Co.* (D. C., Pa.), 36 Am. B. R. 752.

72. *In re Lake Superior Ship Canal, etc. Co.*, Fed. Cas. 7,998, 10 N. B. R. 76.

73. *In re Fortune*, Fed. Cas. 3,586, 1 Low. 384.

74. *In re Miner* (D. C., Oreg.), 9 Am. B. R. 100, 117 Fed. 953.

75. *Shropshire, Woodliff & Co. v. Bush*, 204 U. S. 186, 17 Am. B. R. 77, in which case it was held that an assignee of a claim for wages earned within three months before the commencement of proceedings in bankruptcy against the debtor is entitled to priority of payment under clause 4 of § 64-b, when the assignment occurred prior to the commencement of such bankruptcy proceedings.

76. *In re Bennet* (C. C. A., 6th Cir.), 18 Am. B. R. 320, 153 Fed. 673, 82 C. C. A. 531.

77. Compare *In re McCauley*, 2 N. B. N. Rep. 1085. See also Am. Bankr. Dig. § 735.

78. *In re Dresser* (C. C. A., 2d Cir.), 13 Am. B. R. 747, 135 Fed. 495; *Kelsey v. Munson* (C. C. A., 8th Cir.), 28 Am. B. R. 520, 198 Fed. 841.

79. *In re Coventry-Evans Furniture Co.* (D. C., N. Y.), 22 Am. B. R. 272, 166 Fed. 516; *In re Castle Braid Co.* (D. C., N. Y.), 17 Am. B. R. 143, 145 Fed. 224.

Statement of consideration and payments.

In the case of *In re Stevens* (D. C., Vt.), 5 Am. B. R. 806, 107 Fed. 243, the court said: "The claim is founded upon notes, endorsements and waivers of protest and notes in writing all of which appear to be filed except one such waiver stated to be lost, with the circumstances apparently sufficient to admit, on trial of the facts, of proof of the loss and the contents. And the consideration so far as it moved from the securities held by the claimant and payments so far as received by him are set forth. The requirement by § 57-a of a statement of the consideration and payments is of more than general allegations in these respects which might be sufficient in a declaration against the bankrupt upon those causes of action and extends to the particulars of each for the information of the trustee and those interested in the estate, but not beyond what relates to the claim as it accrued to the claimant. Other sources of information are as well open to them as to him. This requirement seems now to be sufficiently complied with by this claimant." See also *Baumbauer v. Austin* (C. C. A., 5th Cir.), 26 Am. B. R. 385, 186 Fed. 260, revg. 24 Am. B. R. 750, 179 Fed. 966.

Where it is lost or destroyed, it may still be proven by a proper affidavit.⁸⁰ The practice of attaching both original note and copy to the proof of debt, and requesting the referee to return the former, is usual. Where the absence of the original notes upon which the claim is based is not objected to, the court may treat their presence as waived.⁸¹ Where a creditor holds several notes against a bankrupt the better practice is to prove all of them as one claim.⁸² Where a note contains a stipulation as to payment of costs in case of suit, such stipulated fee will not be considered in determining the amount of the claim.⁸³ If the consideration of the note and the allegations of the proof of claim are clearly self-contradictory there should be an investigation as to the fairness and legality of the claim before allowance.⁸⁴

l. Debts created by fraud.—The referee has no jurisdiction to decide that a claim was created by the fraud of the bankrupt. He may only allow such claim.⁸⁵ Where a personal judgment has been procured in a State court creditors who were not parties to the proceeding in the State court may show that such judgment was procured by fraud or collusion.⁸⁶ Creditors whose judgments have been annulled as fraudulent under the bankruptcy act are still entitled to prove their claims. The proof of fraud on the part of the creditor must be clear and convincing; the presumption is that the claim is an honest one.⁸⁷

m. Claims by one bankruptcy estate against another.—Here subdivision *m* regulates. Without it, the trustee of the creditor estate would have power to prove. The court could compel him to file the additional deposition if necessary.⁸⁸

n. Statements, transcripts of judgments, etc., attached.—The practice of attaching statements of accounts to claims is general and should be followed. Likewise, a transcript of judgment should be annexed as an exhibit when the claim rests on a judgment; the proof, itself, should, however, show the consideration of the debt so in judgment.⁸⁹ In the case of transactions with

80. In re Loden (D. C., Ga.), 25 Am. B. R. 917, 184 Fed. 965, holding that after a claim on a note has been proved and allowed the claimant may be permitted by the referee to withdraw his original note upon filing a copy thereof. Form No. 37. See also In re Emison, Fed. Cas. 4,459.

81. In re Carter (D. C., Ark.), 15 Am. B. R. 126, 138 Fed. 846.

82. Frederick v. Citizens National Bank (C. C. A., 3d Cir.), 37 Am. B. R. 22, 231 Fed. 667.

83. In re Hersey (D. C. Ia.), 22 Am. B. R. 863, 171 Fed. 1004. See Mechanics-American National Bank v. Coleman (C. C. A., 8th Cir.), 29 Am. B. R. 396, 204 Fed. 24.

84. Orr v. Parke (C. C. A., 5th Cir.), 25 Am. B. R. 544, 183 Fed. 683, holding that where a proof of claim in the form of a petition of intervention was filed against the bankrupt's estate setting up the giving of a note and chattel mortgage as security for money loaned, but the mortgage attached to the proof recited that the consideration of the note was for the purchase from claimant of the goods described the title to which was to remain in him until the note was fully paid, the allegations of the proof of claim were self-contradictory and were such as to

warrant if not to require an investigation of its fairness and legality.

85. In re Lazarovic (Ref., Kan.), 1 Am. B. R. 476.

Fraud of creditor in prior composition.—Where prior to bankruptcy bankrupt entered into a composition agreement with his creditors to pay 40 per cent. of their claims and then agreed with claimant which did not sign the composition agreement until all the other creditors had signed it, that if it advanced the money necessary to pay the composition, he would pay its debts in full, such agreement was not a fraud on other creditors so as to bar claimant from proving the full amount of its debt in subsequent bankruptcy proceedings. In re Hawks (D. C., Kan.), 30 Am. B. R. 365, 204 Fed. 309.

86. In re Phelps (Ref., N. Y.), 3 Am. B. R. 434.

87. In re Hawks (D. C., Kan.), 30 Am. B. R. 365, 204 Fed. 309.

88. In re Richard (D. C., N. Car.), 2 Am. B. R. 506, 94 Fed. 633. Compare In re Smith (Ref., N. Y.), 1 Am. B. R. 37.

89. In re Elder, Fed. Cas. 4,326. For the impeachment of judgments proven in bankruptcy. See under Section Sixty-three of this work.

a broker who maintains a bucket shop, a deposit made with knowledge that actual stock was not to be sold or purchased, does not entitle the depositor to prove a claim based upon alleged profits, but he must confine his proof to the amount which he actually deposited with the bankrupt broker.⁹⁰

o. Amendment of proof of claims.⁹¹—(1) **IN GENERAL.**—The practice in respect to proofs of claims has always been liberal and free from technicalities.⁹² The general rule is that if the defect in the proof is merely formal it may be either disregarded or an amendment may be permitted to remedy the defect.⁹³ The referee will usually allow such amendments to proofs of debt as justice requires, and claims objected to are often expunged or allowed to be withdrawn, with leave to amend and refile.

(2) **CASES WHERE AMENDMENT WILL BE ALLOWED.**—A claim filed within the required time may be amended, for the purpose of supplying the oath of the creditor and a statement that no payments have been made upon the amount claimed, in conformity with the law,⁹⁴ or for the purpose of itemizing the proofs where a gross charge has been made,⁹⁵ or in the case of a claim upon certain notes to show the balance due,⁹⁶ or where composition was offered but not finally accepted.⁹⁷ Where a claim was presented on the wrong theory, as, for instance, for a secured debt and it appeared that it was unsecured,⁹⁸ the creditor should have an opportunity to amend so as to prove the correct amount of his unsecured claim.⁹⁹ The informal presentation of a claim, not sufficient to constitute a valid "proof of claim" may be amended so as to conform to the requirements, where the record contains all the facts necessary to establish a *bona fide* indebtedness and the circumstances under which it was incurred.¹⁰⁰

90. *Streeter v. Lowe* (C. C. A., 1st Cir.), 25 Am. B. R. 774, 183 Fed. 263, in which case it was held that a creditor making such deposit was not entitled to prove a claim for the entire balance alleged to be due on account of purchases and sales, but that under the Massachusetts statute (Revised Laws of Massachusetts, Chap 99, § 4), providing for the recovery of payments made on margins, the creditor was entitled to have his claim allowed to the extent of the cash payments actually made, his margins and interest thereon.

91. See Am. Bankr. Dig. §§ 740-742.

92. *Lowell on Bankruptcy*, § 221.

93. *Streeter v. Lowe* (C. C. A., 1st Cir.), 25 Am. B. R. 774, 183 Fed. 263.

94. *In re Roeber* (C. C. A., 2d Cir.), 11 Am. B. R. 464, 127 Fed. 122; *Buckingham v. Estes* (C. C. A., 6th Cir.), 12 Am. B. R. 182, 128 Fed. 584.

95. *Matter of Creasinger* (Ref., Col.), 17 Am. B. R. 538, 145 Fed. 224.

96. *In re Faulkner* (C. C. A., 8th Cir.), 20 Am. B. R. 542, 161 Fed. 900, holding that where a paper is signed and sworn to by a creditor, by which it appears that he is a holder of overdue and unpaid notes of the bankrupt, and an order for the sale of collateral securities described therein is granted and the sale confirmed, an amendment will be permitted after the expiration of a year after adjudication. When the amount due upon the notes is ascertained after applying the proceeds of the sale of

the collateral, is properly granted and the creditor is entitled to prove for the balance due.

97. *In re Horne & Co.* (Ref., Miss.), 23 Am. B. R. 590.

98. *Seligman v. Gray* (C. C. A., 1st Cir.), 35 Am. B. R. 516, 227 Fed. 417.

99. *Matter of Soltman* (D. C., N. Y.), 38 Am. B. R. 270, 238 Fed. 241.

100. *In re Standard Telephone & Electric Co.* (D. C., Wis.), 26 Am. B. R. 601, 186 Fed. 586; *In re McCarthy Portable Elevator Co.* (D. C., N. J.), 30 Am. B. R. 247, 205 Fed. 986.

Amendment of informal proof of claim.—

In the case of Matter of Salvator Brewing Co. (D. C., N. Y.), 26 Am. B. R. 21, 188 Fed. 522 (affd. 28 Am. B. R. 56 193 Fed. 989), it appeared that the directors of a corporation indorsed notes of the company which were discounted at a bank; certain securities were assigned to one of the directors to be held by him in trust as security for the indorsement; the company became bankrupt and the notes were paid by the directors; in a proceeding by the trustee the assignment of the securities was declared invalid, but evidence was given proving the indorsement by the directors and payment of the notes; no formal proof of claim was filed; subsequently upon the termination of such proceedings, the directors filed formal proof of claim for the amount paid on their indorsement; objection was made on the ground that a proof of claim had not been

As for instance where after adjudication the bankrupt's creditors enter into an agreement for a settlement, which was signed by the creditors and contained a statement of the amounts of their several claims, it was held sufficient in substance to constitute an amendable claim so as to permit the filing of formal proof of claims.¹⁰¹ To permit an amendment there must be in the record the substance of what is required to make a valid proof of the claim.¹⁰² If a claim has been recognized by the court in proceedings for the settlement of claims against a bankrupt as a condition of the sale of the assets of the bankrupt, formal presentation of such claim may be excused, and the creditor should be permitted to file an amended proof.¹⁰³ Illustrative cases under the present and former law will be found in the foot-note.¹⁰⁴

(3) AMENDMENT AFTER THE EXPIRATION OF YEAR.¹⁰⁵—It is apparent from the cases already cited that a claim which is filed within the required time may be amended even after the expiration of a year.¹⁰⁶ An amendment may be

filed within a year; it was held that the claim had been proved by the evidence given in a former proceeding and that such proof might be amended by adding the former proofs of claim. The court said: "It is also claimed in this case that the evidence given on the hearing in relation to the validity of the assignment of the securities, amounted substantially to a proof of the claim. Such evidence, of course, is not what is commonly known as a formal proof of claim, but it did prove facts which were essential to establish the claim, and indeed it was necessary, as a part of the claimant's proof in that proceeding, to establish that the notes had been paid by the endorser, in order to show any ground for claiming to enforce the securities. I think under the authorities, that the claim was proved in that proceeding, and that the motion made to amend the proof by adding the formal proofs of claim should be allowed." Citing *Buckingham v. Estes* (C. C. A., 6th Cir.), 12 Am. B. R. 182, 128 Fed. 584; *Matter of Roeber* (C. C. A., 2d Cir.), 11 Am. B. R. 464, 127 Fed. 122.

101. In re Fairlamb Co. (D. C., Pa.), 23 Am. B. R. 515, 199 Fed. 278.

Claim for money loaned.—A claim for moneys loaned to the bankrupt, which does not state that payments set forth were made or received on the claim mentioned, and which appears on its face to be barred by the statute of limitations, should be disallowed with leave to amend. *Matter of Ballentine* (D. C., N. Y.), 37 Am. B. R. 111, 232 Fed. 271.

102. A creditor which has not filed or attempted to file a claim within a year, will not be permitted to amend an alleged proof of claim, consisting of a letter stating the status of the bankrupt's account. The general right to amend, regardless of the time which has elapsed, is abundantly sustained by the authorities. But to do so, it is plain, there must be in the record, as it stands, the substance of that which is asked for. The right to amend can go no further than to bring forward and make effective that which in

some shape is already there. *Matter of Thompson* (D. C., N. J.), 34 Am. B. R. 242, 222 Fed. 169 (citing In re McCallum & McCallum (D. C., Pa.), 11 Am. B. R. 447, 127 Fed. 768), *affd.* 36 Am. B. R. 190, 227 Fed. 981.

103. In re Basha & Son (C. C. A., 2d Cir.), 29 Am. B. R. 225, 200 Fed. 951, *revd.* 27 Am. B. R. 435, 193 Fed. 151.

Amendment to include secured claims.—To authorize the amendment of a proof of claim after the expiration of the year limited, there must be in the record the substance of that which is asked for. Hence, where at the time bankruptcy intervened bankrupt was indebted to claimant bank in a certain sum which was unsecured and in a further sum which then appeared to be amply secured, and the bank filed proof of its unsecured indebtedness only but filed nothing with reference to the secured claim, the bank cannot, after the expiration of the one year period when its security had failed, file an "amended or substituted" proof of claim, so as to include the balance due on its secured indebtedness after applying the proceeds of its security. In re Daniel (Ref., Tex.), 29 Am. B. R. 284.

104. In re Friedman (Ref., N. Y.), 1 Am. B. R. 510; In re Smith (Ref., N. Y.), 2 Am. B. R. 648; In re Myers (D. C., Ind.), 3 Am. B. R. 760, 99 Fed. 601; In re Wilder (D. C., N. Y.), 3 Am. B. R. 761, 101 Fed. 104; In re Stevens (D. C., Vt.), 5 Am. B. R. 806, 107 Fed. 243; In re Montgomery, Fed. Cas. 9,729; In re McConnell, Fed. Cas. 8,712; In re Myrick, Fed. Cas. 10,000; In re Parkes, Fed. Cas. 10,754; In re Jaycox, Fed. Cas. 7,242; In re New Brunswick Carpet Co., 4 Fed. 514.

105. See Am. Bankr. Dig. § 742.

106. *Hutchinson v. Otis*, 190 U. S. 552, 10 Am. B. R. 135; *Buckingham v. Estes* (C. C. A., 6th Cir.), 12 Am. B. R. 182, 128 Fed. 584; In re Schiebler (D. C., N. Y.), 21 Am. B. R. 309, 165 Fed. 363; In re Standard Telephone & Electric Co. (D. C., Wis.), 26 Am. B. R. 601, 186 Fed. 586. Where one wishes to amend a claim after the expiration of the

allowed even after the expiration of a year to permit the creditor to substitute for a claim based on an open account, a claim based on promissory notes given in consideration of the items of such account.¹⁰⁷ Where the assignment of a claim not filed within a year of the adjudication is filed in due time the claim may be amended after the year.¹⁰⁸ But an amendment amounting to the presentment of a new claim will not be allowed after a year has elapsed.¹⁰⁹ There must be before the court the substance of a claim in some form, filed or presented within the proper time; whether formal or informal a claim must show that a demand is made against the estate, and must show the creditor's intention to hold the estate liable.¹¹⁰ And where the claim has been unconditionally withdrawn, a like claim, but for a different amount, cannot be filed after the expiration of the year, upon the theory that it is an amended claim.¹¹¹ Nor will an amendment be allowed where it changes a claim from one against a partnership to one against the estate of an individual partner,¹¹² nor will an amended claim be allowed where the original was returned by the referee on the ground that it was defective.¹¹³

period, there must be some claim, already proven, to amend; the mere scheduling of a debt by a bankrupt does not constitute a debt which is subject to amendment. In *re Basha & Son* (D. C., N. Y.), 27 Am. B. R. 435, 193 Fed. 151, revd. 29 Am. B. R. 225, 200 Fed. 951, where the court held that the amendment should have been permitted since it appeared that the creditor's claim had been recognized by the court in a proposed settlement of claims against the bankrupt out of the proceeds of a receiver's sale of the bankrupt's assets. *Contra*: In *re Kempter* (D. C., Ia.), 15 Am. B. R. 675, 142 Fed. 210.

Amendment after lapse of year.—Clause *n*, of this section, cannot be taken to exclude an amendment to a claim already filed, admittedly defective, more than a year after adjudication, where the claim upon which the original proof was made is the same as that ultimately proved. *Hutchinson v. Otis*, 190 U. S. 552, 10 Am. B. R. 135, affg. 8 Am. B. R. 382, 115 Fed. 937. In this case the court said: "It is argued that the allowance of the amendment is within section 57-n, forbidding proof subsequent to one year after the adjudication. The construction contended for is too narrow. The claim upon which the original proof was made is the same as that ultimately proved. The clause relied upon cannot be taken to exclude amendments. An example similar in principle is the allowance of an amendment setting up the same cause of action, after the statute of limitations has run, when the original declaration was bad. The proceedings remain in the district court, notwithstanding the appeal and the amendment properly was allowed there." *Matter of Kessler* (C. C. A., 2d Cir.), 25 Am. B. R. 512, 184 Fed. 51, holding that a proof of claim which is defective in some substantial particular may be amended subsequent to the expiration of one year after adjudication, although the effect of such amendment may be that proof of claim is thereby effectively made only

after the expiration of a year. The sole question in any given case is whether the document tendered is a proper amendment, and furtherance of justice requires it to be filed. If so, and the document proposed to be amended was filed within the year, it should be allowed to be filed even though the year has then elapsed. The statute prescribes no limit as to the time within which amendments may be filed. *Bennett v. American Credit Indemnity Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 260, 263, 159 Fed. 624. (Opinion of Judge Cochran in District Court.) See *Matter of Hamilton Automobile Co.* (C. C. A., 7th Cir.), 31 Am. B. R. 205, 209 Fed. 596.

A creditor which has not filed or attempted to file a claim within a year, should not be permitted to amend an alleged proof of claim, consisting of a letter to the receiver stating the status of the bankrupt's account, so as to conform to the requirements of the bankruptcy act. *Matter of Thompson* (D. C., N. J.), 34 Am. B. R. 242, 222 Fed. 167, affd. 36 Am. B. R. 190, 227 Fed. 981.

107. *Brown v. O'Connell* (C. C. A., 9th Cir.), 29 Am. B. R. 653, 200 Fed. 229.

108. *Bennett v. American Credit Indemnity Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 258, 159 Fed. 624.

109. *Hutchinson v. Otis* (C. C. A., 1st Cir.), 8 Am. B. R. 382, 115 Fed. 937; affd. 10 Am. B. R. 135, 190 U. S. 552; In *re McCallum* (D. C., Pa.), 11 Am. B. R. 447, 127 Fed. 768. But see also In *re Moebius* (D. C., Pa.), 8 Am. B. R. 590, 116 Fed. 47.

110. *Matter of Thompson* (C. C. A., 3d Cir.), 36 Am. B. R. 190, 227 Fed. 981, affg. 34 Am. B. R. 242, 222 Fed. 167.

111. In *re Stevens* (D. C., Vt.), 5 Am. B. R. 806, 107 Fed. 243; In *re Thompson's Sons* (D. C., Pa.), 10 Am. B. R. 581, 123 Fed. 174.

112. In *re McCallum & McCallum* (D. C., Pa.), 11 Am. B. R. 447, 127 Fed. 768.

113. *Matter of Booth* (D. C., N. Y.), 33 Am. B. R. 183, 216 Fed. 575.

(4) **WITHDRAWAL OF CLAIM.**—The right to permit a withdrawal of a claim seems clear; for instance where a creditor files a claim based upon notes containing clauses waiving the bankrupt's homestead exemption, he will be permitted to withdraw such claim so as to proceed in the State court to subject the bankrupt's exempt property to the payment of the notes.¹¹⁴

p. Filing proofs of claims.—Proofs of debt should be filed with the referee. If with the clerk of the district court, it becomes his duty to transmit them to the referee.¹¹⁵ So also of claims filed with the trustee.¹¹⁶ Where the trustee does not deliver such proofs of claims to the referee, the creditor should not be charged with the failure.¹¹⁷ Where proof of claim has been delivered to the trustee the claim is sufficiently filed and it is the duty of the trustee to deliver it to the referee.¹¹⁸ Proofs on receipt are usually stamped with a filing stamp, showing the day and hour received, but are not allowed until called at a meeting of creditors.

III. PROOF OF SECURED, PRIORITY AND PREFERRED CLAIMS.

a. In general.—Subsections *e*, *g* and *h* relate specifically to the proof of claims of secured, priority and preferred creditors. Secured or priority creditors need not surrender their securities, but the value thereof may be determined and deducted, and dividends paid on unpaid balances. Preferred creditors, on the other hand, must surrender their advantage and place themselves on an equality with the other creditors before they will be permitted to share in the estate.

b. Secured claims.—(1) **IN GENERAL.**—The act contemplates that secured creditors may and shall prove their claims, and they are to set forth the claim, the consideration therefor, and whether any, and, if so, what securities are held therefor, etc. Claim of secured creditors and those having priority may also be allowed for certain purposes, thus, for the purpose of fixing the sum on which a dividend from the general estate is to be paid and also for limiting the voting power or voice of the secured creditor, or creditor having a priority, at creditors' meeting.¹¹⁹ Secured claims must be proven on one of the forms provided for that purpose.¹²⁰

(2) **WHAT CONSTITUTES A SECURED CREDITOR.**—Section 1, subdivision 23, defines a secured creditor as one who "has security for his debt upon the property of the bankrupt of a character to be assignable under this act, or who owns such a debt for which some indorser, surety or other person

114. In re Strickland (D. C., Ga.), 21 Am. B. R. 734, 167 Fed. 867.

115. General Order XX.

116. General Order XXI(1).

117. Orcutt Co. v. Green, 204 U. S. 96, 17 Am. B. R. 72.

Filing nunc pro tunc.—It has been held that proofs of claims, duly received by the trustee and handed to his attorney with instructions to file them, and the attorney's clerk neglects to file the same, cannot be filed *nunc pro tunc* in the discretion of the referee. Matter of Ingalls Bros. (C. C. A., 2d Cir.), 13 Am. B. R. 512, 137 Fed. 517.

118. Matter of Kessler (C. C. A., 2d Cir.), 25 Am. B. R. 512, 184 Fed. 51.

A proof of claim delivered to the trustee in bankruptcy within the year after adjudication is sufficiently filed within the meaning

of this section. In re Fairlamb Co. (D. C. Pa.), 28 Am. B. R. 515, 199 Fed. 278.

Delivery to employee of trustee not sufficient filing.—Although the presentation and delivery of a proof of claim to the trustee within the year after a bankrupt's adjudication is sufficient, the delivery for filing of a proof of claim to a person in the employ of the trustee, but in what capacity is not shown, does not constitute a sufficient filing, so as to permit the creditor to file a proof of claim *nunc pro tunc* after the expiration of the one year period. In re Lathrop, Haskins & Co. (C. C. A., 2d Cir.), 28 Am. B. R. 756, 197 Fed. 164.

119. In re Cramwood (D. C., N. Y.), 17 Am. B. R. 22, 145 Fed. 566.

120. Forms Nos. 32 and 36.

secondarily liable for the bankrupt has such security upon the bankrupt's assets." Bondholders of a corporation are secured creditors and may prove their claims against a bankrupt corporation.¹²¹ That "secured creditor" has a limited meaning in bankruptcy should always be remembered.¹²² A holder of a promissory note containing a waiver of exemption is in effect a secured creditor.¹²³ A holder of a mortgage on exempt property of the bankrupt is not a secured creditor.¹²⁴ A person, holding a collateral note of a bankrupt corporation endorsed by one of its officers, is not a secured creditor.¹²⁵

(3) CLAIM SECURED BY OTHER FUND OR ESTATE OR BY THIRD PARTY.—The question pertains in each case to the security which a creditor has upon the property of the bankrupt. He may prove his entire claim against the bankrupt estate notwithstanding the fact that he has other security for the payment of all or a part of such claim. He is not compelled to exhaust his remedy against the other fund before asserting his claim against the bankrupt estate.¹²⁶ No matter how great may be the security which one may have, if it be property of another than the bankrupt, the creditor may prove his entire claim against the bankrupt estate, and receive a dividend thereon, and thereafter institute proceedings to enforce his claim upon the security for the balance.¹²⁷ As where

121. *Matter of San Antonio Land and Irrigation Co.* (D. C., N. Y.), 36 Am. B. R. 512, 228 Fed. 984; *United States Trust Co. v. Gordon* (C. C. A., 6th Cir.), 33 Am. B. R. 300, 216 Fed. 929; *In re Sampter* (C. C. A., 2d Cir.), 22 Am. B. R. 357, 170 Fed. 938.

122. In effect, no creditor is secured in bankruptcy unless there is a lien held by him or accruing to his benefit on the property of the bankrupt. Bankr. Act, § 1(23). Thus see *Swarts v. Bank* (C. C. A., 8th Cir.), 8 Am. B. R. 673, 117 Fed. 1.

123. *In re Meredith* (D. C., Ga.), 16 Am. B. R. 331, 144 Fed. 230.

Effect of proof of waiver note.—Notwithstanding that a creditor has proved his claim in bankruptcy as unsecured, he may assert in a court of competent jurisdiction any right that he may have on a waiver of homestead exemption. *In re Loden* (D. C., Ga.), 26 Am. B. R. 917, 184 Fed. 965. The waiver becomes in the nature of a security in that the debt may be made out of any property owned by the debtor without regard to any exemption rights which the debtor would have had but for the waiver. *Bell v. Dawson County Grocery Co.*, 12 Am. B. R. 159, 120 Ga. 628, 48 S. E. 150.

Claim against exempt property.—In the case of *In re Cale* (D. C., Minn.), 25 Am. B. R. 367, 182 Fed. 439, the claimant had recovered judgment after adjudication and before the bankrupt's discharge, which judgment became a lien upon a part of the debtor's homestead. It was held that the judgment secured was enforceable only in the State courts, and not through sale of the property by the trustee and application of the proceeds, and that the claimant could only prove for the deficiency obtained by deducting from the judgment the value of the part of the debtor's homestead which could be applied in payment thereof. A creditor

with an enforceable lien or claim against exempt property can collect only the deficiency from the general assets. This same question was again considered upon an appeal from a decision of the district court in the case of *Gregory Co. v. Bristol* (C. C. A., 8th Cir.), 26 Am. B. R. 938, 191 Fed. 31, the court holding that where a claimant had a statutory lien on certain of the bankrupt's property which was exempt in bankruptcy from the claims of general creditors by reason of which such claimant was secured in a specified amount, a deduction of such amount from its claim was proper.

124. *In re Bailey* (D. C., Utah), 24 Am. B. R. 201, 176 Fed. 990.

125. *Young v. Gordon* (C. C. A., 4th Cir.), 33 Am. B. R. 522, 219 Fed. 168.

126. *Gorman v. Wright* (C. C. A., 4th Cir.), 14 Am. B. R. 135, 136 Fed. 164.

127. See *In re Headley* (D. C., Mo.), 3 Am. B. R. 272, 97 Fed. 765, citing *Collier on Bankr.* (1st ed.), p. 283. See also *Haas-Baruck & Co. v. Portuondo* (D. C., Pa.), 15 Am. B. R. 130, 138 Fed. 949; *Matter of Thompson* (D. C., N. Y.), 31 Am. B. R. 236, 208 Fed. 207.

The equitable rule that a creditor having a lien upon two funds must exhaust that one upon which other creditors have no lien, does not apply in cases where it operates to the injury of the party having the double lien, and this rule has in substance been made part of the bankruptcy act. One who has been allowed to prove his claim as an unsecured creditor against a bankrupt indorser must realize and credit the proceeds of collateral securities held by him against the principal debtor, before he will be allowed to participate in the distribution of the estate of such indorser. *Gorman v. Wright* (C. C. A., 4th Cir.), 14 Am. B. R. 135, 136 Fed. 164.

a creditor has a claim against two bankrupt estates, he may assert his claim against one unimpaired by the fact that he held security against the other, and he may recover dividends from the two estates upon the full amount of his claim, until from all sources he has received full payment of his claim.¹²⁸ And this rule applies even where the security that is held is security for a partnership debt but is property of individual members of the firm, the partnership and the individual estates being considered distinct and separate.¹²⁹ A trust company which holds as collateral security for the note of a bankrupt company certain debenture bonds issued by the bankrupt as security for the note, but not secured by mortgage or other means, such bonds constitute simply another promise to pay money and the trust company is not a secured creditor.¹³⁰ But it is, of course, otherwise where the bonds are secured by a special fund set apart to provide for their payment when due; in such a case the bondholders may participate in such fund, independent of their right to prove an unsecured balance against the general assets.¹³¹ A creditor whose claim is secured or partly paid by an accommodation indorser may prove the claim to its full amount, and exclude from the bankrupt estate the avails of such security or part payment.¹³² Where a creditor has a claim which is guaranteed by a third person, who turns over a note of the bankrupt to the creditor, such creditor may prove both the claim and the note and receive dividends on both.¹³³

(4) SURRENDER OF SECURITY.—A secured creditor may or may not surrender his security, as he chooses.¹³⁴ If he does, it inures to the benefit of all creditors, and his claim, if otherwise unobjectionable, is allowed at the full amount. If he does not, he can, it seems, have his claim allowed temporarily to enable him to participate in creditors' meetings prior to the determination of the value of his security, but only for such sums as seems to be owing over the security. He may retain his security and prove for the amount of his claim after deducting therefrom the value of his security.¹³⁵

128. Matter of New York Commercial Co. (C. C. A., 2d Cir.), 36 Am. B. R. 769; Board of Commissioners of Shawnee County v. Hurley (C. C. A., 8th Cir.), 22 Am. B. R. 209, 169 Fed. 92.

129. Ex parte Graves, 2 Jur. N. S. 651; Ex parte Peacock, 2 G. & J. 67; In re Howard, Cole & Co., 4 N. B. R. 571, Fed. Cas. 6,750; In re Coe (Ref., Ohio), 1 Am. B. R. 275.

130. Matter of Matthews (D. C., N. Y.), 26 Am. B. R. 19, 188 Fed. 445.

131. Butterfield v. Woodman (C. C. A., 1st Cir.), 34 Am. B. R. 510, 223 Fed. 956, modif. 33 Am. B. R. 154.

132. In re Noyes Bros. (C. C. A., 1st Cir.), 11 Am. B. R. 506, 127 Fed. 286; In re Matthews (D. C., N. Car.), 13 Am. B. R. 91, 132 Fed. 274.

133. In re Keep Shirt Co. (D. C., N. Y.), 28 Am. B. R. 765, 200 Fed. 80.

134. Proof of claims by secured creditors.—Mortgage creditors of a bankrupt corporation are entitled to prove their claims without surrendering their lien, and if on foreclosure the proceeds of the sale were insufficient to pay the debts in full, they are not barred from sharing *pro rata* in the

distribution of the general assets. So also mortgage creditors may surrender their security and elect to file their claims in the bankruptcy court, which entitles them to participate in the distribution of the assets as general creditors. In re Medina Quarry Co. (D. C., N. Y.), 24 Am. B. R. 769, 179 Fed. 929. See *sub nom.* "What is a Surrender" in this section, *post*.

135. Kohout v. Chaloupka (Sup. Ct., Neb.), 11 Am. B. R. 265, 69 Neb. 677; In re Goldsmith (D. C., Tex.), 9 Am. B. R. 419, 118 Fed. 763; In re Hines (D. C., Pa.), 16 Am. B. R. 495, 144 Fed. 142; Steinhardt v. National Park Bank, 19 Am. B. R. 72, 120 N. Y. App. Div. 255, 105 N. Y. Supp. 23, revg. 18 Am. B. R. 86; In re Stevens (D. C., Ore.), 23 Am. B. R. 239, 173 Fed. 842. Compare In re Little (D. C., Iowa), 6 Am. B. R. 681, 110 Fed. 621.

Retention of securities.—In the case of In re Davison (D. C., N. Y.), 24 Am. B. R. 460, 179 Fed. 750, a question arose as to the possession of life insurance policies which had been assigned to a bank as security for the payment of a debt. The court said: "The law does not provide that on crediting the value of the security on

(5) **RETENTION OF SECURITY; EFFECT ON PROOF OF CLAIM.**—If the security is equal in value to the claim, he cannot prove any part of his claim, although the creditor bids in the property at a foreclosure sale for less than his claim.¹³⁶ A creditor cannot prove both a debt and the security thereof, but he may prove either one.¹³⁷ He may rely on his security and enforce it according to his rights as they exist; in such a case it is optional with him to make a formal proof of his claim.¹³⁸ If he does not present his claim and rely on the administration of the bankrupt estate, he is relegated to the property retained as security for the debt, and, so far as the estate is concerned, the debt is released.¹³⁹ As has already been explained, the value of securities is often arrived at summarily at first meetings to permit a creditor to vote the unsecured balance. A claimant may, of course, be fully secured.¹⁴⁰ If so, he should not be allowed to file a proof, and does not become a party to the proceeding.¹⁴¹ A creditor by proving an unsecured claim is not barred from proving the amount of a secured claim less the sum realized on the security.¹⁴² Where a debt is secured by a life insurance policy the value of the policy should be deducted therefrom and the balance may be proved against the

the debt and being allowed a dividend on the balance, the secured creditor is to surrender the security, even if tendered the value thereof as fixed by the court. The secured creditor has the right to retain the policies as security for any balance and any premiums it may pay to keep them alive. (In re Newland, 7 Nat. Bank. Reg. 477.) The policies belong to the bank as security until the debt is paid, but for purposes of a dividend as well as ultimate payment, it is compelled to credit now the value of such security. It does not follow that the policies and all sums received thereon, at maturity will become or now become the property of the bank absolutely, for the ownership is a qualified one and the bank cannot be deprived of them until the notes are fully paid. These policies were assigned to the bank in good faith more than four months before the bankruptcy, and the rights of the bank therein and thereto are in no way effected by the bankruptcy, except that it is compelled, if it elects to prove its claim, to credit the present value as fixed in the mode provided by the act on the debt, and I do not think this operates as an absolute sale and transfer to the bank. . . . The bankruptcy law in plain terms says that in such a case as this the secured creditor may prove his debt, have the value of his security determined, credit such value and have a dividend on the balance, except in cases where the contract of pledge provides a way of converting it into money, in which case that is to be done under and pursuant to the terms of the contract or agreement under which the thing pledged is held. In the absence of something in the bankruptcy act to the contrary, I am of the opinion that in cases where the value of the security is determined by agreement, arbitration or litigation as the court directs, it is contemplated that the secured creditor is to retain such

securities, after receiving the dividends subject to such claims as others may have therein or thereon when finally converted into money."

136. *Matter of Davis* (Ref., Pa.), 23 Am. B. R. 156, affd. 23 Am. B. R. 446, 174 Fed. 556.

137. *First National Bank v. Eason* (C. C. A., 5th Cir.), 17 Am. B. R. 593, 149 Fed. 204; *In re Knight, Yancey & Co.* (C. C., Ala.), 26 Am. B. R. 787, 190 Fed. 893, holding in effect that claimants are not entitled to prove the full amount of a claim where a portion of it has been settled by the sale of merchandise held as security for the payment of the claim.

138. *Ward v. First National Bank of Iron-ton* (C. C. A., 6th Cir.), 29 Am. B. R. 312, 302 Fed. 609; *Robinson v. Roe* (C. C. A., 2d Cir.), 38 Am. B. R. 26, 30, 233 Fed. 936.

139. *Matter of Old Oregon Mfg. Co.* (D. C., Wash.), 38 Am. B. R. 409, 236 Fed. 804.

140. *Matter of Kenney* (Ref., Mass.), 10 Am. B. R. 452, holding that where a claim offered in proof is fully secured it should be disallowed.

141. *Illustrative cases on secured claims under the present law are:* *In re Frick* (Ref., Ohio), 1 Am. B. R. 719; *In re Brown* (D. C., Pa.), 5 Am. B. R. 220, 104 Fed. 762; *In re Rhoads*, 2 N. B. N. Rep. 178; *In re Spring*, 2 N. B. N. Rep. 509; *In re Peasley* (D. C., N. H.), 14 Am. B. R. 496, 137 Fed. 190; *In re Grieve* (D. C., Conn.), 18 Am. B. R. 737, 151 Fed. 711. Under the law of 1867, *Yeatman v. New Orleans, etc.*, 95 U. S. 764; *In re Sauthoff*, Fed. Cas. 12,379; *In re Cram*, Fed. Cas. 3,343; *In re Dunkerson*, Fed. Cas. 4,157; *In re Anderson*, Fed. Cas. 350; *In re Jaycox*, Fed. Cas. 7,240; *In re Newland*, Fed. Cas. 10,170.

142. *In re Ball* (D. C., Vt.), 10 Am. B. R. 564, 123 Fed. 164.

estate.¹⁴³ If a trustee does not elect to redeem the security by paying the debt, the secured creditor may sell the security, if under the terms of his lien he has such right, and file a claim for the unpaid remainder of his debt.¹⁴⁴ There is no authority vested in the court, upon finding that there was an excess due the bankrupt after the payment of the secured claim, to enter a decree against the creditor, who is an adverse claimant, for the amount of the excess.¹⁴⁵ Where the claimant voluntarily appears before the referee in bankruptcy and presents his claim for allowance as a secured claim, alleging that he had a lien upon the land by virtue of a mortgage, deed of trust or the like, the referee has jurisdiction to determine the validity of the lien asserted, and to adjudge whether or not the claim should be allowed as a secured claim.¹⁴⁶ Where book accounts are assigned to secure a debt the creditor must turn over to the trustee the balance of the amount collected by him remaining after payment of his debt, without reference to the adverse claim of another creditor.¹⁴⁸ Where a lease did not provide security for the payment of water-rates and taxes by the bankrupt tenant, the landlord must establish his claim therefor before the referee.¹⁴⁹ Where the security is retained by the creditor he may enforce his lien in any court having jurisdiction, although he has availed himself of the privilege of filing his claim as a secured claim.¹⁵⁰

(6) ASCERTAINING VALUE OF SECURITIES.—The methods of ascertaining the value of the securities to be deducted are prescribed by subsection *h*. The value may be determined by "litigation," meaning any appropriate action or proceeding in the courts to ascertain the value of the security, wherein the

143. *In re Busby* (D. C., Pa.), 10 Am. B. R. 650, 124 Fed. 469; *In re Davison* (D. C., N. Y.), 24 Am. B. R. 460, 179 Fed. 750.

144. *Matter of McAusland* (D. C., N. J.), 37 Am. B. R. 519, 235 Fed. 173, citing text.

145. *Matter of Mertens* (C. C. A., 2d Cir.), 15 Am. B. R. 362, 142 Fed. 445.

146. *In re Jackson Brick & Tile Co.* (D. C., Mo.), 26 Am. B. R. 915, 189 Fed. 636, citing the following cases: *Chauncey v. Dyke Bros.* (C. C. A., 8th Cir.), 9 Am. B. R. 444, 119 Fed. 1, 55 C. C. A. 579; *In re Rochford* (C. C. A., 8th Cir.), 10 Am. B. R. 608, 124 Fed. 182, 59 C. C. A. 388; *In re Granite City Bank* (C. C. A., 8th Cir.), 14 Am. B. R. 404, 137 Fed. 818, 70 C. C. A. 316; *In re Schermerhorn* (C. C. A., 8th Cir.), 16 Am. B. R. 508, 145 Fed. 341, 76 C. C. A. 215; *In re McMahon* (C. C. A., 6th Cir.), 17 Am. B. R. 531, 147 Fed. 684, 77 C. C. A. 668; *In re Dana* (C. C. A., 8th Cir.), 21 Am. B. R. 683, 167 Fed. 529, 93 C. C. A. 238; *Thomas v. Woods* (C. C. A., 8th Cir.), 23 Am. B. R. 132, 173 Fed. 585, 97 C. C. A. 535, 26 L. R. A. N. (N. S.) 1180; *Mound Mines Company v. Hawthorn* (C. C. A., 8th Cir.), 23 Am. B. R. 242, 173 Fed. 882, 97 C. C. A. 394; *Whitney v. Wenman*, 198 U. S. 539, 14 Am. B. R. 45, 25 Sup. Ct. 778, 49 L. Ed. 1157, and see *Matter of Soltman* (D. C., N. Y.), 38 Am. B. R. 270, 238 Fed. 241.

Right of mortgage creditor to relief.—A mortgage creditor may come into a court of bankruptcy and ask for any relief to which he would be entitled in equity. *Matthews & Sons v. Webre Co.* (D. C., La.), 32 Am. B. R. 180, 213 Fed. 396.

Possession of special fund by court.—Where a bankruptcy court had possession of a special fund which was security for the claims of certain creditors of a bankrupt which claims were reserved for future liquidation in an order confirming a composition offer, it was held that the special fund must be distributed on the liquidation of the claims and before the distribution of the consideration of the composition, as otherwise secured creditors might get a larger proportion of their claims than other creditors. *Matter of Hollins & Co.* (D. C., N. Y.), 37 Am. B. R. 205, 230 Fed. 920.

148. *Fitch v. Richardson* (C. C. A., 1st Cir.), 16 Am. B. R. 835, 147 Fed. 196. A creditor whose security consists of assigned accounts does not abandon his security by consenting to a liquidation of the bankrupt's indebtedness. *In re Cyclopean Co.* (C. C. A., 2d Cir.), 21 Am. B. R. 679, 167 Fed. 971.

149. *In re Yodlesman-Walsh Foundry Co.* (D. C., N. Y.), 21 Am. B. R. 509, 166 Fed. 381.

150. *Stewart-Noble Drug Co. v. Bishop-Babcock-Becker Co.* (Col. Sup. Ct.), 38 Am. B. R. 639, 162 Pac. 159, holding that the filing of a secured claim is for the purpose of securing the right to share in the dividends in case the security is insufficient and the bankruptcy court thereby acquires no jurisdiction over the enforcement of the security; hence, the holder of such security is not estopped from attempting to enforce it in the State court.

secured creditor and the trustee may be heard.¹⁵¹ If the value has been legally determined outside of the court of bankruptcy, it will take proof of, and be governed by that fact.¹⁵² This subsection has no application where the securities were not the property of the bankrupt.¹⁵³ The agreement by the terms of which the securities are pledged usually provides for a sale of the securities, and the disposition of the proceeds.¹⁵⁴ The time for fixing the value of the security is the date of the petition. Where the security is sold some time after the filing of the petition and the proceeds are not enough to pay the entire amount of the creditor's claims, it is not permissible to apply the proceeds, first to interest accrued since the filing of the petition, then to the principal, and afterwards to prove for the balance.¹⁵⁵ Where interest and dividends accrue upon securities held by creditors of the bankrupt after the date of the petition in bankruptcy, they may be applied in payment of the after-accruing interest upon the debt.¹⁵⁶ If by action in a State court, the trustee should intervene and see that the security brings what it is fairly worth.¹⁵⁷ Section 6 relating to exemptions does not limit the provisions of subsection *h*, so as to authorize a creditor to prove his entire claim and to receive dividends thereon from the estate, where such claim is secured by a mortgage on exempt property.¹⁵⁸ The value of the security may be ascertained by converting it into money pursuant to the contract, and in the absence of fraud, the creditor may prove the balance of his claim.¹⁵⁹ It is only when the securities have not been disposed of by the creditor in accordance with his contract that the court may direct what shall be done in the premises. Of course where there is fraud or a proceeding contrary to the contract, the interposition of the court might properly be invoked.¹⁶⁰ Although the property

151. *Matter of Soltman* (D. C., N. Y.), 38 Am. B. R. 270, 238 Fed. 241. See Am. Bankr. Dig., § 790.

152. *In re Crammond* (D. C., N. Y.), 17 Am. B. R. 22, 145 Fed. 566.

153. *Matter of Graves* (D. C., Vt.), 20 Am. B. R. 818, 163 Fed. 358, holding that where the bankrupt is indorser upon a corporation note, and the proof of claim thereon sets forth that the note is secured by a mortgage on both the real and personal property of the maker, the bankruptcy court has no jurisdiction over the mortgaged property except to ascertain its value and to see to its proper application in payment of the note when presented for allowance against the bankrupt's estate. See also the opinion of the district court in the same case reported in 25 Am. B. R. 372, 182 Fed. 443.

154. *In re Wiesen* (D. C., Pa.), 15 Am. B. R. 27, 138 Fed. 164.

155. *Sexton v. Dreyfus*, 219 U. S. 339, 25 Am. B. R. 362, revg. *In re Kessler* (D. C., N. Y.), 22 Am. B. R. 606, 171 Fed. 751.

156. *Sexton v. Dreyfus*, 219 U. S. 339, 25 Am. B. R. 362.

157. See under §§ 11 and 47; also *In re Buse*, Fed. Cas. 2,221; *In re Stewart*, Fed. Cas. 13,418.

158. *In re Lantzenheimer* (D. C., Iowa), 10 Am. B. R. 720, 124 Fed. 716; *In re Meredith* (D. C., Ga.), 16 Am. B. R. 331, 144 Fed. 230; *In re Cale* (D. C., Minn.), 25

Am. B. R. 367, 182 Fed. 439, holding that the right of the general creditors to the general assets will be protected and that a creditor with an enforceable lien or claim against exempt property can collect only the deficiency from the general assets. *In re Bailey* (D. C., Utah), 24 Am. B. R. 201, 176 Fed. 990.

159. *In re Peacock* (D. C., No. Car.), 24 Am. B. R. 159, 178 Fed. 851; *British & American Mortgage Co. v. Stuart* (C. C. A., 5th Cir.), 31 Am. B. R. 544, 210 Fed. 425.

160. *Hiscock v. Varick Bank*, 206 U. S. 28, 18 Am. B. R. 1, 9, affg. 15 Am. B. R. 362, holding that the court may direct the disposition of a pledge, or the ascertainment of its value, where the parties have failed to do so by their own agreement.

Where policies of life insurance were assigned in good faith to a bank to secure the payment of such sum as may be due to the bank at the time of the settlement of the policy, and more than four months thereafter the assignor was adjudicated a bankrupt and the bank filed its claim against his estate and petitioned for the ascertainment of the value of the securities to be credited on the claim so that the bank might share in the dividends on the unpaid balance, it was proper for the referee to proceed on due notice and hearing to determine the value of the policies in the absence of an agreement by the bank and the trustee as to such value.

pledged as security may be converted into money as agreed between the parties, yet the secured creditor may not dispose of the property to himself, under the guise of a sale.¹⁶¹ Where a debt is proved as a secured debt in the usual way, and the trustee objects on the ground that the security claimed constitutes a voidable preference, the court may hear and decide the issue, and allow the claim as a secured or unsecured debt, before the alleged security is converted into money.¹⁶² It is proper for the trustee to arrange with the secured creditor to accept the property held as security in satisfaction of the claim.¹⁶³

(7) EFFECT OF PROVING SECURED DEBT AS UNSECURED.—The law here was well settled prior to the present statute. If a secured creditor proves his debt as unsecured, he thereby waives his security.¹⁶⁴ This rule yields, however, where such a proof was made by one ignorant of his legal rights and without fraudulent intent.¹⁶⁵ Thus, where from ignorance or inadvertence a claim has been proved as unsecured the court, in the exercise of its discretion, may permit the creditor to have his proof expunged so that he may take steps to have the value of the security determined and to prove for the excess only. This right will generally be accorded to one asking it and excusing his mistake, if neither the bankrupt nor any other party will be injured; that is, if their rights after the granting of an order to expunge the proof will not be less or different than they would have been had not the mistake been made of proving the claim as unsecured.¹⁶⁶ A proof of claim may be amended so as to include therein a statement of a security in a case where the equities of general creditors will not be disturbed.¹⁶⁷ It has been held that proof without mention

In re Davison (D. C., N. Y.), 24 Am. B. R. 460, 179 Fed. 750.

Duty of court to consider value.—In the absence of a legal rule in the State making the sum for which property sold to satisfy a lien is bought is conclusive as to its value, the bankruptcy court on allegation of inadequate price realized at such sale is by duty bound to consider the question of value. Matter of McAusland (D. C., N. J.), 37 Am. B. R. 519, 235 Fed. 173.

161. Van Kirk v. Vermont Slate Co. (D. C., N. Y.), 15 Am. B. R. 239, 140 Fed. 38; In re Mertens (D. C., N. Y.), 14 Am. B. R. 226, 134 Fed. 104, 105. Compare Turner v. Metropolitan Trust Co. (C. C. A., 9th Cir.), 31 Am. B. R. 181, 207 Fed. 495.

Purchase of property by creditor.—Where a proof of claim shows that claimant on a sale of property mortgaged as security for its debt bought in the property, the burden is on it to show that said property was of insufficient value to pay its debt. Matter of McAusland (D. C., N. J.), 37 Am. B. R. 519, 235 Fed. 173.

162. In re Quinn (C. C. A., 8th Cir.), 21 Am. B. R. 264, 165 Fed. 144.

163. Matter of Rose (D. C., Ky.), 26 Am. B. R. 752, 193 Fed. 815.

164. In re Bloss, 4 N. B. R. 147 Fed. Cas. 1,562; Heard v. Jones, 15 N. B. R. 402; Ex parte Solomon, 1 G. & J. 25; Stewart v. Isidor, 1 N. B. R. 485; Hatch v. Seely, 13 N. B. R. 380; Ex parte Downs, 1 Rose, 96; In re Brand, 3 N. B. R. 324, Fed. Cas. 1,809; In re Granger, 8 N. B. R. 30, Fed. Cas. 5,684; Matter of Burr Mfg. Co. (C. C. A., 2d Cir.),

32 Am. B. R. 708, 217 Fed. 16; Matter of Fisk & Robinson (D. C., N. Y.), 34 Am. B. R. 194, 185 Fed. 974.

One who claims a mechanic's lien but waives it on proving a claim in bankruptcy against the contractor, having voted upon the claim and transacted other business as a creditor at a meeting of creditors for the election of a trustee, may not thereafter assert that through the mistake made by a clerk of the lawyer who drew the proof of claim, the waiver therein was broader than he intended where the lien sought to be preserved must have been collected out of the proceeds of a contract belonging to the bankrupt. Brown v. City National Bank (N. Y. Sup. Ct., Spec. T.), 26 Am. B. R. 638, 72 Misc. 201, 131 N. Y. Supp. 92.

165. In re Brand, Fed. Cas. 1,809; In re Harwood, Fed. Cas. 6,185; In re Parkes, Fed. Cas. 10,754; In re Baxter, 12 Fed. 72.

166. In re Hubbard, 1 N. B. R. 679, Fed. Cas. 6,813.

167. In re Wilder (D. C., N. Y.), 3 Am. B. R. 761, 101 Fed. 104. See also In re Fisk & Robinson, 34 Am. B. R. 194, 185 Fed. 974.

Amendment of claim to reinstate right to security.—Where a claimant has waived his right to security by filing his claim without asserting it, he may, before receiving a dividend, although more than a year after adjudication, be permitted to apply for an order authorizing the filing *nunc pro tunc* of an amended claim thereby reinstating his right to security. Matter of Fisk & Robinson (D. C., N. Y.), 34 Am. B. R. 194, 185 Fed. 974.

of the security does not of itself operate as a discharge of a mortgage security; that while the creditor was prevented from setting up the same against the assignee, no one but the assignee could avail himself of the fact.¹⁶⁸ Where the security is the property of the bankrupt held by an indorser, or a person secondarily liable, it is not necessary that the creditor should prove as a secured creditor in order to retain his rights as against the indorser.¹⁶⁹ It seems that notwithstanding that a creditor has proved his claim based upon a waive note as unsecured, he may assert in a court of contempt jurisdiction any right that he may have on a waiver of exemption.¹⁷⁰ A creditor, having a provable claim, may, upon the relinquishment of his security, share with the other creditors in the distribution of the estate, although the security was such as to be ineffectual against such creditors.¹⁷¹

c. Priority claims.—Subsection *e* of this section yokes priority claims with secured claims, both as to manner of proof and the ascertainment of the value of the property. A landlord's claim for rent, constituting a lien, by State statute, must be proved to protect the landlord's right to priority of payment.¹⁷² On the other hand, it has been ruled that where a claim is fully secured by a lien upon property of the bankrupt, the formal proof required by the bankruptcy act, is not necessary to the enforcement of the lien.¹⁷³ The reasons for the rule of *prima facie* proof applicable to proofs of claims do not apply to petitions for priority. Thus, allegations relating to priority are not *prima facie* evidence of their truth.¹⁷⁴ It is thought that what is said of secured claims, *ante*, applies equally to debts entitled to priority.

d. Preference claims.¹⁷⁵—(1) **IN GENERAL.**—Subsection *g* has been as much discussed as any clause in the present law. The former statute denied allowance to a claim filed by a creditor who accepted a preference "having reasonable cause to believe that the same was made or given by a debtor contrary to any provisions of the act;" nor could any dividend be paid on such a debt until the creditor surrendered his advantage.¹⁷⁶ The words quoted do not appear in the present act. Further, the definition of "preference" was, by a shifting of clauses while the bill was in committee, so changed as to lead to the ruling that any payment by debtor to creditor, after, though without knowledge of, actual insolvency, was a preference, even though lacking intent and made years before. This question is discussed at length elsewhere.¹⁷⁷ A few of the more valuable cases on the now historic controversy will be found in the foot-note.¹⁷⁸ *Carson, Pirie & Co. v. Chicago Title & Trust Co.*¹⁷⁹ settled

168. *Cook v. Farrington*, 104 Mass. 212.

169. *Merchants' Bank v. Comstock*, 55 N. Y. 24.

170. *In re Loden* (D. C., Ga.), 25 Am. B. R. 917, 184 Fed. 965.

171. *Lacy v. Citizens' Bank* (C. C. A., 8th Cir.), 28 Am. B. R. 433, 193 Fed. 484.

172. *In re Hayward* (D. C., Pa.), 12 Am. B. R. 264, 130 Fed. 720.

173. *Courtney v. Fidelity Trust Co.* (C. C. A., 6th Cir.), 33 Am. B. R. 400, 219 Fed. 57.

174. *In re Jones* (D. C., Mich.), 18 Am. B. R. 206, 151 Fed. 108.

175. See Am. Bankr. Dig., §§ 767-784.

176. Act of 1867, § 23, R. S., § 5084. Compare *In re Kingsbury*, Fed. Cas. 7,816; *In re Walton*, Fed. Cas. 17,130; *In re Forsyth*, Fed. Cas. 4,948; *In re Currier*, Fed. Cas. 3,492.

177. See discussion under Section Sixty, *post*.

178. **Declaring payments in due course preferences.**—*In re Knost* (Ref., Ohio), 2 Am. B. R. 471; *In re Conhaim* (D. C., Wash.), 3 Am. B. R. 249, 97 Fed. 923; *Columbus Elec. Co. v. Worden* (C. C. A., 7th Cir.), 3 Am. B. R. 634, 99 Fed. 400; *In re Fixen* (C. C. A., 9th Cir.), 4 Am. B. R. 10, 102 Fed. 295. *Contra*: *In re Piper*, 2 N. B. N. Rep. 8; *In re Smoke* (D. C., N. Y.), 4 Am. B. R. 434, 104 Fed. 289; *In re Hall* (Ref., N. Y.), 4 Am. B. R. 671. Apparently *contra*, even since *Carson, etc., Co. v. Chicago Title & Trust Co.*, 182 U. S. 438, 5 Am. B. R. 814; *In re Dickson* (C. C. A., 1st Cir.), 7 Am. B. R. 186, 111 Fed. 726.

179. 182 U. S. 438, 5 Am. B. R. 814.

the matter. After it, all payments subsequent to insolvency were preferences, the surrender of which was required before the claim of a creditor so "preferred" could be allowed. A further effect of that decision was to declare in substance that all of the indebtedness of the bankrupt to a particular creditor, existing during the period of insolvency, was to be treated as one claim, and any payment made and received, even in good faith, by both parties during such period was to be treated as a preference, and must be surrendered before the balance of the claim, or any part of it, could be allowed.¹⁸⁰ Under the act before the amendment of 1903 it was frequently held that a creditor was not required to surrender a payment made on an open account where, at the time of such payment or subsequent thereto, the creditor extended new credits to the bankrupt in excess of the amount of such payment, the net result of the entire transaction being to increase the indebtedness to the creditor, and the value of the bankrupt estate being enhanced to a like amount.¹⁸¹

(2) THE AMENDMENTS OF 1903.—The conditions resulting from this new doctrine—a reversal of the settled policy of all bankruptcy laws to protect transactions in due course even up to the moment of bankruptcy¹⁸²—were so unsatisfactory to business men and disastrous to the credit system, that the demand for remedial legislation became practically unanimous. Congress has responded by amendment (1) making it certain that no transaction more than four months before the bankruptcy is a preference,¹⁸³ and (2) limiting that which must be surrendered as a condition precedent to proving a debt to (a) preferences that are "voidable under section sixty, subdivision b," and (b) advantages possessed by creditors "to whom conveyances, transfers, assignments, or incumbrances, void or voidable under § 67, subdivision e, have been made or given."

(3) MEANING OF THE AMENDMENTS.—Considered broadly, subsection *g* seems now to mean what the "protected transactions" clauses of the English system have meant for nearly two centuries. He who has obtained an advantage over other creditors, in any of the ways indicated in the present law, and only such an one, must hereafter surrender his advantage before his claim can be filed or allowed. The intention of its framers is expressed in the sentence next before the last.¹⁸⁴ There may be some question, for instance,

180. *In re Delling* (D. C., N. Y.), 10 Am. B. R. 688, 124 Fed. 852. See also *In re Jones* (D. C., S. Car.), 10 Am. B. R. 513, 123 Fed. 128. *Contra*: *In re Wolf* (D. C., Tenn.), 10 Am. B. R. 153, 122 Fed. 127, holding that the case of *Carson, etc., Co. v. Chicago Title & Trust Co.*, 182 U. S. 438, 5 Am. B. R. 814, did not apply to a payment in full of a separate and independent debt.

181. *Matter of Sagor* (C. C. A., 2 Cir.), 9 Am. B. R. 361, 121 Fed. 658; *Gans v. Ellison* (C. C. A., 3d Cir.), 8 Am. B. R. 153, 114 Fed. 734; *Kimball v. Rosenham Co.* (C. C. A., 8th Cir.), 7 Am. B. R. 718, 114 Fed. 85; *Peterson v. Nash* (C. C. A., 8th Cir.), 7 Am. B. R. 181, 112 Fed. 311; *Dickson v. Wyman* (C. C. A., 1st Cir.), 7 Am. B. R. 186, 111 Fed. 726. These cases were cited and apparently approved in the case of *Jaquith v. Alden*, 189 U. S. 78, 9 Am. B. R. 73. See also *Yaple v. Dahl-Millakan*

Grocery Co., 193 U. S. 526, 11 Am. B. R. 596; *Matter of Watkinson* (D. C., Pa.), 16 Am. B. R. 38, 143 Fed. 602.

182. See English Act of 1883, § 49. See also historical review in *In re Hall*, 4 Am. B. R. 671.

183. This change is considered in detail under § 60.

184. The intention of Congress is indicated by the following from the analysis accompanying the House revision of the amendatory bill.

"*Carson, etc., Co. v. Chicago Title & Trust Co.*, 182 U. S. 438, 5 Am. B. R. 814, having held that § 60-a is a definition of 'preference,' it necessarily follows that payments and other *bona fide* transactions after actual insolvency, though in due course of trade and without knowledge or reasonable cause to believe that a preference was intended, must be, under § 57-g, surrendered before a creditor

about the necessity of surrendering where the advantage consists of a lien through legal proceedings within the preference period, such a lien not being strictly either a conveyance, transfer, or assignment, or even an incumbrance in the common meaning of the word. The intention to require the surrender of such an advantage is nevertheless clear; nor is it doubted that the words of the law accomplish it. The discrepancies between a preference which is an act of bankruptcy.¹⁸⁵ and one that is even now merely voidable may also cause discussion. Again, the intention is clear. If not voidable under § 60-b, a preference need not be surrendered; reasonable cause to believe a preference intended must appear.¹⁸⁶ But as to transfers it must appear that they were made with a fraudulent intent.¹⁸⁷ Cases under the former law are not in point, save remotely, and are, therefore, not cited. Still, whatever be the ultimate decisions as to transactions, less common or more subject to suspicion, the exasperating practice of requiring the surrender of mere payments, made and received in due course, is at an end. It is now definitely established that where a creditor at adjudication has a claim for a balance due upon an open account for goods sold and delivered to the bankrupt within the four months' period, payments received by the creditor within said four months, and in good faith, without knowledge of the bankrupt's insolvency, do not constitute preferences which must be surrendered before proof of the claim for the balance due will be allowed.¹⁸⁸

(4) EFFECT OF AMENDMENTS OF 1903.—The effect of this change in § 57-g is to make only those preferences voidable which are made so by § 60-b, or by § 67-e, which latter refers only to conveyances made with intent to defraud creditors or rendered invalid by some statute of the State. Section 60-b, thus referred to, makes transfers voidable by the trustee when the creditor has reasonable cause to believe that the debtor intends thereby to create a preference.¹⁸⁹ Only creditors whose transactions have been entirely in due course will be apt to offer proofs for allowance. This objection will, therefore, not often be made. If it is—as to prevent voting for trustee—it must usually be heard and decided somewhat summarily. The action of the creditor in surrendering or not will often turn on the decision. Whether, if he does not surrender after the point is raised, he can thereafter prove his debt is a question; it is thought that, even after a refusal, the creditor can surrender at any time before a suit is brought.¹⁹⁰ For time when this amendment went into effect, see “supplementary section to amendatory act,” *post*.

(5) CASES PRIOR TO AMENDMENT OF 1903 STILL VALUABLE.—The amendments just considered have rendered many cases decided under the law of 1898 no longer applicable, and they will not be cited. Some cases are

who received such a payment could prove the balance of his debt. This was not what was intended by the framers of the law. There is a very urgent and widespread demand for such an amendment as will obviate this menace to trade.”

The fundamental purpose of this provision is to secure an equality of distribution of the assets of a bankrupt estate. *Keppel v. Tiffin Savings Bank*, 197 U. S. 356, 13 Am. B. R. 552.

185. Compare § 3-a(2) with § 60-a-b.

186. In re Hines (D. C., Pa.), 16 Am. B. R. 495, 144 Fed. 142.

187. In re Bloch (C. C. A., 2d Cir.), 15 Am. B. R. 748, 142 Fed. 674.

188. *Wild & Co. v. Provident Life & Trust Co.* (Sup. Ct.), 214 U. S. 292, 22 Am. B. R. 109; *Yaple v. Dahl-Milliken Grocery Co.*, 193 U. S. 526, 11 Am. B. R. 596; *Matter of Farmer's Store & Supply Co.* (D. C., W. Va.), 32 Am. B. R. 638, 214 Fed. 505.

189. In re First Nat. Bank of Louisville (C. C. A., 6th Cir.), 18 Am. B. R. 766, 155 Fed. 100.

190. Compare cases under this section, subtitle “What is a Surrender,” *post*.

nevertheless still of value. Those bearing on (1) what is a preference, and (2) whether a credit granted in good faith after the commission of a preference may be set off against the preference in determining the amount to be surrendered, will be found elsewhere.¹⁹¹ That until surrender a creditor has not a provable debt and may not be a petitioning creditor in an involuntary case is still the law.¹⁹² So also, it seems, is the doctrine that where the principal creditor cannot prove without surrendering, a guarantor cannot.¹⁹³ Likewise, the rule that creditors who cannot prove without surrendering their advantage on a particular debt, cannot prove other and detached debts not so tainted,¹⁹⁴ also that it is immaterial whether the creditor is entitled to priority or not.¹⁹⁵ The difference between a mere preference and a voidable preference, discussed in some of the cases,¹⁹⁶ now becomes important; the former need not be surrendered.¹⁹⁷

(6) WHEN SURRENDER REQUIRED.—(I) *In general*.—As the law now stands no claim is allowable where the claimant has received any advantage over his co-claimants by means of a preference which is voidable under § 60-b, or by means of a conveyance, transfer, assignment or incumbrance which is void or voidable under § 67-e.¹⁹⁸ A correct understanding of what is required under this section will necessitate a careful reading of the provisions of those sections and of the cases cited in the discussion thereunder. A creditor who has a voidable preference may make and file his formal proof of claim without surrendering his preference, and in that sense his claim is provable. In other words, it is susceptible of a formal statement in writing which may be filed in court. But the claimant may not secure an allowance of his claim, he may not vote upon it at a meeting of creditors, he may not obtain any advantage by means of it in the bankruptcy proceedings, until he first surrenders his preference.¹⁹⁹ It is incumbent on the parties opposing a claim to prove that in fact a preference has been received.²⁰⁰ The surrender must be made

191. See discussion under Section Sixty of this work.

192. *In re Rogers* (D. C., Ark.), 4 Am. B. R. 584, 102 Fed. 687.

193. *In re Schmechel Co.* (D. C., Mo.), 4 Am. B. R. 719, 104 Fed. 64; *In re Hurlbutt* (C. C. A., 2d Cir.), 16 Am. B. R. 198, 143 Fed. 958.

194. *In re Teslow* (D. C., Minn.), 4 Am. B. R. 757, 104 Fed. 229; *In re Conhaim* (D. C., Wash.), 3 Am. B. R. 249, 97 Fed. 923; *Matter of Beswick* (Ref., Ohio), 7 Am. B. R. 395; *In re Meyer* (D. C., Tex.), 8 Am. B. R. 598, 115 Fed. 997; *Swarts v. Fourth Nat. Bank* (C. C. A., 8th Cir.), 8 Am. B. R. 673, 117 Fed. 1. *Contra*, under the former law, *In re Arnold*, Fed. Cas. 551; *In re Richter*, Fed. Cas. 11,803. But see *In re Barnes*, Fed. Cas. 1,013.

A creditor having two distinct claims of the same class, both of which are due at the time of his receiving a preferential payment upon one of them, is not entitled to prove either claim until he has surrendered the preference. *In re Mayo Contracting Co.* (D. C., Mass.), 19 Am. B. R. 551, 157 Fed. 469.

195. *In re Bashline* (D. C., Pa.), 6 Am. B. R. 194, 109 Fed. 965; *In re Proctor*

(Ref., Iowa), 6 Am. B. R. 660; *In re Read* (Ref., N. Y.), 7 Am. B. R. 111.

196. Compare, for instance, *In re Hall* (Ref., N. Y.), 4 Am. B. R. 671. For a case where *bona fides* was the test, see *In re Wyly* (D. C., Tex.), 8 Am. B. R. 604, 116 Fed. 38. And compare *In re Bullock* (D. C., N. Car.), 8 Am. B. R. 646, 116 Fed. 667.

197. Cases where transactions thought preferences under the former law were held not so, are the following: *In re Stevens*, Fed. Cas. 13,391; *In re Horton*, Fed. Cas. 6,707; *In re Independent Ins. Co.*, Fed. Cas. 7,019. The elements of "preference" under that law were so different from those under the present law as amended as to render these and similar cases valuable only as suggestions, not as precedents.

198. *Matter of National Boat & Engine Co.* (D. C., Me.), 33 Am. B. R. 154, 216 Fed. 208, citing *Collier on Bankruptcy* (9th ed.), 731.

199. *Stevens v. Nave-McCord Co.* (C. C. A., 8th Cir.), 17 Am. B. R. 609, 150 Fed. 71; *In re Greenberger* (D. C., N. Y.), 30 Am. B. R. 117, 203 Fed. 583. See Am. Bankr. Dig. §§ 767-780.

200. *In re Hickey* (D. C., Ia.), 7 Am. B. R. 282, 112 Fed. 287.

to the trustee, and not to the bankrupt or any other person.²⁰¹ It is no objection to a surrender that there is no trustee to receive the same since the estate can be reopened under section 2 (8).²⁰²

(II) *Compulsory surrender not a penalty.*—Subsection *g* was not intended to impose a penalty, but merely to give creditors who received preferences options to keep what they have received and take no dividends from the estate; or to surrender their preference and share equally with other creditors in the general distribution.²⁰³ And this right would not appear to be affected by the fraud of the creditor in trying to secure an advantage over other creditors, in the preferential payment of his debt, which was valid at its inception.²⁰⁴ As held by the Supreme Court the act contains no language forfeiting the whole or any part of an otherwise valid claim, on the ground that the creditor has afterward been guilty of fraud,²⁰⁵ and this being so the courts have no authority to enlarge the statute by adding such a provision.²⁰⁶

(III) *Result of transactions beneficial to estate.*—The fact that the net result of transactions within the four months was beneficial to the estate does not relieve the creditor from surrendering a large payment made on an account which had run for a long time prior to such period.²⁰⁷ But payments on a running account are not to be considered as preferences, required to be surrendered, where new sales succeed payments and the net result is to increase the value of the estate.²⁰⁸ Where in a running account payments by the bank-

201. *In re Bailey* (D. C., Utah), 24 Am. B. R. 201, 176 Fed. 990.

202. *In re Feinberg & Sons* (D. C., Mass.), 26 Am. B. R. 587, 187 Fed. 283, holding that when at the time proofs of claims against the bankrupt's estate were presented to the court there was a trustee capable of acting, but the claims were not submitted for allowance until after the trustee's final account had been allowed and he had been discharged, and a composition agreement made prior thereto had been confirmed by the court, and it appears that the claimant had received from the bankrupt a preference voidable under section 60-b, the surrender of the preference is a condition precedent to the allowance of the claims.

203. *In re Conhaim* (D. C., Wash.), 3 Am. B. R. 250, 97 Fed. 923; *Keppel v. Tiffin Savings Bank*, 197 U. S. 356, 13 Am. B. R. 552.

A preferred creditor's claim will be disallowed unless he surrenders his preference. *In re Coffey* (Ref., N. Y.), 19 Am. B. R. 148, 167.

204. *Matter of Bergdoll Motor Co.* (C. C. A., 3d Cir.), 37 Am. B. R. 501, 233 Fed. 410, holding that a creditor whose receipt of a voidable preference has been set aside, may subsequently prove his claim, which was untainted by fraud in its inception, although he attempted to secure a preferential payment by fraud.

205. *Keppel v. Tiffin Savings Bank*, 197 U. S. 362, 13 Am. B. R. 552.

206. *Matter of Bergdoll Motor Co.* (C. C. A., 3d Cir.), 37 Am. B. R. 501, 233 Fed. 410.

207. *In re Watkinson* (Ref., Pa.), 17 Am. B. R. 56.

208. *Wild & Co. v. Life & Trust Co.* (C. C. A., 3d Cir.), 18 Am. B. R. 506, 153 Fed. 562, affg. 17 Am. B. R. 56. This case was reversed by the Supreme Court on the ground that the court below had directed a surrender of a payment made during the four months' period, notwithstanding the fact that the creditor had no knowledge of the insolvency of the bankrupt. See 214 U. S. 292, 22 Am. B. R. 109. The decision in this case is based upon *Carson, etc., Co. v. Chicago Title & Trust Co.*, 182 U. S. 438, 5 Am. B. R. 814, and *Jaquith v. Alden*, 189 U. S. 78, 9 Am. B. R. 73.

Payments on running accounts.—In the case of *Jaquith v. Alden*, 189 U. S. 78, 9 Am. B. R. 773, it was held that where a debt for goods sold to the bankrupt upon a running account was all incurred within the four months' period while he was insolvent, of which fact the creditor was ignorant, payments on account do not constitute preferential transfers which must be surrendered before the creditor can prove his claim, although the greater part thereof was for goods sold before the last payment was made; *Matter of Sagor & Bro.* (C. C. A., 2d Cir.), 9 Am. B. R. 361, 121 Fed. 658. In the case of *Yaple v. Dahl-Millikan Grocery Co.*, 193 U. S. 526, 11 Am. B. R. 596, it was held that where a creditor has a claim against an insolvent debtor for the balance due upon an open account for goods sold and delivered four months before the debtor's adjudication as a bankrupt, and during the same period makes a number of sales of merchandise on credit which becomes a part of the debtor's estate, payments on account from time to time received in good faith

rupt within the four months' period have induced new credits which resulted in the net increase of the estate, the creditor may be said to have once surrendered his preference by the giving of the subsequent credit, but where the bankrupt, beginning far beyond the four months' limit, makes a number of purchases and then finally within the four months makes a large payment on account, the creditor has been preferred.²⁰⁹

(IV) *Intent to prefer*.—A preference must have been actually intended in fact on the debtor's part, or there must have existed what the law regards as the equivalent of such an intent on his part, and such intent is not to be conclusively presumed from the mere fact that the debtor knows himself to be insolvent.²¹⁰ A trust deed given to secure the repayment of funds misappropriated within four months prior to the bankruptcy of the grantor

without knowledge of the debtor's insolvency on the part of the creditor, do not constitute preferences which he is obliged to surrender before he can prove his claim. In the case of *In re Jourdan* (C. C. A., 1st Cir.), 7 Am. B. R. 186, 111 Fed. 726, the court said: "While the Supreme Court has adopted a liberal construction of the statute in question and we are bound to follow it, there must be a limit to that method of interpretation and these cases reach it. It is beyond all reason to hold because a creditor has, in the ordinary course of business, during the four months preceding bankruptcy received payments which under some circumstances might operate as a preference in some views of the law, that that fact can be held to bar the proof of his claim when, looking at all the transactions together, they demonstrate not only that they were without any intention to acquire any unjust preference, but also that they have increased the net indebtedness to the creditor and correspondingly increased the bankrupt's estate. In order to avoid so unreasonable a result, we might say that all the transactions covered by the account current should be regarded as one, so that it could not be held that the effect of the payments was to enable the creditors at bar to obtain a greater percentage of their debt than any other creditor of the same class, within the meaning of paragraph a of section 60."

Payments to an attorney in the settlement of a running account places him in the same position as any other creditor whose claims have been paid within the four months' period, and such payments to the extent of an excess of a reasonable allowance will be deemed preferential. In *re Shiebler & Co.* (D. C., N. Y.), 20 Am. B. R. 777, 163 Fed. 545.

^{209.} In *re Watkinson* (D. C., Pa.), 17 Am. B. R. 56, 146 Fed. 142; *Kimball v. Rosenham Co.* (C. C. A., 8th Cir.), 7 Am. B. R. 718, 114 Fed. 85.

^{210.} In *re Mayo Contracting Co.* (D. C., Mass.), 19 Am. B. R. 551, 157 Fed. 469. See *Am. Bankr. Dig.* § 771.

Receipt of payment on pre-existing debts by the creditors, within the four months'

period, is sufficient cause to believe a preference intended. In *re Andrews* (C. C. A., 1st Cir.), 16 Am. B. R. 387, 144 Fed. 922, affg. 14 Am. B. R. 247.

The test is whether the creditor who is charged with having received a voidable preference had at the time of receiving it such information as ought to have led a reasonably prudent man to the conclusion that a preference was thereby intended. In *re Pfaffinger* (D. C., Ky.), 18 Am. B. R. 807, 154 Fed. 528; *Constam v. Haley* (C. C. A., 6th Cir.), 30 Am. B. R. 650, 206 Fed. 260.

Partial payment on a note does not constitute a preference which must be surrendered under this subdivision. *Rutland County Nat. Bank v. Graves* (D. C., Vt.), 19 Am. B. R. 446, 156 Fed. 169.

Surrender of money paid to wife for family expenses.—Where the wife of a bankrupt filed a claim to the allowance of which objection was made, that within the four months' period prior to the adjudication the bankrupt had made payment to his wife which constituted a preference, to be surrendered before allowance of her claim, and the only evidence relating to such payment was the testimony of the wife herself who stated that the sum was to be paid to and used by her for living expenses and not in part payment of the debt, a finding by the referee that a preference had been received which should be surrendered before allowance of her claim was improper. *Neumann v. Blake* (C. C. A., 8th Cir.), 24 Am. B. R. 575, 178 Fed. 916.

Payment by corporation to officer.—Where claimant who was bankrupt's president and manager ascertained after he became connected with bankrupt that it was insolvent and was in a position to know that such condition continued until bankruptcy intervened, bankrupt was chargeable with his knowledge, and payments made to claimant within the four months' period on account of money loaned by him to bankrupt constituted preferences which were recoverable by bankrupt's trustee and which should be surrendered before a claim for the balance due on such loan could be allowed. *Cooper v.*

constitutes a preference which must be surrendered before proof of the claim based upon the misappropriation.²¹¹ It must appear affirmatively, where the surrender of a preference is insisted upon, that the creditor had reasonable cause to believe that the transaction would result in a preference, and to this end the trustee attacking the creditor's claim has the burden of proving the essential elements of a voidable preference.²¹²

(V) *Distinct and independent debts.*—Where payments were made upon an indebtedness during the period of four months prior to the debtor's bankruptcy, and notes were given for the balance, such notes cannot be proved as independent debts without a surrender of such payment.²¹³ A creditor who holds two separate and distinct debts against the estate of a bankrupt must surrender a preferential payment on one of such debts before he can prove the other.²¹⁴ But where such payment is made upon a distinct and independent debt from that which is sought to be proved it need not be surrendered.²¹⁵ Thus, if a creditor has received a preference from a firm composed of two persons, but has an individual claim against one of them, he may prove the latter without surrendering his preference.²¹⁶

(7) *PAYMENT OF NOTES DISCOUNTED AT A BANK.*—The payment of notes given to third parties and discounted by a bank is a preferential payment to the bank and not to the payees of the notes, and must be surrendered before the bank can prove its claim for other indebtedness of the bankrupt.²¹⁷ In

Miller (C. C. A., 6th Cir.), 30 Am. B. R. 194, 203 Fed. 383.

Creditor's knowledge of debtor's insolvency or intent to prefer.—A farmer operating a dairy farm which he rented, within four months before bankruptcy executed a chattel mortgage to a creditor and also assigned a portion of the money due from the sale of the milk. The creditor knew that all the property on the farm was mortgaged to himself and others and that the farmer was unable to pay his bills as he had "dunned" him on several occasions. Held on all the evidence, that the creditor had knowledge of the debtor's insolvency or intent to prefer, and that he must surrender the preferences before being allowed his claim. Matter of French (D. C., N. Y.), 37 Am. B. R. 289, 231 Fed. 255.

Accommodation indorser; surrender of preference paid to holder.—An accommodation indorser before notes are paid is a creditor, his claim is provable as a contingent claim founded on a contract, and, therefore, he must refund to the bankrupt estate any preferential part payment made by the maker to the holder on account of the notes before he can prove his own claim for payments as indorser. Platt v. Ives (Inf. Ct. of Errors, Conn.), 32 Am. B. R. 846, 86 Atl. 579.

211. Burgoyne v. McKillip (C. C. A., 8th Cir.), 25 Am. B. R. 387, 182 Fed. 452, in which case it was also held that in case of embezzlement or misappropriation of funds by a bankrupt, the person defrauded may at his option assert a demand as upon implied contract to repay and such demand is provable in bankruptcy. The acceptance of a trust deed as security for the repayment of

such funds is an election to assert such a demand.

212. Peck & Co. v. Whitmer (C. C. A., 8th Cir.), 36 Am. B. R. 722, 231 Fed. 893.

213. Dunn v. Gans (C. C. A., 3d Cir.), 12 Am. B. R. 316, 129 Fed. 750; In re Thompson (D. C., Pa.), 10 Am. B. R. 288, 121 Fed. 607; arising under the act before the amendment of 1903.

214. In re Mayer (D. C., Tex.), 8 Am. B. R. 598, 115 Fed. 997; Livingston v. Heine-man (C. C. A., 6th Cir.), 10 Am. B. R. 39, 120 Fed. 786; Matter of Silvernail (D. C., Kan.), 33 Am. B. R. 59, 218 Fed. 979.

215. In re Abraham Steers Lumber Co. (C. C. A., 2d Cir.), 7 Am. B. R. 332, 112 Fed. 406, affg. 6 Am. B. R. 315, 110 Fed. 738; In re Seay (D. C., Ga.), 7 Am. B. R. 700, 113 Fed. 969; In re Bullock (C. C., N. C.), 8 Am. B. R. 646, 116 Fed. 667; In re Wolf & Levy (C. C., Tenn.), 10 Am. B. R. 153, 122 Fed. 127.

216. In re Comstock & Co., 12 N. B. R. 110, Fed. Cas. 3,079.

217. Bartholow v. Bean, 18 Wall. (U. S.) 635; In re Hill & Co. (C. C. A., 7th Cir.), 12 Am. B. R. 221, 120 Fed. 315; In re Thompson (D. C., Pa.), 10 Am. B. R. 288, 121 Fed. 607; Swartz v. Fourth Nat. Bank (C. C. A., 8th Cir.), 8 Am. B. R. 673, 117 Fed. 1; In re Waterbury Furniture Co. (D. C., Ct.), 8 Am. B. R. 79, 114 Fed. 225; Matter of Matthews (Ref., Mass.), 15 Am. B. R. 721; In re Wright-Dana Hardware Co. (D. C., N. Y.), 31 Am. B. R. 192, 207 Fed. 636; State Bank of Clearwater v. Ingram (C. C. A., 8th Cir.), 38 Am. B. R. 447.

Credit by clearing house.—In the case of

determining the preference to be surrendered by the bank, the increase of the contingent indebtedness of the bankrupt on the indorsement of notes given to it by customers and discounted by the bank should not be considered, since it cannot be said that such increased indebtedness resulted in a corresponding increase of the bankrupt's estate.²¹⁸

(8) WHAT IS A SURRENDER.—(I) *Compulsory surrender; effect on proof.*—Here the doctrines declared under the law of 1867 seem at least somewhat applicable. The phrasing of that statute undoubtedly colored some of the decisions under it. In a former edition of this work, the following language was used: "Under well-recognized principles of law, a surrender that is compulsory is not a surrender. The element of fraud is usually present, but may be lacking; the test is: was the act a voluntary one? Each case turns on its own facts and there is some conflict, but the weight of decision under the present law supports this view."²¹⁹ This view as here expressed received the approval of four of the nine judges of the Supreme Court, but the majority maintained a contrary view.²²⁰ The rule as now established is as follows: A creditor, who has received a voidable preference and retained the same until deprived thereof by a judgment of the court, may surrender the preference and thereafter prove his claim against the estate.²²¹

(II) *Rule under former law.*—Under the former law, there were no authoritative decisions. They varied from the rigid rule that, if a suit was brought to recover, it was too late,²²² to the rather watery doctrine that, even after judgment adverse, the recusant creditor was entitled to time to reflect and decide whether he would pay costs and yield, or continue recusant.²²³

(III) *Surrender by direction of court or as a result of litigation.*—A creditor should not be punished for submitting to the court the question as to whether the alleged preference is voidable; upon determining that it is voidable, the court should fix a reasonable time within which the creditor may surrender and have his claim allowed. Where a creditor has been compelled to surrender by direction of the court in a litigation to compel such surrender, he is entitled to prove his claim and to dividends thereon; the court may

Rector v. City Deposit Bank Co., 200 U. S. 405, 15 Am. B. R. 336, it was held that credit by clearing house association of check, payable to a bank subsequently adjudicated a bankrupt, to the account of another bank in the association, was an illegal preference which must be surrendered.

218. In re Hill & Co. (C. C. A., 7th Cir.), 12 Am. B. R. 221, 130 Fed. 315.

219. Collier on Bankr. (4th and 5th Ed.), citing In re Greth (D. C., Pa.), 7 Am. B. R. 598, 112 Fed. 978; In re Owings (D. C., Mo.), 6 Am. B. R. 454, 109 Fed. 623; In re Keller (D. C., Iowa), 6 Am. B. R. 351; 109 Fed. 131; In re Beiber, 2 N. B. N. Rep. 943. *Contra:* In re Baker, 2 N. B. N. Rep. 195.

220. Keppel v. Tiffin Savings Bank, 197 U. S. 356, 13 Am. B. R. 552.

221. In re Oppenheimer (D. C., Iowa), 15 Am. B. R. 267, 140 Fed. 51; In re Lange Co. (D. C., Iowa), 22 Am. B. R. 414, 170 Fed. 114. Compare In re Privett (D. C., N. Car.), 13 Am. B. R. 151, 132 Fed. 592, holding that a creditor who has received a preferential payment may either surrender his preference

and file his claim, or abandon his claim and stand on his preference; he cannot do both; Union Central Life Ins. Co. v. Drake (C. C. A., 8th Cir.), 32 Am. B. R. 252, 214 Fed. 536; Matter of Wenatchee Hgts. Orchard Co. (C. C. A., 9th Cir.), 32 Am. B. R. 620, 214 Fed. 227.

Effect of fraud in receiving preference.—A preferred creditor may prove his claim notwithstanding there has been no surrender of his preference by him beyond what is involved in the payment of a final judgment secured against him in a proceeding instituted by the trustee to avoid the preference. This is true, although the creditor, in furtherance of his fraud in receiving the preference, exposed the estate to delay and expense by prolonged and unwarranted litigation. Matter of Bergdoll Motor Co. (D. C., Pa.), 36 Am. B. R. 265, 230 Fed. 248.

222. In re Lee, Fed. Cas. 8,179. Compare Phelps v. Sterns, Fed. Cas. 11,080.

223. Zahm v. Fry, Fed. Cas. 18,198; Hood v. Karper, Fed. Cas. 6,664.

settle the amount of dividend coming to him, and the final decree may direct him to pay over the full amount of his preference, with interest, less the amount of his dividend.²²⁴ Where as a result of the litigation the creditor surrenders a preferential payment he is entitled to prove his claim against the estate irrespective of whether the suit to avoid the preference was instituted in a State court or in a court of bankruptcy, even though more than a year had expired from the time of the bankrupt's adjudication.²²⁵ The court may summarily diminish or expunge an allowed claim unless the claimant pays to the trustee the value of property of the bankrupt which he has taken and converted to his own use without any prior claim to it, after the petition in bankruptcy was filed.²²⁶ The surrender must be to the trustee, and not to the bankrupt.²²⁷

e. Subrogation claims.—(1) **IN GENERAL.**—Under subsection *i* a surety or indorser or other person secondarily liable for the bankrupt may prove the principal creditor's debt, but only when the principal creditor could prove and does not.²²⁸ The proving party simply has the same relief he would have had if the principal creditor had proved his claim.

224. *Page v. Rogers* (Sup. Ct.), 211 U. S. 575, 21 Am. B. R. 496; *Matter of Wenatchee Hgts. Orchard Co.* (C. C. A., 9th Cir.), 32 Am. B. R. 620, 214 Fed. 227.

Compulsory surrender of preferences.—The surrender clause contained in section 57-g should not be construed as inflicting a penalty upon creditors coming within the scope of the enlarged preference clauses of the bankruptcy act thereby entailing an unjust and unprecedented result. The surrender clause was intended simply to prevent a creditor from creating inequality in the distribution of the assets of a bankrupt estate by retaining a preference, and at the same time collecting dividends from the estate by a proof of his claim against it. Whenever the preference has been abandoned or yielded up and thereby the danger of inequality has been prevented, such creditor is entitled to stand upon an equal footing with other creditors and prove his claim. *Keppel v. Tiffin Savings Bank*, 197 U. S. 356, 13 Am. B. R. 552.

Where within the four months' period a bankrupt corporation pays its notes secured by mortgage upon property of the indorser, and judgment in an action to recover the payment as an alleged preference is rendered in favor of the trustee, more than a year after the adjudication in bankruptcy, the bank, upon payment into court of the full amount of the said judgment with interest and costs, is entitled to prove its claim upon the note as an unsecured claim. *In re Lange Co.* (D. C., Ia.), 22 Am. B. R. 414, 170 Fed. 114.

Right to prove as unsecured creditor where preference has been set aside.—Where a bank in good faith has asserted a preference based upon certain deeds of trust executed by the bankrupt which were subsequently held fraudulent and void, it is entitled to prove as an unsecured creditor for the amount

of its indebtedness. *In re Elletson Co.* (D. C., W. Va.), 28 Am. B. R. 434, 193 Fed. 84.

225. *In re Baker Notion Co.* (D. C., N. Y.), 24 Am. B. R. 808, 180 Fed. 922. See *In re Venstrom* (D. C., Wash.), 30 Am. B. R. 569, 205 Fed. 325; *Matter of Hamilton Automobile Co.* (C. C. A., 7th Cir.), 31 Am. B. R. 205, 209 Fed. 596, holding that a claim disallowed because of the creditors' refusal to surrender a preference may be subsequently reconsidered and allowed after the recovery of the preference by the trustee.

226. *In re Patterson Co.* (C. C. A., 8th Cir.), 25 Am. B. R. 855, 186 Fed. 629.

227. *In re Currier*, 13 N. B. R. 68, Fed. Cas. 3,492.

228. *Swarts v. Siegel* (C. C. A., 8th Cir.), 8 Am. B. R. 689, 117 Fed. 13; *In re Nickerson* (D. C., Mass.), 8 Am. B. R. 707, 116 Fed. 1003; *In re Carter* (D. C., Ark.), 15 Am. B. R. 126, 138 Fed. 846, where a mortgage was given by a married woman on her separate estate to secure her husband's debt to a bank, and she was permitted to prove her claim for money paid on the loan, in the name of the bank; *In re McGuire* (D. C., Ohio), 13 Am. B. R. 704, 137 Fed. 967. See *In re Coe* (D. C., N. Y.), 19 Am. B. R. 618, 157 Fed. 308; *In re Lange Co.* (D. C., Iowa), 22 Am. B. R. 414, 170 Fed. 114; *Sessler v. Paducah Distilleries Co.* (C. C. A., 5th Cir.), 21 Am. B. R. 723, 168 Fed. 44; *Matter of Manhattan Brush Mfg. Co.* (D. C., N. Y.), 31 Am. B. R. 747, 209 Fed. 997; *In re Salvatore Brewing Co.* (C. C. A., 2d Cir.), 28 Am. B. R. 56, 193 Fed. 989.

Claim of indorser of bankrupt corporation's joint note.—Bankrupt, a corporation, and one of its promoters, who was engaged in no other business except the management of the company's affairs, executed a joint negotiable note payable to the order of the third person who indorsed it over to claimant bank, for its face value less the discount.

(2) CLAIM OF PRINCIPAL TO BE PROVED.—It is the fixed liability of the bankrupt to the creditor which is to be proved, not the contingent liability of the bankrupt to the surety.²²⁹ The surety proves not his contingent claim, but the claim of the creditor, and he must prove it in the creditor's name. This right to prove arises, not from the original contract, but from the equities of the subsequent transaction.²³⁰ Since the right to prove exists primarily in the principal creditor, the surety cannot, after discharging part of the debt, be subrogated *pro tanto* and prove to that extent against the estate.²³¹ It is clear that if the principal creditor does not prove the debt, the surety is not released by the bankrupt's discharge.²³² The doctrine of subrogation may be applied to permit a third party who pays a debt and takes into his possession personal property held as security therefor, to prove the amount of such debt against the estate of the bankrupt debtor.²³³ A surety paying the debt of his principal after bankruptcy may set off the amount so paid against his debt to the bankrupt, and this is so, irrespective of the provisions of the bankruptcy act.²³⁴

(3) SURETY ON ATTACHMENT BONDS.—A surety on an attachment bond given by a bankrupt is a creditor, and if the surety pays a judgment rendered in an action on such bond, after the adjudication of the bankrupt, he is subrogated to the rights of the attachment creditor, and may prove the debt against the bankrupt.²³⁵ The attachment creditor may not waive its claim or withdraw proof thereof, with the effect of depriving the surety of the right to prove the claim.²³⁶

(4) RESTORATION OF PREFERENTIAL PAYMENTS.—Where preferential payments have been made by the bankrupt to the holder of notes to be applied thereon, and an indorser subsequently pays the balance due on such notes, he is subrogated to the rights of the holder *cum onere*, and can only prove such

The company acknowledged the debt to be its own and sought to secure it by a deed of trust, and it appeared that, at the time, it was purchasing new stock and material. *Held*, that bankrupt having received the benefit of the proceeds of the note it was liable therefor, and the indorser being liable to claimant bank on his indorsement, he was entitled to file proof of claim. *In re Elletson Co.* (D. C., W. Va.), 28 Am. B. R. 434, 193 Fed. 84.

229. *Insley v. Gardside* (C. C. A., 9th Cir.), 10 Am. B. R. 52, 121 Fed. 699, citing *Collier on Bankruptcy* (3d ed.), p. 383.

230. *In re Bingham* (D. C., Vt.), 2 Am. B. R. 223, 94 Fed. 796. See also *Courier, etc., Co. v. Schaefer-Myers Co.* (C. C. A., 6th Cir.), 4 Am. B. R. 183, 101 Fed. 699; *In re Schmechel, etc., Co.* (D. C., Mo.), 4 Am. B. R. 710, 104 Fed. 64.

231. *In re Heyman* (D. C., N. Y.), 2 Am. B. R. 651, 95 Fed. 800, and cases cited.

232. *National Bank of South Reading v. Sawyer* (Sup. Ct., Mass.), 6 Am. B. R. 154; *In re Perkins*, Fed. Cas. 10,983. Compare *Smith v. Wheeler*, 5 Am. B. R. 46, 55 N. Y. App. Div. 170, 66 N. Y. Supp. 780.

233. *In re Rudd* (D. C., N. Y.), 25 Am. B. R. 35, 180 Fed. 312.

234. See *In re Dillon* (D. C., Mass.), 4 Am. B. R. 63, 100 Fed. 931, holding that

where, upon the dissolution of a firm one partner agrees with his retiring copartners to become responsible for the payment of all firm debts and liabilities, the retiring partners become in equity sureties for the remaining partner, and this relation is recognized in bankruptcy.

235. *Kilpatrick v. United States Fidelity & Guaranty Co.* (C. C. A., 5th Cir.), 37 Am. B. R. 36, 228 Fed. 587.

236. *Waiver by principal; effect.*—A creditor held an attachment bond against a debtor who was afterwards adjudicated a bankrupt. After the adjudication judgment was entered on the bond in a proceeding pending at the time of the adjudication. Thereafter the creditor waived his right to dividends from the bankrupt's estate. *Held*, that the surety on the bond was a creditor at the time of the adjudication and at that time had the right to insist on the liquidation of any claim which the creditor had against the bankruptcy estate, and to discharge its liability on the bond, and therefore the creditor was powerless to waive, without consideration passing to the surety, and without its consent, any rights it had against the estate of the bankrupt. *Kilpatrick v. United States Fidelity & Guaranty Co.* (C. C. A., 5th Cir.), 37 Am. B. R. 36, 228 Fed. 587.

notes and participate in the distribution of the bankrupt's estate when he restores the preferential payments.²³⁷ Additional illustrative cases will be found in the foot-note.²³⁸ General Order XXI (4) should also be read in connection with this subsection.

f. Penalty and forfeiture claims.—The purpose of subsection *j* is clear. The creditors at large are not to be mulcted "except to the amount of the pecuniary loss sustained," interest and costs, because of debts owing the sovereign as a penalty or forfeiture. This clause does not affect a claim for a statutory penalty imposed for non-payment of a tax, in the nature of interest.²³⁹ A penalty imposed by statute for a wrongful act is not a provable claim in behalf of the person for whose benefit such penalty is imposed.²⁴⁰ A claim for a penalty inflicted upon a corporation for a failure to file a report falls within this subsection and is therefore not provable.²⁴¹ A judgment secured on a penalty is not provable, except as to any pecuniary loss sustained by the act out of which the penalty arose, together with actual and reasonable costs and interest, because it is not for a fixed liability.²⁴² The general subject of debts due the State is considered elsewhere.²⁴³

IV. CONTEST OF CLAIMS.

a. In general.—It is provided by subsection *a* that claims duly proved shall be allowed "unless objection to their allowance shall be made by the parties in interest." It is then provided in subsection *f* that such objections shall be heard and determined "as soon as the convenience of the court and the best interests of the estates and the claimant will permit." Subsections *k* and *l* provide for a reconsideration and rejection after allowance.²⁴⁴

b. Objection before allowance.—(1) **PROCEEDINGS ON CONTEST.**—Contests on claims usually arise from objections stated at the time claims are called before the election of a trustee. The result is a trial, as of an issue in equity, the objections being the bill, the proof of debt the answer.²⁴⁵ On the call of

^{237.} *Livingston v. Heineman* (C. C. A., 6th Cir.), 10 Am. B. R. 39, 120 Fed. 786.

Surrender of preference by surety, etc.—The rule is thus stated in the case of *In re Siegel-Hillman Dry Goods Co.* (D. C., Mo.), 7 Am. B. R. 351, 111 Fed. 980: "An indorser, an accommodation maker, or a surety on the obligation of a bankrupt, is a creditor, and a payment on such an obligation by the principal debtor while insolvent to the innocent holder of the contract, within four months before the filing of the petition for adjudication in bankruptcy, will constitute a preference which will debar the indorser, accommodation maker, or surety from the allowance of any claim in his favor against the estate of the bankrupt, unless the amount is first returned to that estate." See also *In re Lyon* (C. C. A., 2d Cir.), 10 Am. B. R. 25, 121 Fed. 723; *Swarts v. Siegel* (C. C. A., 8th Cir.), 8 Am. B. R. 689, 117 Fed. 13; *In re Scherzer* (D. C., Iowa), 12 Am. B. R. 451, 130 Fed. 631.

^{238.} *In re Christensen*, 2 N. B. N. Rep. 1094; *In re New* (D. C., Ohio), 8 Am. B. R. 566, 116 Fed. 116; *Whited v. Pillsbury*, Fed. Cas. 17,572. Compare also *Hayer v. Comstock* (Sup. Ct., Iowa), 7 Am. B. R. 493,

115 Iowa 187, and *Phillips v. Dreher Shoe Co.* (D. C., Pa.), 7 Am. B. R. 326, 112 Fed. 404; *Swarts v. Bank* (C. C. A., 8th Cir.), 8 Am. B. R. 673, 117 Fed. 1.

^{239.} *Matter of Scheidt Bros.* (D. C., Ohio), 23 Am. B. R. 778, 177 Fed. 599.

^{240.} *In re Southern Steel Co.* (D. C., Ala.), 25 Am. B. R. 358, 183 Fed. 498, in which case it was held that a statutory penalty for cutting trees under Code of Alabama, section 6035, is not in the nature of an implied contract to reimburse the owner of the trees to the extent of the damage caused, but is an arbitrary fine imposed on the wrongdoer and is not therefore a claim which may be proved against a bankrupt.

^{241.} *Matter of York Silk Mfg. Co.* (D. C., Pa.), 26 Am. B. R. 650, 188 Fed. 735.

^{242.} *Matter of Abramson and Fichhandler* (C. C. A., 2d Cir.), 32 Am. B. R. 156, 210 Fed. 878.

^{243.} See under Sections Seventeen and Sixty-four.

^{244.} See Am. Bankr. Dig. §§ 747-755.

^{245.} For a breach of promise case in bankruptcy, see *In re Crocker* (Ref., N. Y.), 8 Am. B. R. 188.

claims duly approved and filed there must be an opportunity for objections to allowances by parties in interest.²⁴⁶ If the claimant appears at a hearing on his claim and participates in a proceeding without objecting to the form of the objections, he thereby waives any informality which may have existed.²⁴⁷

(2) FORM OF AND MANNER OF MAKING OBJECTIONS.—In some districts, it is the custom to dispatch business by noting an oral objection, with the proviso that it shall be reduced to writing and filed within ten days, or the claim stand allowed. A trustee's objections may be stated orally, although preferably they should be filed in writing.²⁴⁸ Although the statute is silent as to the form of the objections, it is better that they should be in writing, and sufficiently explicit to indicate to the claimant the nature and character thereof.²⁴⁹ The manner of making such objections is largely committed to the discretion of the referee.²⁵⁰ They need not be under oath.²⁵¹

(3) WHO MAY OBJECT.—The phrase "parties in interest" applies to those who have an interest in the *res* which is to be administered and distributed in the proceeding and does not include those who are merely debtors or alleged debtors of the bankrupt.²⁵² Stockholders of a bankrupt corporation having no provable claims against the corporation are not parties in interest.²⁵³ An unsecured creditor may object to the proof of claim by another unsecured creditor.²⁵⁴

(4) TESTIMONY UPON HEARING OBJECTIONS.—Testimony taken at meetings of creditors, which the claimant did not attend and of which he received no notice, is not admissible upon the hearing of his claim.²⁵⁵ A verified proof of claim will be considered as testimony in behalf of the claimant; no inference is to be drawn from his failure to testify in his own behalf since he is subject to call by the court or contestant to explain his claim.²⁵⁶ The verified claim of the claimant has some probative force. It is *prima facie* evidence of the allegations contained therein. A person who objects to the claim must produce some evidence in support of the assertion that the claim is invalid.²⁵⁷

246. In re Back Bay Automobile Co. (D. C., Mass.), 19 Am. B. R. 835, 158 Fed. 679, revg. 19 Am. B. R. 33; In re Two Rivers Woodenware Co. (C. C. A., 7th Cir.), 29 Am. B. R. 518, 199 Fed. 877.

247. Orr v. Park (C. C. A., 5th Cir.), 25 Am. B. R. 554, 183 Fed. 683, citing Collier on Bankruptcy (8th ed.), p. 608.

248. In re Cannon (D. C., Pa.), 14 Am. B. R. 114, 133 Fed. 837.

249. In re Royce Dry Goods Co. (D. C., Mo.), 13 Am. B. R. 257, 133 Fed. 100.

250. In re Cannon (D. C., Pa.), 14 Am. B. R. 114, 133 Fed. 837.

Discretion of referee.—The bankruptcy act and the rules in bankruptcy are silent as to the form of objections to claims against the bankrupt estate and the manner of making such objections should be largely committed to the discretion of the referee. Orr v. Park (C. C. A., 5th Cir.), 25 Am. B. R. 554, 183 Fed. 683, citing Collier on Bankruptcy (8th ed.), p. 608.

251. In re Wooten (D. C., N. Car.), 9 Am. B. R. 247, 118 Fed. 670.

252. Matter of Sully & Co. (C. C. A., 2d Cir.), 18 Am. B. R. 123, 152 Fed. 619.

253. In re Pittsburg Lead & Zinc Co., Con-

solidated (D. C., Mo.), 28 Am. B. R. 880, 198 Fed. 316.

254. In re Hatem (D. C., N. Car.), 20 Am. B. R. 470, 161 Fed. 895.

255. In re Hersey (D. C., Iowa), 22 Am. B. R. 863, 171 Fed. 1004.

256. Baumhauer v. Austin (C. C. A., 5th Cir.), 26 Am. B. R. 385, 186 Fed. 260, revg. 24 Am. B. R. 750, 179 Fed. 966; Moore v. Crandall (C. C. A., 9th Cir.), 30 Am. B. R. 517, 205 Fed. 689.

257. Verified claim as evidence.—In the case of Whitney v. Dresser, 200 U. S. 532, 15 Am. B. R. 326, the court said: "The words of the statute suggest if they do not distinctly import that the objector is to go forward and show that the formal proof is evidence even when put in issue. The words are 'Objections to claims shall be heard and determined as soon,' etc. (§ 57-f). It is the objection in the claim which is pointed out for hearing and determination. This indicates that the claim is regarded as having a certain standing already established by the oath. Some force also may be allowed to the word 'proof' as used in the act. Convenience, undoubtedly, is on the side of this view. Bankruptcy proceedings

Where a claimant promptly files his claim and offers evidence in support of objections to a subsequent claim which is identical, the subsequent claimant may be permitted to introduce evidence in rebuttal.²⁵⁸

(5) DETERMINATION OF REFEREE.—The right to a review of the referee's decision is generally recognized; but the decision below is in effect that of a court of first instance and on questions of fact the judge will not disturb it, unless clearly erroneous.²⁵⁹ Where a referee's order disallowing a claim upon claimant's proof has been reversed, the matter should be remanded to enable the trustee to controvert the claim.²⁶⁰ A claim may be allowed in part and it is not error for a referee to deduct one item and allow the claim as reduced without requiring it to be resworn.²⁶¹

c. Reconsideration and rejection.—(1) PRACTICE AND PETITION.—(I) *In general*.—A claim once allowed can be re-examined and excluded in whole or in part, but the methods prescribed by this section seem to be exclusive.²⁶² Such a claim may be reconsidered for cause before the estate has been closed and a subsequent disposition thereof may be made according to the equities.²⁶³

are more summary than ordinary suits. Judges of practical experience have pointed out the expense, embarrassments and delay which would be caused if a formal objection necessarily should put the creditor to the production of evidence or require a continuance. Justice is secured by the power to continue the consideration of a claim whenever it appears there is good reason for it. We believe that the understanding of the profession, the words of the act and convenient and just administration are all on the side of treating a sworn proof of claim as some evidence even when it is denied."

Burden of proof.—The presentation of a claim evidenced, by promissory notes, supported by deposition and proof or duly executed by the treasurer of a corporation constitutes a *prima facie* cause against the estate and casts the burden upon the objector to go forward with proof. *Matter of Montgomery* (D. C., Tex.), 25 Am. B. R. 431, 185 Fed. 955. See also *In re Carter* (D. C., Kan.), 15 Am. B. R. 126, 128 Fed. 846, holding that the presentation of the claim in proper form, duly verified except as to particulars which the court treats as waived, presents a *prima facie* case in favor of the claimant upon which it has a right to rest and the burden of proof is upon the objectors; *In re Cannon* (D. C., Pa.), 14 Am. B. R. 114, 133 Fed. 837; *In re Sumner* (D. C., N. Y.), 4 Am. B. R. 123, 101 Fed. 224. In the case of *In re Schwarz* (D. C., N. Y.), 29 Am. B. R. 700, 200 Fed. 309, it was held that the presentation of a promissory note accompanied by a duly verified claim casts upon a creditor objecting thereto the burden of furnishing some evidence to rebut that furnished by possession of the note and by the verified allegations of the claim; but upon such testimony being presented and further evidence being offered in support of the note, the question to be determined is whether the claimant has sustained the

burden of proof, which necessarily rests upon him, to establish his claim.

258. *In re Dunlap Carpet Co.* (D. C., Pa.), 30 Am. B. R. 664, 206 Fed. 726.

259. *In re Wood* (D. C., N. Car.), 2 Am. B. R. 695, 95 Fed. 946; *In re Rider* (D. C., N. Y.), 3 Am. B. R. 192, 96 Fed. 811. See also *In re Clark* (D. C., Wash.), 7 Am. B. R. 96, 111 Fed. 893.

The findings of fact of a referee as to the validity of a claim will not be overruled, except upon convincing proof that he was wrong in his conclusions. *In re Hatem* (D. C., N. Car.), 20 Am. B. R. 470, 161 Fed. 895. A referee's decision, allowing the bankrupt a rebate upon his purchases as against the creditor's claim, may be affirmed, although the court might not have come to the same conclusion. *In re Douglas & Sons Co.* (D. C., Conn.), 8 Am. B. R. 113, 114 Fed. 772. The determination of a referee as to the validity of a claim upon objections filed by the trustee should be sustained when it does not appear that it was clearly erroneous. *In re Greenfield* (D. C., Pa.), 27 Am. B. R. 427, 193 Fed. 98.

Right of bankrupt to present claim as guardian after refusal of discharge.—Where a voluntary bankrupt has been refused a discharge, his application to have the action of the referee reviewed in refusing to allow his claim as guardian for his children to be filed is without merit, because in no event could he be discharged from the same. *Matter of Roberts* (D. C., W. Va.), 32 Am. B. R. 541, 213 Fed. 905.

260. *In re Livingston Co.* (C. C. A., 2d Cir.), 16 Am. B. R. 385, 144 Fed. 971.

261. *In re Goldstein* (D. C., Mass.), 29 Am. B. R. 301, 199 Fed. 665.

262. *In re Roanoke Furnace Co.* (D. C., Pa.), 18 Am. B. R. 661, 152 Fed. 846; *Matten of Collins* (D. C., Ia.), 37 Am. B. R. 692, 235 Fed. 937. See Am. Bankr. Dig. § 760.

263. *In re Effinger* (D. C., Md.), 25 Am. B. R. 924, 184 Fed. 724.

But objections after allowance should be made within the year within which an amended proof of claim might have been filed.²⁶⁴ Upon reconsideration the court may either diminish the claim or expunge it entirely.²⁶⁵

(II) *Jurisdiction of court or referee.*—The practice is indicated in General Order XXI (6). The referee is the court of first instance; the register under the former law was obliged to certify such contests to the judge. If a claim is rejected, it must be “for cause,” and “before but not after the estate has been closed.” The district court has no jurisdiction to act upon a petition for a rehearing of the claim during pendency of appeal under § 25-a.²⁶⁶ A bankruptcy court in which an estate is being administered has full power to inquire into the validity of any alleged debt or obligation of the bankrupt upon which a demand or claim against the estate is based.²⁶⁷

(III) *Petition; who may present.*—The application is by petition,²⁶⁸ by parties in interest,²⁶⁹ and when there is a trustee in existence can only be presented by him, and then only when demanded by the interests of all the creditors.²⁷⁰ But where no trustee has been appointed the bankrupt may move to set aside and expunge a claim which has been allowed.²⁷¹ If a trustee refuses to move for the reconsideration of a claim which has been allowed when he ought to do so, he may be compelled to act or to permit the objecting creditors to act in his name.²⁷² The right of a creditor who moves to expunge

264. Time within which objection should be made.—After the lapse of four years since the allowance of a claim the trustee is estopped from objecting to the sufficiency of the form of the claim. *Matter of Collins* (D. C., W. Va.), 32 Am. B. R. 785, 215 Fed. 247.

265. In re Paterson Co. (C. C. A., 8th Cir.), 25 Am. B. R. 855, 186 Fed. 629.

266. First Nat'l Bank v. State Nat'l Bank (C. C. A., 9th Cir.), 12 Am. B. R. 429, 440, 131 Fed. 422.

267. Lesser v. Gray, 236 U. S. 70, 34 Am. B. R. 8.

268. See form of petition and notice among the “Supplementary Forms,” post. See also Hagar and Alexander's Bankruptcy Forms (2d Ed.). As to a time limit on such petitions, see *In re Chambers* (Ref., R. I.), 6 Am. B. R. 707. As to a petition against several creditors, see *In re Lyon* (Ref., N. Y.), 7 Am. B. R. 61.

269. Matter of Sully & Co. (C. C. A., 2d Cir.), 18 Am. B. R. 123, 152 Fed. 619.

Stockholders of a bankrupt corporation upon whom has been levied an assessment which they will have to pay if the claim they object to is allowed, are “parties in interest,” and may move to set aside the order allowing such claim and to expunge and disallow the same. *Rosenbaum v. Dutton* (C. C. A., 8th Cir.), 30 Am. B. R. 155, 203 Fed. 838.

270. Matter of Lewensohn (C. C. A., 2d Cir.), 9 Am. B. R. 368, 121 Fed. 538; *Matter of Sully & Co.* (D. C., N. Y.), 15 Am. B. R. 304, 142 Fed. 895. Compare *In re Levy* (Ref., N. Y.), 7 Am. B. R. 56; *In re Howard* (D. C., Cal.), 4 Am. B. R. 69, 100 Fed. 630.

Reconsideration of claims; rights of cred-

itors.—Where certain creditors have made objection to and conducted a controversy over a claim in their own names, having voluntarily assumed the liability for costs and expenses, and have shown that the claim should be disallowed, the court will not ignore what has been done, upon the technical ground that the trustee is the only person to dispute the validity of claims against a bankrupt's estate. *In re Canton Iron & Steel Co.* (D. C., Md.), 28 Am. B. R. 791, 197 Fed. 767.

271. In re Ankeny (D. C., Iowa), 4 Am. B. R. 72, 100 Fed. 614, 2 N. B. N. 249.

272. Refusal of trustee to act.—In the case of *In re Stern* (C. C. A., 8th Cir.), 16 Am. B. R. 510, 144 Fed. 956, the court said: “In respect to opposing the allowance of claims and moving for their reconsideration after they have been allowed, the trustee is not bound to comply with every request preferred by objecting creditors, irrespective of its merits, nor is he clothed with absolute discretion to refuse. As the representative of the estate, he is bound to exercise his judgment and to act for the best interests of all concerned, but subject to the supervising power of the referee and the district judge. He does not act judicially but only administratively, and if he refuses to oppose a claim or to move for its reconsideration when he ought to do so, he may be compelled to act or to permit the objecting creditors to act in his name.” See also *In re Lewensohn* (C. C. A., 2d Cir.), 9 Am. B. R. 368, 121 Fed. 538; *In re Baird* (D. C., Pa.), 7 Am. B. R. 448, 112 Fed. 960; *Chatfield v. O'Dwyer* (C. C. A., 8th Cir.), 4 Am. B. R. 313, 101 Fed. 797; *Matter of Ferrer* (D. C., Porto Rico), 22 Am. B. R. 785, holding that if a

the allowance of another creditor's claim is no higher than that of the bankrupts.²⁷³ Creditors themselves should not be permitted to supersede the trustees, and intervene for the purpose of a re-examination.²⁷⁴ A referee may, upon his own motion, take such action as may be necessary to correct an erroneous determination as to the allowance of a claim, due notice being given to the parties concerned.²⁷⁵

(IV) *Practice on application; pleadings; hearings and evidence.*—The application must be made promptly or it will be denied because of laches.²⁷⁶ But it has been held that reconsideration may be allowed after twelve months have elapsed since the filing of a claim, where it appears that no dividend has been paid on the claim and nothing has happened to prejudice the rights of the claimant.²⁷⁷ When application is made to increase or decrease the sum at which a claim has previously been allowed, the better practice is to vacate the former order of allowance, and allow the claim for the new amount.²⁷⁸ The creditors whose claims it is sought to reconsider should be given an opportunity to oppose the application for reconsideration. The bankrupt is not interested in the application and is charged with no duty

trustee wrongfully refuses to take the necessary action to secure a reconsideration, an order will be granted, compelling the trustee to show cause why he should not move for a reconsideration.

Remedy of creditors.—Where a general creditor is dissatisfied with the allowance of the claim of another creditor, his proper remedy is a demand upon the trustee to move for a reconsideration or review of such claim, or, if the trustee upon demand declines to act, then by a motion to the District Court that the trustee be required to move, or that the objecting creditor be permitted to move in his own name. In re Mexico Hardware Co. (D. C., N. Mex.), 28 Am. B. R. 736, 197 Fed. 650.

273. In re Arnold & Co. (D. C., Mo.), 13 Am. B. R. 320, 133 Fed. 789.

274. Matter of Sully & Co. (D. C., N. Y.), 15 Am. B. R. 304, 142 Fed. 895.

Application for re-examination in the interest of bankrupt's debtors.—That an application by creditors whose claims have been proven and allowed for an order compelling a trustee to petition for the re-examination of the claims of other creditors was made in the interest of alleged debts of the bankrupt is not a sufficient reason for denying it where it does not appear that in other respects the application was not a meritorious one as the application being a legitimate one and the assertion of a clear, legal right, under section 57, should not have been denied upon a consideration of motive. Matter of Sully & Co. (C. C. A., 2d Cir.), 18 Am. B. R. 123, 152 Fed. 619.

Debtors of a bankrupt estate are denied the right to move for the reconsideration of claims which have been allowed. In re Pittsburg Lead & Zinc Co., Consolidated (D. C., Mo.), 28 Am. B. R. 880, 198 Fed. 316.

275. International Agricultural Corp. v. Cary (C. C. A., 6th Cir.), 38 Am. B. R. 753, in which the court said: "While it is probably the better practice generally for the referee to act upon petition of the trustee or of creditors, and, in case the information comes in the first instance to the referee, to direct the trustee to institute proceedings for re-examination, yet we cannot think that the referee is without jurisdiction to act, as in the case in question, upon his own motion. There may or may not have been good reason for proceeding *sua sponte*, but the presence or absence of such reason is not fatal to jurisdiction. A court of bankruptcy is a court of equity (Bardes v. National Bank, 178 U. S. 524, 535, 4 Am. B. R. 163); the proceedings therein are more summary than in ordinary suits; and it cannot be that an equity court, acting under such summary practice, is powerless, in the interests of justice, on its own motion to take steps to correct what it believes to have been an erroneous action had upon insufficient knowledge; and the general rule is that firm creditors are not entitled to receive dividends from the separate estates of the partners until separate creditors have been paid in full."

276. In re Hamilton Furniture Co. (D. C., Pa.), 8 Am. B. R. 588, 116 Fed. 115; in Matter of Hinckel Brewing Co. (D. C., N. Y.), 10 Am. B. R. 484, 123 Fed. 492; Matter of Collins (D. C., W. Va.), 32 Am. B. R. 785; 215 Fed. 247.

The question of laches is a question of law where the facts are undisputed. Matter of Sully & Co. (C. C. A., 2d Cir.), 18 Am. B. R. 123, 152 Fed. 619.

277. In re Globe Laundry (D. C., Tenn.), 28 Am. B. R. 831, 198 Fed. 365.

278. In re Smith (Ref., N. Y.), 2 Am. B. R. 648.

concerning it and is therefore not entitled to be heard upon it.²⁷⁹ The claimant is entitled to "due notice" by mail; the time is usually fixed by the referee. It is customary to notify the claimant's attorney of record also. The issue is made by the petition and the proof of debt, the burden being on the petitioner, at least to overcome the *prima facie* case made by the proof of debt.²⁸⁰ Objections to proofs of claims should be set forth in the form of a petition for review.²⁸¹ Each creditor must file his own objections, and make an issue, he cannot adopt the answer of the bankrupt.²⁸² The defense of usury is as available to the debtor's trustee in bankruptcy as to the debtor himself.²⁸³ A trustee's petition for the reconsideration of an allowed claim should allege facts which, if true, are sufficient cause for a re-examination. It is not necessary to allege facts which, if proved, would defeat the claim.²⁸⁴ Although the bankrupt has failed to deny an allegation that one of the petitioners is a creditor, the petitioner must prove his claim, and the trustee or any creditor may contest the claim.²⁸⁵ Neither party is entitled to a jury.²⁸⁶ The customary rules of evidence apply.²⁸⁷ The practice on trials in equity should be followed.²⁸⁸

(V) *Decision; form of order.*—The result is an order either (1) reallowing the claim, or (2) rejecting it, or (3) reducing or increasing it; if the claim is rejected, Form No. 39 should be used; if it is reduced, Form No. 38. The referee cannot pass upon and decide controversies involving questions of fact pertaining to or involving the interests of third parties in property belonging to the estate.²⁸⁹ After a decision and before a formal order has been entered, the referee may, in his discretion, deny a trustee's motion to dismiss his petition for a reconsideration and disallowance.²⁹⁰

279. In re Effinger (D. C., Md.), 25 Am. B. R. 924, 184 Fed. 724.

280. In re Doty (Ref., N. Y.), 5 Am. B. R. 68; In re Sumner (D. C., N. Y.), 4 Am. B. R. 123, 101 Fed. 223. Compare also In re Saunders, Fed. Cas. 12,371.

The burden of proof is upon a creditor moving for the re-examination of another's claim on the ground of an alleged release of the same to the bankrupt. In re Howard (D. C., Cal.), 4 Am. B. R. 69, 100 Fed. 630.

281. Matter of Linton (Ref., Pa.), 7 Am. B. R. 676.

Irregular procedure.—Where creditors have filed exceptions to a claim which have been treated precisely as a petition for the reconsideration and disallowance of the claims, an order disallowing the claim will not be set aside on the ground that a petition for reconsideration and disallowance, and not exceptions, should have been filed. In re Canton Iron & Steel Co. (D. C., Md.), 28 Am. B. R. 791, 197 Fed. 767.

282. Ayres v. Cone (C. C. A., 8th Cir.), 14 Am. B. R. 739, 746, 138 Fed. 733.

283. In re Stern (C. C. A., 8th Cir.), 16 Am. B. R. 570, 144 Fed. 956.

284. In re Watkinson & Co. (D. C., Pa.), 12 Am. B. R. 370, 130 Fed. 218.

Sufficiency of petition.—Where the petition for reconsideration of a claim avers the renewal and extension of an obligation without the knowledge of the bankrupt, but does not aver that the renewed obligation was taken in lieu of the original obligation or

that there was a consideration given for the contract of renewal, it is sufficient to let in proof showing an extension. In re Ankeny (D. C., Ia.), 4 Am. B. R. 72, 100 Fed. 614, 2 N. B. N. 249.

285. In re Harper (D. C., N. Y.), 23 Am. B. R. 918, 175 Fed. 412.

286. In re Christensen (D. C., Iowa), 4 Am. B. R. 99, 101 Fed. 243; Barton v. Barbour, 104 U. S. 126.

287. See, in this connection, In re Shaw (D. C., Pa.), 6 Am. B. R. 499, 109 Fed. 780. Consult also In re Merrill, Fed. Cas. 9,466; In re Moore, Fed. Cas. 9,752; Canby v. McLearn, Fed. Cas. 2,378.

Oral confessions, denied and uncorroborated, are not sufficient to support a claim. In re Kaldenberg (D. C., N. Y.), 5 Am. B. R. 6, 105 Fed. 232.

288. Compare the Equity Rules. See also In re Keller (D. C., Iowa), 6 Am. B. R. 334, 109 Fed. 118.

Expiration of time to file answer.—Where the time allowed a claimant to file an answer to a petition to expunge his claim expires without an answer being filed, an application for leave to file an answer, made after the trustee has presented all his testimony, is properly denied. In re Lewis, Eck & Co. (D. C., Pa.), 18 Am. B. R. 657, 153 Fed. 495.

289. In re Peacock (D. C., No. Car.), 24 Am. B. R. 159, 178 Fed. 851.

290. Matter of Brown (D. C., Ky.), 35 Am. B. R. 826, 228 Fed. 533, holding that ordinarily a plaintiff may dismiss his suit, but

(VI) *Review of order*.—The right of a party aggrieved by such an order to review, and the practice on a review, and the binding effect of the rulings below on questions of fact, are considered elsewhere;²⁹¹ likewise, the effect of proving judgments in other courts.²⁹²

(VII) *Costs and expenses*.—Costs, while often not allowed on such contests, are discretionary. Where it appears that either the claim or the contest was not in good faith, they will usually be given.²⁹³ The referee is not entitled to extra compensation for hearing and deciding, but he can insist on reimbursement or indemnity for his expenses, as in the employment of a stenographer, and the like.²⁹⁴ Illustrative cases under the present law, not already cited, will be found in the foot-note.²⁹⁵

(2) *RECOVERY OF DIVIDENDS IN SUCH CASES*.—It is the trustee's duty to recover a dividend that has been paid, if a claim is rejected, or the proportional part, if it is reduced. The statute is silent as to how this should be done. The claimant being a party, it would seem possible to require him to repay as a part of the order rejecting or reducing, and then, at the instance of the trustee, proceed in contempt if the claimant does not obey. In any event, the trustee can proceed by suit in the proper court.²⁹⁶

V. TIME LIMITATION ON THE ALLOWANCE OF CLAIMS.

a. *Purpose and effect of limitation*.—(1) *IN GENERAL*.—Subsection *n* is new and provides that claims cannot be proved against the bankrupt estate subsequent to one year after the adjudication.²⁹⁷ The purpose of the law is to give

a trustee petitioner cannot be allowed to speculate upon the chances of obtaining a favorable decision and upon learning that the decision will be unfavorable frustrate the whole purpose of the proceeding by dismissing his petition.

291. See pp. 667-675, *ante*; also General Order XXVII.

292. Consult Section Sixty-three, *post*.

293. Compare *In re Little River Lumber Co.* (D. C., Ark.), 3 Am. B. R. 682, 101 Fed. 558; *Matter of Elk Valley Coal Co.* (D. C., Ky.), 31 Am. B. R. 545, 210 Fed. 386; *Matter of All Star Feature Corp.* (D. C., N. Y.), 37 Am. B. R. 610, 232 Fed. 1004; *In re Troy Woolen Co.*, Fed. Cas. 14,203.

294. General Order X.

295. *In re Headley* (D. C., Mo.), 3 Am. B. R. 272, 97 Fed. 765; *In re Wise*, 2 N. B. N. Rep. 250; *In re Smith* (Ref., N. Y.), 2 Am. B. R. 648.

296. When creditors may be required to refund dividends.—After an adjudication in bankruptcy a judgment was entered against the bankrupt in an action pending in the State court at the time the petition was filed. The bankruptcy court ordered that the judgment creditors perfect an appeal within sixty days, otherwise the court would not delay its action. No appeal having been perfected within sixty days, dividends were paid according to the judgment of the State court; but thereafter an appeal was perfected and the judgment reversed. It was held that the judgment creditor, not having appealed within the time fixed, must refund the dividends

received prior to the reversal of his judgment on the ground that having waived the condition as to time and reopened the litigation they should abide the final result. *Nelson v. Heckscher* (C. C. A., 4th Cir.), 33 Am. B. R. 514, 219 Fed. 679.

297. *In re Stein* (D. C., Ind.), 1 Am. B. R. 662, 94 Fed. 124; *Bray v. Cobb* (D. C., N. Car.), 3 Am. B. R. 788, 100 Fed. 270; *In re Shaffer* (D. C., N. Car.), 4 Am. B. R. 728, 104 Fed. 982; *In re Rhodes* (D. C., Pa.), 5 Am. B. R. 197, 105 Fed. 231; *In re Leibowitz* (D. C., Tex.), 6 Am. B. R. 268, 108 Fed. 617, Note also *Hutchinson v. Otis* (C. C. A., 1st Cir.), 8 Am. B. R. 382, 115 Fed. 937; *In re Moebius* (D. C., Pa.), 8 Am. B. R. 590, 116 Fed. 47; *In re Hawk* (C. C. A., 8th Cir.), 8 Am. B. R. 71, 114 Fed. 916; *In re Rosenberg* (D. C., Pa.), 16 Am. B. R. 465, 144 Fed. 442; *Steinhardt v. Nat. Park Bank*, 19 Am. B. R. 72, 120 N. Y. App. Div. 255, 105 N. Y. Supp. 23, revg. 18 Am. B. R. 86; *Cartwright v. West* (Ala. Sup. Ct.), 26 Am. B. R. 831, 55 So. 917, citing *Collier on Bankruptcy* (8th ed.), pp. 612, 613. As to expiration of year, see *In re Co-operative Knitting Mills* (D. C., N. Y.), 30 Am. B. R. 181, 202 Fed. 1016.

Effect of subsection.—This subdivision, "while providing that no claim shall be proved subsequent to one year after the adjudication, provides by implication and effect that any claim may be proved within one year after the adjudication." (Opinion of referee.) *Matter of Bell Piano Co.* (D. C., N. Y.), 18 Am. B. R. 183, 155 Fed. 272.

to each and every creditor one year after adjudication in which to prove and file his claim. It is optional with him to do so or not. This provision is intended for the benefit of creditors who file their proofs of claim promptly and to give them the benefit of their own diligence. It was also intended to facilitate the administration and settlement of the assets of bankrupts.²⁹⁸ The authorities hold that the language of this subsection is more than a limitation of time and is an absolute prohibition.²⁹⁹ But this prohibition is not binding on the United States.³⁰⁰ If an appeal is brought from the order of adjudication it has been held that the time begins to run from the date of the dismissal of the appeal.³⁰¹

(2) APPLICATION OF LIMITATION.—It has no application to an adverse claim of title to property in the possession of a trustee; such a claim is not a debt of the bankrupt or his estate.³⁰² Nor does it apply to a controversy arising between an assignee of a proven claim and the assignor.³⁰³ The limitation was not intended to apply to a claim arising after the bankruptcy proceedings were instituted, as part of the cost of administration.³⁰⁴ The requirement is in line with the policy of the statute to compel rapidity of administration, and is applicable where a composition has been effected.³⁰⁵ The section only applies to claims sought to be asserted in bankruptcy; it would not prevent

"No statutory right to file a proof of claim subsequent to the expiration of a year after adjudication exists." *Matter of Ingalls Bros.* (C. C. A., 2d Cir.), 13 Am. B. R. 512, 137 Fed. 517. The court has no discretionary power to permit the filing and proof of a claim after the expiration of the statutory period. *In re Sanderson* (D. C., Vt.), 20 Am. B. R. 396, 160 Fed. 278.

An application by creditors who were neither deprived of an opportunity to ascertain the value of the assets and whether or not property had been concealed or otherwise improperly disposed of, nor prevented from filing their claims in time, for leave to file and prove claims, will be denied, where, after the expiration of a year following adjudication, it is discerned that assets scheduled and stated to be of no value are valuable. *In re Peck* (D. C., N. Y.), 20 Am. B. R. 629, 161 Fed. 762.

^{298.} *In re Peck* (D. C., N. Y.), 20 Am. B. R. 629, 161 Fed. 762, *affd.* 21 Am. B. R. 707, 168 Fed. 48.

^{299.} *Matter of Bimberg* (D. C., N. Y.), 9 Am. B. R. 601, 121 Fed. 042.

Extension of time.—§57n, requiring claims to be proved within one year from adjudication, is prohibitory and leaves the court no discretion to extend the time. Hence, a creditor who has failed to prove a scheduled claim within the period required is not entitled to have his claim allowed against the objection of the bankrupt out of moneys deposited by the bankrupt for the purposes of a composition, although such deposit is sufficient. *Matter of Blond* (D. C., Mass.), 34 Am. B. R. 193, 188 Fed. 452.

^{300.} *In re Stover* (D. C., Pa.), 11 Am. B. R. 345, 127 Fed. 394.

^{301.} *In re Lee* (D. C., Pa.), 22 Am. B. R. 820, 171 Fed. 266.

^{302.} *Nauman Co. v. Bradshaw* (C. C. A., 8th Cir.), 27 Am. B. R. 565, 193 Fed. 350.

^{303.} *Matter of Breakwater Co.* (D. C., Pa.), 36 Am. B. R. 752.

^{304.} *Matter of Green* (D. C., Pa.), 36 Am. B. R. 188, 231 Fed. 253.

^{305.} *In re Brown* (D. C., Colo.), 10 Am. B. R. 588, 123 Fed. 336.

Where a composition is effected a bankrupt may be heard to object to the allowance of the claim offered for proof after the expiration of the year, although he in good faith omitted it from his schedules. *In re Lane* (D. C., Mass.), 11 Am. B. R. 136, 125 Fed. 772. But it was doubted in *In re Fox* (Ref., Ohio), 6 Am. B. R. 525, whether the year's limitation for proving claims against bankrupt estates, laid down in section 57-n, had any application to composition cases. In the case of *In re French* (D. C., Mass.), 25 Am. B. R. 77, 181 Fed. 583, it was held that in proceedings for the confirmation of a composition the bankrupt has the right to appear in opposition to the allowance of claims which, although scheduled, had not been filed within the year and he would have this right even if he had inadvertently omitted such claims from his schedules; claims which have not been filed within one year after adjudication are not only barred from allowance in bankruptcy proceedings but lose all standing before the court for the purpose of composition.

When an estate is to be administered it is necessary to put a time limit to the proving of claims, because the rate of dividend depends upon what claims are proven, but this is not so in a composition because the dividend is necessarily fixed by the bankrupt upon the schedules alone. *Matter of Atlantic Construction Co.* (D. C., N. Y.), 35 Am. B. R. 838, 228 Fed. 571.

the creditor from setting up his claim, which had not been presented within the year, as a defense in an action brought against him by the trustee.³⁰⁶

(3) FILED WITH REFEREE.—The word “proved” must be read to include filing the claim with the referee; consequently no claim can be allowed against the bankrupt estate unless it has not only been filed but also filed with the referee within one year after the date of the adjudication.³⁰⁷ It is not sufficient that a sworn statement of the claim be made within the time limitation, but such sworn statement must be filed or presented in some form in the bankruptcy proceeding to prevent such claim from being barred by the statute.³⁰⁸

(4) PRESENTATION TO TRUSTEE.—Where a claim is duly presented to the trustee within the year, it is a sufficient compliance with the requirement of the statute, although not delivered to the referee until after that time.³⁰⁹

(5) PRESENTATION OF FACTS SHOWING CLAIM.—It has been held that a presentation of facts before the court establishing the existence of a valid claim against the bankrupt estate is a sufficient compliance with the requirement that a claim must be filed within one year after the adjudication.³¹⁰

306. *Norfolk & W. R. Co. v. Graham* (C. C. A., 4th Cir.), 16 Am. B. R. 610, 145 Fed. 809.

307. *Matter of Pettingill Co.* (Ref., Mass.), 14 Am. B. R. 763.

308. *In re French* (D. C., Mass.), 25 Am. B. R. 77, 181 Fed. 583.

309. *Orcutt Co. v. Green*, 204 U. S. 96, 17 Am. B. R. 72, revg. 13 Am. B. R. 512 (*sub nom.* *Matter of Ingalls Bros.*), see *In re Co-operative Knitting Mills* (D. C., N. Y.), 30 Am. B. R. 181, 202 Fed. 1016.

Presentation of claim to trustee.—In the case of *Orcutt Co. v. Green*, 204 U. S. 96, 17 Am. B. R. 72, revg. 13 Am. B. R. 512 (*sub nom.* *Matter of Ingalls Bros.*), the court said: “General Order XXI provides that ‘proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.’ There is nothing in that provision inconsistent with or opposed to anything stated in the bankruptcy law upon the subject and we must therefore take the statute and the order and read them together, the order being simply somewhat of an amplification of the law with respect to procedure, but nothing which can be construed as beyond the powers granted to the court by virtue of the law itself. The question is not whether any one but the court or referee can pass upon a claim and allow it or disallow it. That must be done by the court or referee, but it is simply whether a delivery of a claim properly proved to the trustee is a sufficient filing. The law provides (subsection c of section 57) that a claim after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending, or before the referee if a cause has been referred; but that does not prohibit their being filed somewhere else prior to their allowance and the order in bankruptcy in substance provides that they may be filed after being proved with the trustee. Such order is equivalent to saying that proofs of debt or claim may be received by

the trustee. When they are so received by him they are in legal effect received by the court, whose official the trustee is. Having been received by the trustee under authority of law, the proofs of debt are thereby sufficiently filed so far as creditors are concerned and it is the duty of the trustee to deliver them to the referee. If a trustee inadvertently neglects to perform that duty it is the neglect of an officer of the court and the creditors are in no way responsible therefor. The presentation and filing having been made within the time provided for and with one of the proper officers, his failure to deliver to the referee cannot be held to be a failure on the part of the creditor to properly file his proofs.” In the case of *Matter of Kessler* (C. C. A., 2d Cir.), 25 Am. B. R. 512, 184 Fed. 51, it was held that where a proof of claim against a bankrupt estate has been delivered to its trustee, the claim is sufficiently filed and it is the duty of the trustee to deliver it to the referee.

310. Presentation of facts showing indebtedness.—In *re Strobel* (D. C., N. Y.), 20 Am. B. R. 884, 163 Fed. 787; *In re Roeber* (C. C. A., 2d Cir.), 11 Am. B. R. 464, 127 Fed. 122, in which case a document intentionally drawn setting forth the amount due and claiming a lien on a certain special fund due the bankrupt was considered a proof of claim; *In re Standard Telephone & Electric Co.* (D. C., Wis.), 26 Am. B. R. 601, 186 Fed. 586, in which case the claimant was the holder of certain bonds secured by mortgage given by the bankrupt company and covering all its property; the mortgagee filed a petition before the referee setting up a mortgage and praying that it be declared a first lien upon the property of the bankrupt; issue was joined on the petition and at a hearing before the referee the bonds were put in evidence; the referee found that the mortgage was void, but it was held that the facts presented established a *bona fide* indebtedness and was sufficient as a proof of claim.

(6) EXCEPTIONS TO REQUIREMENTS.—An exception seems to be made in favor of tax claims, which need not even be filed,³¹¹ and where the administration was halted by an adjustment out of court, sufficient money being deposited to pay all claimants.³¹² Other exceptions are made by the language of the subsection, as where the claimant is an infant or insane.

b. Claims against property.—The presentation of claims against specific property in the possession of the trustee is on a different basis, as to time limitation, than the allowance of claims against the estate, upon which dividends are to be awarded. In such a case the court may, for the prompt administration of the estate, require such claims to be presented within a reasonable time, to be fixed by order, or thereafter to be barred.³¹³ The court may do this in the exercise of its equity jurisdiction, which includes the power to limit the time within which a remedy may be pursued, and to refuse relief where by laches the claimant has unduly delayed the prosecution of his claim.³¹⁴

c. Liquidated by litigation.—(1) IN GENERAL.—The subsection makes an express exception in the case of claims “liquidated by litigation.”³¹⁵ It has

311. In re Cleanfast Hosiery Co. (Ref., N. Y.), 4 Am. B. R. 702.

312. In re Lockwood (D. C., N. Y.), 4 Am. B. R. 731, 104 Fed. 794.

313. In re Lathrop, Haskins & Co. (C. C. A., 2d Cir.), 34 Am. B. R. 739, 223 Fed. 912; In re McIntyre & Co. (C. C. A., 2d Cir.), 24 Am. B. R. 4, 176 Fed. 552; Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721, 741-2; s. c. 216 Fed. 458, 472.

314. Matter of Lathrop, Haskins & Co. (C. C. A., 2d Cir.), 34 Am. B. R. 739, 223 Fed. 912, in which the order of the court provided that “all claimants who did not file notice of claim to the said stock on or before May 1, 1910, should be forever barred from making any claim or asserting any title or interest in or to any of the stocks, bonds or securities of this estate or the proceeds thereof,” and the court said: “The order did not fix a time for general creditors to file claims against the estate. That the court could not have done, as the Bankruptcy Act in providing in section 57, subdivision n, that ‘claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication’ plainly implies that creditors shall be entitled to file claims at any time within the year. But the court sought by its order to require persons claiming stocks or bonds then in the possession of the receiver, or which might subsequently come into his possession or into the possession of the trustee, to give notice of their claims within a time specified or be barred of the right to recover them from the receiver or trustee. We are at a loss to understand why the authority of the court to make such an order should be denied. It is said that such an order is in effect a short statute of limitations, and that as such beyond the power of the court to establish. In making the order the court was in the exercise of its equity jurisdiction. The equity courts, in jurisdictions where the dis-

inction between law and equity is maintained, while not bound by statutes of limitation not in *totidem verbis* applicable to equitable demands have nevertheless from the earliest times asserted the right to adopt and apply statutes of limitation to cases over which their jurisdiction was concurrent with that of the courts of law. And in cases over which the courts of equity have exercised an exclusive jurisdiction they have acted upon the maximum *vigilantibus non dormientibus aequitas subvenit* and recognized laches as a defense peculiar to the chancery courts and refused to grant relief to one who has unduly delayed the prosecution of his claim. And it has also been the practice of equity courts in appointing receivers to limit the time within which claimants could assert a claim against the receivers so appointed. In the exercise of the right thus to limit rights of action the equity courts have not derived their power from any statute but have exercised an inherent power. It is too late in the history of these courts to challenge their right in this respect.”

315. See Am. Bankr. Dig. § 733.

Liquidation by litigation.—Where in a litigation as to property in possession of the bankrupt at adjudication, it is determined, more than a year thereafter, that the transaction by which delivery of the property was made constituted a sale sufficient to pass the title, the defeated claimant may prove for purchase price as a claim “liquidated by litigation” within this section. In re Landis (D. C., Pa.), 19 Am. B. R. 420, 156 Fed. 318. A creditor’s claim under a chattel mortgage, recorded in the wrong county, having been defeated, and his claim of ownership of property in possession of the bankrupt having been determined against him under decisions made more than a year after his adjudication in bankruptcy, his claims may be allowed under this subdivision.

been held that this exception should be interpreted as if it read: "If the final judgment therein is rendered within thirty days before the expiration of such time or at any time thereafter."³¹⁶

(2) **WHAT CONSTITUTES LITIGATION.**—The phrase "liquidated by litigation" is general, and the object of the exception which is made to the statutory limit of time is plainly to allow the proof of the claim after the expiration of a year by a creditor who during that time was engaged in litigation with the bankrupt's estate concerning its liability to him.³¹⁷ The litigation referred to means litigation between the claimants and the bankrupt.³¹⁸

(3) **RECOVERY OF PREFERENCES OR SETTING ASIDE LIENS AND TRANSFERS.**—A suit to recover a preference is a "litigation" within the meaning of this clause, and after judgment against a creditor in such suit, he may prove his claim within sixty days thereafter.³¹⁹ An agreement by a secured creditor and trustee in bankruptcy as to the value of the creditor's security, made pending a litigation in the State courts in which both were parties, constitutes a liquidation by litigation.³²⁰ Where it is sought to establish the validity of a mortgage upon the bankrupt's property in a proceeding before the referee,

In re Strobel (D. C., N. Y.), 20 Am. B. R., 884, 160 Fed. 916. As to effect of portions of claim being "liquidated by litigation," see In re Venstrom (D. C., Wash.), 30 Am. B. R. 569, 205 Fed. 325.

316. *Powell v. Leavitt* (C. C. A., 1st Cir.), 18 Am. B. R. 10, 150 Fed. 89; in re Keyes (D. C., Mass.), 20 Am. B. R. 183, 160 Fed. 763.

Action to establish validity of mortgage.—Where, in an action brought by a creditor in the State court to establish the validity of a mortgage upon a bankrupt's stock-in-trade, the final judgment was rendered in favor of the trustee after the expiration of the year subsequent to the bankrupt's adjudication, declaring such mortgage to be an invalid preference, the claim of the creditor is "liquidated by litigation" within the meaning of section 57-n, and he is entitled to prove the same as an unsecured debt at any time within sixty days of the rendition of the judgment in the action in the State court. *Powell v. Leavitt* (C. C. A., 1st Cir.), 18 Am. B. R. 10, 150 Fed. 89. It has been held, however, that if a secured creditor delays filing his claim until after the year because the security is being liquidated, he loses all right to file it. In re Sampter (C. C. A., 2d Cir.), 22 Am. B. R. 357, 170 Fed. 938, 96 C. C. A. 98. See also In re Baker Notion Co. (D. C., N. Y.), 24 Am. B. R. 808, 180 Fed. 922.

317. In re Noel (C. C. A., 1st Cir.), 18 Am. B. R. 10, 150 Fed. 89, revg. 16 Am. B. R. 457.

The liquidation intended is the determination in the bankruptcy court or elsewhere of the amount or validity of a claim deposited by the trustee, or, at the time of the bankruptcy, not of such a nature as to be capable of exact measurement in terms of dollars. *Matter of Damon & Co.* (Ref., N. Y.), 14 Am. B. R. 809; *First National Bank of Atlanta v. Cameron* (C. C. A., 5th Cir.), 31

Am. B. R. 209. As to the meaning of words "liquidated" by "litigation" see the following cases: *Hutchinson v. Otis* (C. C. A., 1st Cir.), 8 Am. B. R. 382, 115 Fed. 937, s. c. in Supreme Court, 190 U. S. 552, 10 Am. B. R. 135; In re Prindle Pump Co. (Ref., N. Y.), 10 Am. B. R. 405; In re Mertens (C. C. A., 2d Cir.), 16 Am. B. R. 825, 147 Fed. 177; In re Noel (C. C. A., 1st Cir.), 18 Am. B. R. 10, 150 Fed. 89; In re Keyes (D. C., Mass.), 20 Am. B. R. 183, 185, 160 Fed. 763. A claim for a deficiency arising upon the foreclosure of a mortgage within a year after the mortgagor's adjudication is not provable after the expiration of that period. In re Sampter (C. C. A., 2d Cir.), 22 Am. B. R. 357, 170 Fed. 938.

318. In re Thompson's Sons (D. C., Pa.), 10 Am. B. R. 581, 123 Fed. 174, holding that where the amount of the bankrupt's debt is not in controversy, the fact that litigation ensues between the creditor and the surety of the bankrupt to determine the surety's liability does not make the claim of the surety against the bankrupt estate one "liquidated by litigation;" In re Pittsburgh Industrial Iron Works (Ref., Pa.), 22 Am. B. R. 851; In re Daniel (Ref. Tex.), 29 Am. B. R. 284, holding that where the litigation was as between the claimant and third parties as to securities held by the claimant it was not a "liquidation by litigation," so as to permit proof by the claimant after his claim to the securities had been decided, in part, adversely thereto.

319. In re Coventry-Evans Furniture Co. (D. C., N. Y.), 22 Am. B. R. 623, 171 Fed. 673. See also In re Lange Co. (D. C., Ia.), 22 Am. B. R. 414, 170 Fed. 114; *Matter of Cahill* (D. C., Ohio), 30 Am. B. R. 794; *Matter of Bergdoll Motor Co.* (D. C., Pa.), 36 Am. B. R. 265, 230 Fed. 248.

320. *First National Bank of Atlanta v. Cameron* (C. C. A., 5th Cir.), 31 Am. B. R. 695, 209 Fed. 611.

and it is decided by the referee that such mortgage is void, the decision is a process of "liquidation," so as to authorize the filing by the mortgagee of a claim as an unsecured creditor within sixty days after the question was determined.³²¹ The provision applies to a case where a creditor has claimed to hold a security and has litigated that question and been defeated; in such a case the creditor may thereafter prove as a general creditor.³²²

(4) **LIMITATION AS TO TIME.**—The words "such time" refer to the one year after or following adjudication.³²³ If the final judgment is rendered more than thirty days before the expiration of the period of one year after the adjudication, the claim of the creditor will be barred unless he files the same prior to the expiration of the year.³²⁴ If final judgment in the litigation was rendered within the period of thirty days before the expiration of the year, the claim must be filed within sixty days after the rendition of the judgment.³²⁵

d. Proof after expiration of year.—A claim may be offered for proof after the expiration of the year where the delay in its presentation was caused by the fraud of the bankrupt in so preparing his schedules as to lead creditors to believe that there was practically no estate for distribution.³²⁶ The statute was intended to affect the right of a tardy creditor to prove in competition with creditors who had been diligent, not the right of a bankrupt to prevent the payment of a creditor whose tardiness had been caused by the bankrupt's own fraud.³²⁷ But the section must be strictly construed to carry into effect its evident purpose. The expiration of the year terminates the jurisdiction of the court in respect to the filing of claims.³²⁸ The fact that the

^{321.} *In re Standard Telephone & Electric Co.* (D. C., Wis.), 26 Am. B. R. 601, 186 Fed. 586.

^{322.} *Matter of Salvator Brewing Co.* (D. C., N. Y.), 26 Am. B. R. 21, 188 Fed. 522, citing *In re Keyes* (D. C., Mass.), 20 Am. B. R. 183, 160 Fed. 763; *In re Strobel* (D. C., N. Y.), 20 Am. B. R. 884, 163 Fed. 787; *Keppel v. Tiffin Savings Bank*, 197 U. S. 356, 13 Am. B. R. 552; *Page v. Rogers*, 211 U. S. 575, 21 Am. B. R. 496.

^{323.} *In re Peck* (D. C., N. Y.), 20 Am. B. R. 629, 161 Fed. 762. See *Matter of Damon & Co.* (Ref., N. Y.), 14 Am. B. R. 809.

^{324.} *In re Sampster* (C. C. A., 2d Cir.), 22 Am. B. R. 357, 170 Fed. 938, 96 C. C. A. 98.

^{325.} **Additional sixty days, when to commence.**—*In re Clover Creamery Ass'n* (C. C. A., 7th Cir.), 23 Am. B. R. 884, 176 Fed. 907, holding a claim to be barred because not filed within sixty days after the rendition of judgment in an action brought in the State court liquidating the claim. But see *Matter of Eldred* (D. C., N. Y.), 19 Am. B. R. 52, 155 Fed. 686, where the court said: "Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication except in a case of litigation, when ninety days additional may possibly be added; and in the case of infancy or insanity a creditor laboring under these disabilities without notice, may have six months longer within which to file a claim." This statement of the court was not essential to the determination of the question at issue and

may not be considered controlling upon this question. The language of the subsection clearly indicates that the additional sixty days' time begins to run at the date of the rendition of the judgment.

^{326.} *In re Towne* (D. C., Mass.), 10 Am. B. R. 284, 122 Fed. 313. The construction of section 57-n forbidding proofs subsequent to one year after adjudication is too narrow. *National Bank v. Williams* (C. C. A., 5th Cir.), 20 Am. B. R. 79, 85, 159 Fed. 615. Compare *In re Peck* (C. C. A., 2d Cir.), 21 Am. B. R. 707, 168 Fed. 48.

^{327.} *In re Hawk* (C. C. A., 8th Cir.), 8 Am. B. R. 71, 114 Fed. 916; *In re Moebius* (D. C., Pa.), 8 Am. B. R. 590, 116 Fed. 47; *In re Leibowitz* (D. C., Tex.), 6 Am. B. R. 268, 108 Fed. 617; *In re Rhodes* (D. C. Pa.), 5 Am. B. R. 197, 105 Fed. 231; *In re Shaffer* (D. C., N. Car.), 4 Am. B. R. 728, 104 Fed. 982; *Bray v. Cobb* (D. C., S. Car.), 3 Am. B. R. 788, 100 Fed. 270; *Matter of Knosco* (D. C., Ohio), 31 Am. B. R. 238, 208 Fed. 201.

^{328.} *In re Knosco* (D. C., Ohio), 31 Am. B. R. 238, 208 Fed. 201.

An unsecured claim filed more than two years after adjudication is too late under section 57-n of the Bankruptcy Act, which provides that claims with certain exemptions, shall not be proved subsequent to one year after adjudication. *Matter of Trion Manufacturing Co.* (D. C., Ga.), 35 Am. B. R. 480, 224 Fed. 521.

bankrupt has fraudulently concealed assets may not be relied upon to extend the time within which claims may be proved.³²⁹ The period is not enlarged or started anew by the discovery of unschedule assets.³³⁰ The time may not be extended where the creditor fails to file proof of his claim because acting under the advice of counsel he believed that his rights under an attachment might be prejudiced,³³¹ nor where the delay was caused by the creditor's attempt to establish a lien on the bankrupt's property,³³² nor where the creditor's failure to make and file his claim in time was due solely to accident and mistake,³³³ nor where the creditor claims he was misled by the schedules, which stated that a particular asset was of little or no value.³³⁴ It has been suggested, however, that the statute would not run against the claim of a creditor who had sought to maintain as valid an alleged preferential payment but had not succeeded.³³⁵ Where a creditor has been compelled to surrender a voidable preference he will be permitted to prove his claim after the expiration of a year.³³⁶ The fact that the creditor did not receive the required notice, and within the period of one year had no knowledge of the bankruptcy, does not authorize a proof of the claim after the expiration of such period.³³⁷ The filing of a

329. Effect of concealment of assets.—In the case of *In re Meyer* (D. C., Or.), 25 Am. B. R. 44, 181 Fed. 904, the court said: "Section 57-n of the Bankruptcy Act so far as applicable here provides 'that no claim shall be proved against a bankrupt subsequent to one year after adjudication.' The provision has been repeatedly construed by the courts and they are practically agreed that it is more than a limitation and is prohibitory and that the courts have no power or discretion to extend the time therein specified or permit the proof of claims after the expiration of the year, even if the claimant has been misled by the fraudulent concealment of assets of the bankrupt." See also *In re Peck* (C. C. A., 2d Cir.), 21 Am. B. R. 707, 168 Fed. 48, 93 C. C. A. 470; *In re Ingalls Bros.* (C. C. A., 2d Cir.), 13 Am. B. R. 512, 137 Fed. 517, 70 C. C. A. 101; *In re Muskoka Lumber Co.* (D. C., N. Y.), 11 Am. B. R. 761, 127 Fed. 886; *In re Shaffer* (D. C., N. Car.), 4 Am. B. R. 728, 104 Fed. 982.

In the case of *In re Paine* (D. C., Ky.), 11 Am. B. R. 351, 127 Fed. 246, the court said: "It may well be that Congress could with wisdom have put into the clause an exception covering cases where there had been a fraudulent concealment of assets; but that was a matter exclusively for Congress to determine and not for the courts to remedy. This court at least assumes no power to interpolate an exception, and thus put into the statute what Congress declined to embrace therein. The language of the clause is plain and unequivocal. There is no ambiguity about it and it admits of no construction. The decisions are equally clear to the effect that no proof of debt can be made after the expiration of one year after the adjudication, except in those instances where the period is extended by the act to not exceeding one year and six months."

330. *Chapman v. Whitsett* (C. C. A., 8th Cir.), 38 Am. B. R. 424, 236 Fed. 873.

331. *In re Baird & Co.* (D. C., Pa.), 18 Am. B. R. 228, 154 Fed. 215.

332. *In re Noel* (D. C., N. H.), 16 Am. B. R. 457, 144 Fed. 439.

333. *In re Sanderson* (D. C., Vt.), 20 Am. B. R. 396, 160 Fed. 278.

334. *In re Peck* (C. C. A., 2d Cir.), 21 Am. B. R. 707, 168 Fed. 48, affg. 20 Am. B. R. 629, 161 Fed. 762.

335. *In re Fagan* (D. C., S. Car.), 15 Am. B. R. 520, 140 Fed. 758. *Contra:* *In re Kempter* (D. C., Ia.), 15 Am. B. R. 675, 142 Fed. 210; *Matter of Damon* (Ref., N. Y.), 14 Am. B. R. 809.

336. *In re Lange Co.* (D. C., Ia.), 22 Am. B. R. 414, 170 Fed. 114, in which case the court holds that the Supreme Court of the United States does not regard the claims of creditors who have been deprived of merely voidable preferences by the judgment of a court at the suit of the trustee, as falling within the provisions of section 57-n, but as claims accruing under section 57-g, at the time the preference is surrendered or the creditor is deprived thereof by the judgment of the court, and that they may be proved and allowed before the settlement of the estate.

Judgment declaring payment voidable preference.—A creditor may offer a proof of claim within sixty days of a judgment declaring payment of said claim to be a voidable preference, although more than a year has passed since the adjudication. *Matter of Bergdoll Motor Co.* (C. C. A., 3d Cir.), 37 Am. B. R. 501, 233 Fed. 410.

337. *Matter of Prindle Pump Co.* (Ref., N. Y.), 10 Am. B. R. 405; *In re Muskoka Lumber Co.* (D. C., N. Y.), 11 Am. B. R. 761, 127 Fed. 886.

clear statement of the claim in writing, duly verified, within the year is sufficient, even though it may be liquidated and allowed after that time.³³⁸

VI. EFFECT OF PROOF AND ALLOWANCE.

a. In general.—Under the former law, a creditor who proved his claim could not proceed thereon in another court.³³⁹ This is not the law now. He can proceed, though he will usually be halted by a stay.³⁴⁰ He becomes, however, a party to the bankruptcy proceeding, with all that that condition implies.³⁴¹ If his claim, voluntarily filed, is disallowed it is a bar to a suit against the bankrupt on the same cause of action in another jurisdiction.³⁴² Likewise a decree of the bankruptcy court allowing a claim on a contract after a full hearing is binding on both parties and is a complete defense to a claim, made in a subsequent action in the State court on the contract, that it is *ultra vires*.³⁴³ But it has been held that a creditor who has proved in bankruptcy a claim based on a contract and has been paid dividends thereon, may proceed in a State court to recover in tort for the balance due.³⁴⁴ A reservation, in a customer's proof of claim, of whatever rights he has against the bankrupts on account of their failure to return stock covered by a receipt, does not preclude him, after discovery that his shares of stock have been returned to the trustee, from reclaiming them as his own.³⁴⁵

b. Waiver of lien.—A creditor's lien may be waived by the proof and allowance of his claim.³⁴⁶ How far a proof of debt that is not affected by a discharge amounts to a waiver has not yet been much discussed under the present law. Under former laws, providing for such a debt did not estop the creditor from asserting it against after-acquired property.³⁴⁷

338. *In re Mertens* (C. C. A., 2d Cir.), 16 Am. B. R. 825, 147 Fed. 177.

Where a wife succeeds in an action against her husband and his trustee in bankruptcy, commenced within a year after adjudication, her claim is "proven" within the meaning of the act. *Buckingham v. Estes* (C. C. A., 6th Cir.), 12 Am. B. R. 182, 128 Fed. 584.

339. Act of 1867, § 21; *In re Meyers*, Fed. Cas. 9,518; *Cook v. Coyle*, 113 Mass. 522.

340. *In re Buchan's Soap Corporation* (D. C., N. Y.), 22 Am. B. R. 382, 169 Fed. 1017.

341. *Wiswall v. Campbell*, 93 U. S. 347. Compare *In re Jones*, Fed. Cas. 7,447; *In re Coffey* (Ref., N. Y.), 19 Am. B. R. 148; *In re Kenyon* (D. C., Ohio), 19 Am. B. R. 195, 156 Fed. 863, citing *Collier on Bankruptcy* (6th Ed.), 437, and holding that a claimant may not rescind his agreement after proof of his claim. *Matter of Kinnane Co.* (D. C., Ohio), 33 Am. B. R. 243, 217 Fed. 488, citing *Collier on Bankruptcy* (10th Ed.), 749.

342. *Hagardine, etc., Co. v. Hudson* (C. C. A., 8th Cir.), 10 Am. B. R. 225, 122 Fed. 232, affg. 6 Am. B. R. 657; *Elmore, Quillian & Co. v. Henderson-Mizell Mercantile Co.* (Sup. Ct., Ala.), 32 Am. B. R. 658, 179 Ala. 548, quoting text with approval.

343. *Elmore, Quillian & Co. v. Henderson-Mizell Mercantile Co.* (Sup. Ct., Ala.), 32 Am. B. R. 658, 179 Ala. 548.

344. *Matter of Menzin* (C. C. A., 2d Cir.),

38 Am. B. R. 435, 238 Fed. 773, revg. 37 Am. B. R. 468, 233 Fed. 333. And see *Friend v. Talcott*, 228 U. S. 27, 30 Am. B. R. 31.

345. *Thomas v. Taggart* (Sup. Ct.), 209 U. S. 385, 19 Am. B. R. 710, affg. 17 Am. B. R. 467; *Matter of Berry & Co.* (C. C. A., 2d Cir.), 23 Am. B. R. 27, 174 Fed. 409, holding that where a customer of a firm of stockbrokers, with full knowledge of all the facts, elects to prove against their estate in bankruptcy, for the value of corporate stock hypothecated by them, he cannot subsequently claim the stock or its profits specifically.

346. A lien created by the commencement of a judgment creditor's action within the four months' period to set aside an alleged fraudulent transfer by a bankrupt is waived by the proof and allowance of the creditor's claim upon his judgment in the bankruptcy proceeding without a disclosure of the pendency of the action. *Dunn Salmon Co. v. Pillmore*, 19 Am. B. R. 172, 56 Misc. 546, 106 N. Y. Supp. 546. See *Sessler v. Paducah Distilleries Co.* (C. C. A., 5th Cir.), 21 Am. B. R. 723, 168 Fed. 44.

347. *In re Robinson*, Fed. Cas. 11,939; *In re Clews*, Fed. Cas. 2,891; *McBean v. Fox*, 1 Ill. App. 177. The opposite was true under the law of 1841. *Chapman v. Forsyth*, 2 How. 202. See also *Clay v. Smith*, 3 Pet. 411.

SECTION FIFTYEIGHT.

NOTICE TO CREDITORS.

§ 58. **Notice to creditors.**—*a* Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy; (8) the proposed dismissal of the proceedings, *and (9) there shall be thirty days' notice of all applications for the discharge of bankrupts.**

b Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct.

c All notices shall be given by the referee, unless otherwise ordered by the judge.

Analogous provisions: In U. S.: As to notices of first meeting, Act of 1867, § 11, R. S., § 5019; As to notice of filing trustee's account, Act of 1867, § 28, R. S., § 5096; As to notice of dividends, Act of 1867, § 27, R. S., § 5102; Act of 1841, § 9; Act of 1800, § 29; As to notice of application for discharge, Act of 1867, § 29; R. S., § 5109; Act of 1841, § 4; As to notice of application for confirmation of compositions, R. S., § 5103A; As to notice of meetings in general, Act of 1867, § 17, R. S., § 5094.

In Eng.: Generally to different sections, to Schedule I and the General Rules; there is no corresponding single section on notices in the English act.

Cross-references: To the law: Examinations of bankrupts, how conducted, § 7 (9); examination of bankrupt and other persons, § 21-a.

Applications for the confirmation of compositions and hearings thereon, § 12-b, c.

Discharge of bankrupts, application for, and hearing, § 14-b.

Meetings of creditors, first and final, § 55.

Dividends, declaration and payment, § 65.

Final accounts of trustees, when made, § 47-a(8).

Compromise and arbitration of controversies, §§ 26, 27, 57-h.

Sales of property of bankrupt by trustee, § 70-b.

*Amendment of 1910 in italics.

Cross-references — (Continued)

Dismissal of proceedings, § 59-g.

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To the Official Forms: Notice of first meeting of creditors, No. 18.

Notice to trustee of his appointment, No. 24.

Notice of declaration of dividend, No. 41.

Petition and order for sale of perishable property, No. 46.

Notice of petition for removal of trustee, No. 53.

Order of notice on petition for discharge, No. 57.

See also Supplementary Forms, *post*; Hagar and Alexander's Bankruptcy Forms, (2d ed.).

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NOTICE TO CREDITORS.

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III. Notice to Creditors by Publication, 835.**IV.. By Whom Notices Are Given, 836.****I. NOTICE TO CREDITORS GENERALLY.**

a. **In general.**—The present statute requires a notice to creditors of every important step in a bankrupt proceeding. Its predecessor was somewhat loose in this regard, notices being often discretionary, and the time and

method subject to the direction of the court.¹ The present law, perhaps, goes too far the other way. Notices should not contain the names of the creditors or the amounts of their claims, as seems sometimes to have been the practice under the law of 1867. Subsection *a* requires that the notice given shall be (1) by mail, (2) at least ten days before the day set for the meeting, and (3) addressed to the creditors at "their respective addresses as they appear in the list of creditors . . . or as afterwards filed with the papers in the case." The last clause quoted seems to cover cases where a creditor's address is changed during the proceeding, or is found to have been incorrect in the schedules; as well as those where a creditor requires a referee to mail to a specified address.² Notices may, however, be waived. For the first meeting, the addresses given in the schedule should be used,³ thereafter, those specified on the proof of debt, unless a request giving a specified address be filed as provided in General Order XXI (2). The sufficiency of addresses given in the schedules, is discussed under section 7 (8), and as to the effect of a failure to schedule properly under § 17. Whether or not the use of initials and the omission of a street address will make notices to such persons ineffectual will almost invariably depend on extrinsic circumstances.⁴ The cases under the former law will be found of little value.

b. Notices under rules and forms.—The general orders provide for notices in certain cases and regulate the method of service. Notices which are not required by the act or the general orders to be served personally on the party may be served on his attorney.⁵ Property may be sold under an order of the court with or without notice to the creditors.⁶ Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the post-office box or street number, as he may appoint; and thereafter, and until some other designation shall be made by such creditor, all notices shall be so addressed; and in other cases notices shall be addressed as specified in the proof of debt.⁷ The official forms prescribe the form of the notice of the first meeting,⁸ and of the application for a discharge.⁹ So also is the form of the notice to creditors of the payment of a dividend.¹⁰

c. Construction and scope of section.—This section should be read and construed together with § 59. The former enumerates the proceedings, of which notice is to be given to creditors, and prescribes the length of time of the notice and the mode of giving it to the creditors, while the latter is particularly directed to the subject of filing and dismissing petitions.¹¹

1. See "Analogous Provisions," *ante*.

2. General Order XXI (2).

3. In re Schiller (D. C., Va.), 2 Am. B. R. 704, 96 Fed. 400.

Where addresses of creditors are unknown. — When the bankrupt gives a list of creditors, but states that their addresses are unknown, the referee should require the addresses to be furnished, or satisfactory proof to be made that the same cannot be ascertained after due search had been made. In re Dvorak (D. C., Ia.), 6 Am. B. R. 66, 107 Fed. 76.

4. Claffin v. Wolff (N. J. Ct. of Errors & App.), 38 Am. B. R. 852, 96 Atl. 73, holding that in the case of a well known business firm which on its business letter heads uses initials and does not give any street address, a notice to such firm addressed to the city in

which it transacts business is sufficient; Kreitlein v. Ferger, 238 U. S. 21, 34 Am. B. R. 862, 59 L. Ed. 1184, holding that a schedule containing the address "Indianapolis, Ind." is *prima facie* sufficient.

5. General Orders IV.

6. General Orders XVIII. See also Am. B. R. Dig. § 595. Compare, *post*, this section, "Of proposed sales," p. 831

7. General Orders XXI (2).

8. Official Form No. 18.

9. Form No. 57. Additional Forms for other necessary notices will be found in "Supplementary Forms," *post*; and see Hagar & Alexander's Bankruptcy Forms (2d Ed.).

10. Official Form No. 41.

11. Matter of Levi & Klauber (C. C. A., 2d Cir.), 15 Am. B. R. 294, 142 Fed. 962.

d. When notice not necessary.—A notice of a meeting of creditors is not necessary where the referee is the sole judge and acts independently of the creditors; unless, of course, required by subsection *a*. Neither is it essential, where, though similar to or the negative of a meeting of which notice is necessary, the statute does not specifically require it. Thus, a ten-day notice need not be given of the appointment of a special referee,¹² or of a receiver,¹³ or of examinations before the first meeting,¹⁴ or of a trial on a contested claim,¹⁵ or of sales of perishable property,¹⁶ or of the hearing of exceptions to the trustee's report on exemptions,¹⁷ or of many other minor steps in a proceeding.¹⁸ Indeed, no notice whatever need be given in some of them. Where possible, however, the ten-day notice by mail should always be given, unless otherwise prescribed by the general orders or local rules. Such is the policy of the law. Congress has made no provision for giving notice to creditors of the institution of involuntary proceedings, other than that which results by operation of law from the filing of the petition,¹⁹ but it is as true of the present law as it was of the act of 1867 that the filing of a petition is a *caveat* to all the world and in effect an attachment and injunction.²⁰

e. Combined notices.—Form No. 18, itself, is a combined notice—of the first meeting and of the examination of the bankrupt. It is possible also to notify creditors in one notice, say, of (1) a proposed compromise, (2) a proposed sale to be followed, without objection, by a public auction forthwith, (3) the declaration and (4) the payment of a final dividend, and (5) a final meeting to pass on the trustee's account.²¹ Notices should be combined and meetings consolidated, where possible.²²

12. *Bray v. Cobb* (D. C., N. Car.), 1 Am. B. R. 153, 91 Fed. 102.

13. *In re Abrahamson* (Ref., N. Y.), 1 Am. B. R. 44.

14. *Id.*

15. Bankr. Act, § 57-k.

16. General Order XVIII (3). See also Am. B. R. Dig. § 595.

17. General Order XVII.

18. *In re Stotts* (D. C., Ia.), 1 Am. B. R. 641, 93 Fed. 438, holding that where an attorney is employed by the trustee of a bankrupt, an allowance for such services may be made by the referee without notice to the creditors.

19. *Matter of Zotti* (Ref., N. Y.), 23 Am. B. R. 601, holding that the filing of the petition was a command to all having possession of property which the bankrupt at that moment owned, to hold the same subject to the orders of the court. The "*rem*" was reached by the filing of the petition, no matter where it was.

Oral notice to a sheriff that a petition in bankruptcy has been filed against a debtor whose property has been attached and notice of the appointment of a receiver in bankruptcy, and the issuance of a restraining order is sufficient, and he thereafter deals with the property at his peril. *Matter of Lufty* (D. C., N. Y.), 19 Am. B. R. 614, 156 Fed. 873.

Constructive notice.—Notice of facts which would incite a person of reasonable

prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would develop. *Coder v. McPherson* (C. C. A., 8th Cir.), 18 Am. B. R. 523, 152 Fed. 951.

20. *Mueller v. Nugent*, 184 U. S. 1, 14, 7 Am. B. R. 224, 269; *Bailey v. Baker Ice Machine Co.*, 239 U. S. 268, 35 Am. B. R. 814; *State Bank of Chicago v. Cox* (C. C. A., 7th Cir.), 16 Am. B. R. 32, 143 Fed. 91; *Matter of Pittsburg-Big Muddy Coal Co.* (C. C. A., 7th Cir.), 32 Am. B. R. 452, 215 Fed. 703; *Clay v. Waters* (C. C. A., 8th Cir.), 24 Am. B. R. 293, 178 Fed. 385; *In re Billings* (D. C., Ala.), 17 Am. B. R. 80, 145 Fed. 395; *Matter of Schon* (D. C., Conn.), 32 Am. B. R. 494, 213 Fed. 514; *In re Breslauer* (D. C., N. Y.), 10 Am. B. R. 33, 121 Fed. 910; *In re Mertens* (D. C., N. Y.), 12 Am. B. R. 699, 131 Fed. 507; *In re Donnelly* (D. C., Ohio), 26 Am. B. R. 304, 188 Fed. 1001. See also Am. B. R. Dig. § 236.

21. For one of these notices, see "Supplementary Forms," *post*; *Hagar and Alexander's Bankruptcy Forms* (2d Ed.).

22. *Justice Brown* said in *In re Price* (D. C., N. Y.), 1 Am. B. R. 419, 91 Fed. 635, that "Hereafter the published and mailed notices of applications for a discharge should contain a notice of examination of the debtor to avoid the necessity of further notice to all creditors in case such an examination is allowed."

f. Effect of notice on jurisdiction.—The filing of the petition gives jurisdiction, both *in rem* and *in personam*.²³ Failure to receive the notice is, therefore, not an objection to the regularity of the proceeding.²⁴ The important fact under the present law is: was the debt duly scheduled.²⁵ If so, there seems to be jurisdiction of the creditor, even without notice. Illustrative cases under the former law will be found in the foot-note.²⁶

g. Presumption that notice was given.—It is made by subsection *c* the official duty of a referee to give the notices prescribed by the section. It will be presumed, nothing appearing to the contrary, that the officer has properly and legally performed the duty devolved upon him.²⁷ As for instance, it has been held, authoritatively, that an order of discharge will be presumed to be based on sufficient notice to creditors, and that the introduction of the order casts a burden upon a creditor attacking it to show that there was absence of notice or other statutory cause affecting the validity of the order.²⁸ Where the record shows that notices were served as provided by law, it is not sufficient to assert merely that the notices were not received; there must be evidence adduced indicating that the notices were not sent.²⁹

II. WHEN NOTICE REQUIRED.

a. In general.—The mandatory phrasing of subsection *a* indicates that for all the proceedings there enumerated the ten-day notice by mail is absolutely essential.³⁰

b. Of examination of bankrupt.³¹—Subdivision (1) requires notice of an examination of the bankrupt. This refers to an examination under § 7 (9); it may to one under § 21-a. But a bankrupt may be examined at any continuance of a meeting in the call of which his examination has been noticed, and, if present at any other meeting, he can, it is thought, be examined even without such a notice. If examined for the purpose of preparing schedules,³² or on the hearing of his discharge, no notice to creditors seems to be required.³³

c. Of proposed confirmation of composition.³⁴—Notice of the confirmation of a composition is required under subdivision (2). In this connection § 12-b

23. *Southern Loan & Trust Co. v. Benbow* (D. C., N. Car.), 3 Am. B. R. 9, 96 Fed. 514; *Rayl v. Lapham*, 27 Ohio St. 452.

The filing of the petition in bankruptcy against a debtor is notice to all his creditors of the pendency of the proceeding. *Master of Levi & Klauber* (C. C. A., 2d Cir.), 15 Am. B. R. 294, 296, 142 Fed. 962.

24. *In re Stetson*, Fed. Cas. 13,381. See also *Clafin v. Wolff* (N. J. Ct. of Errors & App.), 38 Am. B. R. 652, 96 Atl. 73.

25. See *Bankr. Act*, § 17 (3), and discussion thereunder; *Keefanner v. Hevenor* (Sup. Ct. App. Div., N. Y.), 32 Am. B. R. 580, 148 N. Y. Supp. 434.

26. *Thurmond v. Andrews*, 10 Bush (Ky.), 400; *Heard v. Arnold*, 56 Ga. 570; *Pattison v. Wilbur*, 10 R. I. 448; *In re Archibrown*, Fed. Cas. 504.

27. *Clafin v. Wolff* (N. J. Ct. of Errors & App.), 38 Am. B. R. 852, 96 Atl. 73.

28. *Kreitlein v. Fenger*, 238 U. S. 21, 34 Am. B. R. 862, 59 L. Ed. 1184.

29. *Clafin v. Wolff* (N. J. Ct. of Errors & App.), 38 Am. B. R. 852, 96 Atl. 73.

30. *In re Gilbert*, 2 N. B. N. Rep. 738; *In re Campbell*, Fed. Cas. 2,348.

31. See also Am. B. R. Dig. § 48.

32. *In re Franklin Syndicate* (D. C., N. Y.), 4 Am. B. R. 244, 101 Fed. 402; *In re Abrahamson* (Ref., N. Y.), 1 Am. B. R. 33, holding that, although the statute contemplates an examination of bankrupts at a time directed, of which the creditors shall have notice, yet a bankrupt may be directed to furnish information to aid the court, and its officer, the receiver, in the preservation of the estate for the benefit of creditors, and such information may be elicited by an examination, and notice to the creditors may be dispensed with.

33. *In re Price* (D. C., N. Y.), 1 Am. B. R. 419, 91 Fed. 635, holding that the published and mailed notices of application for a discharge should contain a notice of examination of the debtor to avoid the necessity of further notice to all creditors in case such an examination is allowed.

34. See also Am. B. R. Dig. § 701.

should be consulted. While the usual notice must be given of an application for the confirmation of a composition,³⁵ it usually takes the form of an order to show cause, entitled in the district court and issued by the court.³⁶ It seems that a like notice is not required on an application to set aside a composition. Still, it is customary.³⁷

d. Of application for discharge or revocation thereof.³⁸—Subdivision (2) formerly provided for notice of at least ten days of an application for a discharge. The amendatory act of 1910 added a new subdivision 9 providing for a notice of thirty days in case of an application for a discharge. The Supreme Court has, in Form No. 57, suggested a method which is both cumbersome and, in so far as it attempts to take from the district judge the power to fix the practice,³⁹ of doubtful force. Such notice should take the form of a short show cause order, the original signed by the judge and attested by the clerk, the same to be mailed either by the clerk or by the referee, or the attorney in charge if so "ordered by the judge." This practice is regulated by rules in the different districts,⁴⁰ and, in some, prior to the amendatory act of 1903, fees were charged for this service. Unless, however, there are district rules modifying it, the practice suggested by the Supreme Court should be followed.⁴¹ Personal notice of the application is not essential to the binding force of a decree granting a discharge.⁴² It is not necessary that the notice shall have been actually received and read by creditors, but mailing in the manner prescribed by the statute is sufficient.⁴³ A bankrupt is entitled to reimbursement for the expense of notice to creditors of an application for his discharge.⁴⁴ A default upon a motion to discharge a judgment will be opened, where the creditor did not have proper notice of the proceeding.⁴⁵ Since notice of an application for a discharge is required, it is not necessary to give notice to creditors of an application to extend the time within which to make the application for the discharge.⁴⁶ It seems that, on an application to revoke a discharge, any notice fixed by the court is sufficient.⁴⁷

e. Of proposed sales.⁴⁸—Notice of all proposed sales of property is required by subdivision (4). In this connection § 70-b should be consulted. The requirement that notice be given of every proposed sale of assets has proven an unfortunate restriction on discretion. The time necessary, substantially two weeks after application, often makes advantageous sales impossible. This difficulty doubtless led to General Order XVIII, under which most sales are now

35. *In re Bloodworth-Stembridge Co.* (D. C., Ga.), 24 Am. B. R. 156, 178 Fed. 372; *Matter of Fox* (D. C., N. Y.), 34 Am. B. R. 812, 222 Fed. 135.

36. See *In re Hoole*, 3 Fed. 496.

37. See under Section Thirteen, *ante*. Compare *In re Hamlin*, Fed. Cas. 5,993.

38. See also Am. B. R. Dig. § 1058.

39. That is, as in derogation of Bankr. Act, § 58-c.

40. See, for instance, the practice in the Northern District of New York, 1 N. B. N. 124.

41. **Order of judge.**—Notice to creditors of the hearing of an application for a discharge and the fixing of the date therefor should be upon the order of the judge in accordance with Supreme Court Form No. 57. *In re Hockman* (D. C., Pa.), 30 Am. B. R. 921, 209 Fed. 330.

42. *Hanover National Bank v. Moyses*, 186 U. S. 181, 8 Am. B. R. 1.

43. *In re Downing* (D. C., N. Y.), 28 Am. B. R. 778, 199 Fed. 329; *Clafin v. Wolff* (N. J. Ct. of Errors & App.), 38 Am. B. R. 852, 96 Atl. 72.

44. A bankrupt is entitled to be reimbursed under General Order X, for the amount advanced by him for the issuance, publication and mailing of necessary notices to creditors of an application for his discharge. *In re Hatcher* (D. C., Tex.), 16 Am. B. R. 722, 145 Fed. 658.

45. *Matter of Quackenbush*, 19 Am. B. R. 647, 122 App. Div. 456, 106 N. Y. Supp. 773.

46. *In re Fritz* (D. C., N. Y.), 23 Am. B. R. 84, 173 Fed. 560, holding that the matter is one of discretion, and notice to all creditors does not seem necessary.

47. Compare under Section Fifteen.

48. See also Am. B. R. Dig. §§ 595-596.

made. Under this order the court or a referee may direct a private sale, with or without notice, for good and sufficient cause shown.⁴⁹ The word "perishable" has been construed with extreme liberality.⁵⁰ This is hardly necessary—that is, if General Order XVIII (2) is not in derogation of the statute—provided good cause can be shown for a private sale; at least, such a construction can fairly be put upon that general order. However, when substantial loss will not result, the command of the statute should be obeyed. If notice of a proposed sale is given, it is often so phrased as also to give notice of a meeting of creditors to attend a public sale of the property immediately thereafter.⁵¹ If a creditor actually attends a sale of a bankrupt's property and bids on the same it is immaterial whether he received the usual notice of sale by mail or not.⁵² If an order of sale lapses for any cause and a subsequent order of sale is made, notice should be given to creditors and lienors.⁵³

f. Of declaration and payment of dividends.—Subdivision (5) requires notice of the declaration and time of payment of dividends. This seems to imply two meetings; indeed, since the amendatory act of 1903, two meet-

49. Sale without notice; discretion of referee.—In *re Hawkins* (D. C., N. Y.), 11 Am. B. R. 49, 125 Fed. 633, holding that the discretionary power of a referee directing a private sale of the bankrupt's property, without notice to creditors, ought not to be disturbed unless it clearly appears that his discretion was improvidently exercised.

An order to sell perishable property, even real estate, rests in the sound discretion of the court, and where it is not affirmatively shown that gross injustice has been done to the creditors, a sale of such property at private sale by the trustee, will not be disturbed for lack of notice to a creditor of the application of an order to sell or for confirmation of the sale. In *re Milne Mfg. Co.* (Ref., N. Y.), 21 Am. B. R. 468.

Notice of trustee's sale; sufficiency of publication.—The act of March 3, 1893, (27 Stat. 751), requiring publication once a week for at least four weeks before the sale of real property, which requirement has been construed to mean twenty-eight days at least, does not bind the Federal courts in their administration of the bankruptcy act; and, in the absence of reason to believe that publication three days earlier would have made a real difference for any purpose, the publication of notice of sale of the bankrupt's real estate once a week during each of the four weeks preceding the time set for the sale, the first publication, however, being but twenty-five days before, is sufficient. In *re National Mining Exploration Co.* (D. C., Mass.), 27 Am. B. R. 92, 193 Fed. 232; In *re La France Copper Co.* (D. C., Mont.), 30 Am. B. R. 381, 205 Fed. 207. *Contra:* In *re Britannia Mining Co.* (D. C., Wis.), 28 Am. B. R. 651, 197 Fed. 459.

No notice to stockholders of a bankrupt corporation of a proposed sale of assets is necessary. In *re Witherbee* (C. C. A., 1st Cir.), 30 Am. B. R. 314, 202 Fed. 896.

50. In re Edes (D. C., Me.), 14 Am. B. R.

382, 384, 135 Fed. 595; In *re Smith*, 1 N. B. N. 180; Anon., 1 N. B. 204. *Contra:* In *re Beutel's Sons* (Ref., Ohio), 7 Am. B. R. 768, holding that perishability within the meaning of the term in bankruptcy involves physical deterioration of the property itself. Mere depreciation in value is not enough. A stock of hardware cannot be sold without notice to creditors as "perishable property" although by delay it is becoming unseasonable.

Sale of building deteriorating in value.—Where a building, used as a manufacturing plant by an involuntary bankrupt, was rapidly deteriorating in value and was unsalable, and an offer was made thereof of a sum, representing its fair value, which offer was conditioned upon conveyance being made within a shorter period of time than would allow notice to be given in accordance with the usual practice in sales of bankrupt properties, and where great loss would be occasioned by failure to make the sale, the court is justified in making an order, allowing the trustee to consummate the sale without notice, and a sale so made will not be set aside. In *re Milne Mfg. Co.* (Ref., N. Y.), 21 Am. B. R. 468.

51. See discussion under subtitle "Combined Forms," ante, in this section.

52. In re Caldwell (D. C., Ga.), 24 Am. B. R. 495, 178 Fed. 377.

53. Allgair v. Fisher (C. C. A., 3d Cir.), 16 Am. B. R. 278, 143 Fed. 962, holding that, where the order of a referee authorizing a private sale of the bankrupt's property at a set price, within thirty days, expires by reason of the failure of the trustee to make the sale, a sale, made under a further order of the referee, at a price much less than the set price, will be set aside, where it appears that the sale and the order authorizing it were made without notice to creditors or lienors.

ings are necessary.⁵⁴ Following the practice under the former law, the forms include one to be used by the trustee in instructing creditors to call for their dividends.⁵⁵ This form is archaic and rarely used, dividend checks being mailed direct with receipts attached, or so phrased as to amount to receipts when indorsed. It is common practice, too, to combine in one notice (1) that for the declaration of dividends and (2) that for the payment of the dividends so declared.⁵⁶ Where creditor claims are disallowed,⁵⁷ or if for any reason their claims are voluntarily withdrawn,⁵⁸ they will not be heard to object to any failure to give or defect in a notice as to the declaration of a dividend.

g. Of filing final accounts.—Notice of the filing of final accounts and of the time and place where they may be examined is required by subdivision (6). In this connection §§ 47-a (8), 55-f, and 65-b should be consulted.⁵⁹ The notice is one of ten days, but the return day must be at least fifteen days after the filing of the trustee's final report and account. A meeting for such purpose cannot now be held until three months after the first dividend.⁶⁰

h. If a proposed compromise of a controversy.—Subdivision (7) refers to § 27; perhaps, at least by analogy, to § 26. No compromise can be made, no matter how advantageous, save on the statutory notice. The requirement is often met by combining such a notice with one for a meeting for general purposes.

i. Of a proposed dismissal of a proceeding.⁶¹—Subdivision (8) clearly refers to § 59-g, and the cases cited under § 59 should be consulted. The practical difficulty of notifying creditors whose names and addresses are unknown, as in most involuntary cases before adjudication, is apparent. It, however, does not, it is thought, limit the mandatory effect of this provision.⁶² Notice to the creditors of the bankrupt of a proposed dismissal of the proceedings is indispensable, and an order of dismissal without notice is erroneous.⁶³ It has been held that the provision requiring notice of a proposed dismissal, construed with section 59-g, does not require notice where the dismissal is

54. See Bankr. Act, § 65-b, as amended.

55. Form No. 17.

56. See "Supplementary Forms," *post*.

57. Matter of Leslie & Griffith Co. (D. C., Mass.), 36 Am. B. R. 744, 230 Fed. 465.

58. American Sav. Bank & Trust Co. v. Munson (Wash. Sup. Ct.), 38 Am. B. R. 55, 159 Pac. 1195.

59. Compare *In re Stein* (D. C., Ind.), 1 Am. B. R. 662, 94 Fed. 124, for the law before the amendatory act of 1903.

60. See under Section Sixty-five of this work.

61. See also Am. B. R. Dig. § 173.

62. For instance, see *Neustadter v. Chicago Dry Goods Co.* (D. C., Wash.), 3 Am. B. R. 96, 96 Fed. 830; *Matter of Lederer* (D. C., N. Y.), 10 Am. B. R. 492, 125 Fed. 96.

Dismissal of proceedings; notice to creditors.—An alleged bankrupt had more than twelve creditors, three of whom joined in an involuntary petition against him. Two of the petitioning creditors colluded to compel the alleged bankrupt to pay the claim of the third who was permitted to withdraw as a petitioning creditor. All but two of the listed creditors, aside from the original petitioning creditors, signed a statement in writ-

ing that they objected to an adjudication and agreed not to participate in any effort to that end. The notices to creditors, contemplated by sections 58-a(8) and 59-d, of a proposed dismissal of the proceedings for lack of sufficient number of petitioning creditors and to give other creditors an opportunity to intervene, were not given and no creditors intervened. It was held that one of the petitioning creditors having withdrawn and the other two being estopped from proceeding with the petition because of conduct in violation of their duty as petitioning creditors, the two remaining creditors who had not joined in the creditors' statement would not have been sufficient to make a jurisdictional petition and the court was warranted in dismissing the proceedings without the giving of the notice of proposed dismissal to creditors, especially after issue had been joined and a hearing had and where the question of lack of notice to other creditors was raised for the first time upon appeal. *Cummins Grocery Co. v. Talley* (C. C. A., 6th Cir.), 26 Am. B. R. 484, 187 Fed. 507.

63. *In re Plymouth Cordage Co.* (C. C. A., 8th Cir.), 13 Am. B. R. 665, 135 Fed. 1000.

on the initiation of the court, on account of a voluntary bankrupt's failure to take the necessary preliminary steps to bring the creditors before the court; the provision relates only to applications for dismissals by parties in interest.⁶⁴ The section contemplates notice to creditors when the petition is about to be dismissed for want of prosecution or by consent of the parties already in court, and has no application to the dismissal of the petition on the merits after hearing.⁶⁵ A dismissal of a petition without notice to creditors is not void because the bankruptcy court has jurisdiction of the subject-matter and of the parties, and its erroneous orders and judgments are as valid, in the absence of direct proceedings to review them, as those in which there is no error.⁶⁶ In an involuntary proceeding, where no list of creditors has been scheduled, the court may dismiss the petition upon the bankrupt's motion, without notice to those creditors who have not intervened.⁶⁷ The notice, if before a reference to the referee, should perhaps take the form of an order to show cause, and be served as above suggested in the same manner as the like order in an application for discharge.⁶⁸

j. Of appointment of receivers.⁶⁹—A receiver of the property of an alleged bankrupt ought never to be appointed, except in rare cases,⁷⁰ without notice to the alleged bankrupt; but an appointment without notice is not, in a constitutional sense, a deprivation of property without due process of law.⁷¹ Neither should a receiver be appointed without notice to adverse claimant in possession of the property,⁷² or a State court receiver⁷³ in possession of the property.

64. *Matter of Crisp* (D. C., Tenn.), 38 Am. B. R. 557.

65. *Lackawanna Leather Co. v. La Porte Carriage Co.* (C. C. A., 7th Cir.), 31 Am. B. R. 658, 211 Fed. 318.

66. **Effect of dismissal without notice.**—In re *Plymouth Cordage Co.* (C. C. A., 8th Cir.), 13 Am. B. R. 665, 674, 135 Fed. 1000; In re *Jemison Mercantile Co.* (C. C. A., 5th Cir.), 7 Am. B. R. 588, 112 Fed. 966, 50 C. C. A. 641, upon the motion of all the petitioners, a petition in bankruptcy was dismissed without notice to the creditors. Eleven months and twenty-three days after this dismissal other creditors appeared, and asked permission to join in the dismissed petition and to prosecute the proceeding, and their application was denied. The court held that the dismissal of the petition without giving notice to the creditors was not void, and that the application was too late to be seriously considered; *Neustadter v. Chicago Dry Goods Co.* (D. C., Wash.), 3 Am. B. R. 96, 96 Fed. 830; In re *Jamaica Slate Roofing & Supply Co.* (D. C., N. Y.), 28 Am. B. R. 763, 197 Fed. 240.

In this case the court, after referring to sections 58 and 59, said: "It is my opinion that these provisions of the law relate to dismissals which in effect withdraw the cases without submission to the court for its decision upon the merits, and there appears to be no requirement of notice to creditors who have not appeared, of trials or hearings in involuntary cases, but if the law does require notice to creditors of hearings upon the

merits, still the rendering of a final judgment without notice to the creditors would be an irregularity or error, the effect of which would be to make the judgment voidable or reversible, as to parties to the record, and void as to others."

67. *Matter of Levi* (C. C. A., 2d Cir.), 15 Am. B. R. 294, 142 Fed. 962.

68. See p. 831, *ante*, and in the "Supplementary Forms," *post*.

69. See also Am. B. R. Dig., § 298.

70. In re *Abrahamson* (Ref., N. Y.), 1 Am. B. R. 44.

71. Bankr. Act, § 2 (33); *Latimer v. McNeal* (C. C. A., 3d Cir.), 16 Am. B. R. 43, 142 Fed. 451.

Bankrupt in prison.—The appointment of a receiver of a bankrupt before adjudication without notice to the bankrupt, who was in prison for engaging with two others, who had absconded, in procuring money through the mails by fraudulent representations, was held not to be void as taking property without due process of law, where a notice would in all probability defeat the very object of the appointment. In re *Francis* (D. C., Pa.), 14 Am. B. R. 676, 136 Fed. 912.

72. *T. S. Faulk & Co. v. Steiner* (C. C. A., 5th Cir.), 21 Am. B. R. 623, 165 Fed. 861.

73. **Notice to state receiver.**—Although notice to an alleged bankrupt of an application for the appointment of a receiver is excused by showing that the defendant has absconded, notice of such application should be given to a state receiver, since the receiver in bankruptcy, when appointed, succeeds to

k. Of petition for attorney's allowance.—A petition for the allowance of an attorney's fee under section 64-b (3) must be upon notice to the parties interested.⁷⁴

l. Of filing voluntary petition after involuntary petition.—When a bankrupt against whom an involuntary petition is pending files his voluntary petition notice should be given to the creditors filing the involuntary petition before any adjudication is made upon the voluntary petition, and then such action should be taken as the hearing shows to be for the best interest of the estate.⁷⁵

m. Of meetings generally.—In addition to the requirements as to notice of the different steps already mentioned, subsection *a* also requires that the parties in interest shall have the statutory notice of "all meetings of creditors." This omnibus phrase seems to include every gathering to pass on matters that may be submitted to creditors. It does not, therefore, include meetings where the referee or judge acts independently of them. A first meeting or a special meeting to fill a vacancy in the office of trustee must, therefore, be regularly noticed.⁷⁶

III. NOTICE TO CREDITORS BY PUBLICATION.

Subsection *b* provides that only the notice of the first meeting must be published. It should be so published at least once, and the last publication must be "at least one week prior to the date fixed for the meeting." Publication must be in the official newspaper.⁷⁷ Whether other notices shall be published depends either on the standing rules of the district or the order

the possession of the receiver in the state court. *Bauman Diamond Co. v. Hart* (C. C. A., 5th Cir.), 27 Am. B. R. 632, 192 Fed. 498.

74. *In re Young* (D. C., N. Car.), 16 Am. B. R. 106, 142 Fed. 891.

75. *In re Dwyer* (D. C., N. Dak.), 7 Am. B. R. 432, 112 Fed. 777; *International Silver Co. v. New York Jewelry Co.* (C. C. A., 6th Cir.), 37 Am. B. R. 91, 233 Fed. 945, holding that where an involuntary proceeding is pending and a voluntary petition is subsequently filed notice thereof should be given to the petitioning creditors, and opportunity be thus afforded to determine the course most likely to conserve the interests of the estate; *Matter of Continental Coal Corp.* (C. C. A., 6th Cir.), 38 Am. B. R. 168, 238 Fed. 113.

Want of notice of voluntary petition.—In the case of *In re New Chattanooga Hardware Co.* (D. C., Tenn.), 27 Am. B. R. 77, 90, 190 Fed. 241, the court, in commenting on the *Dwyer* case, said: "I am clearly of opinion that the want of formal notice to the petitioning creditors of the application for an adjudication in the voluntary case, which it is stated in the *Dwyer* case should, as a matter of proper practice, be given, is not now a valid objection to an adjudication in the voluntary proceedings, as it appears that the petitioning creditors in both the involuntary cases have in fact had actual notice of the application for an adjudication under the voluntary petition, and have appeared in op-

position thereto, so that the failure to give them formal notice is entirely immaterial."

76. Not so of a "special meeting," called under General Order XXI (6); there the court fixes what is due notice.

Notice of special meeting.—In the case of *In re Stoevers* (D. C., Pa.), 5 Am. B. R. 250, 105 Fed. 355, the court said: "I am of opinion that the notice in question, namely, of a special meeting called upon the petition of a creditor, under paragraph 6 of General Order 21, to have a re-examination of certain claims, should have been sent out by the referee, and that this duty did not rest upon the petitioner. Paragraph 6 provides that 'due notice [of such meeting] shall be given by mail addressed to the creditor whose claim is to be re-examined, but does not specify by whom the notice shall be given. I think, however, that this omission is supplied by the Bankruptcy Act in clause 'c' of section 58, which declares that 'all notices shall be given by the referee unless otherwise ordered by the judge.' It was suggested that this clause should be confined to the eight notices enumerated in clause 'a' of the same section, but I am unable to assent to the correctness of this construction. As the language is 'all notices,' and there is no other qualification than this 'unless otherwise ordered by the judge,' I can see no reason to limit the meaning of the word 'all.'"

77. Bankr. Act, § 28.

of the court in each case. It is customary on discharge applications and sales. Failure to publish, while not going to the jurisdiction, is probably so far an irregularity as to render void any meeting for which publication is necessary.⁷⁸ Proof of publication should be made by affidavit of the proprietor or foreman of the newspaper.⁷⁹

IV. BY WHOM NOTICES ARE GIVEN.

Notices must be given by the referee, "unless otherwise ordered by the judge." If by the former, the official business envelope can be used; perhaps if, under the order of the judge, actually mailed by another. Notices are sometimes printed on postal cards, sometimes on slips and inclosed in envelopes. The law imposes this duty upon the referee, and it will be presumed that he has properly performed it.⁸⁰ If the referee mails the notice he is entitled to indemnity for his actual expense in so doing, but, especially since § 72 was added by the amendatory act, to no fee. No compensation thus being possible, the judge has often in the past "otherwise ordered," *i. e.*, he has, by standing rule, directed such notices to be mailed by the bankrupt or his attorney, and this practice will perhaps become general. In that case, proof must be made by affidavit and filed with the referee. If the referee mails the notices, a certificate in his record-book that he mailed notices to all creditors at the addresses given in the schedules, or as afterward filed with the papers in the case, is enough.⁸¹

78. In re Hall, Fed. Cas. 5,922. See also In re Bellamy, Fed. Cas. 1,260; Wiley v. Pavey, 61 Ind. 457.

79. For form see 1 N. B. N. 118. See also "Supplementary Forms," *post*.

80. Clafin v. Wolff (N. J. Ct. of Errors & App.), 38 Am. B. R. 852, 96 Atl. 73.

81. This practice is outlined in 1 N. B. N. 112, 113, 118.

SECTION FIFTY-NINE.

WHO MAY FILE AND DISMISS PETITIONS.

§ 59. **Who May File and Dismiss Petitions.**—*a* Any qualified person may file a petition to be adjudged a voluntary bankrupt.

b Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.

c Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.

d If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

e In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.

f Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.

g A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors, *and to that end the court shall, before entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their*

*addresses, and shall cause notice to be sent to all such creditors of the pendency of such application, and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest opportunity to be heard.**

Analogous provisions: In U. S.: As to who may file voluntary petitions, Act of 1867, § 11, R. S., § 5044; Act of 1841, § 7; As to who may file involuntary petitions, Act of 1867, § 39, R. S., § 5021; Act of 1841, § 1; Act of 1800, §§ 1, 2; As to intervention by other creditors, Act of 1867, R. S., § 5026.

In Eng.: Act of 1883, §§ 4, 5, 6, 7; General Rules 143 to 152.

Cross-references: To the law: Definition of creditor, § 1(9); of petition, § 1(20); of secured creditor, § 1(23).

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See also Supplementary Forms, *post*; Hagar and Alexander's Bankruptcy Forms (2d Ed.)

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I. FILING PETITIONS GENERALLY.

a. **Comparative legislation.**—In most of the continental countries, a single creditor, no matter what his debt, may petition. The English law permits one creditor, as well as two or more, in not less than £50, to apply.¹ Our laws as to voluntary petitions are considered elsewhere.² As to involuntary, the law of 1800 permitted a petition "by any one creditor" in \$1,000, or

1. English Act of 1883, § 6(1)-a.

2. See under Section Four of this work.

two creditors in \$1,500, or three creditors in \$2,000; the law of 1841 allowed one creditor in \$500 to petition; while the law of 1867, which originally gave the right to one or more creditors in \$250, was, in 1874, so amended that it could be exercised only by one-fourth in number of the creditors the aggregate of whose provable debts amounted to one-third of all. The present act seems a compromise.³

b. Scope of section.—This section has to do primarily with: (1) who may file petitions; and secondarily with: (2) the practice where an answer denies that the creditors are less in number than twelve; (3) the intervention of creditors other than the petitioning creditors, and (4) the dismissal of petitions other than on the merits. It should always be read in connection with § 18. Its limited scope and the other sections controlling on the frame of, the allegations in, the verification of, and the service of process under, involuntary petitions, are indicated elsewhere.

c. Liability of petitioning creditors when unsuccessful.⁴—A petition filed by *bona fide* creditors, without malice, without libelous and slanderous charges, with reasonable grounds for believing the allegations contained in the petition, with probable cause, and upon legal advice, although not successfully prosecuted, will not sustain an action for damages;⁵ but where a bankruptcy proceeding is instituted without probable cause and with malicious intent, an action for malicious prosecution will lie.⁶ Material allegations in a petition in bankruptcy are absolutely privileged and cannot be made the basis of an action for libel.⁷ A State court has the power to restrain, by injunction, a creditor from prosecuting a fraudulent and oppressive petition in bankruptcy against a debtor, especially in cases where the petitioning creditor has, prior to filing the petition, sought the aid of the State court with reference to the claim held by him.⁸

II. WHO MAY FILE VOLUNTARY PETITIONS.⁹

a. In general.—Subsection *a* provides that any qualified person may file a petition to be adjudged a voluntary bankrupt. Section 4 prescribes who may become a voluntary bankrupt. The discussion under that section may prove useful in determining whether a person is qualified. "Any qualified person" means, therefore, "any person except a municipal, railroad, insur-

3. See "Analogous Provisions," *supra*.

4. See also Am. B. R. Dig. § 286.

5. Harvey v. Gartner, 34 Am. B. R. 301, 67 So. 197.

6. Wilkinson v. Goodfellow-Brooks Shoe Co. (C. C., Mo.), 15 Am. B. R. 554, 141 Fed. 218; Matter of Moebs & Rechnitzer (D. C., N. Y.), 22 Am. B. R. 286, 174 Fed. 165.

7. Libel, privileged communications.—Where, in an action for libel, the complaint alleges that defendants maliciously and wrongfully published concerning the plaintiff a statement in a petition in bankruptcy alleging that the bankrupt had made a fraudulent general assignment and had removed and concealed property with intent to defraud his creditors, the property so removed and concealed including goods recently purchased from defendants, and that a large quantity of said goods were in the possession

of the plaintiff and being offered for sale by the plaintiff at a price much less than the present market value, characterizing the action of the plaintiff as dishonest and in collusion with the bankrupt to defraud said creditors and also assist him in concealing his assets, the alleged libel complained of, being a statement in a pleading or petition filed in a court in pending judicial proceedings, pertinent and relevant to the issue there presented, was absolutely privileged and, appearing upon the face of the complaint, said complaint was demurrable. Rosenberg v. Dworetzky (Sup. Ct., App. Div., N. Y.), 24 Am. B. R. 583, 139 N. Y. App. Div. 517, 124 N. Y. Supp. 191.

8. Pusey v. Bradley, 46 How. Pr. 255, 1 N. Y. Super. Ct 661.

9. See also Am. B. R. Dig. §§ 121-154, 106-199.

ance or banking corporation."¹⁰ A State court has no right to enjoin a party from applying to the court of bankruptcy to be adjudged a voluntary bankrupt.¹¹

b. Where involuntary petition has been filed.¹²—The practice of allowing a bankrupt to file a voluntary petition in bankruptcy after an involuntary petition had been filed against him appears to have been disapproved by the court under the act of 1867 and an adjudication upon a voluntary petition was set aside,¹³ the court evidently not following an earlier case decided under the act of 1841, holding that a debtor might file a voluntary petition after an involuntary petition had been filed against him.¹⁴ Under the present act it is well settled that the pendency of an involuntary petition before adjudication will not prevent an insolvent debtor from making a voluntary petition.¹⁵ The debtor has the right to avail himself of the benefits of the bankruptcy law on his own application, and this right cannot be forfeited or rendered ineffectual merely because the creditors' petition is first filed and pending undetermined when the debtor files his petition.¹⁶ A voluntary proceeding takes precedence over an involuntary proceeding, unless the latter is first heard or has gone to an adjudication.¹⁷ Where both proceedings are instituted in the same court, the duty arises of choosing as to which proceeding is for the best interests of creditors;¹⁸ and if voluntary proceedings are entertained subsequent to the filing of an involuntary petition, notice

10. Upon the petition of a New York corporation to be adjudged a voluntary bankrupt, where neither the body of the petition, nor the verification, nor the schedule annexed thereto, stated or showed that any corporate action had been had authorizing the filing of the petition in bankruptcy, or authorizing the president of the corporation, who signed and verified it, to execute the petition in the name of the corporation, it was held, that the court did not have jurisdiction to adjudge the corporation a voluntary bankrupt until it had a verified petition before it, showing, as provided by the N. Y. General Corporation Law, section 34, that the board of directors at a meeting duly held, had determined to make and file such a petition, and had authorized or designated the officer or officers making it, to execute the same on behalf of the corporation. *In re Jefferson Casket Co.* (D. C., N. Y.), 25 Am. B. R. 663, 182 Fed. 689.

11. *Filligin v. Thornton*, 12 N. B. R. 92, 49 Ga. 384.

12. See also Am. B. R. Dig. § 198.

13. Rule under former act.—In the case of *In re Stewart*, 3 N. B. R. 108, Fed. Cas. 13,419, an adjudication was made upon a voluntary petition but the same was set aside by the court on motion. The court in granting the motion said: "It was never intended by the bankruptcy act and no correct rule of practice can tolerate that when a creditor has instituted proceedings to enforce his debtor into bankruptcy such debtor should be allowed to become a bankrupt and to be adjudicated before the determination of the creditor's petition. To permit such a practice might work a most flagrant wrong upon the rights of the petitioning creditor."

14. *In re Canfield*, 1 N. Y. Leg. Obs. 234, 5 Law Rep. 415. See also *In re Davidson*, 3 N. B. R. 418, Fed. Cas. 3,599.

15. *In re Waxelbaum* (D. C., N. Y.), 3 Am. B. R. 392, 98 Fed. 589; *In re Dwyer* (D. C., N. Dak.), 7 Am. B. R. 532, 112 Fed. 777; *In re Stegar* (D. C., Ala.), 7 Am. B. R. 665, 113 Fed. 978; *Matter of Carpenter* (Ref., N. Y.), 25 Am. B. R. 161, citing *Collier on Bankruptcy* (8th Ed.), p. 629; *In re New Chattanooga Hardware Co.* (D. C. Tenn.), 27 Am. B. R. 77, 190 Fed. 241; *Matter of Pennington & Co.* (D. C., Ky.), 35 Am. B. R. 832, 228 Fed. 388, citing text. The mere pendency of an involuntary petition cannot deprive the bankruptcy court of jurisdiction to receive and consider a voluntary petition; nor can the filing of a voluntary petition be a lawful basis for entering an adjudication or taking any other step in the involuntary proceeding. *In re Lachenmaier* (C. C. A., 7th Cir.), 29 Am. B. R. 325, 203 Fed. 32.

Intent to effect composition.—It is no objection to an adjudication in voluntary bankruptcy proceedings, upon a petition filed by a debtor subsequent to the filing of involuntary petitions, that the debtor intended to take advantage of section 12-d(1) of the Bankruptcy Act and effect a composition with its creditors. *In re New Chattanooga Hardware Co.* (D. C., Tenn.), 27 Am. B. R. 77, 190 Fed. 241.

16. *Matter of Carpenter* (Ref., N. Y.), 25 Am. B. R. 161; *In re Stegar* (D. C., Ala.), 7 Am. B. R. 665, 113 Fed. 978.

17. *Matter of Pennington & Co.* (D. C., Ky.), 35 Am. B. R. 832, 228 Fed. 388.

18. *International Silver Co. v. New York Jewelry Co.* (C. C. A., 6th Cir.), 37 Am. B. R. 91, 233 Fed. 945.

should be given to the petitioning creditors.¹⁹ But where a question is raised as to the residence or principal place of business of the bankrupt, it has been held that the court in a district in which such residence or place of business is located may retain and exercise exclusive jurisdiction notwithstanding the subsequent filing of a voluntary petition in another district.²⁰

c. Form of petition and practice.—Section 18 relates to pleadings in voluntary bankruptcies. It has seemed more appropriate to consider under that section the form and sufficiency of a voluntary petition. The petition must be accompanied by a schedule of liabilities and assets. This is considered under § 7, and it is not necessary to discuss it further in this connection. Subsection *c* of this section (§ 59) requires petitions to be filed in duplicate, and this applies to voluntary, as well as to involuntary petitions.

III. WHO MAY FILE INVOLUNTARY PETITIONS.²¹

a. In general.—Subsection *b* definitely declares as to what creditors,—under certain restrictions as to number and amount,—may file a petition against a person alleged to be bankrupt. The words of the subsection state one of the jurisdictional allegations of all involuntary petitions.²² Other essential allegations are referred to elsewhere.²³ This section is confined to creditors and contains the only provision of the act that expressly defines who may file a petition in proceedings to have a debtor adjudged an involuntary bankrupt.²⁴ A bankruptcy petition cannot be filed other than by the debtor, save by (1) a creditor or creditors, (2) having provable claims,²⁵ (3) aggregating in excess of securities, \$500,²⁶ (4) if but one creditor petitions, he must aver that the alleged bankrupt has less than twelve creditors in all; otherwise, three creditors must join in the petition.²⁷ If there are a sufficient number of petitioning creditors holding a sufficient amount of provable claims, bankruptcy administration may be had, although a large majority of

19. *Matter of Continental Coal Corp.* (C. C. A., 6th Cir.), 38 Am. B. R. 168, 238 Fed. 113; *International Silver Co. v. New York Jewelry Co.* (C. C. A., 6th Cir.), 37 Am. B. R. 91, 233 Fed. 945.

20. *Roszell Bros. v. Continental Coal Corp.* (D. C., Ky.), 38 Am. B. R. 31, 235 Fed. 343; *Matter of Continental Coal Corp.* (C. C. A., 6th Cir.), 38 Am. B. R. 168, 238 Fed. 113.

21. See also Am. B. R. Dig. §§ 200–210.

22. Unless this requirement is observed jurisdiction is not conferred upon the court. In *re Gillette* (D. C., N. Y.), 5 Am. B. R. 119, 125, 104 Fed. 769; In *re Rogers Milling Co.* (D. C., Ark.), 4 Am. B. R. 540, 102 Fed. 687. Although it may be that such a defect is waivable since it pertains merely to want of jurisdiction of the person or thing In *re Mason* (D. C., N. Car.), 3 Am. B. R. 599, 99 Fed. 256.

23. See under Sections Two, Three, Four, Five and Eighteen of this work.

24. In *re J. M. Ceballos & Co.* (D. C., N. J.), 20 Am. B. R. 459, 161 Fed. 445, 451.

25. See *post*, this section, creditors who have provable claims.

26. Effect of reduction of amount of claims prior to adjudication.—Where, in an invol-

untary bankruptcy, the aggregate amount of the claims of the original petitioners is, before adjudication, reduced below the statutory limit by payments made by the alleged bankrupt, and other creditors holding claims to an amount sufficient to make the aggregate amount of all the claims \$500 petition to join in the proceedings, the court has jurisdiction to enter an order of adjudication. In *re Ryan* (D. C., Pa.), 7 Am. B. R. 562, 114 Fed. 373.

27. In *re Corwin Mfg. Co.* (D. C., Mass.), 26 Am. B. R. 269, 185 Fed. 976; In *re Brown* (D. C., Mo.), 7 Am. B. R. 102, 111 Fed. 979, holding that, where the petition in an involuntary proceeding avers that the creditors of the alleged bankrupt are less than twelve, and his answer alleges that his creditors are more than twelve, and gives a list of thirteen creditors with their addresses and the amounts owing to them, and the proof shows that one of the creditors has assigned his claim and joined in the petition, and that another alleged creditor claims that he is not a creditor at all, there are still twelve creditors, including the petitioning creditor, and the petition must be dismissed.

the creditors are favorable to a general assignment for creditors.²⁸ The holders of composition notes given by a debtor, which were assumed by a corporation organized to take over the debtor's business are creditors entitled to file a petition against the corporation.²⁹

b. Stockholders and officers of corporation.—Stockholders as such are not creditors of a bankrupt corporation and may not file an involuntary petition against the corporation,³⁰ but creditors of a corporation, who are also directors, are not precluded from petitioning for the adjudication of the corporation on the ground of inability to pay its debts merely because their presence at a meeting of the board of directors when the admission was made was necessary to its validity.³¹

c. Creditors who were not such at time of commission of act of bankruptcy.—There are a number of cases holding that a creditor who was not such at the time of the commission of an alleged act of bankruptcy cannot petition his debtor into bankruptcy.³² This appears to be not only the conclusion of the courts in well-considered cases, but a reasonable construction.³³ It is unquestionably based upon the well-established principle that creditors cannot complain of an act of bankruptcy, consisting of a transfer or preference by the debtor prior to the time they became creditors, unless such transfer or preference was made with the direct purpose of defeating their claim.³⁴ This doctrine has been disapproved, on the ground that the statute does not specifically declare that petitioning creditors must have been such at the time of the commission of the act of bankruptcy,³⁵ and it would appear that the weight of authority now favors the proposition that creditors having provable claims at the time of filing the petition may join therein.³⁶

d. Number of creditors and amount of claims.³⁷—(1) **TIME CONTROLLING NUMBER AND AMOUNT.**—The time when the petitioning creditors must be sufficient in number and amount is at the time of the adjudication.³⁸ Creditors other

28. *In re Perry & Whitney Co.* (D. C., Mass.), 22 Am. B. R. 772, 172 Fed. 745.

29. *Matter of Fleig Mercantile Co.* (C. C. A., 7th Cir.), 38 Am. B. R. 113, 237 Fed. 178.

30. *In re Eureka Anthracite Coal Co.* (D. C., Ark.), 28 Am. B. R. 758, 197 Fed. 216.

31. *Home Powder Co. v. Geis* (C. C. A., 8th Cir.), 29 Am. B. R. 580, 204 Fed. 568.

32. *In re Callison* (D. C., Fla.), 12 Am. B. R. 344, 130 Fed. 987; *affd. sub. nom. Brake v. Callison* (C. C. A., 5th Cir.), 11 Am. B. R. 797, 129 Fed. 201; *In re Stone* (D. C., Pa.), 30 Am. B. R. 392, 206 Fed. 356. See also Am. B. R. Dig. § 205.

33. *In re Brinckmann* (D. C., Ind.), 4 Am. B. R. 551, 103 Fed. 65; *Beers v. Hanlin* (D. C., Or.), 3 Am. B. R. 745, 99 Fed. 695; *In re Muller*, Fed. Cas. 9,912; *In re Burke*, Fed. Cas. 2,156.

34. *Brake v. Callison* (C. C. A., 5th Cir.), 11 Am. B. R. 797, 129 Fed. 201. Text quoted in *In re Stone* (D. C., Pa.), 30 Am. B. R. 392, 206 Fed. 356.

35. *Matter of Hanyan* (D. C., N. Y.), 24 Am. B. R. 72, 180 Fed. 498, holding that a creditor may join in a petition in an involuntary proceeding, if he have a provable claim against the alleged bankrupt at the time the petition is filed and he is not disqualified to act as such where he became a

creditor after the act of bankruptcy alleged in the petition was committed. In the case of *In re Perry & Whitney Co.* (D. C., Mass.), 22 Am. B. R. 772, 172 Fed. 745 (*affd.* 23 Am. B. R. 695, 175 Fed. 52), the court stated that it should not be held that a creditor is disqualified as a petitioner for no other reason than that the claim owned by him was not transferred to him until after the act of bankruptcy.

36. *Emerine v. Tarault* (C. C. A., 6th Cir.), 34 Am. B. R. 55, 219 Fed. 68; *Matter of Kehoe* (C. C. A., 2d Cir.), 36 Am. B. R. 891; *In re Perry & Whitney* (C. C. A., 1st Cir.), 23 Am. B. R. 695, 175 Fed. 52.

37. See also Am. B. R. Dig. § 211.

38. *In re Plymouth Cordage Co.* (C. C. A., 8th Cir.), 13 Am. B. R. 665, 135 Fed. 1,000. *In Moulton v. Coburn* (C. C. A., 1st Cir.), 12 Am. B. R. 553, 557, 131 Fed. 201, the court said: "It is true that, according to express provisions of the statute, the sufficiency of the number of petitioning creditors is to be determined as of the date of hearing, and not as of the date of filing the original petition."

State of claim when petition is filed governs. The fact that a petitioning creditor having a provable claim at the time of filing the petition subsequently became liable to

than original petitioners may join in at any time before adjudication and be counted to make the required number of creditors and amount of claims,³⁹ even though the original creditors had no provable claims,⁴⁰ unless, perhaps, in a case where the original petition shows on its face that an insufficient number of creditors or an insufficient amount of claims had united in the petition.⁴¹ But debts created subsequent to the filing of the petition not being provable, it follows that creditors whose claims were created after such time may not be counted in making up the required number.⁴² Neither can the purchaser of a claim, bought after the filing of the petition in bankruptcy for the purpose of creating an additional creditor, be counted in making up the statutory number.⁴³ Where only two petitioning creditors have qualified, and six out of nine intervening creditors are of unquestioned competency, the proceeding will be sustained.⁴⁴

(2) **BUYING CLAIMS OR INDUCEMENT NOT TO JOIN.**—A person may buy up claims to make the required amount;⁴⁵ the debtor may importune his creditors to proceed and the adjudication still be valid;⁴⁶ and if a creditor solicits other creditors to join, the bankrupt may solicit them not to do so.⁴⁷

(3) **TRANSACTIONS AFFECTING NUMBER OF CREDITORS AND AMOUNT OF CLAIMS.**—Where several claims are purchased for the purpose of instituting proceedings in bankruptcy the purchaser will be deemed a single creditor in counting the number of creditors;⁴⁸ where the main purpose of such a trans-

the bankrupt's assignee for creditors because of a wrongful attachment is immaterial. In re Bevins (C. C. A., 2d Cir.), 21 Am. B. R. 344, 165 Fed. 434.

Amount of claims of petitioning creditors.—In determining the propriety of making an adjudication on an involuntary petition, it is not necessary to determine the exact amounts due the petitioning creditors but it is enough that the petitioning creditors have shown that they are creditors, and to an extent sufficient to satisfy the act. In re Hughes (D. C., N. Y.), 25 Am. B. R. 556, 183 Fed. 872.

39. Creditors other than original petitioners may at any time before an adjudication of bankruptcy or the dismissal of the original petition, and whether before or after the expiration of four months from the act of bankruptcy, join therein in order to supply any deficiency in the amount of provable claims originally set forth in the petition, insufficiency in amount of such claims not being an incurable jurisdictional defect. In re Mackey (D. C., Del.), 6 Am. B. R. 577, 110 Fed. 355; In re Plymouth Cordage Co. (C. C. A., 8th Cir.), 13 Am. B. R. 665, 135 Fed. 1000; In re Crenshaw (D. C., Ala.), 19 Am. B. R. 503, 156 Fed. 638; In re Beddingfield (D. C., Ga.), 2 Am. B. R. 355, 96 Fed. 190; Hoffschlaeger Co. v. Nap (D. C., Hawaii), 12 Am. B. R. 515, 2 U. S. D. C. Hawaii, 96; In re Romanow (D. C., Mass.), 1 Am. B. R. 461, 92 Fed. 510; In re Charles Town Light & Power Co. (D. C., W. Va.), 25 Am. B. R. 687, 183 Fed. 160; In re Mercur (D. C., Pa.), 2 Am. B. R. 626, 95 Fed. 634.

40. In re Mammoth Pine Lumber Co. (D. C., Ark.), 6 Am. B. R. 84, 109 Fed. 308.

41. In re Beddingfield (D. C., Ga.), 2 Am. B. R. 355, 96 Fed. 190.

42. Moulton v. Coburn (C. C. A., 1st Cir.), 12 Am. B. R. 553, 557, 131 Fed. 201.

43. Emerine v. Tarault (C. C. A., 6th Cir.), 34 Am. B. R. 55, 219 Fed. 68; Matter of Kehoe (C. C. A., 2d Cir.), 36 Am. B. R. 891.

44. In re Vastbinder (D. C., Pa.), 11 Am. B. R. 118, 126 Fed. 417. See In re Romanow (D. C., Mass.), 1 Am. B. R. 461, 92 Fed. 510.

45. In re Woodford, Fed. Cas. 17,972; In re Shouse, Fed. Cas. 12,815; In re Bevins (C. C. A., 2d Cir.), 21 Am. B. R. 344, 165 Fed. 434; Matter of Kehoe (C. C. A., 2d Cir.), 36 Am. B. R. 891.

46. In re Bouton, Fed. Cas. 1,706; Matter of Brown (D. C., Mo.), 7 Am. B. R. 102, 111 Fed. 979.

It is not illegal for an attorney to agree to pay a creditor's claim upon his joining in an involuntary petition. Bernard v. Fromme, 22 Am. B. R. 585, 132 App. Div. 922, 116 N. Y. Supp. 807.

47. In re Brown (D. C., Mo.), 7 Am. B. R. 102, 111 Fed. 979; Matter of Kehoe (C. C. A., 2d Cir.), 36 Am. B. R. 947.

48. Intervening petitioners whose claims are in fact owned by the original petitioner are not existing "creditors who have provable claims," and cannot be considered in making up the requisite number of petitioners for an involuntary adjudication; such procedure is an obvious subterfuge, and the intervening petitions will be summarily dismissed. In re Burlington Malting Co. (D. C., Wis.), 6 Am. B. R. 369, 109 Fed. 177, citing In re Worcester County (C. C. A., 1st Cir.), 4 Am. B. R. 496, 505, 102 Fed. 808,

action is to take the administration of an estate out of the State court where nearly all of the creditors are satisfied that it should remain, the bankruptcy court should be slow to lend its aid, and "should resolve every doubtful question of law or fact against the petitioning creditor."⁴⁹ As where two notes given by the bankrupt to a creditor were assigned by an agent under claim of authority, but without the creditor's knowledge, the assignees could not both be counted as petitioning creditors, it appearing that the transaction was for the purpose of securing advantage in the proceedings.⁵⁰ A debtor, by reducing the amount of his indebtedness to less than \$1,000 by a settlement with certain creditors after a general assignment, cannot prevent other creditors holding claims sufficient in number and amount, who refused to so settle, from filing an involuntary petition.⁵¹ A transaction devised and entered into for the purpose of preventing a petition by a single creditor by continuing the number of creditors at more than twelve, being an indirect method of defeating the statute, is unlawful and void.⁵² The act does not sanction the splitting

49. *Lowenstein v. McShane Mfg. Co.* (D. C., Md.), 12 Am. B. R. 601, 130 Fed. 1007. But where only a comparatively inconsiderable minority of the creditors desire the administration of their debtors' estate in bankruptcy, and the greater proportion of them in number and amount regard the general assignment as more for their interests, the facts do not warrant the court in resolving every doubtful question of fact or law against the petitioning creditors, if there are three *bona fide* creditors whose claims, amounting in all to \$500, insist upon bankruptcy administration. In *re Perry & Whitney Co.* (D. C., Mass.), 22 Am. B. R. 772, 172 Fed. 745, affd. 23 Am. B. R. 695, 175 Fed. 52.

50. In *re Perry & Whitney Co.* (D. C., Mass.), 22 Am. B. R. 772, 172 Fed. 745, affd. 23 Am. B. R. 695, 175 Fed. 52.

51. Reduction below \$1,000 by settlement with certain creditors after general assignment and before filing of petition.—An alleged bankrupt, owing over \$4,000, committed an act of bankruptcy by making an assignment for the benefit of creditors and thereafter made a settlement with certain of his creditors by paying them a percentage of their claims, receiving releases discharging him and his assignee from all further liability to them, which reduced the amount of his indebtedness to less than \$1,000, the amount required by § 4-b of the bankruptcy act to enable him to be adjudged an involuntary bankrupt. It was held, that other creditors holding claims sufficient in number and amount who refused to so settle could not be thus debarred from filing a petition in involuntary bankruptcy subsequent to such settlement and within four months of the commission of such act of bankruptcy, as, it would seem, the amount of debts owing was intended by § 4-b to be ascertained as of the date of the act of bankruptcy charged, but even if that were not so, the effect of an adjudication would be to annul the general assignment and the dealings thereunder between the alleged bankrupt and the assenting

creditors, created, so far as the petitioners' rights were concerned, a preferential or fraudulent transfer, which, upon adjudication, they were entitled to have recovered by the trustee in bankruptcy, and for that reason the debts of the assenting creditors should be counted as debts owing at the date of the petition. In *re Jacobson* (D. C., Mass.), 24 Am. B. R. 927, 181 Fed. 870.

52. Assignment of claims to prevent creditors' petition.—Where the assignee under a general assignment for creditors made within the four months' period and prior to the filing of a petition in bankruptcy against the assignor, took assignments in writing to himself of the claims of twelve creditors paying therefor by checks signed by him as assignee and four days before the petition in bankruptcy was filed, each of the said claims were assigned by the assignee to different persons for the same amount that he had paid for them, the purpose of the parties being to keep claims enough alive to prevent a single creditor from maintaining a petition in bankruptcy against the assignor, is an attempt to artificially create a new condition for the specific purpose of defeating, by indirect methods, the scheme of the bankruptcy statute, and cannot receive the approval of the court. *Leighton v. Kennedy* (C. C. A., 1st Cir.), 12 Am. B. R. 229, 129 Fed. 737. Judge Putnam, in delivering the opinion in this case, said: "An attempt to create such a condition, and thus by indirect methods to defeat the scheme of the statute, is unlawful and void, and so clearly so that we need not elaborate the proposition."

Where a creditor in consideration of the transfer to him of all assets of his debtor assumes the payment of all his debts, except one, and under the State law becomes absolutely liable to the creditors so preferred to the full amount of their claims, they may not, in the absence of dissent on their part to such transfer, be counted as creditors in an effort to prevent the single creditor from maintaining an involuntary petition in

of a claim into parts in order to create the requisite number of petitioning creditors.⁵³

(4) CREDITORS WHO ARE ESTOPPED FROM FILING PETITION NOT TO BE COUNTED.—It is only such creditors as may be petitioners who should be counted.⁵⁴ A creditor who has a voidable preference may not be counted against the petitioner in computing the number of creditors that must join in a petition, until he surrenders his preference. If he surrenders before adjudication he may be counted,⁵⁵ but in determining whether the debts of the alleged bankrupt aggregate \$1,000, not only those which exist unpaid at the time of filing the petition, but also those which the debtor may have preferentially paid within four months, are to be counted.⁵⁶ Where the creditors are protected by a guaranty from another creditor to whom the assets of the bankrupt have been assigned, they are not to be counted as creditors in an effort to prevent the guarantor creditor from maintaining an involuntary proceeding.⁵⁷ But where one of two or more joint makers or endorsers of a note is petitioned against each of the co-makers or co-endorsers who are required to pay the note has a separate provable claim against the alleged bankrupt and may be counted.⁵⁸

e. Creditors who have provable claims.—Under this section it is absolutely necessary that each creditor joining in an involuntary petition should be the owner of a demand or claim provable against the bankrupt within the provisions of the act.⁵⁹ Whether the petitioning creditor's debt is provable or not is the important test in determining whether his petition will be entertained. The meaning of "provable debts"⁶⁰ is discussed in detail under § 63. There

bankruptcy against the assignor. *In re Blount* (D. C., Ark.), 16 Am. B. R. 97, 142 Fed. 263.

53. *In re Tribelhorn* (C. C. A., 2d Cir.), 14 Am. B. R. 491, 137 Fed. 3, holding that, where the attorney for the petitioning creditors becomes a creditor by an assignment of a part of the claim of one of the petitioning creditors in an involuntary bankruptcy made after the filing of the petition he may not be counted as a petitioning creditor; *In re Independent Thread Co.* (D. C., N. J.), 7 Am. B. R. 704, 113 Fed. 998, holding that, where a sufficient number of creditors are not willing to file an involuntary petition against a corporation, and for the purpose of evading the requirements of the statute it procures one creditor to assign part of its claim to third persons, in order to create the necessary number of creditors, their petition will be dismissed.

54. *In re Miner* (D. C., Mass.), 4 Am. B. R. 710, 104 Fed. 520, holding that creditors who have assented to a general assignment are not to be counted.

55. Creditors holding voidable preferences. —*Matter of Murphy* (D. C., Mass.), 35 Am. B. R. 635, 225 Fed. 392; *Stevens v. Nave-McCord Co.* (C. C. A., 8th Cir.), 17 Am. B. R. 609, 150 Fed. 71, in which the court says: "But after a thoughtful consideration of this and other contentions of counsel, the evil of preferences which the bankrupt law was enacted to remove, the remedy of an equal distribution of the property of the

bankrupt which it was passed to provide, the prohibition of the use of their claims by preferred creditors until they surrender them which the act contains, the general scope of the law and all its provisions considered together, and the duty to give it a rational and sensible interpretation have forced our minds to the conclusion that it was the intention of Congress that creditors who hold voidable preferences should not be counted either for or against the petition for an adjudication in bankruptcy until they surrender their preferences." Compare *McMurtrey v. Smith* (Ref., Tex.), 15 Am. B. R. 427; *Leighton v. Kennedy* (C. C. A., 1st Cir.), 12 Am. B. R. 229, 232, 129 Fed. 739.

56. *In re Cain* (Ref., Ill.), 2 Am. B. R. 378; *In re Norcross* (Ref., Mo.), 1 Am. B. R. 644; *In re Tirre* (D. C., N. Y.), 2 Am. B. R. 493, 95 Fed. 425.

57. *In re Blount* (D. C., Ark.), 16 Am. B. R. 97, 142 Fed. 263.

58. *Wright v. Rumph* (C. C. A., 5th Cir.), 38 Am. B. R. 235, 238 Fed. 138.

59. *Matter of Howell* (C. C. A., 2d Cir.), 32 Am. B. R. 572, 215 Fed. 1.

60. Provable and allowable claims distinguished.—The distinction between "proved" and "allowed" is always made apparent throughout the bankruptcy act, and the term "provable claims," in section 59d, is not to be given the same meaning as allowable claims. *Matter of Hornstein* (D. C., N. Y.), 10 Am. B. R. 308, 122 Fed. 266.

are numerous cases under the present law where a creditor's petition has been attacked on this ground; these will be considered here. The provability of the creditors should be established by at least *prima facie* evidence, although it is not essential that formal proof be presented.⁶¹ As to the person petitioning, it has been held that a wife may do so,⁶² also where the petitioner is the only creditor and is such by virtue of a judgment for breach of promise,⁶³ and that, if also creditors, stockholders may petition against their corporation,⁶⁴ or a partner against his partnership, but not as mere stockholders or partners;⁶⁵ It is clear too, that the creditors of a partnership may file against an individual partner.⁶⁶ Depositors in an insolvent bank may join in a petition against a stockholder of the bank, where a State statute makes the stockholder personally liable for deposits.⁶⁷ A tax collector cannot file a petition without alleging that the taxes are a provable claim under the State law.⁶⁸ An unliquidated claim, under the present law, not being yet "provable," will not sustain a petition.⁶⁹ But it has been held that a creditor, having an unliquidated debt, may file a petition, provided the debt is provable.⁷⁰ Whether a surety on a debt not due may file a petition is a question.⁷¹ That an indorser can is not doubted, his claim being provable,⁷² so also, if the surety has, on default of his principal, assumed the latter's obligation;⁷³

61. In re McNally Co. (Ref., N. Y.), 29 Am. B. R. 772.

62. In re Novak (D. C., Iowa), 4 Am. B. R. 311, 101 Fed. 800.

63. In re Penzansky (Ref., Mass.), 8 Am. B. R. 99.

64. In re Rollins, etc., Co., 2 N. B. N. Rep. 988.

65. See In re Schenkin & Coney (Ref., N. Y.), 7 Am. B. R. 162, *affd.* on this point, 113 Fed. 421.

66. In re Mercur (D. C., Pa.), 2 Am. B. R. 626, 95 Fed. 634.

67. In re Walker (C. C. A., 9th Cir.), 21 Am. B. R. 132, 164 Fed. 680. Such a liability is contractual. In re Brown (C. C. A., 9th Cir.), 21 Am. B. R. 123, 164 Fed. 673.

68. **Petition by tax collector.**—Where petitioner in involuntary bankruptcy proceedings was a tax collector and there was no allegation that at the date of the petition the taxes had remained unpaid for three months after being committed to the collector, the collector had no provable claim and was incapable of maintaining the petition, as, under the Massachusetts law, such allegation was necessary in order to maintain an action. In re Corwin Mfg. Co. (D. C., Mass.), 26 Am. B. R. 269, 185 Fed. 976.

69. **Unliquidated claim.**—Beers v. Hanlin, (D. C., Oreg.), 3 Am. B. R. 745, 99 Fed. 695; In re Brinckmann (D. C., Ind.), 4 Am. B. R. 551, 103 Fed. 65; In re Morales (D. C., Fla.), 5 Am. B. R. 425, 105 Fed. 761; In re Big Meadows Gas Co. (D. C., Pa.), 7 Am. B. R. 697, 113 Fed. 974. See also Am. B. R. Dig. § 206.

70. In re Manhattan Ice Co. (D. C., N. Y.), 7 Am. B. R. 408, 114 Fed. 400, *affd.* as In re Stern (C. C. A., 2d Cir.), 8 Am. B. R. 569, 116 Fed. 604. And compare In re Hilton

(D. C., N. Y.), 4 Am. B. R. 774, 104 Fed. 981.

A claim for damages for breach of warranty upon the sale of personal property is a provable debt, and the amount may be liquidated upon a jury trial demanded upon a petition filed against the debtor. In re Grant Shoe Co. (D. C., N. Y.), 11 Am. B. R. 48, 125 Fed. 576.

The amount to be paid a subcontractor for work and materials in the construction of a building, under a contract providing that the contractor shall pay to the subcontractor a certain portion of the sum received from the owner, is not a provable claim against the contractor, where the owner has not paid anything to him. In re Ellis (C. C. A., 6th Cir.), 16 Am. B. R. 221, 143 Fed. 103.

71. **Philips v. Dreher Shoe Co.** (D. C., Pa.), 7 Am. B. R. 326, 112 Fed. 404, holding that, where the maker of promissory notes not yet due executes a general assignment for the benefit of creditors, thus committing an act of bankruptcy, the sureties upon the notes, unless they have paid them, has no provable claim, and no standing to institute proceedings to have the maker adjudged an involuntary bankrupt.

72. In re Gerson (D. C., Pa.), 5 Am. B. R. 89, 105 Fed. 891; *affd.* s. c., 6 Am. B. R. 11, 107 Fed. 897.

73. **Surety on defaulting contractor's bond may file petition.**—Where in the absence of evidence that the authorities of a municipal corporation acted fraudulently in forfeiting and canceling a contract for the execution of certain work in connection with the city's water works, because the work was not proceeding satisfactorily, and the surety company upon the contractor's bond under its contract of indemnity with its principal,

and so can the holder of a note not yet due, indorsed by the alleged bankrupt.⁷⁴ The provability of such debts is considered elsewhere.⁷⁵ Numerous cases under the former law will be found in point.⁷⁶

f. Secured creditors not to file.—Creditors who are fully secured may not petition. This seems to have been otherwise under the former law, the petition being considered a waiver of the security.⁷⁷ But the intention under the present act is clear. A secured debt can be counted in dollars only to the amount unsecured;⁷⁸ if there be no such amount, it should not be counted at all. It is doubtful whether the doctrine of implied waiver will apply under the phrasing of the present law. If, on the other hand, the claim is not fully secured, it may sustain a petition, provided, when reckoned at the unsecured amount, the required aggregate of \$500 is reached.⁷⁹ The cases seemingly *contra*⁸⁰ under the former law are not in point, referring, as they do, to the number of the creditors, rather than the existence of a petitioning creditor's debt.

g. Creditors who have received preferences.—Prior to the amendatory act of 1903, all partial payments after insolvency were preferences. Thus, the objection was often made to involuntary petitions that the creditors had not provable debts. That, in such cases, it was well taken is sustained by a number of authorities under both the former and the present law.⁸¹ If a payment to a creditor was made more than four months prior to the date of the petition, it is not preferential, and does not disqualify him as a petitioning creditor.⁸² The use of the word "provable" has been thought to refer to the proof of a debt as distinguished from its allowance.⁸³ Some question has arisen as to whether a preferred creditor has a "provable" claim before the surrender of his preference, so as to give him any rights as a petitioning creditor. All debts can be "proved" whether secured, or preferred, or fraudulent; they cannot be "allowed" unless the advantage is surrendered. It would seem within reason to assert that "provable" must be here considered the equivalent of "allowable."⁸⁴ But at the present time the weight

and with the permission of the municipal authorities, assumes charge of and completes the work at an expenditure in excess of the contract price, the surety company is entitled, to be regarded as having been lawfully substituted in the place of the contractor for the execution of the work which it had guaranteed, and is entitled to file a petition against the contractor. *Boyce v. Guaranty Co.* (C. C. A., 6th Cir.), 7 Am. B. R. 6, 111 Fed. 138.

74. In re Rothenberg (D. C., N. Y.), 15 Am. B. R. 485, 140 Fed. 798, holding that, under the present act, the simple test is whether the claim is provable. The fact that it is not yet allowable is immaterial.

75. See under Section Sixty-three of this work.

76. *Michaels v. Post*, 21 Wall. 398; *Sloan v. Lewis*, 22 Wall. 150; *Linn v. Smith*, Fed. Cas. 8,375; In re *Alexander*, Fed. Cas. 161; In re *Western Savings, etc., Co.*, Fed. Cas. 17,442; In re *Nickodemus*, Fed. Cas. 10,254; In re *Chamberlin*, Fed. Cas. 2,580; In re *Matot*, Fed. Cas. 9,282; In re *Broich*, Fed. Cas. 1,921; In re *Noesen*, Fed. Cas. 10,288; In re *Cornwall*, Fed. Cas. 3,250.

77. In re *Stansell*, Fed. Cas. 13,293. Compare also In re *Bergeron*, Fed. Cas. 1,342; In re *Hatje*, Fed. Cas. 6,215.

78. *Emerine v. Tarault* (C. C. A., 6th Cir.), 34 Am. B. R. 55, 219 Fed. 68. Compare In re *Smith* (D. C., N. Y.), 23 Am. B. R. 864, 176 Fed. 426.

79. See In re *Hazens*, Fed. Cas. 6,285.

80. In re *Frost*, Fed. Cas. 5,134; In re *Serafford*, Fed. Cas. 12,556.

81. In re *Rogers Milling Co.* (D. C., Ark.), 4 Am. B. R. 540, 102 Fed. 687; In re *Gillette* (D. C., N. Y.), 5 Am. B. R. 119, 104 Fed. 769; In re *Hunt*, Fed. Cas. 6,882; In re *Rado*, Fed. Cas. 11,522; In re *Israel*, Fed. Cas. 7,111; *Clinton v. Mayo*, Fed. Cas. 2,899.

82. In re *Girard Glazed Kid Co.* (D. C., Pa.), 12 Am. B. R. 295, 129 Fed. 841.

83. See In re *Norcross* (Ref., Mo.), 1 Am. B. R. 644.

84. This seems sustainable under the authority of In re *Gillette* (D. C., N. Y.), 5 Am. B. R. 119; In re *Fishplate Clothing Co.* (D. C., N. Car.), 11 Am. B. R. 204, 125 Fed. 986.

of authority is opposed to this doctrine, and the rule now is that a preferred creditor holding a voidable preference may present, or may join in, a petition for an adjudication of bankruptcy.⁸⁵ It is probable, in any event, that where a preferred creditor petitions, or joins in a petition, he should set up his willingness to surrender his preference.⁸⁶

h. Creditors who have attachments.⁸⁷—The cases are not uniform as to the right of an attaching creditor to file a petition. A number of creditable cases are to the effect that such a creditor may not petition.⁸⁸ There is some doubt whether an attachment less than four months old amounts to a "preference;"⁸⁹ it more nearly resembles a security. On broad principles of equity, however, it is an advantage, placing the creditor having it out of that class which alone can file an involuntary petition. Only after a surrender of it, or at least an offer to surrender, should he be allowed to file.⁹⁰

85. *Stevens v. Nave-McCord Co.* (C. C. A., 8th Cir.), 17 Am. B. R. 609, 150 Fed. 71; *In re Douglass Coal & Coke Co.* (D. C., Tenn.), 12 Am. B. R. 539, 551, 131 Fed. 769; *Matter of Murphy* (D. C., Mass.), 35 Am. B. R. 635, 225 Fed. 392. See also Am. B. R. Dig. § 202.

Preferred creditor's claim provable.—Judge Ray, in the case of *Matter of Hornstein* (D. C., N. Y.), 10 Am. B. R. 308, 321, 122 Fed. 266, insists that equity demands that those creditors who have received a preference be allowed to file petitions even if they have not surrendered their preferences. He emphatically dissents from the text as contained in the 4th edition of this work, p. 407, and says: "That 'provable' as used in the bankruptcy act, is to be considered as the equivalent of 'allowable,' as used in the same act, is a contention that ought not to prevail. Those words are not used in the act as equivalents, or as expressing the same meaning. Nor are the acts or proceedings for 'proving a claim' and of 'allowing a claim,' the same." In the case of *In re Herzikopf* (D. C., Cal.), 9 Am. B. R. 90, 118 Fed. 101, it is held that a creditor may be a petitioner in bankruptcy notwithstanding the receipt of a preference which is unsundered. Citing *In re Norcross* (Ref., Mo.), 1 Am. B. R. 644; *In re Cain* (Ref., Ill.), 2 Am. B. R. 378; *In re Bloss*, Fed. Cas. No. 1,562; *In re California Pacific Ry. Co.*, Fed. Cas. 2,315; *In re Stansell*, Fed. Cas. No. 13,293; *Rankin v. Railway Co.*, Fed. Cas. No. 11,567.

86. Return of preference.—In the case of *In re Vastbinder* (D. C., Pa.) 11 Am. B. R. 118, 126 Fed. 417, it was held that a creditor may surrender his preference and thus qualify as a petitioner, and it is sufficient if he offers to do so in the petition. In *re Fishplate Clothing Co.* (D. C., N. Car.), 11 Am. B. R. 204, 125 Fed. 986, holding that, where in an involuntary proceeding it appears that one of the petitioning creditors had received a payment on his claim within the four months' period which he had not surrendered, and that the petitioners had not asked for leave to amend the petition to

conform to the provisions of the bankrupt law, the petition will be dismissed.

A preference which has not been fraudulently obtained does not estop the preferred creditor from filing a petition, provided he surrenders such preference. *In re Miller* (D. C., N. Y.), 5 Am. B. R. 140, 104 Fed. 764.

A creditor who has received a voidable preference, which he has not mentioned in an involuntary petition, but which he offers to return on a hearing before the referee, and before the court, may be counted as a petitioning creditor, upon deposit of the amount of the preference with the clerk, to be paid over to the trustee upon the latter's appointment. *Matter of Murphy* (D. C., Mass.), 35 Am. B. R. 635, 225 Fed. 392.

87. See also Am. B. R. Dig. § 204.

88. *In re Burlington Malting Co.* (D. C., Wis.), 6 Am. B. R. 369, 109 Fed. 777, holding that a creditor with an attachment obtained and permitted by his debtor while insolvent may not follow up his attachment with a petition for an adjudication of bankruptcy against his debtor based upon the same claim without a formal release of his levy; *In re Schenkein*, 113 Fed. 421, revg. on this point, s. c., 7 Am. B. R. 162.

89. Compare *In re Schenkein* (Ref., N. Y.), 7 Am. B. R. 162, with *In re Hazens*, Fed. Cas. 6,285, and *In re Broich*, Fed. Cas. 1,921.

90. *In re Schenkein* (Ref., N. Y.), 7 Am. B. R. 162; *In re Burlington Malting Co.* (D. C., Wis.), 6 Am. B. R. 369, 109 Fed. 777, holding that a creditor with an attachment obtained and permitted by his debtor while insolvent may not follow up his attachment with a petition against his debtor based upon the same claim without a formal release of his levy.

A creditor who has received an attachment within the four months' period may be a petitioner in proceedings to have his debtor adjudged a bankrupt, but before an order of adjudication is made he must formally surrender his attachment lien, and in the meantime the court of bankruptcy will restrain all persons from interfering

i. **Creditors who have an advantage through fraud.**—As has been seen, proofs of debt are not allowed if objection is made by a party in interest and that objection is sustained.⁹¹ Thus, debts paid in part by a fraudulent transfer would probably be refused allowance. It is thought such claims will not sustain a creditor's petition, unless the petitioner surrenders his fraudulent advantage. Creditors who have merely connived at a "fraud on the law,"⁹² as well as those who have attempted or accomplished a fraud on the other creditors, cannot institute an involuntary proceeding. Neither class, it seems, comes into court with clean hands. But the adjudication of an insolent corporation may not be defeated because its directors and stockholders join in the petition, thus preventing a sale of corporate property under an execution.⁹³

j. **Estoppel of creditors.**⁹⁴—(1) **IN GENERAL.**—If it appears that the act of bankruptcy was secured by the connivance of a creditor, he should not be permitted to institute the proceedings.⁹⁵ A petition may not be filed by a creditor who procures a judgment creditor to issue execution for the sole and express purpose of enabling him to file a petition against the debtor,⁹⁶ or by two petitioning creditors who fraudulently compelled the bankrupt to pay the claim of a third creditor, thereby reducing the requisite number.⁹⁷ It is not immoral or illegal for petitioning creditors to solicit the alleged bankrupt not to defend, where he is in fact insolvent and has committed an act of bankruptcy, and this fact alone will not preclude them.⁹⁸ On general principles of equity it would seem that a creditor who is also an officer of a corporation ought not to be permitted to petition his debtor (such corporation) into bankruptcy on the ground

with the attached property until an adjudication is had and a trustee appointed, or the petition in bankruptcy is dismissed. *Matter of Hornstein* (D. C., N. Y.), 10 Am. B. R. 308, 122 Fed. 266.

91. See generally under Section Fifty-seven of this work.

92. Consult *In re Gutwillig* (C. C. A., 2d Cir.), 1 Am. B. R. 388, 92 Fed. 337; *West v. Lea*, 174 U. S. 590, 2 Am. B. R. 463.

93. *First Nat. Bank v. Wyoming Valley Ice Co.* (D. C., Pa.), 14 Am. B. R. 448, 136 Fed. 466.

94. See also Am. B. R. Dig. § 209.

95. *In re Marks Bros.* (D. C., Pa.), 15 Am. B. R. 457, 142 Fed. 279; *Clark v. Henne* (C. C. A., 5th Cir.), 11 Am. B. R. 583, 127 Fed. 288; *Moulton v. Coburn* (C. C. A., 1st Cir.), 12 Am. B. R. 553, 131 Fed. 201; *In re Curtis* (D. C., Ill.), 1 Am. B. R. 440, 91 Fed. 737, affd. 2 Am. B. R. 440, 91 Fed. 737, affd. 2 Am. B. R. 226, 94 Fed. 630. And see, for what acts do not constitute an estoppel, *Simonson v. Sinsheimer*, 96 Fed. 579, as affirmed by C. C. A., 6th Cir., 3 Am. B. R. 824, 100 Fed. 426; *In re Winston* (D. C., Tenn.), 10 Am. B. R. 171, 122 Fed. 187; *Matter of Taylor House Association* (D. C., N. Y.), 31 Am. B. R. 727, 732, 209 Fed. 924; *Perry v. Langley*, Fed. Cas. 11,006; *Spicer v. Ward*, Fed. Cas. 13,241.

Preference made with approval of creditors.—Where an alleged bankrupt conducting its business under the direction of a creditor's committee, with the approval of

the latter, borrowed money from a bank within four months preceding the filing of a petition against it, and gave collateral security to an amount greater than the loan, and the trust company applied the excess to the bankrupt's past indebtedness to it, the creditors who were members of the committee are estopped from objecting to the transfers as acts of bankruptcy. *Matter of Freeman Coting Coat Co.* (D. C., Mass.), 32 Am. B. R. 489, 212 Fed. 548.

96. *In re Marks Bros.* (D. C., Pa.), 15 Am. B. R. 457, 142 Fed. 279.

97. **Fraudulently reducing number of creditors.**—Where two of three petitioning creditors after filing their petition colluded in an attempt to compel the alleged bankrupt to pay the claim of the third and by various means procured a judgment by a justice of the peace, which the alleged bankrupt was compelled to and did pay and satisfy; and that thereupon there was a failure of the requisite number of petitioning creditors, it was held that the two petitioning creditors being responsible for the situation and the third creditor having obtained the judgment and payment thereof and been allowed to withdraw, the remaining two were estopped from proceeding further as petitioning creditors. *Cummins Grocery Co. v. Talley* (C. C. A., 6th Cir.), 26 Am. B. R. 484, 187 Fed. 507.

98. *In re Billing* (D. C., Ala.), 17 Am. B. R. 80, 145 Fed. 395.

that such corporation has committed an act of bankruptcy, which act he himself brought about and caused to be committed.⁹⁹

(2) **ASSENT TO OR PARTICIPATION IN ASSIGNMENT OR RECEIVERSHIP.**—Where a creditor has voluntarily assented to the administration of the bankrupt's estate by means of an assignment, as by accepting its terms, or otherwise actively co-operating in its execution, he is estopped from thereafter filing an involuntary petition;¹⁰⁰ and this disability extends to their subsequent vendees, disqualifying the latter from filing an involuntary petition in bankruptcy.¹⁰¹ However a creditor may not be estopped where it appears that he was misled into the assignment by misstatements,¹⁰² or where the petitioning creditors had

99. Per Judge Ray in *Matter of Taylor House Association* (D. C., N. Y.), 31 Am. B. R. 727, 733, 209 Fed. 924.

100. **Assent to general assignment.**—*Utz & Dunn Co. v. Regulator Co.* (C. C. A., 8th Cir.), 32 Am. B. R. 167, 213 Fed. 315; *Despres v. Galbraith* (C. C. A., 8th Cir.), 32 Am. B. R. 170, 213 Fed. 190; *Matter of Campe & Co.* (D. C., Cal.), 38 Am. B. R. 792; *Durham Paper Co. v. Seaboard Knitting Mills* (D. C., N. Car.), 10 Am. B. R. 29, 121 Fed. 179; *In re Miner* (D. C., Mass.), 4 Am. B. R. 710, 104 Fed. 520; *In re Perry & Whitney Co.* (D. C., Mass.), 22 Am. B. R. 722, 172 Fed. 745, affd. 23 Am. B. R. 695, 175 Fed. 52; in this same case (22 Am. B. R. 780), on the petition of one of the bankrupt's creditors to intervene it was held that where the holder of a note against a debtor had knowledge that he had made an assignment for creditors, allowed four months to elapse without any attempt to become a party to bankruptcy proceedings, charging said assignment as an act of bankruptcy, both he and the assignee of the note are estopped from maintaining the bankruptcy petition. Compare *Hays v. Wagner* (C. C. A., 6th Cir.), 18 Am. B. R. 163, 150 Fed. 533.

In the case of *Simons v. Sinsheimer*, 3 Am. B. R. 824, 37 C. C. A. 337, 95 Fed. 948, Judge Taft said: "Where a debtor makes a general assignment for the benefit of his creditors, and judicial proceedings are instituted to enforce and carry out the assignment, creditors who, on being made parties to such proceedings, do not repudiate the assignment, nor begin proceedings in bankruptcy, but file their claims under the assignment, and participate in the administration of the estate, and suffer the assignee to sell the property and collect the proceeds, involving a delay of several months, and the incurring of costs and expenses, are estopped thereafter to file a petition in involuntary bankruptcy against the assignor based solely on the ground of the assignment."

Where, upon an insolvent debtor's making a general assignment for the benefit of creditors, certain creditors have voluntarily become parties to such assignment proceedings, such creditors by assenting to the assignment are estopped from instituting involuntary bankruptcy proceedings against their debtor, based upon such assignment as an

act of bankruptcy. In *re Romanow* (D. C., Mass.), 1 Am. B. R. 461, 92 Fed. 510, citing *Perry v. Langley*, 19 Fed. Cas. 282, 283, where the court said: "If the proof was that Perry had advised the making of the assignment, or after its execution had expressly given his assent to it, as a creditor of Langley, he would have been precluded from insisting on it as an act of bankruptcy, and could not have maintained a standing in this court as a petitioning creditor."

Creditors, assenting in writing to a common-law assignment for the benefit of creditors, are not, except under special circumstances, entitled to join in an involuntary petition, alleging as the sole act of bankruptcy the making of such assignment. *Moulton v. Coburn* (C. C. A., 1st Cir.), 12 Am. B. R. 553, 131 Fed. 201, affg. 11 Am. B. R. 212.

Where, upon the proposal made at a meeting of all the creditors but one, of an insolvent debtor, he executes a transfer in the form of a deed of trust or chattel mortgage in the usual form, with power of sale and condition of defeasance of his stock of goods, etc., to a trustee, the creditors are estopped from setting up such conveyance as a ground of bankruptcy. *Clark v. Henne* (C. C. A., 5th Cir.), 11 Am. B. R. 583, 127 Fed. 288.

In the Territory of Hawaii, there being no insolvent laws, creditors assenting to an assignment for the benefit of creditors, and acting under it to the extent of filing claims, are not thereby estopped from petitioning for a decree of bankruptcy against the assignor. *Matter of Hirose* (D. C., Hawaii), 12 Am. B. R. 154, 2 U. S., D. C. Hawaii, 111.

Creditor participating in proceeding under State law.—A creditor participating in proceedings under a State insolvency law which are void because the operation of such law has been suspended by the bankruptcy act, is not estopped from attacking such proceedings and joining in a petition to have the debtor adjudicated an involuntary bankrupt. In *re Weedman Stave Co.*, (D. C. Ark.), 29 Am. B. R. 460, 199 Fed. 948.

101. *Utz & Dunn Co. v. Regulator Co.* (C. C. A., 8th Cir.), 32 Am. B. R. 167, 213 Fed. 315.

102. *Matter of Canner* (Ref., Mass.), 21 Am. B. R. 199, affd. *sub nom.* *Canner v. Tapper Co.* (C. C. A., 1st Cir.), 21 Am. B. R. 872, 168 Fed. 519.

simply filed their claims as required by the State law, but had not by any other act assented to or participated in or made themselves parties to the assignment complained of as an act of bankruptcy.¹⁰³ The same estoppel exists where the creditor has been an active and voluntary participant in receivership proceedings in a State court,¹⁰⁴ but the mere fact that such proceedings have been brought and a creditor has filed a claim with the receiver appointed therein as required by the practice of the court, will not prevent his subsequent participation in bankruptcy proceedings against the debtor.¹⁰⁵ But if the participation in receivership proceedings extends so far as the acceptance of dividends the creditor is estopped.¹⁰⁶

k. Counting creditors when but one creditor petitions.¹⁰⁷—Subsection *b* also provides that where all the creditors are less than twelve, one of such creditors whose claim equals the sum of \$500 may file a petition. The doctrines already declared also apply where the sole question is the number of creditors in a given case. Only persons having provable debts¹⁰⁸ can be counted. Where the total of the indebtedness is at issue, all debts preferentially paid must be counted.¹⁰⁹ A preferred creditor may not be counted against a petition, nor in computing the number of creditors that must join in the petition, unless he first surrenders his preference. But, if he surrenders his preference before the adjudication, he may be counted after the surrender.¹¹⁰ Were it not for these rules, a debtor might often successfully resist a petition by collusion with creditors whom he had preferred. It seems to be the rule that where, upon the filing of an involuntary petition in bankruptcy, there are not the proper number of petitioning creditors nor a sufficient amount of claims to support the petition, but subsequently and before the adjudication other creditors enter their appearances and join in the petition, such creditors and the amounts of their claims will be reckoned in making up the number of the

103. *In re Curtis* (D. C., Ill.), 1 Am. B. R. 440, 91 Fed. 737, *affd.* 2 Am. B. R. 226, 94 Fed. 630. See also *Durham Paper Co. v. Seaboard Knitting Mills* (D. C., N. Car.), 10 Am. B. R. 29, 121 Fed. 179.

104. *Lowenstein v. McShane Mfg. Co.* (D. C., Md.), 12 Am. B. R. 601, 130 Fed. 107; *Woodford v. Diamond State Steel Co.* (D. C., Del.), 15 Am. B. R. 31, 138 Fed. 582. *Matter of Commonwealth Lumber Co.* (D. C., Wash.), 35 Am. B. R. 202, 223 Fed. 667; *In re Gold Run Mining & Tunnel Co.* (D. C., Col.), 29 Am. B. R. 563, 200 Fed. 162; *Ohio Motor Car Co. v. Eiseman Magneto Co.* (C. C. A., 6th Cir.), 36 Am. B. R. 237, 230 Fed. 370.

105. **Filing claim in receivership proceedings.**—The fact that proceedings have been instituted in a State court and are being conducted under a statute authorizing any creditor of an insolvent corporation to institute an action in the nature of a creditor's bill, for the purpose of winding up the business, and, through the medium of a receiver, bringing to sale its property and paying the proceeds to the creditors according to their priorities, does not preclude the creditors from petitioning to have the corporation adjudged a bankrupt and have its assets administered in the bankruptcy court. While the mere filing of a claim with a receiver

appointed in such proceedings will not operate to estop the creditor from thereafter joining in a petition to have the insolvent adjudged bankrupt, still, if with full knowledge of his rights, a creditor delays such action, making no suggestion to those interested in the administration of the estate until the property is sold, expenses incurred, and the rights of innocent persons attached, he will not be permitted to proceed in a bankruptcy court after long delay, upon the sole ground that an assignment was made or a receiver appointed. *Matter of McKinnon Co.* (D. C., N. C.), 38 Am. B. R. 727, 237 Fed. 869.

106. *Ohio Motor Car Co. v. Eiseman* (C. C. A., 6th Cir.), 36 Am. B. R. 237, 230 Fed. 370.

107. See also Am. B. R. Dig. § 211.

108. Bankr. Act, § 1(9); note the exception of employees and laborers, discussed later. Compare on this, *In re Barrett Co.*, 2 N. B. N. Rep. 80.

109. *In re Norcross* (Ref., Mo.), 1 Am. B. R. 644; *In re Tirre* (D. C., N. Y.), 2 Am. B. R. 493, 95 Fed. 425. See also *In re Cain* (Ref., Ill.), 2 Am. B. R. 378, and *In re Barrett Co.*, 2 N. B. N. Rep. 80.

110. *Stevens v. Nave-McCord Co.* (C. C. A., 8th Cir.), 17 Am. B. R. 609, 617, 150 Fed. 71.

creditors and the amount of claims necessary to support an involuntary petition in bankruptcy. The number of creditors should be reckoned as of the date of the petition.¹¹¹

1. **Involuntary petitions must be in duplicate.**—(1) **IN GENERAL.**—Although this seems to mean two petitions, each an original and not an original and a copy,¹¹² it has been held that the statute is fully satisfied by filing an original and a certified copy of the original prior to the four months' period.¹¹³ These papers must be filed with the clerk; handing them to him out of his office, while not usual, is enough.¹¹⁴ The duplicate is served with the subpoena on the alleged bankrupt.

(2) **WAIVER OF DUPLICATE.**—As the only benefit of filing a duplicate petition is to enable the debtor to answer more speedily and conveniently, an answer without a demand of the privilege is a waiver of it. It estops the debtor from thereafter insisting upon it, because it leads the petitioner to proceed and to incur expense in reliance upon the renunciation of the privilege which has become *functus officio* by the answer.¹¹⁵

IV. PRACTICE IF ANSWER AVERS MORE THAN TWELVE CREDITORS.

a. **In general.**—Though the policy of the law is to require the concurrence of at least three creditors in a petition, subsection *d*, in connection with subsection *f*, in practice, results in petitions by one creditor in most cases where there is neither time nor opportunity to ascertain whether the alleged debtor has twelve or more. As a consequence, even if an answer alleging that number of creditors is interposed, the quota of three is easily supplied by intervenors, and a bankruptcy through one creditor in \$500 is nearly as easy as it was under the former law before the amendments of 1874. The allegation that the creditors are less than twelve can, nay, often must be, on information and belief, and, if so, it seems, sufficient.¹¹⁶ Insufficiency in the allegation as to the number of creditors is not an incurable jurisdictional defect.¹¹⁷

b. **Filing "list of creditors."**—The "list of creditors" required of the defendant debtor by § 59-d of the statute, when he sets up as a defense to a petition by a single creditor that the number of his creditors is more than twelve, must contain, besides the bare names and addresses of such creditors, at least a statement of the amount due each creditor, the date of the debt, when due, whether due by note or account or by some form of contract, the consideration therefor, whether owned jointly with another, as partner or otherwise, and such full particulars as will enable the petitioning creditor to

111. *Moulton v. Coburn* (C. C. A., 1st Cir.), 12 Am. B. R. 553, 131 Fed. 201, affg. 11 Am. B. R. 212, holding that, in determining whether, upon a petition filed by a single creditor, the number of creditors of an alleged bankrupt is less than twelve, thirteen creditors, induced by the bankrupts' assignee under a general assignment acting in behalf of creditors not to join in the petition, should be counted.

112. *In re Dupree*, 97 Fed. 28; *In re Stevenson* (D. C., Del.), 2 Am. B. R. 66, 94 Fed. 110. In each of these cases a single paper had been filed within the four months' period. In each of them an application was made after the four months had expired to permit the filing *nunc pro tunc* of a copy or a duplicate original.

113. *Millan v. Exchange Bank of Mannington* (C. C. A., 4th Cir.), 24 Am. B. R. 889, 183 Fed. 753.

114. Compare under Section Eighteen of this work. See also Am. B. R. Dig. §§ 232-234.

115. *In re Plymouth Cordage Co.* (C. C. A., 8th Cir.), 13 Am. B. R. 665, 135 Fed. 1000.

116. *In re Scamman*, Fed. Cas. 12,427; *Perrin & Gaff Mfg. Co. v. Peale*, Fed. Cas. 10,981; *In re Mann*, Fed. Cas. 9,033.

117. *Matter of Haff* (C. C. A., 2d Cir.), 13 Am. B. R. 362, 68 C. C. A. 340, 136 Fed. 78. See *infra* this section, *Amendments of Petition*.

negotiate with others to join with him in the petition and save the necessity and cost of a reference to ascertain the facts. There should be no concealment of these particulars by the debtor in making such a defense. If the particulars of the debts contained in the list of creditors, where it is alleged by debtor that his debts are more than twelve in number, are not disclosed in the answer of the defendant, the court will, if necessary, refer the case to ascertain them, and thus settle any dispute between the parties concerning them.¹¹⁸

c. **Practice.**—The practice on such an answer is distinctly marked out in this subsection.¹¹⁹ A practical difficulty arises where a reference has been made to a special master. He is not “the court” and cannot, therefore, give the notice to the other creditors. This difficulty is usually met either by obtaining from the court an order directing him so to do, or by a stipulation of the parties. The mode of service of the notice is left to the discretion of the court; if the creditors named were actually served in time to intervene, the mode of service is immaterial.¹²⁰ If other creditors “join in,” they must do so in the court proper and not before the special master. Where such an answer raises other questions and other creditors do not intervene, the evidence should at first be confined to the single question of the number of creditors; the burden is on the alleged bankrupt. If the decision is with him, the petition must be dismissed. The words “such hearing” clearly refer to a trial of this issue only. Creditors may join in at any time before the evidence thereon is closed. The cases under the former law are often in point.¹²¹

V. EXCLUSION OF EMPLOYEES, RELATIVES AND OFFICERS.

Subsection *e* excludes from the computation the bankrupt's employees and relatives within the third degree. While claimants who have an advantage in dollars are not excluded in ascertaining the number of creditors, those presumably in the control of the bankrupt are. The purpose—to prevent the creation of fictitious debts and thereby the number of creditors where less than twelve are alleged—is clear. But the subsection hardly goes far enough to prevent that evil. In line with its policy, it has been held that the officers of a bankrupt corporation, who are also its creditors, should be excluded.¹²² This may be doubted.¹²³ The subsection is by way of limitation and should be construed strictly. Only employees at the time of the bankruptcy and relatives by consanguinity or affinity within the third degree should be excluded. The statute is silent concerning whether, being so excluded, these classes may be petitioning or intervening creditors. It has been held that a relative who may not be counted in computing the number of creditors may bring a petition.¹²⁴

118. *W. A. Gage & Co. v. Bell* (D. C., Tenn.), 10 Am. B. R. 696, 124 Fed. 371.

119. That the list of creditors must be “under oath,” compare *In re Steinman*, Fed. Cas. 13,357; *In re Hymes*, Fed. Cas. 6,986. See also “Supplemental Forms,” *post*.

120. *In re Tribelhorn* (C. C. A., 2d Cir.), 14 Am. B. R. 491, 137 Fed. 3.

121. *Robinson v. Hanway*, Fed. Cas. 11,953; *In re Sheffer*, Fed. Cas. 12,742.

122. *In re Barrett Co.*, 2 N. B. N. Rep. 80.

123. Creditors of a corporation, who are also directors, are not precluded from pe-

tioning for the adjudication of the corporation in bankruptcy on the ground that it had admitted its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground, merely because their presence at the meeting of the board of directors, when such admission was made, was necessary to its validity. *Home Powder Co. v. Geis* (C. C. A., 8th Cir.), 29 Am. B. R. 580, 204 Fed. 568.

124. *Perkins v. Dorman* (D. C., N. Mex.), 30 Am. B. R. 767, 208 Fed. 858.

VI. INTERVENTION BY OTHER CREDITORS.¹²⁵

a. **In general.**—After the amendments of 1876, intervention by other creditors, under the previous law, was regulated by statute. The time, ten days, was rather short. There is no such limitation in the present law. Creditors other than the original petitioners may, at any time, enter their appearance and join in the petition, and creditors so joining in a petition subsequent to its filing may be counted in making up the number of creditors and amount of claims required by the act to support the petition.¹²⁶ Application by a party in interest to intervene in an involuntary proceeding calls for the exercise by the court of a sound discretion in determining in the first place whether the leave ought to be granted.¹²⁷ Under subsection *f* it is now well settled that creditors may join at any time before adjudication, even though it be more than four months after the act of bankruptcy was committed, and will be counted to make up the number of creditors and the amount of claims required by the act,¹²⁸ but a delay of a year has been thought unreasonable and permission to intervene refused.¹²⁹ No settlement that the petitioning creditors make can defeat the right.¹³⁰ If the original petitioners withdraw, the creditors who intervene prior to such withdrawal will be permitted to continue the proceeding, although such intervention is more than four months subsequent to the alleged act of bankruptcy,¹³¹ and the adjudication will

125. See also Am. B. R. Dig. § 257.

126. In re Crenshaw (D. C., Ala.), 19 Am. B. R. 502, 156 Fed. 638.

Policy of act.—The court in the exercise of its discretion in granting or refusing leave to intervene should take notice of the policy which is evidenced by the provision of section 59-f that creditors other than the original petitioners may at any time enter their appearance and file an answer and be heard in opposition to the prayer of the petition. *Abbott v. Wauchula Mfg. & Timber Co.* (C. C. A., 5th Cir.), 36 Am. B. R. 310, 229 Fed. 677.

127. *Abbott v. Wauchula Manufacturing & Timber Co.* (C. C. A., 5th Cir.), 36 Am. B. R. 310, 229 Fed. 677.

128. *Ohio Motor Car Co. v. Eiseman* (C. C. A., 6th Cir.), 36 Am. B. R. 237, 230 Fed. 370; In re *Charles Town Light & Power Co.* (D. C., W. Va.), 25 Am. B. R. 687, 183 Fed. 160; In re *Stein* (C. C. A., 2d Cir.), 5 Am. B. R. 288, 105 Fed. 749, 45 C. C. A. 29; In re *Plymouth Cordage Co.* (C. C. A., 8th Cir.), 13 Am. B. R. 665, 135 Fed. 1000, 68 C. C. A. 434; In re *Romanow* (D. C., Mass.), 1 Am. B. R. 461, 92 Fed. 510, 512; In re *Mercur* (D. C., Pa.), 2 Am. B. R. 626, 95 Fed. 634.

Joining before adjudication.—In the *Stein* case, *supra*, Judge Wallace, after referring to the provision which authorizes creditors other than original petitioners "at any time" to enter their appearance and join in the petition, said: "It is urged that to permit other creditors to procure an adjudication who have not sought to do so until after four months have elapsed since the act of bankruptcy would enable them to overhaul conveyances and sales as fraudu-

lent or preferential which could not be done otherwise, and might work injustice to those whose titles had by lapse of time become safe. Nothing in the bankrupt act indicates a solicitude for the protection of fraudulent vendees, and if creditors whose preferences may be disturbed have any equities to urge against an adjudication, they are authorized by section 59 to intervene and present them. And, even if imaginable cases of hardship may arise, the plain language of the act, authorizing creditors 'at any time' to join in the original petition, cannot be disregarded."

129. In re *Jemison Mercantile Co.* (C. C. A., 5th Cir.), 7 Am. B. R. 588, 112 Fed. 966, holding that, where the petition for an involuntary adjudication is dismissed upon the request of the petitioning creditors, the application of other creditors for a reinstatement of the proceedings may after the lapse of a year be denied with costs upon the ground of unreasonable delay. Compare also *Citizens' Nat. Bank v. Cass*, Fed. Cas. 2,732.

130. In re *Calendar*, Fed. Cas. 2,307; In re *Buchanan*, Fed. Cas. 2,073.

131. *Matter of Bolognesi* (C. C. A., 2d Cir.), 34 Am. B. R. 692, 223 Fed. 771 in which the court said: "The original petition was undoubtedly valid on its face, and gave the court jurisdiction. *Matter of New York Tunnel Company* (C. C. A., 2d Cir.), 21 Am. B. R. 531, 166 Fed. 284, 92 C. C. A. 202. When that petition was filed a proceeding became pending in the District Court, initiated in accordance with the statute and in which creditors who had not participated in its initiation were entitled to intervene. Bankruptcy Act, section 59-f. We do not

operate on preferences within four months of the original filing.¹³² In such a case, the intervening petitioners need not be three in number or have debts aggregating \$500.¹³³ But intervention will not be ordered where the original petition was on its face defective in number or amount;¹³⁴ nor will it be permitted, as a matter of right, after a hearing and a dismissal of the petition;¹³⁵ nor will intervention be permitted where the original petition was signed by creditors who were estopped from filing a petition.¹³⁶ But it has been held that an intervening petition seasonably and properly filed should not be dismissed where the intervening creditors were not aware of an estoppel against the principal petitioners, if the original petition was brought in good faith and was good upon its face.¹³⁷ A creditor cannot intervene to oppose a voluntary petition on the ground that the petitioner is not insolvent.¹³⁸

think that the mere circumstance that their intervention come so long after the act of bankruptcy that they could not then have originated a proceeding bars them from intervening in a pending proceeding; their adoption of the original petition related back to the date it was filed because it was good and needed no amendment. Certainly the original proceeding cannot be held to be a void one, because facts may be shown in affirmative defense which may constitute an estoppel against the original petitioners taking advantage of the act of bankruptcy. No doubt any petitioner may be allowed to withdraw, in the court's discretion. If the original petitioners so withdraw, before others intervene, that ends the proceeding completely; there is nothing left to intervene in. But until they do withdraw there is a proceeding, in which others may intervene; and if others have done so, in the lifetime of the proceeding, subsequent withdrawal of the originators will leave the intervenors free to proceed. In *re Cronin* (D. C., Mass.), 3 Am. B. R. 552, 98 Fed. 584. If the opinion in *Despres v. Galbraith* (C. C. A., 8th Cir.), 32 Am. B. R. 170, 213 Fed. 190, in which the court seems to have held that the original petition was void, be construed to hold that intervention under a valid petition, four months after the act of bankruptcy and before the original proceeding was dismissed gives the intervenors no right to proceed, we cannot concur."

^{132.} In *re Lacey*, Fed. Cas. 7,965.

^{133.} In *re Sheffer*, Fed. Cas. 12,742. Consult, however, In *re Ryan* (D. C., Pa.), 7 Am. B. R. 562, 114 Fed. 373, holding that, where in an involuntary bankruptcy the aggregate amount of the claims of the original petitioners is, before adjudication, reduced below the statutory limit by payments made by the alleged bankrupt, and other creditors, holding claims to an amount sufficient to make the aggregate amount of all the claims \$500, petition to join in the proceedings, the court has jurisdiction to enter an order of adjudication.

A single intervening creditor may carry on a petition good on its face. *Matter of Cugin-Pace Contracting Co.* (D. C., Mass.), 35 Am. B. R. 375, 224 Fed. 245.

^{134.} Joinder where petition is defective as to amount or number.—In *re Beddingfield* (D. C., Ga.), 2 Am. B. R. 355, 96 Fed. 190, in which Judge Newman said: "It would be necessary in every case, of course, that a petition in involuntary bankruptcy should, on the face of it, show that creditors participated to the amount of \$500, before a petition could be filed, or a rule obtained; and these, of course, would have to be participating in good faith. Then, if afterwards, and before adjudication, it should appear that for some reason one or more of the petitioning creditors did not have debts, or their debts were not provable, and other creditors came in sufficient to make the amount necessary, they could be allowed, and the proceedings stand. The court would never entertain a mere sham petition prepared originally with a view to doing this but it would be only where a petition was brought in good faith, and some such contingency as has been referred to occurred." See also *Robinson v. Hanway*, Fed. Cas. 11,953.

Intervention by a creditor who became such after the joinder of issue on an involuntary petition merely to supply an additional creditor will not be permitted. In *re Perry & Whitney* (D. C., Mass.), 22 Am. B. R. 780, 172 Fed. 752. In *Manning v. Evans* (D. C., N. J.), 19 Am. B. R. 217, 221, 156 Fed. 106, Judge Lanning says that: "To extend that rule to a case in which the petition shows on its face that the requisite number of creditors have not joined in it—a defect which every creditor is bound to observe—is equivalent to adjudging a petition valid in which the acts of bankruptcy charged were committed more than four months before the filing of the petition."

¹³⁵ In *re Tribelhorn* (C. C. A., 2d Cir.), 14 Am. B. R. 492, 137 Fed. 3.

^{136.} *Despres v. Golbraith* (C. C. A., 8th Cir.), 32 Am. B. R. 170, 213 Fed. 190.

^{137.} *Matter of Freeman Cotting Coat Co.* (D. C., Mass.), 32 Am. B. R. 493, 212 Fed. 551.

^{138.} In *re Carleton* (D. C., Mass.), 8 Am. B. R. 270, 115 Fed. 246.

A creditor who fails to intervene in a proceeding wherein a demurrer to an involuntary petition is sustained, is in no more favorable position to maintain a new proceeding in another district than the creditors who did intervene.¹³⁹ The answer of a creditor, which is not sworn to as required by law, may be amended at any time before adjudication.¹⁴⁰

b. Who may intervene.—Generally speaking, any creditor who could have petitioned may join in a petition for intervention.¹⁴¹ The assignee of a provable claim may intervene.¹⁴² When an answer is filed, however, the rule seems different and may be expressed by submitting the words "party in interest" for "creditor." Thus, it is thought, any one who has a direct pecuniary interest in preventing the bankruptcy, even though that degree of good faith required of a petitioner in such a case is absent, may file an answer.¹⁴³ Thus, it has been held that an attaching creditor may resist an involuntary petition without surrendering his attachment,¹⁴⁴ and so may a secured creditor having a provable claim for the excess of the value of his securities.¹⁴⁵ Stockholders of a bankrupt corporation may be permitted to intervene in the proceedings upon a proper showing, notably that they had attempted to induce the directors or managers of the corporation to take remedial action.¹⁴⁶ The procedure after answer is considered elsewhere.¹⁴⁷

c. Practice.—Whether creditors "join in the petition" or "file an answer," they should enter an appearance.¹⁴⁸ This is usually enough. If the application

139. *Matter of Culgin-Pace Contracting Co.* (D. C., Mass.), 35 Am. B. R. 375, 224 Fed. 245.

140. *In re Harris* (D. C., Ala.), 19 Am. B. R. 204, 156 Fed. 875.

141. *Ayres v. Cone* (C. C. A., 8th Cir.), 14 Am. B. R. 739, 138 Fed. 778. See also Am. B. R. Dig. § 257.

Claims purchased after petition filed.—Creditors in order to intervene in an involuntary bankruptcy proceeding must be such at the time of the filing of the petition. Creditors who purchased claims after the filing of a petition should not be allowed to intervene. *Matter of Kehoe* (C. C. A., 2d Cir.), 36 Am. B. R. 891.

142. **Right to intervene on assigned claim liquidated after petition filed.**—Where at the time of the filing of a petition in bankruptcy, claimant's assignor held a bond of the alleged bankrupt secured by a mortgage, and thereafter foreclosed such mortgage, and about a month after the filing of the petition entered a deficiency judgment against the alleged bankrupt, he had at the time the petition was filed a claim which was provable, although not yet allowable, but which became liquidated, and in a condition to be allowed, by the foreclosure suit wherein the value of his security was ascertained and claimant was entitled to intervene in the pending bankruptcy proceedings. *Matter of Fitzgerald* (D. C., N. Y.), 26 Am. B. R. 773, 191 Fed. 95.

143. For illustrative cases, see *In re Heusted*, Fed. Cas. 6,440; *In re Jack*, Fed. Cas. 719; *In re Hatje*, Fed. Cas. 6,215; *In re Mendelsohn*, Fed. Cas. 9,420; *In re Austin*, Fed. Cas. 662; *In re Jonas*, Fed. Cas. 7,442;

In re Vogel, Fed. Cas. 16,981. *Contra*: *In re Boston, etc., Co.*, Fed. Cas. 1,679; and, under the law of 1841, *Dutton v. Freeman*, Fed. Cas. 4,210; *In re Tallmadge*, Fed. Cas. 13,738; *Jackson v. Wauchula Manufacturing and Timber Co.* (C. C. A., 5th Cir.), 36 Am. B. R. 408, 230 Fed. 409.

144. *In re Moench* (D. C., N. Y.), 10 Am. B. R. 590, 123 Fed. 977.

145. *Johansen Bros. Shoe Co. v. Alles* (C. C. A., 8th Cir.), 28 Am. B. R. 299, 197 Fed. 274.

146. *Ogden & Jamison v. Gilt Edge Mines Co.* (C. C. A., 8th Cir.), 34 Am. B. R. 893, 225 Fed. 723; *In re Eureka Anthracite Coal Co.* (D. C., Ark.), 28 Am. B. R. 758, 197 Fed. 216.

147. See under Section Eighteen of this work.

148. For practice, compare *In re Taylor*, 1 N. B. N. 412. For forms, see "Supplementary Forms," *post*.

Answer by intervening creditor.—Where, after a bankrupt has answered an involuntary petition, admitting a preferential payment to a creditor and declaring his willingness to submit to adjudication, such creditor filed an answer denying the receipt of a preference, after which the petition was amended so as to charge another act of bankruptcy consisting of a preferential payment to another creditor, which the bankrupt likewise admitted and declared his willingness to submit to adjudication on that ground, the creditor's answer raises merely academic questions and the adjudication is properly entered upon the preference charged in the amended petition. *In re Cleary* (D. C., Pa.), 24 Am. B. R. 742, 179 Fed. 990.

is to "join in" the petition, it may be by a verified petition, and is usually heard *ex parte*. If granted, the applicant becomes as much a petitioning creditor as if he had joined in the original petition.¹⁴⁹ Whether a new act of bankruptcy can be alleged in such a petition is doubted. If such act was committed more than four months before, though within four months of the filing of the original petition, it certainly should not be.¹⁵⁰ In any event, a petition which thus changes the issue should not be made, save on notice to all parties. The better practice is to amend the original petition,¹⁵¹ after the order of intervention is granted. All parties to the proceeding should be notified of the entry of the order; this is usually done by the intervenor's attorney. Professional courtesy suggests that such notice be accompanied by copies of the petition and order, if any. Any party to the proceeding may respond that the intervenor is not a creditor;¹⁵² otherwise, a reply is usually unnecessary. If the order has been granted, such a response can be brought upon motion to vacate or an order to show cause. Notice should be given all parties who have appeared. Where the validity of the claim of a petitioning creditor is put in issue and the claim is adjudged valid, the adjudication is *res adjudicata* in the hearing of a subsequent objection to the allowance of the claim on the same ground.¹⁵³

d. Notice to creditors.—The bankruptcy statute carefully selects and specifies the instances in which it intends to give the creditor the right to notice. The filing of a petition in involuntary proceedings by proper parties, making the jurisdictional allegations, operates as *lis pendens*, and is notice to all the world; and no other notice to creditors of the proceeding is necessary. The only instance in which any right to notice is given the creditor, as to the disposition of an involuntary petition, is when it is proposed to dismiss the proceedings by consent of the parties, or for want of prosecution.¹⁵⁴

VII. AMENDMENTS OF PETITIONS.¹⁵⁵

Amendments relating to the number of the petitioning creditors and the amount and nature of their claims can be made more than four months after the commission of the act of bankruptcy. When so made they relate back to the date of the filing of the original petition.¹⁵⁶ But where an alleged bankrupt fails to answer or plead to an involuntary petition filed against him, it may not thereafter be amended so as to allege acts of bankruptcy prior to the acts of bankruptcy set forth in a second petition.¹⁵⁷ And an application to amend by alleging an additional act of bankruptcy should be denied when

149. Compare *In re Beddingfield* (D. C., Ga.), 2 Am. B. R. 355, 96 Fed. 190.

150. For a sufficient reason, see *In re Lacy*, Fed. Cas. 7,965.

151. See under Section Eighteen of this work.

152. Compare *In re Taylor*, 1 N. B. N. 412.

153. *Ayres v. Cone* (C. C. A., 8th Cir.), 14 Am. B. R. 739, 138 Fed. 778.

154. *In re Billing* (D. C., Ala.), 17 Am. B. R. 80, 145 Fed. 395.

155. See also discussion under § 18, *ante*, and Am. B. R. Dig. § 231.

156. *Millan v. Bank of Mannington* (C. C. A., 4th Cir.), 24 Am. B. R. 889, 183 Fed. 753; *State Bank v. Haswell* (C. C. A., 8th Cir.), 23 Am. B. R. 330, 174 Fed. 209; *Ryan*

v. Hendricks (C. C. A., 7th Cir.), 21 Am. B. R. 570, 166 Fed. 94; *In re Plymouth Cordage Co.* (C. C. A., 8th Cir.), 13 Am. B. R. 665, 135 Fed. 1000; *Matter of Haff* (C. C. A., 2d Cir.), 13 Am. B. R. 362, 68 C. C. A., 340, 136 Fed. 78; *Matter of Jones* (D. C., Tenn.), 31 Am. B. R. 693, 209 Fed. 717, holding that a petition to amend the original petition so as to allege a preference through legal proceedings, should be denied where it does not appear that the preference was made within four months prior to the filing of the original petition; *Matter of Condon* (C. C. A., 2d Cir.), 31 Am. B. R. 754, 209 Fed. 800, affg. 29 Am. B. R. 907, 198 Fed. 947.

157. *In re Harris* (D. C., Ala.), 19 Am. B. R. 204, 156 Fed. 875.

it does not appear when the act was committed or who was benefited thereby.¹⁵⁸ The discretion of the Bankruptcy Court in granting or refusing amendments in petitions will not be interfered with unless an abuse of discretion is shown.¹⁵⁹

VIII. DISMISSALS OF PETITIONS.

A petitioning creditor cannot withdraw¹⁶⁰ and thus reduce the number to less than three. A proceeding once begun must result either in an adjudication or a dismissal. Subsection *g* has to do only with dismissals, other than on the merits. Dismissal for "want of prosecution" is not justified by the mere failure of creditors to present evidence in support of their petition, without notice to creditors, where it appears that the petitioning creditors and the alleged bankrupt agreed to such dismissal.¹⁶¹ It is provided by the amendment of 1910 that before the court will entertain an application for a dismissal, the bankrupt must file a list of his creditors with the addresses, and will cause notices to be served on such creditors. A dismissal may be had on motion of bankrupt without notice to creditors who have not intervened where there is no suggestion of collusion.¹⁶² Its close connection with § 58-a (8) should be noted; also a practical difficulty previously mentioned.¹⁶³ The fact that after adjudication the bankrupt appears to be solvent is not of itself sufficient grounds for dismissal.¹⁶⁴ It is clearly intended to prevent the use

158. *Matter of Lewis Shoe Co.* (D. C., Mass.), 38 Am. B. R. 134, 235 Fed. 1017.

159. *Sabin, Blake-McFall Co.* (C. C. A., 9th Cir.), 35 Am. B. R. 179, 223 Fed. 501.

Discretion of court.—Amendments are freely allowed, but are within the discretion of the court, which discretion will not ordinarily be disturbed. The court should not permit the filing of an amended petition in which the petitioners swear to positive averments of facts, where they had testified that they had no such knowledge as would justify the averments. *Matter of Frank* (C. C. A., 3d Cir.), 38 Am. B. R. 674, affg. 37 Am. B. R. 19, 234 Fed. 665.

160. *In re Rosenfields*, Fed. Cas. 12,061; *In re Philadelphia Axle Works*, Fed. Cas. 11,091. But see *In re Sargent*, Fed. Cas. 12,361. Three out of four petitioning creditors should not be permitted to withdraw on the claim that the other petitioner is not a creditor. See *In re Quincy Granite Quarries Co.* (D. C., Mass.), 16 Am. B. R. 823, 147 Fed. 279. Where one of three petitioning creditors has withdrawn and the other two are estopped from proceeding because of conduct in violation of their duty, the petition may be dismissed. *Cummins Grocery Co. v. Talley* (C. C. A., 6th Cir.), 26 Am. B. R. 484, 187 Fed. 507.

161. "Want of prosecution."—Where petitioning creditors follow up a petition in all formal matters, and duly attend before the referee, their failure to offer any evidence to sustain the petition does not constitute a "want of prosecution," within the meaning

of section 59-g of the Bankruptcy Act, providing that an involuntary petition shall not be dismissed "for want of prosecution or by consent of parties" until after notice to the creditors. *Matter of Chalfeu* (D. C., Mass.), 35 Am. B. R. 257, 223 Fed. 379.

162. *Matter of Levi* (C. C. A., 2d Cir.), 15 Am. B. R. 294, 142 Fed. 962.

Dismissal of proceedings.—Where practically all of an alleged bankrupt's creditors assent to a dismissal of involuntary bankruptcy proceedings, either affirmatively or by failure to oppose, and the statutory three creditors are not found insisting on a continuance thereof, and no deception is suggested to have been practiced on creditors, the proceedings should be dismissed. *In re Rosenblatt & Co.* (C. C. A., 2d Cir.), 28 Am. B. R. 401, 193 Fed. 638.

Notice to creditors.—Section 59-g of the Bankruptcy Act, providing for notice to creditors of a motion to dismiss a petition, does not require service of notice upon all the creditors of the alleged bankrupt; notice to petitioning creditors who have appeared in the proceeding is sufficient. *Matter of Mason-Seaman Transportation Co.* (D. C., N. Y.), 37 Am. B. R. 677, 235 Fed. 974.

163. See *ante*, under this section, and also Bankr. Act, § 58-a (8). Where the dismissal is on the initiation of the court, notice to creditors is not required. *Matter of Crisp* (D. C., Tenn.), 38 Am. B. R. 558.

164. *In re Jamaica Slate Roofing & Supply Co.* (D. C., N. Y.), 28 Am. B. R. 763, 197 Fed. 240.

of the court as a means to compel a settlement with the petitioning creditor. It is in line with the principle that the filing of a petition confers jurisdiction as to all creditors as well as over all property; it guarantees them notice of the step which may end such jurisdiction. The cases under the present law and the practice have already been considered.¹⁶⁵

165. See under Sections Eighteen and Fifty-eight of this work. See also Am. B. R. Dig. §§ 271-274. For forms, see "Supplementary Forms," *post*; Hagar and Alexander's Bankruptcy Forms (2d Ed.).

SECTION SIXTY.

PREFERRED CREDITORS.

§ 60. **Preferred Creditors.**—*a.* A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.

b If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person.* And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.†

c If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in

*Amendments of 1910 in italics.

†Amendment of 1903 added last sentence.

bankruptcy may be set off against the amount which would otherwise be recoverable from him.

d If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

Analogous provisions: In U. S.: As to voidable preferences, Act of 1867, § 35, R. S., §§ 5128, 5130A; Act of 1841, § 2; Act of 1800, § 28; As to fraudulent conveyances, Act of 1867, § 35, R. S., §§ 5129, 5130A; As to transfers out of the ordinary course of business being presumptively fraudulent, Act of 1867, § 35, R. S., § 5130; As to fraudulent preferences being an objection to a discharge, Act of 1867, § 44, R. S., § 5110.

In Eng.: As to "fraudulent" preferences, Act of 1883, § 48; as to "undue" preferences being an objection to a discharge, Act of 1890, § (3) (i).

Cross-references: To the law: Definition of transfer, § 1(25).

Suffering or permitting preference through legal proceedings, act of bankruptcy, § 3-a(3); transfer of property to prefer creditor, act of bankruptcy, § 3-a(2).

Fraudulent transfer ground for refusing discharge, § 14-b(4).

Jurisdiction of suits for recovery of preferences, § 23-b.

Liens created within four months' period void, § 67-b; liens obtained through legal proceedings, § 67-f.

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I. PREFERENCES IN BANKRUPTCY.

a. **Historical statement.**—A preference is a “conventional fraud;” the debtor merely prefers to pay one creditor more than, or to the exclusion of, others. At common law, such a payment or transfer was not even constructively fraudulent, though as early as 1635, preferential transfers were regulated by statute and, for more than a century, were punishable as crimes.

Our modern doctrine that preferences are wrongs on other creditors was first declared by Lord Mansfield.¹

b. Comparative legislation.—(1) **IN ENGLAND.**—There was no statutory definition of a preference prior to the English act of 1869; though the insolvent debtor acts, beginning with that of 1824, contained clauses declaring what were preferences in cases where debtors other than traders sought the refuge of the courts.² Even now the English law explains, rather than defines what is a preference. Prior to these enactments, the courts had construed the word “preference” with considerable elasticity; the elements of proof varied from decade to decade, and many hair-splitting and sometimes inexplicable distinctions were made. The statutory definition in England is thus the result of more than a century of decisions, some of them by judges whose names have become household words. By § 48 of the act of 1883, the elements of a preference are: (1) A payment or transfer or conveyance, (2) by a person unable to pay his debts as they become due, (3) with a view to giving the person to whom it is made an advantage over other creditors, provided (4) such payment is made within three months of the bankruptcy. The English law specifically protects payments in due course of trade, and has since the middle of the eighteenth century;³ hence, what are known as “protected transactions.”

(2) **IN THE UNITED STATES.**—Our first definition of preferences in a bankruptcy law appears in that of 1841.⁴ It is somewhat unscientific. That in the law of 1867 was identical with the present English definition, save in the time limit—four months instead of three—and the additional elements on the part of the creditor of (1) reasonable cause to believe that the debtor was insolvent, and (2) knowledge that the payment was in fraud of the act.⁵

c. Definition of a preference under present law.—Subsection *a* has been held to be a controlling definition of a preference.⁶ We have already referred to the term as so defined under § 1. It has been doubted whether this is altogether accurate.⁷ Certainly a preference which amounts to an act of bankruptcy must still show intent,⁸ and the so-called definition does not exactly dovetail into another subsection.⁹ It is, however, a definition when applied to a transaction voidable under subsection *b*.

The wide gap between the term as defined in subsection *a* and all definitions heretofore recognized should always be borne in mind. It makes many of the cases under the former law inapplicable. Briefly, it differs from the present English definition in (1) the elimination of “intent” and the substitution of “the result of the act,” and (2) in making the preference period four months instead of three; while, when considered as an act that is voidable,

1. *Worsely v. de Mattos*, 1 Burr. 467; *Al-derson v. Temple*, 4 Burr. 2235.

2. For historical review, see *In re Hall* (Ref., N. Y.), 4 Am. B. R. 671.

3. English Act of 1883, § 49.

4. Act of 1841, § 2.

5. Act of 1867, § 35, R. S., § 5128. The amendatory act of 1874 changed “belief” of a fraud on the act to “knowledge.”

6. *Swarts v. Fourth Nat. Bank* (C. C. A., 8th Cir.), 8 Am. B. R. 673, 117 Fed. 1; *In re Steers Lumber Co.* (C. C. A., 2d Cir.), 7 Am. B. R. 332, 112 Fed. 406; *Stern, Falk &*

Co. v. Louisville Trust Co. (C. C. A., 6th Cir.), 7 Am. B. R. 305, 112 Fed. 501.

7. It has been held merely a “rule of evidence” (*In re Piper*, 2 N. B. N. Rep. 7). See also *Stern, Falk & Co. v. Louisville Trust Co.* (C. C. A., 6th Cir.), 7 Am. B. R. 305, 112 Fed. 501.

8. See Bankr. Act, § 3-a (2), and the cases cited.

9. Bankr. Act, § 67-c (1). Compare *In re McLam* (D. C., Vt.), 3 Am. B. R. 245, 97 Fed. 922.

it differs from that of our law of 1867, not only in substituting the result for the intent save in so far as the latter is an element of "reasonable cause to believe," but also in requiring the attacking trustee to show only that the creditor had reasonable cause to believe that a preference was intended instead of the more difficult elements of proof, indicated above. The present law, too, distinguishes between a mere preference in fact and one that is voidable.¹⁰

d. Effect of definition prior to amendments of 1903.—The controversy touching the effect of this new definition on transactions in due course of trade has now passed into history. In brief, the view that subsection *a* defined a preference led to the doctrine that payments on account after insolvency were preferences without either knowledge of insolvency on the part of the debtor, or reasonable cause to believe that a preference was intended on the part of the creditor; a doctrine that reversed the rule that good faith was the test and rendered cash transactions in business not only the safest course, but, in effect, essential.¹¹ As a consequence, the meaning of both subsection *b* and subsection *c* was greatly enlarged by judicial construction. Indeed, the very existence of the bankruptcy system was for a time put in jeopardy. The reports are full of cases bearing on these much-mooted questions. The amendatory act of 1903 has brought the statute back to what its framers intended it to say, and thus made most of these cases valueless. The principal evil to be corrected by the amendment of 1903 was that of secret preferences given by withholding from record instruments which by the whole policy of recording statutes should be recorded.¹² Section 60 as amended and § 3-a are to be construed in harmony.¹³ Some of the numerous cases arising prior to the amendment of 1903 are cited in the foot-note.¹⁴

10. For an unusual case, see *In re Chaplin* (D. C., Mass.), 8 Am. B. R. 121, 115 Fed. 162.

11. "This was never intended by the framers of the law, and it works obvious injustice and is the source of 99 per cent. of the objections to the law." (House Judiciary Committee's Report accompanying amendatory bill, April 21, 1902.)

12. *In re Dundore* (D. C., Pa.), 26 Am. B. R. 100; *Loeser v. Savings Deposit Bank* (C. C. A., 6th Cir.), 17 Am. B. R. 628, 148 Fed. 978.

Purpose of amendment.—In the case of *In re Sayed* (D. C., Mich.), 26 Am. B. R. 444, 185 Fed. 962, the court said: "It is familiar history, in connection with the original Bankruptcy Act, that the giving of a preference might come within the definition of an act of bankruptcy, and so might by reason of the time provision for recording found in connection with this definition be the basis of an adjudication; and yet that same preference could not be set aside by the trustee under section 60, because more than four months' time had elapsed after the giving of the preference, and before the filing of the petition in bankruptcy. To meet this difficulty, the amendment of 1903 to section 60-b provided that, if the instrument of preferential transfer was one which by law was required or permitted to be recorded, the pref-

erence might be set aside if the bankruptcy petition was filed within four months after the day of recording. The court of appeals in this circuit has said that the purpose of this amendment was to bring the two sections into harmony, and that the provision concerning recording should receive the same construction in each section." Citing *In re Loeser v. Savings Bank*, 17 Am. B. R. 628, 148 Fed. 975, 78 C. C. A. 597, 18 L. R. A. (N. S.) 1233.

13. *In re Donnelly* (D. C., Ohio), 27 Am. B. R. 504, 193 Fed. 755. As to effect of failure to conform requirements of § 60, as to recording or filing transfers with those prescribed in § 3-b, see *Carey v. Donohue*, 240 U. S. 430, 36 Am. B. R. 704, 709.

14. That partial payments in due course of trade are "preferences": *In re Knost* (Ref., Ohio), 2 Am. B. R. 471; *affd.* as *Strobel v. Knost* (D. C., Ohio), 3 Am. B. R. 631, 99 Fed. 409; *In re Conhaim* (D. C., Wash.), 3 Am. B. R. 249, 97 Fed. 923; *In re Fort Wayne Electric Co.* (D. C., Ind.), 13 Am. B. R. 186, 96 Fed. 803; *affd.* as *Columbus Electric Co. v. Worden* (C. C. A., 7th Cir.), 3 Am. B. R. 634, 99 Fed. 400; *In re Fixen* (C. C. A., 9th Cir.), 4 Am. B. R. 10, 102 Fed. 296; *Carson, etc., Co. v. Chicago Title & Trust Co.*, 182 U. S. 438, 5 Am. B. R. 814, 45 L. ed. 1171, 21 Sup. Ct. 906; that they are not: *In re Piper*, 2 N. B. N. Rep. 7; *In re*

e. Distinction between preference and fraudulent transfer.—Conveyances may be fraudulent because the debtor intends to put his property beyond the reach of his creditors; or because he intends to hinder and delay them as a class; or by preferring one who is favored above the others. There is no necessary connection between the intent to prefer and that to defraud; but inasmuch as one of the common incidents of a fraudulent conveyance is the purpose on the part of the grantor to apply the proceeds in such a manner as to prefer favored persons, the existence of such intent to prefer is an important matter to be considered in determining whether there was an intent to defraud. But the two purposes are not of the same quality, either in conscience or in law, and one may exist without the other. The statute recognizes the difference between the intent to defraud and the intent to prefer, and also the difference between a fraudulent and a preferential conveyance. One is inherently and always vicious; the other innocent and valid, except when made in violation of express provisions of law.¹⁵ One is *malum per se* and the other *malum prohibitum*, and then only to the extent that it is prohibited. A fraudulent conveyance is void, regardless of its date; a preference is valid unless made within the prohibited date.¹⁶

II. ELEMENTS OF A PREFERENCE.

a. In general.—Since the amendatory act, a preference consists in a person, (1) while insolvent and (2) within four months of the bankruptcy, (3) procuring or suffering a judgment to be entered against himself or making a transfer of his property, (4) the effect of which will be to enable one creditor to obtain a greater percentage of his debt than any other creditor of the same class. Such a preference is voidable at the instance of the trustee, if (5) the person recovering it or to be benefited thereby has (6) reasonable cause to believe that the enforcement of the judgment or transfer will result in a

Smoke (D. C., N. Y.), 4 Am. B. R. 434, 104 Fed. 289; In re Hall (Ref., N. Y.), 4 Am. B. R. 671; In re Ratliff (D. C., N. Car.), 5 Am. B. R. 713, 107 Fed. 780. See, for a vigorous protest against the doctrine of Carson, etc., Co. v. Chicago Title & Trust Co., In re Dickson (C. C. A., 1st Cir.), 7 Am. B. R. 186, 111 Fed. 726. There are also numerous cases pro and con, (1) whether a payment which exactly cancels one of several obligations must be surrendered; for instance, see In re Conhaim (D. C., Wash.), 3 Am. B. R. 249, 97 Fed. 923; also In re Beswick (Ref., Ohio), 7 Am. B. R. 395, and Kimball v. Rosenham Co. (C. C. A., 8th Cir.), 7 Am. B. R. 718, 114 Fed. 185; In re Seay (D. C., Ga.), 7 Am. B. R. 700, 113 Fed. 969, and In re Beswick (Ref., Ohio), 7 Am. B. R. 403; and (2) whether a subsequent credit could be set off against a preference, some of which are cited later under this section. None of these cases are thought now applicable.

15. Right to prefer.—It is not a fraud at common law for a debtor in straightened circumstances to prefer one or more creditors, though payments so made render it impossible to pay other creditors. If the sole object of the transfer is to pay or secure the

payment of a debt, the transaction is valid at common law. Lyon v. Wallace, 35 Am. B. R. 688, 108 N. E. 1075; and see Kentucky Bank & Trust Co. v. Pritchett (Okla. Sup. Ct.), 33 Am. B. R. 190, 143 Pac. 338.

Until the commencement of bankruptcy proceedings a debtor has the right to dispose of his property, the right to receive and pay his debts with it and the right to receive and pay one of his creditors in preference to others, provided the payment or security is not violative of any act of Congress or law of the State. Johnson, Baillie Shoe Co. v. Bardsley (C. C. A., 8th Cir.), 38 Am. B. R. 492, 237 Fed. 763.

Before a bankrupt has been adjudicated as such he has the right to deal with his property as he may see fit, so long as he does not give a preference to any creditor or impair the value of his estate. O'Connell v. City of Worcester (Mass. Sup. Ct.), 38 Am. B. R. 913, 114 N. E. 201.

16. Van Iderstine v. National Discount Co., 227 U. S. 575, 29 Am. B. R. 478, 57 L. ed. 652, 33 Sup. Ct. 343; Kentucky Bank & Trust Co. v. Pritchett (Sup. Ct., Okla.), 33 Am. B. R. 190, 143 Pac. 338.

preference.¹⁷ If any of these elements is wanting, a preference cannot be set aside if otherwise valid under the State law.¹⁸ If the transfer was made or the judgment procured or suffered while the debtor was insolvent and the effect of such transfer or judgment was to enable one creditor to obtain a greater percentage of his debt than any other creditor of the same class, such transfer or judgment is a preference.¹⁹ The burden of proving the existence

17. No matter how devious the scheme (see *In re Belding* (D. C., Mass.), 8 Am. B. R. 718, 116 Fed. 1016), if it comes fairly within the purpose of the statute as evidenced by its words, it will be a voidable preference. See *Stern, Falk & Co. v. Louisville Trust Co.* (C. C. A., 6th Cir.), 7 Am. B. R. 305, 112 Fed. 501; *In re Beerman* (D. C., Ga.), 7 Am. B. R. 431, 112 Fed. 662; *Stern v. Mayer*, 16 Am. B. R. 763, 113 N. Y. App. Div. 181, 98 N. Y. Supp. 1028. For a case where nearly all the elements were lacking, see *Brown v. Guichard*, 7 Am. B. R. 515, 37 N. Y. Misc. 78, 74 N. Y. Supp. 735. See Am. Bankr. Dig. § 482.

The amendment of 1910 makes "reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference" an essential element of a preference, instead of "reasonable cause to believe that a preference was intended."

Essential elements of preference.—In the case of *Sebring v. Wellington*, 6 Am. B. R. 671, 63 N. Y. App. Div. 498, 171 N. Y. Supp. 788, the court said: "It seems to be conceded that in order to render a preference voidable within the provisions of this section it is necessary to establish four facts, viz: (1) the insolvency of the transferor; (2) the obtaining by one creditor of a greater percentage of his debt than any other creditor of the same class; (3) the giving of a preference within four months before the filing of the petition in bankruptcy; and (4) reasonable cause on the part of the creditor to believe that a preference was intended." The same is held in *Matthews v. Hardt*, 9 Am. B. R. 373, 79 N. Y. App. Div. 570, 80 N. Y. Supp. 462. These cases were decided prior to the amendment of 1903. To this element must now be added those referred to in the text based upon the amendment of 1903. The text is cited with approval in the case of *Brown v. City National Bank* (N. Y. Supp. Ct.), 26 Am. B. R. 638, 72 N. Y. Misc. 201, 131 N. Y. Supp. 92. And see *Newman v. Tootle-Campbell Dry Goods Co.* (Mo. Kans. City Ct. of App.), 31 Am. B. R. 399, 160 S. W. 825, specifying the elements of a voidable preference; *Mayes v. Palmer* (C. C. A., 8th Cir.), 31 Am. B. R. 225, 208 Fed. 97; *Sparks v. Marsh* (D. C., Ark.), 24 Am. B. R. 280, 177 Fed. 739; *In re Starkweather & Albert* (D. C., Mo.), 30 Am. B. R. 743, 206 Fed. 797; *Heyman v. Third Nat. Bank* (D. C., N. J.), 32 Am. B. R. 716, 216 Fed. 685; *Sheetz v. Walter Boyd Saddlery Co.* (Kan. Sup. Ct.), 33 Am. B. R. 32, 147 N. W. 897; *Russell's*

Trustees v. Mayfield Lumber Co. (Ky. Ct. of App.), 32 Am. B. R. 357, 164 S. W. 783; *Kentucky Bank & Trust Co. v. Pritchett* (Sup. Ct., Okla.), 33 Am. B. R. 190, 143 Pac. 338.

The bankruptcy law recognizes two kinds of preferences—those which a creditor in good faith may accept, and retain, and those which are forbidden and therefore voidable. The constitutive elements of a preference of the latter class are: First, the insolvency of the debtor at the time of the preference; second, the giving of the preference within four months of the filing of the petition in bankruptcy; third, the effect of securing to the favored creditor a greater percentage of his debt than other creditors of the same class may obtain from the estate of the debtor; and, fourth, that the preferred creditor when he received the preference, knew, or had reasonable cause to believe, that it was the purpose of his debtor to give him a preference over other creditors of the same class. *Wolff Mfg. Co. v. Batheal Shoe Co.* (Mo. Kan. City Ct. of App.), 35 Am. B. R. 895, 180 S. W. 396.

Attempted compromise of claims.—In order to render void as preferences payments made to defendants in an attempted compromise of their claims, by the application to their claims of certain insurance moneys, it must be established (1) that bankrupt was insolvent at the time of the transfer; (2) that the defendants obtained a greater percentage of their indebtedness than other creditors of the same class; (3) that the preference was given within four months before the filing of the petition in bankruptcy; and (4) that defendants had reasonable cause to believe that a preference was intended. *Shultz v. Boyd Saddlery Co.* (Sup. Ct., Iowa), 33 Am. B. R. 32, 147 N. W. 897.

Recovery of transfer preferentially made where the elements specified in the text are shown to exist. *Grandison v. National Bank of Rochester* (C. C. A., 2d Cir.), 36 Am. B. R. 438, 231 Fed. 800; *Healy v. Wehrung* (C. C. A., 9th Cir.), 36 Am. B. R. 673, 229 Fed. 686.

18. *Russell v. Mayfield Lumber Co.* (Ct. of App., Ky.), 32 Am. B. R. 357, 164 S. W. 783.

19. *In re Sayed* (D. C., Mich.), 26 Am. B. R. 444, 185 Fed. 962. In the case of *Boswell National Bank v. Simmons* (C. C. A., 8th Cir.), 26 Am. B. R. 865, 190 Fed. 735, it was held that where a bankrupt, being insolvent, made payments within the four months' period to a creditor, in satisfaction of a then existing debt, under such circumstances as to

of the essential elements of a transfer is upon the trustee seeking to avoid it.²⁰

b. While insolvent.—(1) **IN GENERAL.**—The word “insolvent” has the same meaning here as elsewhere in the act.²¹

(2) **TIME OF INSOLVENCY.**—If the debtor was not insolvent when the transfer was made it will not operate as a preference although made within four months before the filing of a petition in bankruptcy against him.²² The question of solvency must be determined as of the date when the payments or transfers were made.²³ If the levy following the judgment causes the insolvency, it is not enough.²⁴

enable the creditor to obtain a greater percentage of his debt than any other creditor of the same class, and the creditor had reason to believe it was being preferred, the payment constituted a voidable preference recoverable by the bankrupt's trustee; *Marsh v. Walters* (C. C. A., 6th Cir.), 34 Am. B. R. 85, 220 Fed. 805; *Peterson v. Nash Bros.* (C. C. A., 8th Cir.), 7 Am. B. R. 181, 112 Fed. 311; *Swarts v. Fourth Nat. Bank* (C. C. A., 8th Cir.), 8 Am. B. R. 673, 117 Fed. 1; *McElvain v. Hardesty* (C. C. A., 8th Cir.), 22 Am. B. R. 320, 169 Fed. 32.

Grounds of attack upon transfer.—By the express authority of the bankruptcy act, the trustee may attack any transfer alleged to be voidable as a preference if made within the period fixed by law. It is only when the trustee attacks a transfer or mortgage on other grounds that State laws and decisions apply as to the validity of a transfer. A trustee may attack a transfer as a voidable preference concededly valid on all other grounds. *Williams v. German American Trust Co.* (C. C. A., 8th Cir.), 33 Am. B. R. 600, 219 Fed. 507.

20. Burden of proving elements of voidable preference.—Under sections 60-a and 60-b of the Bankruptcy Act as amended in 1903, and prior to the amendment of 1910, the burden of proof is on a trustee in bankruptcy who seeks to avoid as a preference to show that the bankrupt (1) while insolvent, (2) within four months of the bankruptcy, (3) made the transfer in question; (4) that the creditor receiving the transfer will be thereby enabled to obtain a greater percentage of his debt than other creditors of the same class; and (5) that the creditor receiving the transfer had reasonable cause to believe that it was thereby intended to give a preference. *Kimmerle v. Farr* (C. C. A., 6th Cir.), 26 Am. B. R. 818, 189 Fed. 295. See also *Tumlin v. Bryan* (C. C. A., 5th Cir.), 21 Am. B. R. 319, 165 Fed. 166, 91 C. C. A. 200; *In re Neill-Pinckney-Maxwell Co.* (D. C., Pa.), 22 Am. B. R. 401, 170 Fed. 481; *Cauthorn v. Burley State Bank* (Idaho Sup. Ct.), 33 Am. B. R. 794, 144 Pac. 1608 (quoting entire paragraph of text); *Kentucky Bank & Trust Co. v. Pritchett* (Okla. Sup. Ct.), 33 Am. B. R. 190, 143 Pac. 338.

As to evidence and burden of proof in ac-

tions to recover preferences, see Am. Bankr. Dig. § 677; evidence of reasonable cause to believe preference was intended, Am. Bankr. Dig. § 514, and *post* under heading “Evidence of reasonable cause to believe.”

21. See Bankr. Act, § 1 (15), and discussion thereunder. Compare *In re Alexander* (D. C., Ga.), 4 Am. B. R. 376, 102 Fed. 464. For rule under former law, see *Toof v. Martin*, 13 Wall. 40; *Wager v. Hall*, 16 Wall. 584. *Marvin v. Anderson* (Sup. Ct., Wis.), 6 Am. B. R. 520, 87 N. W. 226, is, therefore, more in line with the old definition than the new. See also *Benjamin v. Chandler* (D. C., Pa.), 15 Am. B. R. 439, 142 Fed. 217.

Sufficient means to satisfy debts.—Evidence that a bankrupt was not possessed of sufficient ready means to satisfy all his debts at the time of the execution of a chattel mortgage, alleged to constitute a preference, is insufficient; proof must be presented respecting the amount of the mortgagor's property at a fair valuation at the time of giving the mortgage as required by subdivision 15 of section 1 of the Bankruptcy Act. *Matter of Walker Starter Co.* (C. C. A., 7th Cir.), 37 Am. B. R. 122, 235 Fed. 285.

22. *In re Leech* (C. C. A., 6th Cir.), 22 Am. B. R. 599, 171 Fed. 622.

23. *In re Wittenberg, etc., Co.* (D. C., Wis.), 6 Am. B. R. 271, 108 Fed. 593; *Butler Paper Co. v. Goembel* (C. C. A., 7th Cir.), 16 Am. B. R. 26, 143 Fed. 295; *Sabin v. Camp* (D. C., Oreg.), 3 Am. B. R. 578, 98 Fed. 974; *Sheppard-Strassheim Co. v. Black* (C. C. A., 7th Cir.), 33 Am. B. R. 574, 211 Fed. 643; *McNell v. Folk* (Sup. Ct. of App., W. Va.), 33 Am. B. R. 234, 83 S. E. 192; *Rosenman v. Copard* (C. C. A., 5th Cir.), 35 Am. B. R. 786, 228 Fed. 114; *Tumlin v. Bryan* (C. C. A., 5th Cir.), 21 Am. B. R. 319, 165 Fed. 166; *Matter of Bunch Commission Co.* (D. C., Kan.), 35 Am. B. R. 526, 225 Fed. 243; *In re Farmers' Supply Co.* (D. C., Ohio), 22 Am. B. R. 460, 170 Fed. 502. See Am. Bankr. Dig. § 484.

24. *Chicago Title & Trust Co. v. Roebeling's Sons* (C. C., Ill.), 5 Am. B. R. 368, 107 Fed. 71; *Matter of Chicago Car Equipment Co.* (C. C. A., 7th Cir.), 31 Am. B. R. 617, 211 Fed. 638. See also *Clarion Bank v. Jones*, 21 Wall. 325.

(3) **PROOF OF INSOLVENCY.**—Whether or not a debtor is insolvent is a question of fact,²⁵ and the burden of showing insolvency is on him who alleges it.²⁶ The fact that a debtor is adjudged a voluntary bankrupt does not raise a presumption of insolvency prior to the filing of the petition.²⁷ But it has been held that an adjudication in an involuntary proceeding, that a judgment debtor was insolvent at the time of the recovery of certain judgments against him, is conclusive upon the question of insolvency.²⁸ But insolvency must be alleged and found as a fact; mere belief is not enough,²⁹ nor is danger of insolvency as a coming result.³⁰ The method of determining the question of insolvency has already been considered. The rules which are applicable generally in determining this question are also applicable in determining whether a transfer is preferential because made at a time when the bankrupt was insolvent.³¹ The schedule of liabilities filed by the bankrupt is admissible on the issue of insolvency,³² although this has been doubted.³³ The bankrupt's books of accounts;³⁴ the method of determining appraisement taken in the proceedings, are admissible upon the question of insolvency.³⁵

(4) **VALUATION OF PROPERTY.**—Where property is transferred in fraud of creditors the definition of insolvency contained in § 1 (15) contemplates that the bankrupt shall not have the benefit of its valuation in determining whether he is insolvent; but where property is transferred in payment of a just debt the mere fact that it involves a preference does not exclude the property from consideration in determining the debtor's solvency.³⁶ In determining insolvency

25. *Kaufman v. Treadway*, 195 U. S. 271, 12 Am. B. R. 682, 49 L. Ed. 190, 25 Sup. Ct. 33; *Kentucky Bank & Trust Co. v. Pritchett* (Sup. Ct., Okla.), 33 Am. B. R. 190, 143 Pac. 338.

26. *In re Chappell* (D. C., Va.), 7 Am. B. R. 608, 113 Fed. 545.

Burden of proof.—In an action by a trustee to recover a payment in discharge of a valid obligation from the bankrupt to a bank, the burden of proof is upon the plaintiff to show that the bank had reasonable cause to believe that a preference was intended. *Calhoun County Bank v. Cain* (C. C. A., 4th Cir.), 18 Am. B. R. 509, 152 Fed. 983. It must be alleged and proven that the bankrupt was insolvent at the time of the transfer. The burden of proving such facts is on the trustee. *In re Leech* (C. C. A., 6th Cir.), 22 Am. B. R. 599, 171 Fed. 622.

27. *In re Chappell* (D. C., Va.), 7 Am. B. R. 608, 113 Fed. 545; *McNell v. Folk* (Sup. Ct. of App., W. Va.), 33 Am. B. R. 234, 83 S. E. 192.

28. *De Graff v. Lang*, 92 N. Y. App. Div. 564, 87 N. Y. Supp. 178.

29. *Wager v. Hall*, 16 Wall. 584. Compare also *In re Linton* (Ref., Pa.), 7 Am. B. R. 676.

30. *Beals v. Quinn*, 101 Mass. 262.

31. See discussion under Bankr. Act, section 1 (15), *ante*, p. 12.

32. *Hackney v. Hargreaves*, 13 Am. B. R. 164, 3 Neb. (Unoff.) 676; *In re Docker-Foster Co.* (D. C., Pa.), 10 Am. B. R. 584, 123 Fed. 190; *Bank of N. Y. v. Southern Nat. Bank*, 170 N. Y. 1, 62 N. E. 677. As

to sufficiency of evidence of insolvency, see *Benjamin v. Chandler* (D. C., Pa.), 15 Am. B. R. 439, 142 Fed. 217; *Ridge Av. Bank v. Sundheim* (C. C. A., 3d Cir.), 16 Am. B. R. 863, 145 Fed. 798.

Schedules filed by the bankrupt in the bankruptcy proceedings are proper evidence in an action against a creditor of the bankrupt to recover back an alleged preference obtained by such creditor when such schedules are properly identified, and the production and admission of secondary evidence of such schedules is governed by the same rules which govern the production and admission of such evidence in other cases, and the same is true with respect to the admission of duplicate originals. *Utah Ass'n of Credit Men v. Boyle Furniture Co.* (Sup. Ct., Utah), 26 Am. B. R. 867, 117 Pac. 800.

33. *Hackney v. Raymond Bros., Clarke Co.* (Sup. Ct., Neb.), 10 Am. B. R. 213, 214, 68 Neb. 624.

34. *In re Docker-Foster Co.* (D. C., Pa.), 10 Am. B. R. 584, 123 Fed. 190.

35. *Hackney v. Hargreaves*, 13 Am. B. R. 164, 3 Neb. (Unoff.) 676.

36. *In re Doscher* (D. C., N. Y.), 9 Am. B. R. 547, 554, 120 Fed. 408. See also *Lansing Boiler & Engine Works* (C. C. A., 6th Cir.), 11 Am. B. R. 558, 128 Fed. 701; *Acme Food Co. v. Meier* (C. C. A., 6th Cir.), 18 Am. B. R. 550, 153 Fed. 74, holding that if the evidence does not justify a finding that the conveyance had been made with intent to defraud, all the property of the alleged bankrupt is to be taken into account in determining the question of the bankrupt's insolvency;

property of the bankrupt which is exempt under the State law should be included.³⁷ The fair valuation of the bankrupt's property at the time of alleged preferential payments should be considered in determining his insolvency and intent to prefer, and not what the property brought in a lump at an auction sale by the trustee.³⁸ The test in determining insolvency under this section is as in other cases, whether the property of the bankrupt taken at a fair valuation is sufficient to pay his debts. Fair valuation is not what the property would bring at a forced sale.³⁹ The valuation used as a test must relate to the conditions existing in respect to the bankrupt's business as a going concern, at the time when preference was given.⁴⁰

c. Within four months.—(1) **IN GENERAL.**—The words of the statute, "within four months before the filing of the petition," mean within four months of the inception of the proceedings. It is the date of filing the original petition which controls; and amendment of the petition does not extend the time because such amendment relates back to the date of filing the original petition.⁴¹ The method of computing time is considered elsewhere.⁴² If a transfer be made prior to the period of four months before the filing of the petition it cannot be attacked as a preference under this section, although clearly preferential.⁴³ And if the preference was given before the passage of the bankruptcy law, it cannot be disturbed.⁴⁴

(2) **WHEN TIME BEGINS TO RUN.**—The period ordinarily begins to run from the moment the judgment or transfer takes effect.⁴⁵ And if recording is not

Utah Ass'n of Credit Men v. Boyle Furniture Co. (Sup. Ct., Utah), 26 Am. B. R. 867, 117 Pac. 800.

37. Utah Ass'n of Credit Men v. Boyle Furniture Co. (Sup. Ct., Utah), 26 Am. B. R. 867, 117 Pac. 800.

38. Rutland County Nat. Bank v. Graves (D. C., Vt.), 19 Am. B. R. 446, 156 Fed. 168.

Fair valuation of alleged bankrupt's property is not the price obtained at a forced sale. Chicago Title & Trust Co. v. Roebeling's Sons (C. C., Ill.), 5 Am. B. R. 368, 107 Fed. 71. The present market value, that is, what the property will probably bring, or is worth in the general market, where everybody buys, is a sure standard. In re Hines (D. C., Oreg.), 16 Am. B. R. 295, 144 Fed. 442; Duncan v. Landis (C. C. A., 3d Cir.), 5 Am. B. R. 649, 106 Fed. 839.

Where the fair or market value of a debtor's property and the amount of his debts have not been established it cannot be said that he is insolvent, within the meaning of the bankruptcy act. Jump v. Bernier (Mass. Sup. Ct.), 35 Am. B. R. 591, 108 N. E. 1027.

39. Chicago Title & Trust Co. v. Roebeling's Sons (C. C., Ill.), 5 Am. B. R. 368, 107 Fed. 71; Rutland County National Bank v. Graves (D. C., Vt.), 19 Am. B. R. 446, 156 Fed. 168.

40. Butler Paper Co. v. Goembel (C. C. A., 7th Cir.), 16 Am. B. R. 26, 143 Fed. 295; Chicago Motor Vehicle Co. v. American Oak Leather Co. (C. C. A., 7th Cir.), 15 Am. B. R. 804, 141 Fed. 518, in which case the evidence was examined and it was held that the referee had erred in his finding as to the in-

solveny of the bankrupt based upon evidence of fair valuation of the property belonging to the bankrupt corporation as a going concern; Dougherty v. First National Bank (C. C. A., 6th Cir.), 28 Am. B. R. 263, 197 Fed. 241.

41. First State Bank of Corinth v. Haswell (C. C. A., 8th Cir.), 23 Am. B. R. 330, 174 Fed. 209.

42. See under Section Thirty-one of this work. See also Whitley, etc., Co. v. Roach (Sup. Ct., Ga.), 8 Am. B. R. 505, 115 Ga. 918.

In computing the four months before filing the petition in bankruptcy within which time a preference is voidable, the day on which the petition was filed must be excluded. Dutcher v. Wright, 94 U. S. 553, 24 L. ed. 130.

43. Jackson v. Sedgwick (C. C., N. Y.), 26 Am. B. R. 836, 189 Fed. 508; Brown v. City National Bank (N. Y. Sup. Ct., Trial), 26 Am. B. R. 638, 72 Misc. 201, 131 N. Y. Supp. 92.

44. In re Terrill (D. C., Vt.), 4 Am. B. R. 145, 100 Fed. 778. As to the effect of this doctrine on a case which would be a voidable preference under the law as amended, but which was not before, *quaere*, and see "Supplemental Section to Amendatory Act," *post*.

45. See Sawyer v. Turpin, 91 U. S. 114, 23 L. ed. 235; In re Foster, Fed. Cas. 4,964; Matter of Wilson (D. C., Hawaii), 23 Am. B. R. 814.

An order on a creditor for the payment of money due the bankrupt is a transfer of the fund from the day of its presentation.

required the transfer takes effect from the date thereof and not from the time it is actually recorded.⁴⁶ It seems that the amendment to § 60-a is for the purpose of bringing it into substantial accord with § 3-a. These provisions should be read together, and when so read there can be no permissible question but that the date of the preference referred to in § 60 is the same as that referred to in § 3-b.⁴⁷ However, there is authority to the effect that Congress did not intend § 3-b and § 60-a to mean the same thing, but in fact, after due consideration, deliberately refused to make § 60-a as broad as § 3-b.⁴⁸ And this suggestion has now received the sanctioning approval of the Supreme Court.⁴⁹

(3) PERFORMANCE OF AGREEMENT MADE PRIOR TO FOUR MONTHS' PERIOD.—

Any attempt to evade the act by agreement entered into prior to the prescribed period, consummated by the perfection of a lien within the period, is nugatory. Such a lien is ineffectual and is a voidable preference. Such a transaction will be subject to the same rules as though no such agreement had been made. Its validity will be determined in each instance, as of the date when the preferential lien was sought to be perfected. A mortgage or transfer of his property by an insolvent debtor within four months of the filing of a petition in bankruptcy against him, which otherwise constitutes a voidable preference, is not deprived of that character or made valid by the fact that it was executed in performance of a contract to do so made more than four months before the filing of the petition.⁵⁰ The same rule applies where a transfer in payment of

Johnston v. Huff (C. C. A., 4th Cir.), 13 Am. B. R. 287, 133 Fed. 704; *In re Hines* (D. C., Pa.), 16 Am. B. R. 495, 144 Fed. 142, 147, 543.

When "four months period" commences to run.—Where the mortgagee does not file a sworn statement required by the Colorado statute until seven months after the expiration of one year from the time the mortgage was recorded, the four months' period within which the trustee in bankruptcy of the mortgagor may attack the transfer must be figured from the date of taking possession of the property by the mortgagee and not from the date of record. *Williams v. German American Trust Co.* (C. C. A., 8th Cir.), 33 Am. B. R. 600, 219 Fed. 507.

46. *Matter of Boyd* (C. C. A., 2d Cir.), 32 Am. B. R. 548, 213 Fed. 774.

47. *Long v. Farmers' State Bank* (C. C. A., 8th Cir.), 17 Am. B. R. 103, 147 Fed. 360; *English v. Ross* (D. C., Pa.), 15 Am. B. R. 370, 140 Fed. 630.

48. *Matter of Boyd* (C. C. A., 2d Cir.), 32 Am. B. R. 548, 213 Fed. 774; *Matter of Harvey* (D. C., Ala.), 32 Am. B. R. 337, 212 Fed. 340.

49. *Carey v. Donohue*, 240 U. S. 430, 36 Am. B. R. 704, 60 L. ed. 726, 36 Sup. Ct. 386 (rev. 31 Am. B. R. 210, 209 Fed. 328), in which the court comments upon the evident purpose of Congress in eliminating certain language, as to requiring recording or registering transfers, from § 60 which was included in § 3-b.

50. *In re Great Western Mfg. Co.* (C. C.

A., 8th Cir.), 18 Am. B. R. 259, 264, 152 Fed. 123.

Effect of prior agreements.—A transfer of property within the four months' period to be applied on an antecedent debt, under an agreement made anterior to such period, is a preference. *Vitzthum v. Large* (D. C., Ia.), 20 Am. B. R. 666, 162 Fed. 685. *In Wilson v. Nelson*, 183 U. S. 191, 198, 7 Am. B. R. 142, 49 L. Ed. 147, 22 Sup. Ct. 74, the debtor had given an irrevocable power of attorney to the creditor to confess judgment many years before judgment was confessed under it within the four months, and the Supreme Court held it to be a voidable preference. See also *Page v. Rogers*, 211 U. S. 575, 21 Am. B. R. 496, 53 L. Ed. 332, 29 Sup. Ct. 159.

Mortgages executed within the four months' period in performance of agreements to give them made more than four months before the filing of the petitions in bankruptcy have been held to be voidable preferences. *In re Sheridan* (D. C., Pa.), 3 Am. B. R. 554, 98 Fed. 406; *In re Ronk* (D. C., Ind.), 7 Am. B. R. 31, 111 Fed. 154; *In re Dismal Swamp Co.* (D. C., Va.), 14 Am. B. R. 175, 135 Fed. 415; *Matter of White* (Ref., R. I.), 22 Am. B. R. 200; *In re Smith* (D. C., N. Y.), 23 Am. B. R. 864, 176 Fed. 426. And this view seems to be sustained by the terms of the bankruptcy act, by the more cogent reasons, and by the weight of authority. *In re Great Western Mfg. Co.* (C. C. A., 8th Cir.), 18 Am. B. R. 259, 265, 152 Fed. 123; *Lathrop Bank v. Holland* (C. C. A., 8th Cir.), 30 Am. B. R. 62, 205 Fed. 143.

an antecedent debt is made under such circumstances.⁵¹ Where an insolvent corporation, within the four months' period, makes a partial payment on account of goods sold received under a contract entered into prior to its bankruptcy, such payment is preferential, though thereafter no more goods were furnished under the contract.⁵² Where a claim secured by a chattel mortgage or an assignment, executed more than four months prior to bankruptcy, is waived by the acceptance of an offer of settlement, payment on such claim within the four months' period will constitute a voidable preference.⁵³

(4) DATE OF CONTRACT GOVERNS.—Where a contract for the sale of the bankrupt's property which provided that the proceeds of the sale were to be applied in payment of certain claims against the bankrupt, the date of the contract rather than the date of payment under the contract governs in determining whether a preference was given within the four months' period.⁵⁴ If the contract gives rise to an equitable lien in favor of the creditor such lien will be presumed to exist as of the date of the contract, and the delivery of the property under such contract to the creditor within the four months' period will not make it a preference.⁵⁵ Whether or not such a lien takes effect as of the date of the contract or as of the date of the taking possession of the property will be governed by the State law.⁵⁶

51. *Vitzthum v. Large* (D. C., Ia.), 20 Am. B. R. 666, 162 Fed. 685.

52. *In re Mayo Contracting Co.* (D. C., Mass.), 19 Am. B. R. 551, 157 Fed. 469.

53. *Schuetz v. International Harvester Co.* (Iowa Sup. Ct.), 34 Am. B. R. 708, 149 N. W. 855, in which case it appeared that a debtor, after property purchased by him had been destroyed by fire, gave an order on the insurance companies in favor of the vendor, and in order to avoid bankruptcy the vendor with other creditors agreed to accept the insurance money pro rata on their respective claims, it was held that the vendor thereby waived his claim under the order and also under notes secured by a chattel mortgage given more than four months prior to bankruptcy, and the trustee in bankruptcy may recover the payments from the insurance money as preferences.

54. *Fitch v. Bank of Grand Rapids* (Sup. Ct., Wis.), 26 Am. B. R. 879, 131 N. W. 1095.

55. *Sexton v. Kessler & Co.* (C. C. A., 2d Cir.), 21 Am. B. R. 807, 172 Fed. 535, affd. 225 U. S. 90, 28 Am. B. R. 85, 56 L. ed. 995, 32 Sup. Ct. 657; *Godwin v. Murchison National Bank*, 22 Am. B. R. 703, 145 N. C. 320; *Hanson v. Blake* (D. C., Me.), 19 Am. B. R. 325, 155 Fed. 342; *Wilder v. Watts* (D. C., S. C.), 15 Am. B. R. 57, 138 Fed. 426.

Delivery to pledgee within four months' period not a preference.—Bankrupt had for many years drawn upon defendant, an English company, and in 1903, upon request that it set aside securities for its drawing credit, placed in its safe deposit vault, in a separate package, certain securities named, designated them as held in escrow as security to defendant for drafts, and notified defendant of its action and of the particular securities so held. Bankrupt also entered the securities

and all substitutions on its loan book, and as substitutions were made from time to time, the English company was notified. The securities were always either negotiable by delivery or indorsed in blank. They were always marked and kept separate and never removed from the vault, except when taken to the office to be examined and checked off by a representative of the English company. Thereafter, within four months of defendant's bankruptcy, and at a time when it was insolvent, the escrow securities were delivered over to the defendant. It appeared that the transaction was entered into in good faith and that the transfer was not void as against bankrupt's creditors, irrespective of attachment. Held, that when defendant took the securities, it only exercised a right which had been created long before bankruptcy, and that the transaction could not be avoided by bankrupt's trustee as a preference under the bankruptcy act. *Sexton v. Kessler & Company, Ltd.*, 225 U. S. 90, 28 Am. B. R. 85, 56 L. ed. 995, 32 Sup. Ct. 657.

56. *Thompson v. Fairbanks*, 196 U. S. 516, 13 Am. B. R. 437, 49 L. Ed. 577, 25 Sup. Ct. 306; *In re Chantler Cloak & Suit Co.* (D. C., R. I.), 18 Am. B. R. 498, 151 Fed. 952; *In re Automobile Livery Service Co.*, 23 Am. B. R. 799, 176 Fed. 792, in which it was held that under the Alabama law where there has been no delivery of pledged property, but in pursuance of a prior agreement such property upon the pledgor's default was delivered within the four months' period, the possession thus acquired relates back to the time of said agreement and constitutes a preference only as to claimants who had in the meantime perfected liens upon the property.

(5) POSSESSION WITHIN FOUR MONTHS' PERIOD.—Where possession is taken by the creditors of an insolvent debtor's property within four months before the filing of the petition, under an agreement, whereby a lien was created in favor of the creditors upon such property in case of a failure of the debtor to comply with the terms of such agreement, such assumption of possession will constitute an unlawful preference notwithstanding the fact that the agreement was made prior to the four months' period.⁵⁷ But where property is pledged or mortgaged for the benefit of creditors by a valid pledge or mortgage executed prior to the four months' period, such creditors may enter into possession of such property within the four months' period. In all such cases the rights of creditors in respect to the particular property will depend upon the validity of the pledge or mortgage under the laws of the state where made.⁵⁸ A pledge

57. *Matthews v. Hardt*, 9 Am. B. R. 373, 79 N. Y. App. Div. 570, 80 N. Y. Supp. 462; *Matter of Mandel* (D. C., N. Y.), 10 Am. B. R. 774, 127 Fed. 863. Compare *In re Chadwick* (D. C., Ohio), 15 Am. B. R. 528, 140 Fed. 674; *Christ v. Zehner*, 212 Pa. St. 188, 16 Am. B. R. 788, 61 Atl. 822. See Am. Bankr. Dig. § 488.

Trust receipts; assignment of accounts to release.—In an action by trustees in bankruptcy to set aside assignments of accounts and warehouse receipts to the defendant as an illegal preference and to recover the amount realized thereon it appeared that the defendant in lending money to the bankrupt took warehouse receipts and trust receipts more than four months prior to bankruptcy covering raw material taken from the warehouse by the bankrupt with the defendant's consent. These trust receipts stipulated that the material was to be held for the defendant with liberty to sell it and apply the proceeds to any indebtedness to the bank. The bankrupt, with the knowledge of the defendant, mingled the raw material so taken under the trust receipts with other material in its factory, and sold the manufactured product. The defendant claimed that the accounts assigned to it within four months of bankruptcy represented the raw material covered by the trust receipts. It was held that the assignment of accounts was a voidable preference, as constituting a transaction entirely apart from the trust receipts covering the raw material which entered, in part, into the manufacture of the articles for which the accounts accrued. *Merchants National Bank v. Corr*, (C. C. A., 4th Cir.), 34 Am. B. R. 527, 221 Fed. 419.

58. *Sabin v. Camp* (D. C., Or.), 3 Am. B. R. 578, 98 Fed. 974; *In re Wolf* (D. C., Iowa), 3 Am. B. R. 555, 98 Fed. 74; *Thompson v. Fairbanks*, 196 U. S. 516, 13 Am. B. R. 437, 49 L. Ed. 577, 25 Sup. Ct. 306; *Sexton v. Kessler & Co.* (C. C. A., 2d Cir.), 21 Am. B. R. 807, 172 Fed. 535. But compare *In re Sheridan* (D. C., Pa.), 3 Am. B. R. 554, 98 Fed. 406.

In Massachusetts the taking of possession of mortgaged chattels by the mortgagor within the four months' period under an un-

recorded mortgage covering after-acquired property made more than two years before the bankruptcy of the mortgagor does not constitute a preference. *Humphrey v. Tatman*, 198 U. S. 91, 14 Am. B. R. 74, 49 L. Ed. 956, 25 Sup. Ct. 567. A mortgagee taking possession before the commencement of bankruptcy proceedings against his mortgagor of after-acquired property covered by the mortgage, is entitled under the law of Massachusetts to hold the property as against the trustee. *In re Hurley* (D. C., Mass.), 26 Am. B. R. 434, 185 Fed. 851.

Missouri statute.—In the case of *In re Ozark Cooperage & Lumber Co.* (C. C. A., 8th Cir.), 24 Am. B. R. 835, 180 Fed. 105, the court speaking of the Missouri statute relating to change of possession said: "Some kinds of personal property may be readily delivered from hand to hand and interested persons may rightfully expect that method to be observed. In other cases, the character of the property and the circumstances of its situation preclude such a transfer; and other *indicia* of a change of ownership such as signs, brands and marks are generally accepted as sufficient. Each case, however, as it arises should be determined by its own peculiar facts and circumstances."

Taking possession of property within the four months' period.—In the case of *In re Bird* (D. C., Minn.), 25 Am. B. R. 24, 180 Fed. 229, it appeared that about two years before the petition in bankruptcy was filed, a bank had in its possession personal property belonging to the bankrupt which had been pledged to the bank to secure the payment of a debt owing to the bank by him; at the same time the bankrupt assigned to another creditor all his interest in the equity of such personal property, such equity to be determined after the bank should have been fully paid; at the time of the adjudication the property was still in the possession of the bank; it was held that the assignment of the equity in such property was a valid contract under the common law and under the law of Minnesota and that it was not void as a preference for failure to record or register the transfer as required by section 60-a, as such transfer was not required to be

of stock by a bankrupt to a bank, prior to the four months' period, which pledge was perfected at the time by the delivery of the certificates of stock without transfer on the books of the corporation, does not constitute a preference although such stock was sold pursuant to the pledge, within the four months' period.⁵⁹

(6) **ASSIGNMENT OF PROPERTY WITHIN FOUR MONTHS.**—Where an assignment of personal property and book accounts was made by a bankrupt within the four months' period to secure to a bank the payment of notes, purchased by it from the bankrupt, under an agreement made more than four months prior to the filing of the petition, whereby the bankrupt agreed to maintain at all times a deposit equal to at least twenty-five per cent. of the notes so purchased, and against which the notes payable at maturity could be charged. Such assignment constitutes a voidable preference.⁶⁰ Collections made within the four months' period on accounts, which were assigned before that period commenced, do not constitute a preference which the trustee may recover.⁶¹

(7) **PRIOR TO THE AMENDMENTS OF 1903.**—The clause as to the period within which a preference shall not be given was in subdivision *b* in the original law. It led to the anomalous doctrine that mere preferences, as, for instance, *bona fide* payments, must be surrendered if since insolvency, no matter how many months or years back, but fraudulent preferences were good unless within the four months' period.⁶² This dilemma was the direct result of *Carson v. Chicago Title & Trust Co.*,⁶³ and gave force to the demand for

recorded or registered under the Minnesota law, nor was it a preference for failure to take possession of the property within the four months' period.

Where the rights of a mortgagee under a chattel mortgage had been fixed more than four months prior to the bankruptcy of the mortgagor, by a contract good between the parties, his taking possession of the mortgaged property within the four months' period did not constitute the transaction a preference. In *re East End Mantel & Tile Co.* (D. C., Pa.), 29 Am. B. R. 793, 202 Fed. 275.

Assignments of fire insurance policy under prior agreement.—A transaction in which the owner of a mercantile business gives to a creditor an assignment of a fire insurance policy, in order that such creditor may collect the amount thereof and apply the same to the payment of a prior loan, and which is given in furtherance of a prior agreement by which the insurance policy was pledged to the said creditor as security for money loaned and for future advances, and under the understanding that in case of fire such authority to collect or assignment should be given, is not an unlawful preference even though made within four months of the act of bankruptcy; the money being loaned and the policy having been pledged prior to that time. *Hecker v. Commercial State Bank*, 37 Am. B. R. 809, 159 N. W. 97.

Valid lien; possession within four months.—Where a bankrupt has given an equitable lien on his property which according to the law of the state is enforceable against the bankrupt and purchasers with notice, the preference which results from the lienor tak-

ing possession of the property dates back to the date of the original lien, and therefore, although possession is taken within four months, it is not a voidable preference. *Davis v. Billings* (Pa. Sup. Ct.), 38 Am. B. R. 957, 99 Atl. 163.

^{59.} *First Nat. Bank of Lake Charles v. Lang* (C. C. A., 5th Cir.), 29 Am. B. R. 247, 253, 202 Fed. 117, 121.

^{60.} *Tilt v. Citizens' Trust Co.* (D. C., N. J.), 27 Am. B. R. 320, 191 Fed. 441, affd. 29 Am. B. R. 906, 200 Fed. 410.

^{61.} *Lowell v. International Trust Co.* (C. C. A., 1st Cir.), 19 Am. B. R. 853, 158 Fed. 781.

Collection of accounts within four months.—When an assignment of accounts is made more than four months prior to the bankruptcy, the fact that the accounts are not collected by the creditor until within four months does not make the transaction a preference. In *re Bird* (D. C., Minn.), 25 Am. B. R. 24, 180 Fed. 229.

^{62.} For instance, see the now inapplicable cases of *In re Jones* (D. C., Mass.), 4 Am. B. R. 563, 110 Fed. 763; *In re Abraham Steers Lumber Co.* (D. C., N. Y.), 6 Am. B. R. 315, 110 Fed. 738; affd. s. c., 7 Am. B. R. 332, 112 Fed. 406; *In re Rosenberg* (Ref., N. Y.), 7 Am. B. R. 316; also the numerous cases contra, of which the following are characteristic: *In re Wise*, 2 N. B. N. Rep. 151; *In re Beswick* (Ref., Ohio), 7 Am. B. R. 395; *In re Siegel-Hillman, etc., Co.*, 2 N. B. N. Rep. 937; *In re Dickinson* (Ref., N. Y.), 7 Am. B. R. 679.

^{63.} 182 U. S. 438, 5 Am. B. R. 814, 45 L. Ed. 1171, 21 Sup. Ct. 906.

amendment. The clause has now been restored to subsection *a*, where it was in the Torrey bill.⁶⁴ The effect of this transfer is to make the four months' limitation an element of the preference referred to in both subdivisions *a* and *b*.⁶⁵

(8) RUNNING OF TIME WHERE RECORDING IS REQUIRED.—(I) *In general*.—The concluding sentence of subdivision *a* was inserted by the amendatory act of 1903. Its purpose is apparent—to meet the decisions that held the date of the delivery of a preferential instrument, rather than the date of the record, the beginning of the four months' period.⁶⁶ But the amendment did not change the date as to which such transfers are to be judged in determining their voidable character.⁶⁷ If the transfer was filed or recorded within the four months' period, where filing or recording is required, and at that time the bankrupt was insolvent, and the transferee had reasonable cause to believe it, and the effect was to give him a greater percentage of his debt than the other creditors, the transfer is a preference.⁶⁸ This clause as

64. See *In re Hall* (Ref., N. Y.), 4 Am. B. R. 671. Compare Report No. 1,698, 57th Congress, First Session, pp. 3, 8.

65. *Manning v. Evans* (D. C., N. J.), 19 Am. B. R. 217, 156 Fed. 106.

66. *In re Wright* (D. C., Ga.), 2 Am. B. R. 364, 96 Fed. 187; *In re Mersman* (Ref., N. Y.), 7 Am. B. R. 46; *In re Kindt* (D. C., Iowa), 4 Am. B. R. 148, 101 Fed. 107. Apparently *contra*: *In re Klingaman* (D. C., Iowa), 4 Am. B. R. 254, 101 Fed. 691; *Babbitt v. Kelly*, 9 Am. B. R. 335, 95 Mo. App. 529, 70 S. W. 384; *Davis v. Hanover Savings Fund Soc.* (C. C. A., 4th Cir.), 31 Am. B. R. 368, 210 Fed. 768; *Deupree v. Watson* (C. C. A., 6th Cir.), 32 Am. B. R. 407, 216 Fed. 483.

As to splitting days into hours, see *In re Tonawanda Street Planing Mill* (Ref., N. Y.), 6 Am. B. R. 38, and cases cited.

67. *Deupree v. Watson* (C. C. A., 6th Cir.), 32 Am. B. R. 407, 216 Fed. 483.

68. *McElvain v. Hardesty* (C. C. A., 8th Cir.), 22 Am. B. R. 320, 169 Fed. 32; *Covington v. Bergman* (D. C., N. C.), 32 Am. B. R. 35, 210 Fed. 499.

Mortgage given before but recorded within four months' period.—On November 26, 1909, when indebted to a large extent bankrupt gave to the claimant, his brother, a mortgage on real estate for the sum of \$1,300 to secure an alleged advance of a like amount. Claimant admitted that he knew bankrupt was pressed by creditors when the alleged loan was made. He did not at any time take possession of the mortgaged premises and did not record the mortgage until March 10, 1910, two weeks before the bankrupt filed a petition in voluntary bankruptcy, at which time bankrupt's liabilities three times exceeded his assets. Under the law of Pennsylvania, where the real estate is situate, a mortgage is a lien only from the date of recording. Held, that the giving of the mortgage was a transfer of property within the four months before the filing of the petition and constituted a voidable preference under subdivi-

sions "a" and "b" of section 60 of the Bankruptcy Act. *In re Dundore* (D. C., Pa.), 26 Am. B. R. 100.

Conveyance based on present consideration.—In the case of *In re Jackson Brick & Tile Co.* (D. C., Mo.), 26 Am. B. R. 915, 927, 189 Fed. 636, which arose prior to the amendment of 1910, the court said: "The provisions of the statute that 'where the preference consists in a transfer, such period of four months shall not expire until four months after the recording or registering of the transfer, if, by law, such recording or registering is required,' was intended to postpone the time within which a transfer is open to attack as a preference until four months after the date of the recording of the transfer, where such recording is required by the local law; but while the statute postpones the time within which the transfer can be attacked the statute cannot properly be so applied as to materially alter the essential character of the transaction. If the transfer is one which is required to be recorded, the four-month period during which it may be attacked does not begin to run until the conveyance is recorded, but if the transfer when made was based upon a present consideration, a delay in recording the instrument does not warrant us in treating the conveyance as if it were made as security for an antecedent debt, because to do so would be to create by construction a transaction different from the actual one. It is true that in certain cases where the conveyance has no force and validity whatever as to creditors until recorded, the courts have held that the transfer may be regarded as first coming into existence when it is recorded (*McElvain v. Hardesty* (C. C. A., 8th Cir.), 22 Am. B. R. 320, 169 Fed. 31; *In re Newton* (C. C. A., 8th Cir.), 18 Am. B. R. 567, 153 Fed. 841, 83 C. C. A., 23; *First Nat. Bank v. Connett* (C. C. A., 8th Cir.), 15 Am. B. R. 662, 142 Fed. 33, 73 C. C. A. 219, 5 L. R. A. [N. S.] 148); but in my opinion these cases are inapplicable to the facts here presented, and, as the

amended only refers to transfer originally intended as preferences, or which, at their inception, constituted such as a matter of law.⁶⁹

(II) *Registering or recording required by State law.*—The amendment of 1910 makes voidable a preferential transfer required by State law to be registered or recorded, if such transfer was so registered or recorded within the four months' period. The omission of words equivalent to "unless the petitioning creditors have received actual notice of such transfer or assignment," found in § 3-b should be noted.⁷⁰ The State law relative to registration or recording will determine as to whether or not a transfer is required to be registered or recorded.⁷¹ The word "required" has reference to the character of the instrument of transfer required to be recorded by the State law rather than to the particular individuals who, by reason of adventitious circumstances, may or may not be affected by an unrecorded instrument.⁷² It will sometimes be found difficult to determine whether the law actually requires the recording or registering of a transfer within the meaning of this subsection. For instance, under a statute requiring the recording of a chattel mortgage, it was held that a failure to register rendered the mortgage void only as against lien creditors, subsequent purchasers or incumbrancers in good faith, and that such recording was therefore not required to make the instrument valid as against the mortgagor's general creditors; it is this character of a requirement which is needed to bring the transaction within this subdivision.⁷³ It is now determined authoritatively that a provision in a State law

transfer here in question was for a present consideration, it cannot properly be treated as a voidable preference.

Filing within four months' period.—The validity of a chattel mortgage given by a bankrupt to a bank as security, must be determined as of the date of its execution; and where it was given in good faith and valid when executed, and neither preferential nor fraudulent under State law, because withheld from record, the fact that it was not filed until within four months of the bankruptcy proceedings, does not make it invalid under section 60a of the Bankruptcy Act, as amended in 1903: *Dougherty v. First National Bank of Canton* (C. C. A., 6th Cir.), 28 Am. B. R. 263, 197 Fed. 241.

69. *Bradley Clark Co. v. Benson*, 13 Am. B. R. 170, 93 Minn. 91, 109 N. W. 670.

70. On this general subject, the practitioner should consult the discussion of this subsection, found in Section Three. Note distinction made between language here used and that used in § 3-b, as discussed in *Little v. Holly Brooks Hardware Co.* (C. C. A., 5th Cir.), 13 Am. B. R. 422, 133 Fed. 874 and *Carey v. Donahue*, 240 U. S. 430, 36 Am. B. R. 704, revg. 31 Am. B. R. 210, 209 Fed. 328.

71. *Hawkins v. Dannenberg Co.* (D. C., Ga.), 37 Am. B. R. 262, 234 Fed. 752. See Am. Bankr. Dig. § 490.

Maine Statute.—Under the revised statutes of Maine, chapter 93, section 1, providing that "No mortgage of personal property is valid against any other person than the parties thereto, unless possession of such property is delivered to, and retained by the

mortgagee, or the mortgage is recorded," a chattel mortgage is required to be recorded, within the meaning of section 60a of the Bankruptcy Act, as amended in 1910. *Matter of Alden* (D. C., Me.), 37 Am. B. R. 611, 233 Fed. 160.

72. *First Nat. Bank v. Connett* (C. C. A., 8th Cir.), 15 Am. B. R. 662, 665, 142 Fed. 33.

Under the law of Georgia, the failure to record a chattel mortgage does not render it void as between the parties and ordinary creditors, but only against lien creditors of the mortgagor, or subsequent purchasers and mortgagees or lienholders in good faith, and recording is not "required" within the meaning of this section. In *re Jacobson & Perrill* (D. C., Ga.), 29 Am. B. R. 603, 200 Fed. 812.; *Martin v. Commercial Nat. Bank* (C. C. A., 5th Cir.), 36 Am. B. R. 25, 228 Fed. 651; *Johnson v. Barrett* (D. C., Ga.), 38 Am. B. R. 464; but see *Hawkins v. Dannenberg Co.* (D. C., Ga.), 37 Am. B. R. 262, 234 Fed. 752.

73. *Meyer Bros. Drug Co. v. Pitkin Drug Co.* (C. C. A., 5th Cir.), 14 Am. B. R. 477, 136 Fed. 396; In *re Chadwick* (D. C., Ohio), 15 Am. B. R. 528, 140 Fed. 674; *Martin v. Commercial Nat. Bank* (C. C. A., 5th Cir.), 36 Am. B. R. 25, 228 Fed. 651.

Recording required as against judgment creditors.—In the case of *Matter of Hunt* (D. C., N. Y.), 14 Am. B. R. 416, 139 Fed. 283, it was held that, because under the laws of New York an unrecorded conveyance was good as against everybody except subsequent purchasers without notice, it was not required to be recorded in order to be

requiring the recording or registration of a transfer to make it valid as against subsequent *bona fide* purchasers does not constitute a requirement of recording or registering within the meaning of this section, so as to entitle the trustee to recover the preference for the benefit of creditors.⁷⁴ It was formerly held

effectual against a bankrupt trustee. But Judge Archbald, in *re English v. Ross* (D. C., Pa.), 15 Am. B. R. 370, 140 Fed. 631, and the circuit court of appeals for the eighth circuit, in *First Nat. Bank v. Connett* (C. C. A., 8th Cir.), 15 Am. B. R. 662, 142 Fed. 33, reached an opposite conclusion and held that a recording statute, which required a conveyance or transfer to be recorded to be effectual against a certain class or classes of persons, was a law which required the recording of the transfer in question within the meaning of section 60-a as amended. The same conclusion was reached in *Loeser v. Bank & Trust Co.* (C. C. A., 6th Cir.), 17 Am. B. R. 628, 148 Fed. 975, revg. 15 Am. B. R. 528, 140 Fed. 674. The circuit court of appeals in the seventh circuit have adopted the ruling declared in the fifth circuit, following the case of *Meyer Bros. Drug Co. v. Pitkin Drug Co.*, *supra*, and the case of *In re Sturtevant* (C. C. A., 8th Cir.), 26 Am. B. R. 574, 188 Fed. 196, in which the court held that where bankrupts more than two years before bankruptcy, being solvent, in good faith gave to claimant's testator a chattel mortgage to secure their note made for a present and valid consideration, but the mortgage was not recorded until fifteen days prior to the filing of a petition in bankruptcy, and under the law of Illinois such a mortgage, although unrecorded, is good as against the mortgagor and his general creditors, the recording of the mortgage within the four-month period did not create a preference within the meaning of section 60a of the Bankruptcy Act. The Supreme Court in *Carey v. Donahue* 240 U. S. 430, 36 Am. B. R. 704, 60 L. ed. 726, 36 Sup. Ct. 386, has overruled the *Loeser* case and other cases like it and has followed the *Sturtevant* case.

Revised Laws 1905 (Minn.), sec. 3502, providing that "every assignment of a debt, unless the same be in writing and be filed with the clerk of the town or municipality in which the assignor resides, shall be presumed to be fraudulent and void as against his creditors, unless those claiming thereunder make it appear that it was made in good faith and for a valuable consideration," does not "require" a "recording or registering" within the meaning of sections 60-a and b of the Bankruptcy Act. Hence, where a written assignment of a claim was actually made more than four months prior to the filing of a petition in bankruptcy by the assignor, it cannot be avoided by the trustee in bankruptcy as a preference although it was never filed. *Telford v. Hendrickson* (Minn. Sup. Ct.), 31 Am. B. R. 866, 139 N. W. 941.

Subsequent purchasers or lien creditors.—A chattel mortgage given to recover a debt and required to be recorded under the law

of Arkansas to be valid against subsequent purchasers or lien creditors, must be treated as executed when first filed for record, and is invalid as against the mortgagor's trustee in bankruptcy when not filed until within four months of the filing of the petition in bankruptcy, when the mortgagor was insolvent. *Matter of Bunch Commission Co.* (D. C., Kan.), 35 Am. B. R. 526, 225 Fed. 243.

74. Purpose of provision as to requirements of recording.—In the case of *Carey v. Donahue*, 240 U. S. 430, 36 Am. B. R. 704, the Supreme Court had under consideration the Ohio statute (Ohio Code, § 8543) relative to the recording of instruments conveying real property, which provided that until so recorded "they shall be deemed fraudulent so far as relates to a subsequent bona fide purchaser." It appeared that a deed conveying real property to a creditor was executed by the bankrupt more than four months prior to his bankruptcy, but it was recorded within the four months' period. The court through Mr. Justice Hughes said:—"As Congress did not undertake in § 60 to hit all preferential transfers (otherwise valid) merely because they were not disclosed either by record or possession, more than four months before the bankruptcy proceeding, the inquiry is simply as to the nature of the requirement of recording to which Congress referred. The character of the transfer itself, both with respect to what should constitute a transfer and its preferential effect, had been carefully defined. It is plain that the words are not limited to cases where recording is required for the purpose of giving validity to the transaction as between the parties. For that purpose, no amendment of the original act was needed, as in such a case there could be no giving of a preference without recording. But in dealing with a transfer, as defined, which, though valid as between the parties, was one which was 'required' to be recorded, the reference was necessarily to a requirement in the interest of others who were in the contemplation of Congress in enacting the provision. The natural, and, we think, the intended, meaning, was to embrace those cases in which recording was necessary in order to make the transfer valid as against those concerned in the distribution of the insolvent estate; that is, as against creditors, including those whose position the trustee was entitled to take. This gives effect to the amendment and interprets it in consonance with the spirit and purpose of the bankruptcy act. See Senate Report, No. 691, Sixty-first Cong. 2d Sess., p. 8. In the present case, there was no requirement of recording in favor of creditors, either general creditors or lien creditors. The requirement of the

that where a State statute provides that every chattel mortgage not accompanied by immediate delivery and followed by continued change of possession "shall be absolutely void as against the creditors of the mortgagor and as against subsequent purchasers and mortgagees in good faith" unless it, or a true copy thereof, be filed with the county clerk, registration is required within the meaning of this section of the bankruptcy act, and it is none the less so though the penalty for noncompliance is not invalid as to everybody and for all purposes.⁷⁵ This provision would appear, from the principle underlying the ruling of the Supreme Court, to be one requiring the recording or filing of the instrument to protect it as against the creditors of the bankrupt, who are represented by the trustee, so as to justify a recovery of the preference.⁷⁶ The cases in which it has been declared that if recording or registration is required for any purpose, even if not for all purposes, it is "required" within the meaning of the amendment,⁷⁷ are now nullified by the conclusion reached by the Supreme Court in the Carey case. The purpose of the amendment will be effectuated by construing it as referring to transfers which require recording or registration to make them valid as against general creditors.⁷⁸ Where the

applicable law was solely in favor of subsequent *bona fide* purchasers without notice. These subsequent purchasers are entirely outside of the purview of the bankruptcy act. The proceeding in bankruptcy is not, in any sense, in their interest, and the trustee does not represent them. We can find no ground for the conclusion that the clause 'if by law recording or registering thereof is required' had any reference to requirements in the interest of persons of this description. The limitation of the provision to those transfers which are 'required' to be recorded under the applicable law is not to be taken to be an artificial one by which the rights of creditors are made to depend upon the presence or absence of local restrictions adopted, *alio intuitu*, in the interest of others. Rather, as we have said, we deem the reference to be to requirements of registry or record which have been established for the protection of creditors,—the persons interested in the bankrupt estate, and in whose behalf, or in whose place, the trustee is entitled to act. And where, as in this case, there is no such requirement, and the transfer was made more than four months before the filing of the petition in bankruptcy, there can be no recovery under § 60."

75. *Mattley v. Giesler* (C. C. A., 8th Cir.), 26 Am. B. R. 116, 187 Fed. 790, revg. 23 Am. B. R. 673, 175 Fed. 619, which arose under the Nebraska statute; see s. c. 29 Am. B. R. 132, 202 Fed. 738. Compare *Fisher v. Zollinger* (C. C. A., 6th Cir.), 17 Am. B. R. 618, 149 Fed. 34, affg. 15 Am. B. R. 524, holding that under the laws of Ohio the taking possession of after-acquired property within the four-month period, under a chattel mortgage given and recorded prior to that time, does not constitute a voidable preference.

76. *Bunch v. Maloney* (C. C. A., 8th Cir.), 37 Am. B. R. 369, 233 Fed. 967 (affg. 35

Am. B. R. 526, 225 Fed. 243) holding that where the applicable registry statute provides generally that an unfilled or unrecorded transfer shall be void as to "creditors" or employs words of similar import as in Arkansas, the trustee in bankruptcy as the representative of general creditors may invoke the remedy of section 60b of the Bankruptcy Act, regardless of the local construction of the statute making a procedural distinction between creditors with a lien and those without.

77. *Ragan v. Donovan* (D. C., Ohio), 26 Am. B. R. 311, 189 Fed. 138, holding that where a State statute provides that deeds not recorded, although good as between the parties, are void as to *bona fide* purchasers for value without knowledge, the recording of a deed is "required" within the meaning of § 60-a; *In re Beckhaus* (C. C. A., 7th Cir.), 24 Am. B. R. 380, 177 Fed. 141; *Loeser v. Bank & Trust Co.* (C. C. A., 6th Cir.), 17 Am. B. R. 628, 148 Fed. 975; *In re Donnelly* (D. C., Ohio), 27 Am. B. R. 504, 193 Fed. 755.

78. *In re Sturtevant* (C. C. A., 7th Cir.), 26 Am. B. R. 574, 577, 189 Fed. 138, in which the court said: "If the word 'required' in section 60-a is to be construed as referring to a transaction which would be invalid for all purposes, then it does not apply to the case in hand, for the recording of the mortgage is not required in that sense under the Illinois statute. The recording laws are only for the purpose of notice. *Dean v. Plane*, 195 Ill. 495-500, 63 N. E. 274. This construction of section 60-a does not strike at the object sought to be attained by the amendments of 1903. It would formerly have been an easy matter to make a preferential transfer prior to the beginning of the four-month period, and withhold the transfer instrument from record until after the period had begun to run, thus defeating the benefit contemplated

State law requires that failure to file or record will invalidate the transfer as against creditors, the word "creditors" will not be limited in its application, but will include creditors of all kinds, and under such law filing or recording is required.⁷⁹ The provision does not apply where the recording of an instrument is permissive only, and the grantee takes possession under a deed.⁸⁰ An assignment of a land contract which might have been recorded if executed with due formality, under the laws of a State, but in respect to which recording is not required to give it validity, is not "required" to be recorded.⁸¹ If a chattel mortgage first comes into existence as against general creditors, under a State statute, when it is recorded, it is "required" to be recorded under this subdivision even though it is not absolutely void in all circumstances because not so recorded.⁸²

(III) *Transfers prior to four months' period recorded within such period.*—Where a transfer in the nature of a preference was made more than four months before the petition in bankruptcy was filed, but was recorded within that period, the statute does not have the effect of making it voidable at the instance of a trustee, unless it was one required by law to be recorded or registered within the principles heretofore declared, and the invalidating circumstances existed when it was recorded or registered.⁸³ If an instrument has been made by a bankrupt, and recorded within the statutory period, it is a question of fact whether it was done with intent to give a preference.⁸⁴ The failure to record a deed until after the grantor's adjudication as a bankrupt is not sufficient to make it an unlawful preference, in the absence of a fraudulent agreement, where, under the State law, the unrecorded instrument is valid between the parties and against general creditors of the grantor.⁸⁵ Such fact will be corroborative of the general scheme to defraud, where it appears that

by the creation of that period. Manifestly Congress must have construed the law as it then stood as making the transfer to date from the time it was actually made, without regard to the date of filing for record. Therefore a transfer, though fraudulent, could not have been attacked, even though the instrument evidencing the transfer were recorded within the four months. In order to cure this, the amendment was added that no fraudulent transfer constituting a preference could escape the four-month provision unless the recording was effected prior to that period." See *Dougherty v. First National Bank* (C. C. A., 6th Cir.), 28 Am. B. R. 263, 197 Fed. 241, as to effect of amendment of 1906.

79. *In re Mission Fixture & Mantel Co.* (D. C., Wash.), 24 Am. B. R. 873, 180 Fed. 263.

80. *Getman v. Lippert* (N. Y. App. Div.), 36 Am. B. R. 806, 171 N. Y. App. Div. 536, 157 N. Y. Suppl. 867.

81. *In re Sayed* (D. C., Mich.), 26 Am. B. R. 444, 185 Fed. 962.

82. *First Nat. Bank v. Connett* (C. C. A., 8th Cir.), 15 Am. B. R. 662, 142 Fed. 33; *In re Montague* (D. C., Va.), 16 Am. B. R. 18, 143 Fed. 428; *In re Noel* (D. C., Md.), 14 Am. B. R. 715, 137 Fed. 694.

83. *Martin v. Commercial Nat. Bank* (C. C. A., 5th Cir.), 36 Am. B. R. 25, 228 Fed.

651; *Getman v. Lippert* (N. Y. App. Div.), 36 Am. B. R. 806, 171 N. Y. App. Div. 536, 157 N. Y. Suppl. 867; *Matter of Roberts* (D. C., Ga.), 36 Am. B. R. 137, 227 Fed. 177; *Johnson v. Barrett* (D. C., Ga.), 38 Am. B. R. 464, 237 Fed. 112; *Dougherty v. First Nat. Bank* (C. C. A., 6th Cir.), 28 Am. B. R. 263, 197 Fed. 241.

Mortgage by bankrupts to indorsers as security.—The facts that a bank, when it took an assignment of a mortgage executed to indorsers by the maker of a note which it had discounted, had learned that the maker was then insolvent, and was insolvent when the mortgage was given, and that recording had been postponed pursuant to an agreement between the maker and the indorsers do not avoid or defeat the mortgage as a valid security in the possession of the bank, the holder of the note secured thereby. *Matter of Mosher* (D. C., N. Y.), 35 Am. B. R. 284, 224 Fed. 739.

84. *Matter of McKane* (D. C., N. Y.), 19 Am. B. R. 103, 158 Fed. 647. See *Anderson v. Chenault* (C. C. A., 5th Cir.), 31 Am. B. R. 349, 208 Fed. 400.

85. *In re McIntosh* (C. C. A., 9th Cir.), 18 Am. B. R. 169, 150 Fed. 546; *In re Sayed* (D. C., Mich.), 26 Am. B. R. 444, 185 Fed. 962.

It seems, that a mortgage for \$1,000 given by a bankrupt to secure a loan for

the deed was without consideration and in fraud of creditors.⁸⁸ Where a deed absolute on its face, but in effect a mortgage was given long prior to bankruptcy as security for a promissory note, but was withheld from recorded by agreement until the day before the petition in bankruptcy, the transfer constituted a preference, since it being in effect a mortgage it was "required" to be recorded to be valid as against creditors.⁸⁷

d. Procured or suffered a judgment.—The words "procured or suffered a judgment to be entered against himself in favor of any person" seems an inheritance from the law of 1867.⁸⁸ They are not the same as those used in § 3-a (3). "Procuring" a judgment implies active agency on the part of the debtor. It is very different from "permitting" the same thing. But the disjunctive "or" is used, as is the word "suffered," and cases in point under § 3-a (3) are probably equally in point as to preferences which are voidable. Thus, *Wilson v. The City Bank*⁸⁹ is no longer controlling even here. The crucial element of intent is now unnecessary. The few decisions under the present law directly in point are to like effect.⁹⁰ Cases under the former law on the meaning of "suffer or procure" should be cited with caution.⁹¹

e. Made a transfer of his property.—(1) *IN GENERAL.*—The word "transfer," both by the express terms of the bankruptcy law and by authoritative decisions, includes "the sale and every other and different mode of disposing of, or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security."⁹²

(2) *METHOD OF TRANSFER.*—(I) *In general.*—The method of transfer is immaterial, and this was so under the former law.⁹³ Any method of transfer whereby the transferee, a creditor, receives property belonging to the bankrupt,

only \$700, and withheld from record until within four months of bankruptcy is preferential under section 60-a of the Bankruptcy Act, and might also be attacked for usury. *Butcher v. Werksman* (D. C., N. Y.), 30 Am. B. R. 332, 204 Fed. 330.

^{86.} *Butcher v. Werksman* (D. C., N. Y.), 30 Am. B. R. 332, 204 Fed. 330.

^{87.} *Dulany v. Morse* (Ct. of App., D. C.), 29 Am. B. R. 275, 41 Wash. L. Rep. 52.

^{88.} Act of 1867, § 39.

^{89.} 17 Wall. 473.

^{90.} *In re Collins* (Ref., Ia.), 2 Am. B. R. 1; *In re Richards* (D. C., Wis.), 2 Am. B. R. 518, 95 Fed. 258; *Grant v. National Bank of Auburn* (D. C., N. Y.), 28 Am. B. R. 712, 197 Fed. 581; *Moore v. Smith & Sons* (D. C., N. Y.), 30 Am. B. R. 413, 205 Fed. 431. See Am. Bankr. Dig. § 521.

Essential elements, where judgment is suffered.—An analysis of the statute will reveal that, to establish a preference, the trustee must show: (1) That the debtor was insolvent at the time of the entry of the judgment; (2) that the debtor suffered the judgment to be entered within four months before the filing of the petition; (3) that the enforcement of the judgment obtains for the creditor a greater percentage of its debt than any other creditor of the same class; and (4) that the bank or its agent had reasonable cause to believe that the effect of such judgment was to give a preference

within the meaning of the acts of Congress relating to bankruptcy. *Anderson v. Hayton State Bank* (Ore. Sup. Ct.), 38 Am. B. R. 4, 159 Pac. 1003.

Confession of judgment.—Where a corporation, with knowledge of its insolvency and within two months of bankruptcy, not only suffers, but procures a judgment to be entered against itself, the enforcement of which will give to the judgment creditor substantially every thing it owns, and a greater percentage of its claim than any other creditor of the same class, said corporation will be deemed to have given a voidable preference. *Grant v. National Bank of Auburn* (D. C., N. Y.), 37 Am. B. R. 329, 232 Fed. 201.

^{91.} The following are typical: *Little v. Alexander*, 21 Wall. 500; *Tenth Nat. Bank v. Warren*, 96 U. S. 539; 24 L. ed. 640; *Sage v. Wynkoop*, 104 U. S. 319, 24 L. Ed. 740; *In re Dunkle*, Fed. Cas. 4,160; *In re Baker*, Fed. Cas. 763.

^{92.} Bankr. Act, § 1 (25). *Coder v. Arts* (C. C. A., 8th Cir.), 18 Am. B. R. 513, 1445 Fed. 202, 152 Fed. 943, modifying 16 Am. B. R. 583, 145 Fed. 202, affd. 213 U. S. 223, 22 Am. B. R. 1, 53 L. Ed. 772, 29 Sup. Ct. 436.

^{93.} *Stern, Falk & Co. v. Louisville Trust Co.* (C. C. A., 6th Cir.), 7 Am. B. R. 305, 112 Fed. 501; *National Bank of Newport v. Herkimer Bank*, 225 U. S. 178, 28 Am. B. R. 218, 56 L. ed. 1042, 32 Sup. Ct. 633.

and thereby obtains a preference over other creditors, will result in a preference.⁹⁴ It is the effect of the transfer, and not its form or method which controls.⁹⁵ So that a payment of money,⁹⁶ a conveyance of land or mortgage thereof as security for a payment of a debt,⁹⁷ the voluntary confession of judgment to a creditor⁹⁸ the retaking of goods which have been sold and delivered,⁹⁹ or any other device by means of which the bankrupt has disposed of any portion of his estate will constitute a transfer. Where a creditor secures a judgment against an insolvent debtor and procures an execution to be levied on his personal property, the execution sale of such property and payment of the proceeds to the creditor constitutes a transfer within the meaning of the bankruptcy act.¹⁰⁰ A trustee in bankruptcy who mingles the funds of the estate with his own, and afterward becomes bankrupt himself, cannot pay out of the funds deposited in his name, the amount due the estate of which he is trustee.¹⁰¹

(II) *Transfer by indirection.*—Where a debtor conveyed property to his wife without any consideration and she mortgaged it in favor of his creditors,

94. *Bailey v. Baker Ice Machine Co.* 239 U. S. 268, 35 Am. B. R. 814, 819, 60 L. Ed. 275, 36 Sup. Ct. 50, affg. 31 Am. B. R. 593, 209 Fed. 603.

95. *Rogers v. Fidelity Sav. Bank & Loan Co.* (D. C., Ark.), 23 Am. B. R. 1, 172 Fed. 735. In the case of *National Bank of Newport v. Herkimer County Bank*, 225 U. S. 178 28 Am. B. R. 218, 222, 56 L. Ed. 1042, 32 Sup. Ct. 633, it is said: "It is not the mere form or method of the transaction that the act condemns, but the appropriation by the insolvent debtor of a portion of his property to the payment of a creditor's claim, so that thereby the estate is depleted and a creditor obtains an advantage over other creditors."

96. *Carson, etc., Co. v. Chicago, etc., Trust Co.*, 182 U. S. 438, 5 Am. B. R. 814, 45 L. Ed. 1171, 21 Sup. Ct. 906; *Jaquith v. Alden*, 189 U. S. 78, 82, 9 Am. B. R. 773, 47 L. Ed. 717, 23 Sup. Ct. 649; *New York Co. Nat. Bank v. Massey*, 192 U. S. 138, 11 Am. B. R. 42, 48 L. Ed. 380, 24 Sup. Ct. 199; *In re Fixen & Co.* (C. C. A., 9th Cir.), 4 Am. B. R. 10, 102 Fed. 296; *In re Arndt* (D. C., Wis.), 4 Am. B. R. 773, 104 Fed. 234; *In re Sloan* (D. C., Ia.), 4 Am. B. R. 356, 102 Fed. 116; *West v. Bank of Lahoma* (Sup. Ct., Okla.), 16 Am. B. R. 733, 16 Okla. 508, 86 Pac. 59; *In re Warner*, Fed. Cas. 17,177; *In re Clark*, Fed. Cas. 2,812.

Payment of money.—In a suit by a trustee in bankruptcy to set aside an alleged preferential payment it appeared that the bankrupt while insolvent executed a mortgage to a realty company which delivered to him its check on defendant's bank; that one K, in exchange for the realty company's check gave the bankrupt's broker his own check on another bank; that the broker deposited K's check in his own bank and drew his check to the order of defendant for which he received notes of the bankrupt held by defendant; that defendant had reasonable cause to believe that the bankrupt was insolvent, but did not have any interest in

the realty company, it was held that a decree dismissing the complaint on the theory that there had been no real transfer of cash by the bankrupt to defendant, should be reversed. *Obermeier v. Kass* (C. C. A., 2d Cir.), 34 Am. B. R. 37, 219 Fed. 529.

97. *Sieg v. Greene* (C. C. A., 8th Cir.), 35 Am. B. R. 150, 225 Fed. 955.

98. *Grant v. National Bank of Auburn* (D. C., N. Y.), 28 Am. B. R. 712, 197 Fed. 581.

99. *Wolff Mfg. Co. v. Battreal Shoe Co.* (Mo. Kan. City Ct. of App.), 35 Am. B. R. 895, 180 S. W. 396, holding that where a creditor, under an agreement with his debtor, takes goods from the debtor's store just prior to bankruptcy and with full knowledge of the debtor's insolvency, such transfer is a voidable preference under the bankruptcy act.

100. *Galbraith v. Whitaker* (Sup. Ct. Minn.), 32 Am. B. R. 113, 138 N. W. 772.

101. *Block v. Rice* (D. C., Pa.), 21 Am. B. R. 691, 167 Fed. 693.

Payments on account of loans, made during insolvency and within the four months' period, constitute preferences. *In re Colton Export & Import Co.* (C. C. A., 2d Cir.), 10 Am. B. R. 14, 121 Fed. 663. So held where payment was made from the general funds of the bankrupt, although the loan was made for a particular purpose but not used therefor. *In re Kearney* (D. C., Pa.), 21 Am. B. R. 721, 167 Fed. 995.

The repayment of stolen money does not constitute a preference, the person to whom it is restored being in entire ignorance both of the theft and the restoration. *McNaboe v. Columbian Manufacturing Co.* (C. C. A., 2d Cir.), 18 Am. B. R. 684, 153 Fed. 967. In the above case the president of a bankrupt corporation converted into cash a portion of its assets and repaid himself, as agent of another corporation, money which he had stolen from its funds and applied to the uses and purposes of the bankrupt and it was held that such repayment did not constitute a preference under the bankruptcy act.

it was held to be a preference by the debtor.¹⁰² If a transaction was entered into for the purpose of indirectly evading the provisions of the act and procuring an undue preference to the creditor, it is voidable.¹⁰³ Any transfer whether direct to the creditor or for his benefit, whereby the estate was depleted and the creditor received an unfair advantage is sufficient.¹⁰⁴

(III) *Partnership and individual assets.*—Any scheme or device resorted to by persons in contemplation of bankruptcy, for the purpose of charging the partnership assets with individual obligations is a violation of the act.¹⁰⁵ So, on the other hand, any scheme or device resorted to by a creditor for the purpose of charging the individual assets of a partner, with the co-partnership liabilities, would be unlawful.¹⁰⁶ So a transfer of the firm assets to one partner, for the purpose of enabling the individual creditors of the purchasing

102. *Gibson v. Dobie*, Fed. Cas. 5,394, 14 N. B. R. 156, 5 Biss. 198.

103. *Roberts v. Johnson* (C. C. A., 4th Cir.), 18 Am. B. R. 132, 151 Fed. 567; *Mason v. Nat. Herkimer Co. Bank* (D. C., N. Y.), 21 Am. B. R. 98, 163 Fed. 920, *revid.* on other grounds, 22 Am. B. R. 733, 172 Fed. 529; *In re Beerman* (D. C., Ga.), 7 Am. B. R. 431, 112 Fed. 663; *Frank v. Musliner*, 9 Am. B. R. 229, 76 N. Y. App. Div. 616; 78 N. Y. Supp. 369; *Block v. Academy Ball Room*, (D. C., N. Y.), 34 Am. B. R. 675, 221 Fed. 1004.

Payment or transfer by indirection.—Upon the foreclosure of a mortgage upon firm property, there remained after satisfaction of the mortgage a considerable surplus belonging to the bankrupt firm. One of the partners directed the mortgagee to pay from the surplus in his hands a debt due a creditor, thereby creating a preference. In legal effect this transaction was the same as a direct payment by the firm to prefer a firm creditor. *Johnson v. Hanley, Hoyer & Co.* (D. C., R. I.), 26 Am. B. R. 748, 188 Fed. 752.

Where a bank received security for bankrupt's indebtedness by means of an assignment of a mortgage executed by the bankrupt to a third party, in determining whether the transaction constituted a preference, it must be determined by its effect and not by its form; as the court must look at results and not at the devious ways by which they are accomplished. *In re McDonald & Sons* (D. C., S. Car.), 24 Am. B. R. 446, 178 Fed. 487, *affd.* 25 Am. B. R. 948. And see *Walters v. Zimmerman* (D. C., Ohio), 30 Am. B. R. 776, 780, 208 Fed. 62, where mortgage to secure loan from president of bank for the payment of a debt due the bank was held a preference; modified by *Marsh v. Walters* (C. C. A., 1st Cir.), 34 Am. B. R. 85, 220 Fed. 805.

The payment of a bankrupt's note, which was secured by a chattel mortgage on his stock of goods, by the purchaser of said goods, who had assumed the mortgage as part of the purchase price, has the same legal effect, so far as the giving of a preference to the holder of the note is concerned, as if the payment had been made

by the bankrupt himself. *Wickwire v. Webster City Sav. Bank* (Sup. Ct., Ia.), 27 Am. B. R. 157, 133 N. W. 100.

Acceptance of mortgage security.—Where in an action by a trustee in bankruptcy against two directors of a bankrupt corporation to recover alleged preferential payments, it appeared that each of the defendants had advanced certain amounts to the corporation, that thereafter the wife of one of the directors advanced a certain amount to the corporation receiving a mortgage as security, with the understanding that \$3,500 of the amount advanced by each defendant should be included in the mortgage; that the mortgage advanced the amount less the sums paid to the defendants by checks of the corporation which they indorsed to her; it was held that the transaction did not constitute a preferential transfer to the defendants, and, therefore, no recovery should be allowed against them. *Withoft v. Andrews* (D. C., Calif.), 33 Am. B. R. 536, 217 Fed. 421.

Sale of notes under judgment of State court.—A sale of notes, belonging to a bankrupt, which had been attached in actions against him by creditors in another State, while he was insolvent, does not constitute a preference, where the bankrupt made no transfer of the notes and did not suffer or procure the judgment made in the actions against him. *De Friece v. Bryant* (D. C., Ky.), 37 Am. B. R. 275, 232 Fed. 233.

104. *Grandison v. Nat. Bank of Rochester* (C. C. A., 2d Cir.), 36 Am. Pr. R. 438, 231 Fed. 800; and see *National Bank of Newport v. National Herkimer County Bank*, 225 U. S. 178, 184, 28 Am. B. R. 218, 56 L. Ed. 104, 32 Sup. Ct. 633.

105. *In re Jones & Cook* (D. C., Mo.), 4 Am. B. R. 141, 100 Fed. 781. See Am. Bankr. Dig. § 479.

106. *Matter of Frazer* (D. C., N. Y.), 34 Am. B. R. 467, 221 Fed. 83, holding that where a creditor of a partnership knowing that the insolvency of the firm was imminent and having reasonable cause to believe that the effect of the indorsement of the firm notes by an individual partner, who was solvent, would be to constitute a preference, the payment of such note from the individual assets of the indorser will operate as a preference.

partner to obtain an advantage over firm creditors, constitutes a preference.¹⁰⁷ If an individual member of a firm, while the firm is insolvent, transfers his property in payment of a firm debt, it constitutes an unlawful preference, not by the firm, but by the individual member.¹⁰⁸

(IV) *Contract of conditional sale.*—The lien which a vendor of personal property retains under a contract for the sale of such property on condition that the vendor retains title notwithstanding change of possession, is not a transfer of such property. The transfer to be within the statute must be of property belonging to the bankrupt.¹⁰⁹ A conditional sale, made for value, and filed as required by the statute is not a preference, though made within four months of the buyer's adjudication as a bankrupt.¹¹⁰

(3) *INTENT OR GOOD FAITH.*—A resultant inequality being now the essence of a preference, it makes no difference whether the transferee was coerced by his creditor.¹¹¹ The section prior to the amendment of 1910 provided that the person receiving the preference "shall have had reasonable cause to believe that it was *intended* thereby to give a preference;" and under this clause the intent of the bankrupt to prefer was required to be shown.¹¹² Under the section as it then existed the fact that the transfer was made in good faith was immaterial, if made within the prescribed period to secure an antecedent debt, and intended and accepted as a preference, and so resulted.¹¹³ As the section now stands all that is required is "reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference," without regard to the intent of the bankrupt. The transfer itself shows the intent; the other elements of a preference being present, it will be presumed that when he made the transfer he intended a preference.¹¹⁴ But

107. *In re Waite*, Fed. Cas. 17,044, 1 Low. 207.

Mortgage on individual property.—Based on the principle that each individual partner is liable for the entire partnership indebtedness, a preference is created in favor of a partnership creditor where one or more of the individual partners gives a mortgage on his individual property in favor of a partnership creditor or suffers a judgment to be taken against him individually. The rule stated applies as well where the several partners have not been individually adjudicated bankrupts as where they have been so adjudicated. Where individual partners have given a preference to a firm creditor the bankruptcy court has jurisdiction, although the partners individually have not been adjudicated bankrupts, to set aside such preference by virtue of its power under section 5-g of the Bankruptcy Act to "marshal the assets of the partnership estate and the individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates." *Fort Pitt Coal & Coke Co. v. Diser* (C. C. A., 6th Cir.), 38 Am. B. R. 566.

108. *Mayes v. Palmer* (C. C. A., 9th Cir.), 31 Am. B. R. 225, 208 Fed. 97; *Mills v. Fisher* (C. C. A., 6th Cir.), 20 Am. B. R. 237, 159 Fed. 897, 87 C. C. A. 77.

109. *Bailey v. Baker Ice Machine Co.*, 239 U. S. 268, 35 Am. B. R. 814, affg. 31 Am. B. R. 593, 209 Fed. 603; *Big Four Implement*

Co. v. Wright (C. C. A., 8th Cir.), 31 Am. B. R. 125, 207 Fed. 535; *In re Farmers' Co-operative Co.* (D. C., N. Dak.), 30 Am. B. R. 187, 202 Fed. 1005; *Matter of Anson Mercantile Co.* (D. C., Tex.), 38 Am. B. R. 952, 203 Fed. 871.

110. *Matter of Cohen* (D. C., N. Y.), 20 Am. B. R. 796, 163 Fed. 444.

111. See *Clarion Bank v. Jones*, 21 Wall. 325; *Giddings v. Dodd*, Fed. Cas. 5,405; *In re Batchelder*, Fed. Cas. 1,098.

112. *Kimmerle v. Farr* (C. C. A., 6th Cir.), 26 Am. B. R. 818, 189 Fed. 295; *Hardy v. Gray* (C. C. A., 1st Cir.), 16 Am. B. R. 387, 144 Fed. 922, 75 C. C. A. 562; *In re First Nat. Bank of Louisville* (C. C. A., 6th Cir.), 18 Am. B. R. 766, 155 Fed. 100, 84 C. C. A. 16; *Rutland County Nat. Bank v. Graves* (D. C., Vt.), 19 Am. B. R. 446, 156 Fed. 168; *Soule v. First Nat'l Bank* (Sup. Ct., Idaho), 32 Am. B. R. 536, 140 Pac. 1098.

113. *Morgan v. First Nat. Bank* (C. C. A., 4th Cir.), 16 Am. B. R. 639, 145 Fed. 466, so held in respect to a trust deed executed in good faith by an insolvent to secure an antecedent debt. *Brewster v. Goff Lumber Co.* (D. C., Pa.), 21 Am. B. R. 106, 164 Fed. 127.

114. *Hackney v. Raymond Bros. Clarke Co.* (Sup. Ct. Nebr.), 10 Am. B. R. 213, 214, 68 Neb. 624, citing *Johnson v. Wald* (C. C. A., 5th Cir.), 2 Am. B. R. 84, 93 Fed. 640; *Frost v. Latham & Co.* (D. C., Ala.), 25 Am. B. R. 313, 181 Fed. 866; *Patterson v. Baker Gro-*

where a debtor pays and a creditor receives the amount of a just debt, the good faith of the transaction will be presumed, but upon proof that a voidable preference resulted the initial presumption is destroyed.¹¹⁵ Good faith alone would not be sufficient to preserve the transfer, if it in fact constituted a preference.¹¹⁶ It is conclusively presumed that a preference was intended when the effect of the transaction is to give one creditor a greater percentage of his debt than other creditors of the same class.¹¹⁷

(4) ESTATE MUST BE DIMINISHED.—(I) *In general*.—There can be no preferential transfer without a depletion of the bankrupt's estate.¹¹⁸ A fictitious transaction not affecting the estate of the debtor or the rights of creditors cannot be deemed a transfer, although assuming the form of one.¹¹⁹ If the property alleged to have been transferred is of no value to the trustee, representing the creditors, as where it consists of a revocable privilege, of personal value to the bankrupt, such transfer is not in any sense a preference.¹²⁰ Where the holder of an alleged preference actually returns the property to the bankrupt in good faith before bankruptcy proceedings, and nothing was paid therefor by the bankrupt, and his estate was not depleted by the transfer, the alleged holder of the preference is relieved from liability.¹²¹ The transfer must consist of property belonging to the bankrupt; thus if an indorser on the bankrupt's note pay the debt and credit the amount thereof on an indebtedness due by the indorser to the bankrupt, the payment is not a preference.¹²²

cery Co. (Sup. Ct., Ore.), 33 Am. B. R. 740, 144 Pac. 673; *Soule v. First Nat'l Bank* (Sup. Ct., Idaho), 32 Am. B. R. 536, 140 Pac. 1098.

115. *Wolff Mfg. Co. v. Battreal Shoe Co.* (Mo. Kan. City Ct. of App.), 35 Am. B. R. 895, 180 S. W. 396, holding that proof that a preference was voidable destroys the initial presumption of good faith on the part of a creditor in accepting payment of his just claim, and places him in the position of attempting to evade and defeat the application of the bankruptcy law to the estate of his insolvent debtor.

116. *Morgan v. First Nat. Bank* (C. C. A., 4th Cir.), 16 Am. B. R. 639, 145 Fed. 466; *Matter of Gesas* (C. C. A., 9th Cir.), 16 Am. B. R. 872, 146 Fed. 734.

117. *In re McDonald & Sons* (D. C., S. Car.), 24 Am. B. R. 446, 178 Fed. 487, *affd.* 25 Am. B. R. 948, 184 Fed. 986.

118. *Stearns Salt & Lumber Co. v. Hammond* (C. C. A., 6th Cir.), 33 Am. B. R. 484, 217 Fed. 559, holding that where a mortgage obligated the mortgagor to insure the property for the benefit of the mortgage trustee, "as a further security" for the mortgage indebtedness, and the mortgagor within twenty days of its bankruptcy authorized the trustee to pay a portion of the proceeds of the policies to the mortgagee to be applied upon an open unsecured account, such payments constituted preferences, within the meaning of section 60 of the Bankruptcy Act, as they operated to deplete the assets available to the general and unsecured creditors, and the trustee of the bankrupt mortgagor is entitled to a recovery thereof.

119. *In re Steam Vehicle Co.* (D. C., Pa.),

10 Am. B. R. 385, 121 Fed. 939; *Continental & Com. Trust & Sav. Bank v. Chicago Title & Trust Co.* (U. S. Sup. Ct.), 229 U. S. 435, 30 Am. B. R. 624, 57 L. Ed. 1268, 33 Sup. Ct. 829. The mere preferential transfer of a worthless claim does not come within the meaning of the act. *Matter of Hamilton Automobile Co.* (C. C. A., 7th Cir.), 31 Am. B. R. 205, 209 Fed. 596; *Root Manufacturing Co. v. Johnson* (C. C. A., 7th Cir.), 34 Am. B. R. 247, 219 Fed. 397.

120. *In re Martin* (C. C. A., 3d Cir.), 29 Am. B. R. 623, 200 Fed. 940.

121. *Lucey v. Matteson* (D. C., N. Y.), 32 Am. B. R. 782, 215 Fed. 224.

122. *Payment by indorser of bankrupt's note*.—Bankrupt executed a note for certain machinery and supplies, and the payee indorsed it, discounted it at a bank and received the proceeds for its own use. Thereafter, the note was renewed from time to time, with like indorsement. The payee, in the meantime, had pledged to the bank all of its assets, intending to liquidate its business, and at the time of the last renewal secured the note by specific assignments of accounts, as collateral. Within four months of the maker's bankruptcy and before the maturity of the note, the payee, acting in its own behalf, took up the note and received back its collateral. The amount so paid was charged by the payee to bankrupt to which it was indebted in a large sum, and on bankrupt's books a corresponding credit was given to the payee, the charge against bankrupt, however, not being known to the bank. *Held*, that since the payment to the bank was not made by bankrupt, either directly or indirectly, so that its assets were thereby

(II) *Fair consideration for present loan.*—Where the transfer consists of the giving of a fair security for a present loan, and does not diminish the general fund,¹²³ or a pledge or payment for a consideration given in the present or to be given in the future, whether in money, goods, or services, no preference results.¹²⁴ Where a deed of trust is given to a bank to secure the payment of a present loan it is valid.¹²⁵

(III) *Payments on account; net result rule.*—Where the net result of the transactions complained of was to increase rather than deplete the estate, there can be no preference. For instance where payments are made on a running account between the parties, in the regular course of business for goods sold and delivered within the four months' period, without knowledge on the part of the creditor of the debtor's insolvency, and the effect was to keep the account alive, with the result that new credits were extended and new

depleted, such payment did not constitute a preference, the amount of which could be recovered by bankrupt's trustee. *National Bank of Newport v. National Herkimer County Bank*, 225 U. S. 90, 28 Am. B. R. 218, 56 L. ed. 995, 32 Sup. Ct. 657, affg. 22 Am. B. R. 733, 172 Fed. 529.

Where a partner negotiated loans from a bank on his own notes, indorsing them in the name of the firm, assumption of the payment of such notes to the bank by the firm within four months of the partner's bankruptcy and the subsequent payment thereof to the bank by the firm, did not constitute a preference to the bank, as the creditor did not receive any of the bankrupt's property. *Catchings v. Chatham Nat. Bank* (C. C. A., 2d Cir.), 24 Am. B. R. 843, 180 Fed. 103. See also *Aiello v. Crampton* (C. C. A., 8th Cir.), 29 Am. B. R. 1, 201 Fed. 891.

^{123.} In *re Wolf* (D. C., Ia.), 3 Am. B. R. 555, 98 Fed. 74; *First Nat. Bank v. Penn. Trust Co.* (C. C. A., 3d Cir.), 10 Am. B. R. 782, 124 Fed. 968; *Tiffany v. Boatman's Sav. Bank*, 18 Wall. 375; In *re Noel* (D. C., Md.), 14 Am. B. R. 715, 137 Fed. 694; *McDonald v. Clearwater Ry. Co.* (C. C., Idaho), 21 Am. B. R. 182, 164 Fed. 1007; *O'Connell v. City of Worcester* (Mass. Sup. Ct.), 38 Am. B. R. 913, 114 N. E. 201.

Transfer for present consideration.—It is not every transfer by an insolvent within the four months' period that is voidable by his trustee in bankruptcy, but the transfer to be voidable must be on account of a pre-existing debt; and when one gives an insolvent present value for a transfer of property, or when he makes an exchange of property, there is no preference. *Ernst v. Mechanics' & Metals Nat. Bank* (C. C. A., 2d Cir.), 29 Am. B. R. 289, 201 Fed. 664, affd. 231 U. S. 50, 31 Am. B. R. 291, 58 L. Ed. 115, 34 Sup. Ct. 20.

Loan by officer to insolvent corporation.—A chattel mortgage, authorized by a corporation in financial difficulty, prior to, but actually executed after, the receipt of a loan of money by an officer and director, which was actually delivered to the corporation, is not a preference under the Bankruptcy Act or

section 66 of the New York Stock Corporation Law. *Matter of Metropolitan Dairy Co.* (C. C. A., 2d Cir.), 35 Am. B. R. 466, 224 Fed. 444.

Transfer to secure present indebtedness.—The maker of a note on the same day executed a mortgage on his real estate to indorsers as security and thereupon a bank discounted the note. The indorsers unknown to the bank agreed not to record the mortgage, and it was not recorded until twenty days before the bankruptcy of the maker. Thereafter the indorsers assigned the mortgage to the bank. It was held, that the mortgage was not a preference, as it was accepted by the indorsers in good faith as security. *Matter of Mosher* (D. C., N. Y.), 35 Am. B. R. 284, 224 Fed. 739.

^{124.} *Furth v. Stahl*, 10 Am. B. R. 442, 205 Pa. St. 439. See also *Dressel v. North State Lumber Co.* (D. C., N. Car.), 9 Am. B. R. 541, 119 Fed. 531, holding that the return of money to a bankrupt advanced to the bankrupt upon a check under an agreement that it was to be used to obtain a loan, which was not made, is not a preferential payment to the bankrupt.

Security for present and future loans.—Where an assignment of security for present and future loans was made by a bankrupt while solvent, the loan and each advancement thereafter made were, in substantial effect, in exchange for present security and, under the rule that a security given for present loan is not a preference, even though the debtor be insolvent, such assignment did not constitute a preference. In *re Sayed* (D. C., Mich.), 26 Am. B. R. 444, 185 Fed. 962.

^{125.} In *re Jackson Brick & Tile Co.* (D. C., Mo.), 26 Am. B. R. 915, 189 Fed. 636, (revd. on other grounds, 27 Am. B. R. 673, 195 Fed. 188), citing In *re Union Feather & Wool Mfg. Co.* (C. C. A., 7th Cir.), 7 Am. B. R. 472, 112 Fed. 774, 50 C. C. A. 524; *City Bank v. Bruce* (C. C. A., 4th Cir.), 6 Am. B. R. 311, 109 Fed. 69, 48 C. C. A. 236; *Stedman v. Bank* (C. C. A., 8th Cir.), 9 Am. B. R. 4, 117 Fed. 237, 54 C. C. A. 269; *Farmers' Bank v. Carr* (C. C. A., 4th Cir.), 11 Am. B. R. 733, 127 Fed. 690, 62 C. C. A. 446.

goods placed in stock increasing the bankrupt estate, such payments are not voidable as preferences.¹²⁶ A transfer of property by a bankrupt which does not exceed in value the amount due the creditor on its mortgage and the amount of money actually paid by him to unsecured creditors by agreement with the bankrupt, does not constitute a preference.¹²⁷ Where a bankrupt within four months prior to bankruptcy pays a creditor with money that is exempt under the State law such payment does not constitute a preference.¹²⁸

(IV) *Substitution of securities.*—The substitution of securities pledged for an old loan, as, for instance, the exchanging of accounts receivable between an insolvent debtor and one of his creditors, does not create a preference, because there is no diminution of the debtor's estate whereby the creditors may be injured.¹²⁹ An absolute transfer of an account against an insolvent debtor made in good faith to a person who afterward purchases goods from the debtor and gives in payment therefor the account thus transferred to him, is not a transaction especially prohibited by the bankruptcy act.¹³⁰

(5) PAYMENT OF ANTECEDENT DEBTS.—Any transfer within the statutory

126. *Chisholm v. First Nat. Bank* (Ill. Sup. Ct.), 35 Am. B. R. 598, 109 N. E. 657; *Jaquith v. Alden*, 189 U. S. 78, 47 L. ed. 717, 23 Sup. Ct. 649.

Payments on a running account.—Where a creditor has a claim on a running account for goods sold and delivered during the four months' period, the account being made up of debits and credits, leaving a net amount due from the bankrupt estate, payments made within such period without knowledge of the debtor's insolvency are not preferences. *Wild & Co. v. Provident Life & Trust Co.*, 214 U. S. 292, 22 Am. B. R. 109, 53 L. ed. 1003, 29 Sup. Ct. 619, revg. 18 Am. B. R. 506, 153 Fed. 562.

Where the account between the bankrupt's estate and the person charged with having received a preference is an account current, the balance of the account, when the transactions cease, is to be taken in the determination of whether there has been an advancement by the bankrupt's estate which would constitute a voidable preference. If the bankrupt's estate has not been diminished there has been no voidable preference. *Dunlap v. Seattle National Bank* (Wash. Sup. Ct.), 38 Am. B. R. 937, 161 Pac. 364.

127. *Russell's Trustee v. Mayfield Lumber Co.* (Ct. of App., Ky.), 32 Am. B. R. 357, 164 S. W. 783.

128. *First Nat. Bank of Cleveland v. Orten* (Sup. Ct., Okla.), 33 Am. B. R. 108, 142 Pac. 1096.

129. *In re Reese-Hammond Fire Brick Co.* (C. C. A., 3d Cir.), 25 Am. B. R. 323, 181 Fed. 641, citing *Collier on Bankruptcy* (8th ed.), p. 657; *Lloyd v. Sickles* (Wash. Sup. Ct.), 38 Am. B. R. 785, 162 Pac. 979; *Clark v. Iselin*, 21 Wall. 369; *Stewart v. Platt*, 101 U. S. 731, 25 L. Ed. 816; *Birnhisel v. Firman*, 22 Wall. 170; *In re Weaver*, Fed. Cas. 17,307; *Butt v. Carter*, Fed. Cas. 1,844. See Am. Bankr. Dig. § 506.

Exchange of securities.—In *Cook v. Tullis*,

18 Wall. 332, the Supreme Court uses the following language: "A fair exchange of values may be made at any time, even if one of the parties to the transaction be insolvent. There is nothing in the bankruptcy act, either in its language or object, which prevents an insolvent from dealing with his property, selling or exchanging it for other property at any time before proceedings in bankruptcy are taken by or against him, provided such dealings be conducted without any purpose to defraud or delay his creditors or give preference to any one, and does not impair the value of his estate. An insolvent is not bound, in the misfortune of his insolvency, to abandon all dealings with his property; his creditors can only complain if he waste his estate or give preference in its disposition to one over another. His dealings will stand if it leave his estate in as good plight and condition as previously." The language was quoted by the Supreme Court in the case of *Stewart v. Platt*, 101 U. S. 818. The same principle may be found announced in *Jaquith v. Alden*, 189 U. S. 78, 9 Am. B. R. 773, 47 L. ed. 717, 23 Sup. Ct. 649.

In the case of *Sawyer v. Turpin*, 91 U. S. 114, 120, 23 L. Ed. 235, the Supreme Court said: "It is too well settled to require discussion that an exchange of securities within the four months is not a fraudulent preference within the meaning of the Bankruptcy Law, even when the creditor and the debtor know that the latter is insolvent, if the security given up is a valid one when the exchange is made, and if it be undoubtedly of equal value with the security substituted for it."

130. *Hackney v. Raymond Bros. Clarke Co.* (Sup. Ct., Nebr.), 10 Am. B. R. 213, 214, 68 Nebr. 624; *Lyon v. Clark*, 124 Mich. 100, 105, 88 N. W. 1046; *North v. Taylor*, 6 Am. B. R. 233, 61 N. Y. App. Div. 253, 70 N. Y. Supp. 338.

time by way of payment on or security of an antecedent debt is a preference.¹³¹ As a corollary to the proposition that only transfers which diminish the estate of the bankrupt are preferences, it may be stated that preferences arise only in the case of antecedent debts. The distinction between a security and a preference is determined in accordance with that corollary. Property transferred by a borrower at the time of receiving the loan, and for the purpose of making the lender safe, is a security. Its validity, if unaccompanied by positive fraud, is recognized and enforced in bankruptcy. But a transfer intended to enable one to secure payment of an antecedent debt is a preference, if its effect is to give that creditor an advantage over others. If that is not its effect, it is a valid payment.¹³² Whether a debt secured by a

131. In re Belding (D. C., Mass.), 8 Am. B. R. 718, 116 Fed. 1016; In re Cobb (D. C., N. Car.), 3 Am. B. R. 129, 96 Fed. 821; In re Wolf (D. C., Ia.), 3 Am. B. R. 555, 98 Fed. 74; In re Jones (D. C., S. Car.), 9 Am. B. R. 262, 118 Fed. 673; In re Montgomery, Fed. Cas. 9,732; Coggeshall v. Potter, Fed. Cas. 2,955. But compare Brooks v. Davis, Fed. Cas. 1,950; Adams v. Merchants' Bank, 2 Fed. 174. It is suggested that In re Sanderlin (D. C., N. Car.), 6 Am. B. R. 384, 109 Fed. 857, is more reliable authority here than is McNair v. McIntyre (C. C. A., 4th Cir.), 7 Am. B. R. 638, 113 Fed. 113, that reversed it; Feilbach Co. v. Russell (C. C. A., 6th Cir.), 37 Am. B. R. 285, 233 Fed. 412; Conners v. Brockport Nat. Bank (D. C., Maine), 32 Am. B. R. 882, 214 Fed. 847; Schener v. Katzoff (D. C., N. Y.), 37 Am. B. R. 476, 233 Fed. 473; Matter of Mosher (D. C., N. Y.), 35 Am. B. R. 284, 224 Fed. 739.

In Louisiana, a conveyance of real estate by an insolvent husband, within the four months' period, to his wife, does not constitute a preference, under section 60-b, where the subject-matter of the conveyance does not exceed in value the total property of the wife. Gomila v. Wilcombe (C. C. A., 5th Cir.), 18 Am. B. R. 143, 151 Fed. 470.

Payment of rent within four months of bankruptcy.—A payment by a bankrupt within four months of bankruptcy to be applied to rent not within the current year constitutes a voidable preference, where the landlord knew or had reasonable cause to know that the tenant was insolvent. Matter of Bergdoll Motor Co. (D. C., Pa.), 35 Am. B. R. 32, 225 Fed. 87.

132. City National Bank v. Bruce (C. C. A., 4th Cir.), 6 Am. B. R. 311, 109 Fed. 69, 48 C. C. A. 236, citing text.

The difference between preferences in payment of antecedent debts, and securities given at the time of incurring liabilities was clearly stated by Justice Davis of the United States Supreme Court in *Tiffany v. Boatman's Savings Inst.* (18 Wall. 376), who said: "Neither the terms or policy of the bankrupt act are violated if these collaterals be taken at the time the debt is incurred. His (the bankrupt's) estate is not impaired or diminished in consequence, as he gets a present equivalent for the securities he pledges for the repayment of the money bor-

rowed. Nor in doing this does he prefer one creditor over another, which is one of the great objects of the bankrupt law to prevent. The preferences at which this law is directed can only arise in case of antecedent debts. To secure such a debt would be a fraud on the act, as it would work an unequal distribution of the bankrupt's property; and, therefore, the debtor and creditor are alike prohibited from giving or receiving any security whatever for a debt already incurred, if the creditor had good reason to believe the debtor to be insolvent. But the giving of securities when the debt is created is not within the law, and if the transaction be free from fraud in fact, the party who loans the money can retain them until the debt is paid. In the administration of the bankrupt law in England this subject has frequently come before the courts, who have uniformly held that advances may be made in good faith to a debtor to carry on his business, no matter what his condition may be, and that the party making these advances can lawfully take securities at the time for their repayment. And the decisions in this country are to the same effect. (*Hilliard on Bankruptcy*, 333, ch. 10, sec. 10; *Hutten v. Crutwell*, 1 El. & Bl. 15; *Harris v. Rickett*, 4 Hurl. & N. 1; *Bruteston v. Cooke*, 6 E. & B. 296; *Lee v. Hart*, 34 Eng. Law and Eq. 569; *Belle v. Simpson*, 2 H. & N. 410; *Hunt v. Mortimer*, 10 B. & C. 44; *Ex. p. Shouse*, *Crabb R.* 482; *Wadsworth v. Tyler*, Fed. Cas. 17,032, 2 N. B. R. 101; quarto.)"

Security for clearance loan.—Where bankrupts, who were stockholders, obtained from defendant banks at the beginning of banking hours, day or clearance loans, and later in the same day, when bankrupts were insolvent and the banks had reasonable cause to believe them to be so, delivered to the banks, upon demand, a large quantity of collaterals as security, the transactions constituted preferences and the securities were recoverable by bankrupts' trustees. *Ernst v. Mechanics' & Metals Nat. Bank* (C. C. A., 2d Cir.), 29 Am. B. R. 289, 201 Fed. 664, affd. 231 U. S. 50, 31 Am. B. R. 291, 58 L. Ed. 115, 34 Sup. Ct. 20.

Mortgage to secure funds to pay antecedent debt.—A mortgage given by an insolvent within four month of being adjudicated to secure money borrowed at the time for the

transfer or lien is antecedent must be determined as of the date of the transfer or lien.¹³³ A transfer of goods within the four months' period in part payment of unsecured debts, constitutes a preference, and the trustee is entitled to the goods or their value, if possible.¹³⁴ The delivery of a horse either in payment of a debt or as security therefor, is a preference, and must be delivered to the trustee for the benefit of the estate.¹³⁵ The assignment of a policy of fire insurance, within the statutory period, as security for an antecedent debt, constitutes a preference.¹³⁶ A transfer of firm property in payment of an individual partner's antecedent debt is a preference,¹³⁷ but the firm must be adjudged bankrupt before a suit can be brought to avoid it.¹³⁸ But if the debt is secured by an inchoate statutory lien the payment thereof is not a preference.¹³⁹ Payments may be made in discharge of a valid lien, either legal or equitable.¹⁴⁰

(6) MORTGAGE OF PROPERTY.—A transfer may include a mortgage of the bankrupt's property as well as an absolute conveyance.¹⁴¹ Thus, a chattel mortgage, given on the verge of bankruptcy, may constitute an unlawful preference.¹⁴² A mortgage is a security and a transfer, and subject to the provisions of subsections *a* and *b*. Such a mortgage or transfer as constitutes a preference under subsection *a* is not voidable under subsection *b* unless the creditor who receives it, or is benefited by it, or his agent, has

purpose of preferring a certain creditor, where the lender knew or had reasonable cause to believe that such was his purpose, is void. *Matter of Stone* (Ref., Mass.), 37 Am. B. R. 138.

133. *Matter of Mossler Co.* (C. C. A., 7th Cir.), 38 Am. B. R. 604.

134. *In re Ansley Bros.* (D. C., N. Car.), 18 Am. B. R. 457, 153 Fed. 983.

135. *In re Nechankus* (D. C., N. Y.), 19 Am. B. R. 189, 155 Fed. 867, holding that any claim of the creditor for stable hire, medical attendance, etc., for the horse in excess of the value of its use must be presented, and in a proper way may be considered as an expense of the receiver in bankruptcy.

136. *Hanson v. Blake & Co.* (D. C., Mc.), 19 Am. B. R. 325, 350, 155 Fed. 342, holding that the assignee has no equitable lien upon the insurance money; *State Bank of Clearwater v. Ingram* (C. C. A., 5th Cir.), 38 Am. B. R. 447.

137. *In re Gillette et al.* (D. C., N. Y.), 5 Am. B. R. 119, 104 Fed. 769. See also *In re Beerman* (D. C., Ga.), 7 Am. B. R. 431, 112 Fed. 662.

138. *Withrow v. Fowler*, Fed. Cas. 17,919. Compare *Amsinck v. Bean*, 22 Wall. 395; *In re Hines* (D. C., Pa.), 16 Am. B. R. 495, 144 Fed. 142.

139. *In re Lynn Camp Coal Co.* (Cir. Ct., Ky.), 2 Am. B. R. 60, 168 Fed. 998.

140. A subcontractor under agreement to furnish materials to a contractor, which had agreed to construct certain buildings for a railway company, after the railway company had agreed to see that it was paid for materials delivered, filed a lien, and thereafter the railway company, the contractor, its sureties, and the subcontractor with other claim-

ants all entered into an agreement for the settlement of the differences which had arisen and for the payment of all legitimate lienable claims, and the railway company and the sureties deposited a certain sum, more than six months prior to the commencement of bankruptcy proceedings against the contractor, for the payment of such claims, which had to be severally approved by the parties to the agreement. It was held that the fact that the bankrupt joined with his co-trustees in approving the settlement of the subcontractor's claim, within four months of his adjudication, does not constitute the payment a voidable preference; and that said agreement gave the subcontractor an equitable lien good as against the trustee in bankruptcy. *Root Manufacturing Co. v. Johnson* (C. C. A., 7th Cir.), 34 Am. B. R. 247, 219 Fed. 397.

141. *In re Coffey* (Ref., N. Y.), 19 Am. B. R. 148, 164, holding that the effect of a mortgage, being to enable the mortgagee to obtain a greater percentage of his debt than other creditors, renders it a voidable preference.

Mortgage prior to four months' period.—A real estate mortgage, given more than four months prior to the filing of a petition in bankruptcy against the mortgagor, can only be avoided for actual fraud, although not recorded until within four months of the filing of the petition in bankruptcy. *Matter of Mosher* (D. C., N. Y.), 35 Am. B. R. 284, 224 Fed. 739.

142. *Coder v. McPherson* (C. C. A., 8th Cir.), 18 Am. B. R. 523, 152 Fed. 951; *Rutland County Nat. Bank v. Graves* (D. C., Vt.), 19 Am. B. R. 446, 156 Fed. 168; *In re Hickerson* (D. C., Idaho), 20 Am. B. R. 682, 162 Fed. 345; *Brooks v. Bank of Beaver City* (Sup. Ct., Kans.), 25 Am. B. R. 890, 109 Pac. 409. See Am. B. R. Dig. § 538.

reasonable cause to believe that it was intended to give a preference.¹⁴³ The receipt by the mortgagee, shortly before the bankruptcy, of certain specific property from the bankrupt, by virtue of a contract of purchase in connection with another and separate transaction does not constitute a preference, barring proof of the claim under the mortgage.¹⁴⁴ The taking of a chattel mortgage by a creditor to secure the payment of an overdue debt, shortly before the institution of proceedings in bankruptcy by or against him, is usually suggestive of insolvency, and should be carefully scrutinized.¹⁴⁵ A partnership mortgage given within the four months' period and while the partnership was insolvent, to secure the individual debt of a member of the firm, constitutes a voidable preference, upon the adjudication in bankruptcy of the partnership.¹⁴⁶ And the assignment of a mortgage given within the four months' period by an insolvent corporation has been held to constitute a preference.¹⁴⁷ If a mortgage be given partly for an antecedent debt and partly for a present consideration it is voidable as a preference to the

143. *Coder v. Arts* (C. C. A., 8th Cir.), 18 Am. B. R. 513, 152 Fed. 943, modifying 16 Am. B. R. 583, affd. 213 U. S. 223, 22 Am. B. R. 1, 53 L. ed. 772, 29 Sup. Ct. 436; *Stock-grower's State Bank of Mountain Home v. Corker* (C. C. A., 9th Cir.), 34 Am. B. R. 392, 220 Fed. 614.

A mortgage given by an insolvent debtor within the four months' period is void under § 60-b where the creditor had reasonable cause to believe a preference intended. In *re Tindel* (D. C., S. Car.), 18 Am. B. R. 773, 155 Fed. 456. Or where the creditor received the mortgage with knowledge of the bankrupt's insolvency. *Pittsburg Plate Glass Co. v. Edwards* (C. C. A., 8th Cir.), 17 Am. B. R. 447, 148 Fed. 377. Where it does not appear whether the mortgagor was insolvent when the mortgage was given or not, but he was insolvent, and the mortgagee knew it when he took possession, the mortgage constitutes a preference. In *re Reynolds* (D. C., Ark.), 18 Am. B. R. 666, 153 Fed. 295. In *re Herman* (D. C., Iowa), 31 Am. B. R. 243, 207 Fed. 594, in which case a chattel mortgage was given immediately prior to bankruptcy to secure a present loan, and also an antecedent loan, and it was held that the mortgage was a void preference, although it was made pursuant to an agreement made when the first loan was made, prior to the four months' period.

Taking of chattel mortgage by bank; reasonable cause to believe.—Where a banker finds that a customer, already in debt to the bank, is running behind; that his transactions indicate a loss in business; that his balances are becoming depleted; that his demands for additional loans are pressing and frequent; that his overdrafts are the subject of special attention, and that his credit is so overstrained that the banker will not pay checks, even for very small amounts, it is fair to conclude that the taking of a chattel mortgage or any other lien by the bank upon all that the debtor has, must have been with reasonable cause to believe that foreclosure

of the mortgage would create a preference. *Rosenthal v. Bronx National Bank* (D. C., N. Y.), 35 Am. B. R. 273, 222 Fed. 83.

Present and past consideration.—Where a debtor being indebted to a father and son and also to others, gives a mortgage to the father covering both debts and secures thereon money to pay the son, and the father fails to make reasonable inquiries as to the solvency of the debtor, such mortgage constitutes a preference. *Matter of Stone* (Ref., Mass.), 37 Am. B. R. 138.

144. *Mills v. Virginia-Carolina Lumber Co.* (C. C. A., 4th Cir.), 20 Am. B. R. 750, 164 Fed. 168, modg. 18 Am. B. R. 218, 151 Fed. 642.

145. *Hussey v. Richardson-Roberts Dry Goods Co.* (C. C. A., 8th Cir.), 17 Am. B. R. 511, 148 Fed. 598.

Mortgage as security for note.—A bankrupt corporation, within four months of bankruptcy, purchased certain shares of stock from another corporation and gave its check in payment. The bank on which the check was drawn rejected payment three times for lack of funds, and the bankrupt finally gave its note secured by a deed of trust or mortgage, which the vendor accepted, without attempting to prevent the bankrupt from disposing of the stock. Evidence examined and held that the mortgage constituted a voidable preference which may be set aside by the trustee. *Security Trust and Savings Bank v. Staats Co.* (C. C. A., 9th Cir.), 37 Am. B. R. 547, 233 Fed. 514.

146. In *re W. J. Floyd & Co.* (D. C., N. Car.), 19 Am. B. R. 438, 156 Fed. 206.

147. In *re Mills Co.* (D. C., N. Car.), 20 Am. B. R. 501, 162 Fed. 42. See Am. B. R. Dig. § 520.

An assignee of a chattel mortgage, constituting a voidable preference, who forecloses and appropriates the proceeds, is liable to the trustee in bankruptcy of the mortgagor. *Neilbach Co. v. Russell* (C. C. A., 6th Cir.), 37 Am. B. R. 285, 233 Fed. 412.

extent of the antecedent debt.¹⁴⁸ A chattel mortgage given to secure a present loan, but which was really for the purpose of obtaining payment of an antecedent debt is a preference.¹⁴⁹ Where a mortgagee under a chattel mortgage, containing a provision covering after acquired property which is void under a State statute, takes possession of such property within the period of four months with full knowledge of the mortgagor's insolvency, the transaction constitutes a voidable preference.¹⁵⁰ The taking of possession of property covered by an unrecorded chattel mortgage within the four months' period constitutes a voidable preference.¹⁵¹ A mortgage on exempt and non-exempt property may be avoided as preferential so far as it pertains to the non-exempt property.¹⁵²

(7) NOTES AND CHECKS.—It is not the giving of a note by the bankrupt to a creditor that constitutes a preference, but the payment thereof within the four months' period.¹⁵³ But the delivery of the note of a third person constitutes a preference.¹⁵⁴ Payments on a note or check even where there is an indorsement by a solvent party constitutes a preference.¹⁵⁵ A post-dated check constitutes a transfer at the time of its payment, and the question of preference under the statute is to be determined by the conditions existing

148. *City National Bank v. Bruce* (C. C. A., 4th Cir.), 6 Am. B. R. 311, 109 Fed. 69, 48 C. C. A. 236. A mortgage made within the four months' period in good faith to secure a present loan is valid but cannot be sustained as a security for antecedent debts, although mortgagee believed mortgagor to be solvent. *Farmers' Bank v. Carr* (C. C. A., 4th Cir.), 11 Am. B. R. 733, 127 Fed. 690, 62 C. C. A. 446; *In re Hull* (D. C., Vt.), 8 Am. B. R. 302, 115 Fed. 858, holding that a chattel mortgage given within the four months' period to secure the purchase price of a present sale of goods is valid as to the goods sold, but is invalid as to other goods not included in the sale.

Present consideration.—Where the treasurer and stockholder of a corporation in order to enable it to complete contracts which it had undertaken within four months prior to his bankruptcy, mortgaged his real property to secure a loan from a surety company to which he was liable as indemnitor for bonds it had given for the performance of the contracts, such mortgage will be deemed to have been given for a present consideration, and, hence, is not a fraudulent transfer or a preference. *Angle v. Bankers' Surety Co.* (D. C., N. Y.), 32 Am. B. R. 71, 210 Fed. 289.

149. The directors of a bank to which the bankrupt was indebted, after their bank had refused him a loan, induced another bank in which they were also directors, within four months before bankruptcy, to make a loan to the bankrupt secured by a note and chattel mortgage. The latter was foreclosed and the proceeds used in paying the first bank. At the time of the execution of the mortgage the bankrupt had other debts and the cashier of the first bank knew that his account was unsatisfactory. The enforcement of the chattel mortgage was held to be a voidable preference. *Stockgrower's State Bank of Mountain*

Home v. Corker (C. C. A., 9th Cir.), 34 Am. B. R. 392, 220 Fed. 614.

150. *Grimes v. Clark* (C. C. A., 4th Cir.), 37 Am. B. R. 142.

151. *Brooks v. Bank of Beaver City* (Sup. Ct., Kans.), 26 Am. B. R. 890, 895, 109 Pac. 409.

152. *In re Bailey* (D. C., Utah), 24 Am. B. R. 201, 176 Fed. 990.

Mortgage of real estate exempt as homestead.—A mortgage given by a bankrupt on real estate which is partly exempt as a homestead under State law, cannot operate as a preference, to the extent of bankrupt's homestead exemptions, since the general creditors would not be entitled to the exempt property in any event. *First National Bank of Lake Charles v. Lanz* (C. C. A., 5th Cir.), 29 Am. B. R. 247, 253, 202 Fed. 117, 121.

153. *In re Wolf & Levy* (D. C., Tenn.), 10 Am. B. R. 153, 122 Fed. 127.

Payment on note.—Where a debtor, within four months of bankruptcy, sells property and receives therefor two checks payable to a bank, with which a note held by the bank was paid, and the balance deposited to the credit of the debtor in its general account, the payment on the note is a voidable preference. *Chisholm v. First National Bank of Le Roy* (Ill. Sup. Ct.), 35 Am. B. R. 598, 109 N. E. 657.

154. *Dickinson v. Bank of Richmond* (C. C. A., 4th Cir.), 6 Am. B. R. 551, 110 Fed. 353.

155. *Swarts v. Fourth Nat. Bank* (C. C. A., 8th Cir.), 8 Am. B. R. 673, 117 Fed. 1; *In re Lyon* (C. C. A., 2d Cir.), 10 Am. B. R. 25, 121 Fed. 723, affg. 7 Am. B. R. 412, 114 Fed. 326; *Landry v. Andrews*, 6 Am. B. R. 281, 21 R. I. 597; *In re Hill Co.* (C. C. A., 7th Cir.), 12 Am. B. R. 221, 130 Fed. 315; *In re Deutscher & Co.* (D. C., Pa.), 25 Am. B. R. 348, 182 Fed. 435.

at such time.¹⁵⁶ Payment on notes within the four months' period, although such notes were given for the support of the bankrupt's business, is a preference.¹⁵⁷ A payment on an indorsed note which relieves the indorser, who is good, of his liability, is a preference, although the creditor may not have received any benefit from such payment.¹⁵⁸ But if the indorser had no knowledge of the payment and did nothing to induce it, the payment may not be regarded as a preference; because having no knowledge of it he had no reasonable cause to believe that a preference would result.¹⁵⁹ If the indorser had knowledge of the bankrupt's condition, and procured the payments to be made so that he might be relieved from his obligation, the payment is a preference.¹⁶⁰

(8) TRANSACTION OF BANKING BUSINESS.—The inhibition of preferential transfers by this section does not prevent the transaction of the business of banking in the ordinary way. As will be observed under section 68, relative to setoffs, a bank may set off against a claim against a depositor the amount of his deposit, and prove for the balance due.¹⁶¹ A bank may take renewal notes in extension of credit and receive partial payment of the debt, and has the right during the continuance of their relations to presume that the debtor is solvent and carrying on business in the usual way; and if it turns out that the debtor was insolvent the creditor may receive payment without incurring the liability of having to restore such payment when bankruptcy intervenes. A restoration of preferential payments is required of the bank only when it has reasonable cause to believe that a preference will result from such payments made within four months of the bankruptcy.¹⁶²

156. *In re Lyon* (C. C. A., 2d Cir.), 10 Am. B. R. 25, 121 Fed. 723, affg. 7 Am. B. R. 412, 114 Fed. 326. If the bank received the bankrupt's check for an amount to be applied on account of a matured note held by the bank, it constitutes a voidable preference. *Ridge Ave. Bank v. Sundheim* (C. C. A., 3d Cir.), 16 Am. B. R. 863, 145 Fed. 798; *In re Starkweather & Albert* (D. C., Mo.), 30 Am. B. R. 743, 206 Fed. 797.

157. *Ohio Valley Bank v. Mack* (C. C. A., 6th Cir.), 20 Am. B. R. 40, 163 Fed. 155.

Where a bank received payment on a note from an indorser, a corporation, the maker, another corporation, being a bankrupt, the officers of both corporations being the same, it was not a preference. *Mason v. Nat. Herkimer County Bank* (C. C. A., 2d Cir.), 22 Am. B. R. 733, 172 Fed. 529, revg. 21 Am. B. R. 98, 163 Fed. 920, affd. *sub nom.* *National Bank of Newport v. Herkimer County Bank*, 225 U. S. 90, 28 Am. B. R. 218, 56 L. Ed. 995, 32 Sup. Ct. 657.

158. *Swarts v. Bank* (C. C. A., 8th Cir.), 8 Am. B. R. 673, 117 Fed. 1.

Security transferred to an accommodation maker of a promissory note for the benefit of an insolvent debtor constitutes a preference. *In re Bailey & Son* (D. C., Pa.), 21 Am. B. R. 911, 166 Fed. 982; *Landry v. Andrews*, 6 Am. B. R. 281, 21 R. I. 597.

159. *Reber v. Schulman & Bro.* (C. C. A.,

3d Cir.), 25 Am. B. R. 475, 183 Fed. 564, affg. 24 Am. B. R. 782, 179 Fed. 574.

Payment to relieve indorser.—In the cases of *Kobusch v. Hand* (C. C. A., 8th Cir.), 19 Am. B. R. 379, 156 Fed. 660, 84 C. C. A. 372; *In re Sanderson* (D. C., Vt.), 17 Am. B. R. 871, 149 Fed. 273, and *Brown v. Streicher* (D. C., R. I.), 24 Am. B. R. 267, 177 Fed. 473, the party benefited by the payment made by the bankrupt either had control of the bankrupt or requested him to make the payment, so that in every instance the party benefited by the payment not only had knowledge thereof but actively participated therein.

160. *Brown v. Streicher* (D. C., R. I.), 24 Am. B. R. 267, 177 Fed. 473; *Kobusch v. Hand* (C. C. A., 8th Cir.), 19 Am. B. R. 379, 156 Fed. 660, 84 C. C. A. 372. See *post* under this section, subtitle "Creditors only to be preferred."

161. See § 68, *Set-offs and counterclaims*, E (2), and cases cited.

162. *Grandison v. Robertson* (D. C., N. Y.), 34 Am. B. R. 609, 220 Fed. 985, citing *Studley v. Boylston Nat. Bank*, 229 U. S. 523, 30 Am. B. R. 161, 33 Sup. Ct. 806, 57 L. Ed. 1313; *Grant v. Nat. Bank*, 97 U. S. 80, 24 L. Ed. 971; *Paper v. Stern* (C. C. A., 8th Cir.), 28 Am. B. R. 592, 198 Fed. 642, 117 C. C. A. 346; *In re Eggert* (C. C. A., 7th Cir.), 4 Am. B. R. 449, 102 Fed. 735, 43 C. C. A. 1.

(9) DEPOSIT OF MONEY.—A deposit of money in a bank, upon an open account, subject to check, is not a transfer constituting a preference, although the bank as a creditor has the right to set off its claim against the deposit.¹⁶³ A deposit here referred to is a deposit received in the usual course of banking business, and not one which is "built up" or deposited under unusual circumstances for the purpose of giving a preference to the bank.¹⁶⁴ The action of a bank in applying the deposit or any portion thereof upon the depositor's indebtedness to the bank does not constitute a preferential transfer,¹⁶⁵ if at the time the bank had no reason to believe that the depositor was insolvent, and there was no collusion.¹⁶⁶ If the deposit is made as a part of a scheme to pay the depositor's indebtedness to the bank after he became insolvent, and such insolvency was known to the bank, it is a voidable preference.¹⁶⁷ Where the bankrupt deposits money with a bank under an arrangement with it and other creditors that the money was to be received for the purpose of a *pro rata* distribution among such creditors, the trustee in bankruptcy has no enforceable interest in the arrangement.¹⁶⁸ But where a payment is made to a bank, the effect and purpose of which is to protect the bank on a loan made by it sometime before such payment, it will be regarded as a pref-

163. In re Hill Co. (C. C. A., 7th Cir.), 12 Am. B. R. 221, 130 Fed. 315; West v. Bank of Lahoma (Sup. Ct., Okl.), 16 Am. B. R. 733, 16 Okla. 508, 86 Pac. 59. As to whether a payment of a clearing house check by a clearing house association is a preference, see Rector v. City Deposit Bank Co., 200 U. S. 405, 15 Am. B. R. 336, 50 L. Ed. 527, 26 Sup. Ct. 289. As to effect of fraud or collusion between officers of bank and bankrupt, see In re Wright-Dana Hardware Co. (D. C., N. Y.), 31 Am. B. R. 192, 207 Fed. 636.

A deposit of money to one's credit in a bank does not operate to diminish the estate of the depositor, for when he parts with the money he creates at the same time on the part of the bank an obligation to pay the amount of the deposit as soon as the depositor may see fit to draw a check against it. It is not a transfer of property as a payment, pledge, mortgage, gift or security. New York Co. Nat. Bank v. Massey, 192 U. S. 138, 11 Am. B. R. 42, 48 L. Ed. 380, 24 Sup. Ct. 199; Parker v. First Nat. Bank (Sup. Ct., Vt.), 34 Am. B. R. 669, 94 Atl. 1, holding that a bank with knowledge that a debtor is about to file a petition in bankruptcy may apply on the debt money of the debtor in a "commercial or check account," where it appears that the deposit was general, subject to check in the usual course of business.

164. Mechanics & Metals National Bank v. Ernst, 231 U. S. 60, 31 Am. B. R. 302, 58 L. Ed. 121, 34 Sup. Ct. 22; National City Bank v. Hotchkiss, 231 U. S. 50, 31 Am. B. R. 291, 58 L. Ed. 115, 34 Sup. Ct. 20; Fourth National Bank of Wichita v. Smith (C. C. A., 8th Cir.), 38 Am. B. R. 771; German-American State Bank v. Larimer (C. C. A., 8th Cir.), 37 Am. B. R. 556, 235 Fed. 501; In re National Lumber Co. (C. C. A., 3d Cir.), 32 Am. B. R. 389, 212 Fed. 928.

165. In re Elsasser (Ref., Pa.), 7 Am. B. R. 215; In re Little (D. C., Ia.), 6 Am. B. R. 682, 110 Fed. 621; In re Smith Thorndyke & Brown Co. (C. C. A., 7th Cir.), 22 Am. B. R. 350, 170 Fed. 900.

166. Right of bank to apply deposits to indebtedness.—Where bankrupt, being indebted to a bank upon past due notes, deposited to its credit in said bank a sum loaned to it upon a mortgage given by it to the wife of its secretary and treasurer, and paid the bank the amount of its indebtedness with interest from the money so deposited; but the evidence was not sufficient to show that at the time of the payment bankrupt was insolvent or that it acted in collusion with the bank, the transaction did not constitute a voidable preference, since, in the absence of collusion, fraud or insolvency of the bankrupt, the bank did not need a check to enable it to get the money, but had the right to apply so much of bankrupt's deposit as was necessary to the payment of its debt. Walsh v. First Nat. Bank of Maysville (C. C. A., 6th Cir.), 29 Am. B. R. 118, 201 Fed. 522.

167. Johnson v. Gratoit County State Bank (Mich. Sup. Ct.), 38 Am. B. R. 518, 160 N. W. 544.

Acceptance by bank of check from depositor.—Acceptance by a bank of a check of a depositor in payment of an overdue note, within four months of the bankruptcy of the depositor, and with reasonable cause to believe that the transaction would result in a preference, constitutes a payment, not a set-off, and effects an unlawful preference. Knoll v. Commercial Trust Co. (Pa. Sup. Ct.), 35 Am. B. R. 379, 94 Atl. 750.

168. Lowell v. International Trust Co. (C. C. A., 1st Cir.), 19 Am. B. R. 853, 158 Fed. 781.

ference,¹⁶⁹ and so also where a deposit is made with a bank after it had cause to believe that the depositor was insolvent.¹⁷⁰

(10) **PAYMENT OF WAGES.**—The payment of wages by a bankrupt is not a preference.¹⁷¹ The payment of checks given by a corporation to its president for present advances with which to pay its workmen their weekly wages is not a preference.¹⁷²

(11) **TRANSFERS THAT ARE VOIDABLE.**—The practitioner should always have in mind that, under the present law, many transfers are preferences in name but not in fact. To be the latter, the remedy prescribed in subsection *b* must at least be available. The transfers must, in short, be voidable. Of the multitude of cases under the present law, only those including the element of reasonable cause to believe,¹⁷³ are, therefore, still in point. The others, since the changes made in § 57-g, are of value only by way of possible suggestion.

f. Effect a greater percentage.—(1) **PROVISIONS OF STATUTE.**—Clause *a* must be construed as making a judgment or transfer a preference when the effect of the enforcement thereof would be to enable one creditor of a class to obtain a greater percentage of his debt than any other creditor of the same class. Clause *b* as amended in 1910 authorizes a recovery of a preference if the creditor benefited has "reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference." So that if a creditor receiving a transfer within the four months' period had reasonable cause to believe that such transfer would give him a greater percentage of his debt than other creditors of the same class would receive, it constitutes a preference which may be recovered by the trustee.¹⁷⁴

(2) **CLASS OF CREDITORS.**—While the statute does not define the word "class" nor state in terms what creditors are in the same class, there is recognition in the statute of certain classes of creditors who are to be treated alike in the distribution of the bankrupt estate; as for instance, creditors to

169. *Pratt v. Columbia Bank* (D. C., N. Y.), 18 Am. B. R. 406, 157 Fed. 137.

Deposits after insolvency; set-off.—Where an insolvent firm deposits securities and money with a bank after the cashier has refused payment of its checks and requested them to make further deposits, and a few hours thereafter an involuntary petition in bankruptcy is filed against them, a voidable preference is created, and the deposits cannot be allowed to the bank as a set-off in a suit by the trustee in bankruptcy to recover them. *Mechanics & Metals Nat. Bank v. Ernst*, 231 U. S. 60, 31 Am. B. R. 302, affg. 29 Am. B. R. 289, 201 Fed. 664.

Deposits or checks by insolvent to bank.—If an insolvent, within four months antecedent to bankruptcy, makes deposits or gives checks to a bank to enable it to secure a preference, the transaction will be held void as a preference. *American Bank & Trust Co. v. Coppard* (C. C. A., 5th Cir.), 35 Am. B. R. 742, 227 Fed. 597.

170. *Ernst v. Mechanics & Metals Nat. Bank* (C. C. A., 2d Cir.), 29 Am. B. R. 289, 201 Fed. 664, affd. *sub nom.* *National City Bank v. Hotchkiss*, 231 U. S. 50, 31 Am. B. R. 291, 58 L. Ed. 115, 34 Sup. Ct. 20.

171. *Matter of Read* (Ref., N. Y.), 7 Am.

B. R. 111; *In re Feuerlicht* (Ref., N. Y.), 8 Am. B. R. 550; *In re Abraham Steers Lumber Co.* (D. C., N. Y.), 6 Am. B. R. 315, 110 Fed. 738, affd. 7 Am. B. R. 332, 112 Fed. 406.

172. *In re Union Feather & W. Co.* (C. C. A., 7th Cir.), 7 Am. B. R. 472, 112 Fed. 774. Compare *In re King Co.* (D. C., Mass.), 7 Am. B. R. 619, 113 Fed. 110.

173. See this subject, generally, under this section, *post*.

174. *Alexander v. Redmond* (C. C. A., 2d Cir.), 24 Am. B. R. 620, 180 Fed. 92; *In re Sayed* (D. C., Mich.), 26 Am. B. R. 444, 185 Fed. 962; *Heyman v. Third Nat'l Bank* (D. C., N. J.), 32 Am. B. R. 716, 216 Fed. 685.

Benefit of particular creditor.—Section 60b of the Bankruptcy Act refers to an act on the part of the bankrupt whereby he surrenders or incumbers his property or some part of it for the benefit of a particular creditor, and thereby diminishes the estate which the Bankruptcy Act seeks to apply for the benefit of all the creditors. *Bailey v. Baker Ice Machine Co.* (U. S. Sup. Ct.), 239 U. S. 268, 35 Am. B. R. 814, 60 L. Ed. 275, 36 Sup. Ct. 50.

whom taxes are owing, employees holding claims for wages, and those who by the laws of the states or the United States are entitled to priority;¹⁷⁵ and so also certain claims secured by liens on the property of the bankrupt are entitled to special consideration.¹⁷⁶ Creditors holding such claims, and the general creditors of the estate, constitute the classes of creditors of which the act treats.¹⁷⁷ It is the relation of their claims to the estate of the bankrupt, the percentage their claims are entitled to draw out of the estate of the bankrupt, and these alone, that dictate the relations of the creditors of the estate, and fix their classification and their preferences.¹⁷⁸

(3) WHO ARE CREDITORS OF THE SAME CLASS.—The “greater percentage” refers only to creditors of the same class. This is the reason why the payment of wages is not a preference.¹⁷⁹ If the effect of the transfer is to enable the creditor to receive out of the debtor’s estate a larger percentage of his claim than other creditors of the same class, it constitutes a preference.¹⁸⁰ Thus a mortgage, which enables the mortgagee to get more than other creditors, is a preference.¹⁸¹ But a part payment to one creditor is not a preference where the debtor is able to pay his other creditors the same percentage.¹⁸² If the transaction results in the *pro rata* distribution of the debtor’s estate among all his creditors it does not create a preference, although the creditors had notice of the debtor’s insolvency.¹⁸³ Payments and sales in the general

175. Bankr. Act, § 64, *post*.

176. Bankr. Act, §§ 56b, 57e and 57h, *ante*.

177. Swarts v. Fourth Nat. Bank (C. C. A., 8th Cir.), 8 Am. B. R. 673, 680, 117 Fed. 1.

178. Swarts v. Fourth Nat. Bank (C. C. A., 8th Cir.), 8 Am. B. R. 673, 117 Fed. 1.

Joint notes signed by a partnership and also by its members and joint and several notes founded on a partnership debt and signed by the individual members of the firm only are both in the same class, and the enforcement of a judgment upon the joint and several notes will effect a preference. *Anderson v. Stayton State Bank* (Ore. Sup. Ct.), 38 Am. B. R. 4, 159 Pac. 1003.

179. *In re Keller* (D. C., Ia.), 6 Am. B. R. 334, 109 Fed. 118. Compare *Swarts v. Fourth Nat. Bank* (C. C. A., 8th Cir.), 8 Am. B. R. 673, 117 Fed. 1; *Mills v. Fisher & Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 237, 241, 159 Fed. 897.

180. *Brittain Dry Goods Co. v. Bertenshaw* (Sup. Ct., Kan.), 11 Am. B. R. 629, 68 Kan. 734; *Matter of Cotton Export, etc., Co.* (C. C. A., 2d Cir.), 10 Am. B. R. 14, 121 Fed. 663; *In re Douglass Coal & Coke Co.* (D. C., Tenn.), 12 Am. B. R. 539, 131 Fed. 769; *In re Mayo Contracting Co.* (D. C., Mass.), 19 Am. B. R. 551, 157 Fed. 469; *Mills v. J. H. Fisher & Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 237, 159 Fed. 897, holding that it is not a preference to make a payment upon a running account of purchases and payments where the effect was not to diminish the fund to which the creditors look for payment; *Harder v. Clark* (City Ct., N. Y.), 23 Am. B. R. 756, 66 Misc. 584, 123 N. Y. Supp. 1102.

A distress for rent by a landlord does not

enable the landlord to obtain a greater percentage of his debt than other creditors of the same class, where there is but one landlord. *In re Belknap* (D. C., Pa.), 12 Am. B. R. 326, 129 Fed. 646.

181. *In re Coffey* (Ref., N. Y.), 19 Am. B. R. 148, 165.

182. *Brittain Dry Goods Co. v. Bertenshaw* (Sup. Ct., Kan.), 11 Am. B. R. 629, 68 Kan. 734.

183. *Payments to creditors share and share alike.*—In the case of *In re Varley, & Brauman Clothing Co.* (D. C., Ala.), 26 Am. B. R. 840, 191 Fed. 459, the court said: “If the reviewing creditors did in fact believe, and would as prudent business men reasonably have believed, from their correspondence with the bankrupt that the small payments were made to them, share and share alike with all the other creditors of the bankrupt, from the proceeds of the special sale, conducted by the bankrupt for that purpose, then the receipt of them by the creditors would not, in my opinion, constitute a voidable preference, even though the bankrupt was insolvent, had knowledge of its condition, and made them with intent to keep the creditors quiet, and not to distribute its assets equally among its creditors, and even though the creditors were charged with knowledge of its embarrassment or even of its insolvency. The usual inference to be drawn from a payment made by an insolvent of an intent to prefer the recipient would in that event be displaced by the assurance of the bankrupt that the payment was not exclusive, but was shared in by all creditors alike.”

course of business do not constitute preferences where the net result is to increase the bankrupt's estate.¹⁸⁴

(4) **TEST A GREATER PERCENTAGE.**—The test of a preference, under the act, is the payment, out of the bankrupt's property, of a larger percentage of the creditor's claim than other creditors of the same class receive, and not the benefit or injury to the creditor preferred.¹⁸⁵ An intent to prefer, even prior to the amendment of 1910, was not required to be specifically proven, but was conclusively presumed from the effect of the transaction in giving one creditor a greater percentage of his debt than any other creditor of a like class.¹⁸⁶ The transfer must be such as to effectually dispose of the debtor's property; if it was originally and remained a nullity against the debtor's trustee in bankruptcy, it is not a preference.¹⁸⁷ It is the effect of the transaction which will control; if the transfer results in certain creditors being paid and others excluded, the other elements existing, it is preferential.¹⁸⁸ This requirement as to equal percentages does not affect the requirement as to belief that a preference will result at the time the payment was made; so that if a creditor accepts payment of a percentage of his claim believing that other creditors received the same percentage no preference will result.¹⁸⁹ The transfer of a homestead exemption is not a preference, since it is not subject to the demands of creditors.¹⁹⁰

(5) **INTENT IMMATERIAL.**—The logical result of the amendment of 1903 was to make intent, save as evidence of a reasonable cause to believe, immaterial; it gave place to the new element, resultant inequity.¹⁹¹ The amend-

184. *In re Sagor* (C. C. A., 2d Cir.), 9 Am. B. R. 361, 121 Fed. 658; *Jacquith v. Alden*, 189 U. S. 78, 9 Am. B. R. 773, 47 L. Ed. 717, 23 Sup. Ct. 649.

185. *Swarts v. Fourth Nat. Bank* (C. C. A., 8th Cir.), 8 Am. B. R. 673, 677, 117 Fed. 1.

Failure to show greater percentage.—In an action by a trustee in bankruptcy to recover goods which were returned to the vendor under unrecorded conditional sale contract, and which were of less value than the amount due defendant under such contract, where the evidence failed to show what assets came into the trustee's hands and what creditors were entitled to participate therein so that it could not be determined whether the return of defendant's goods resulted in giving it a greater percentage of its debts than had or would be paid to other creditors, an essential element of a voidable preference was not proven. *Hart v. Emerson-Brantingham Co.* (D. C., Mo.), 30 Am. B. R. 218, 203 Fed. 60.

186. *Hackney v. Hargreaves Bros.*, 13 Am. B. R. 164, 168, 68 Nebr. 624, revg. 10 Am. B. R. 213, 214, 68 Neb. 624; *In re McDonald & Sons* (D. C., So. Car.), 24 Am. B. R. 446, 178 Fed. 487, affd. 25 Am. B. R. 948, 184 Fed. 986; *In re Martin* (Ref., Tex.), 27 Am. B. R. 151, holding that where the logical outcome of a debtor's acts in securing a creditor is to give such creditor a greater per cent. on its debt than other creditors, intent on the part of the debtor to give a preference may be presumed without further proof.

187. *Rosenbluth v. De Forest & Hotchkiss Co.* (Sup. Ct., Conn.), 27 Am. B. R. 359, 81 Atl. 955.

188. *In re Shantz & Son Co.* (D. C., N. Y.), 30 Am. B. R. 552, 205 Fed. 425.

189. **Reasonable cause to believe that greater percentage was received.**—By the language of section 60b of the bankruptcy act, a payment must operate as a preference at the time it is made, or not at all, and the belief of the creditor as to whether it will constitute a preference or not, must be of the time the payment is made. This is true notwithstanding the clause of section 60a that "the effect of the enforcement of such judgment or transfer *will be* to enable any one of his creditors to obtain a greater percentage," etc. Where it appears that the percentage of the total indebtedness of a bankrupt paid during the four months period amounted to about thirty per cent., which was about twenty-seven per cent. in excess of the percentage received by two creditors if each individual payment is considered alone, and about twelve per cent. in excess if the total payments made to the two creditors be considered, and it also appears that the estate of the bankrupt has been reduced to cash and will pay about thirty per cent. more of the total indebtedness, it cannot be held that the two creditors at the time they received the payments had reasonable cause to believe that a preference would result therefrom. *Peck & Co. v. Whitner* (C. C. A., 8th Cir.), 36 Am. B. R. 722, 231 Fed. 893.

190. *Mills v. Fisher & Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 237, 159 Fed. 897.

191. Compare *Crooks v. The People's Bank*, 3 Am. B. R. 238, 46 N. Y. App. Div. 335, 61 N. Y. Supp. 604; *Lazarus v. Eagan* (D. C., Pa.), 30 Am. B. R. 287, 206 Fed. 518.

See Am. Bankr. Dig. § 517.

ment of 1910 obviated the requirement of proof of intent, by making it sufficient to prove reasonable cause to believe that the transfer would result in a preference. If the effect of the act was to create a preference, and such was its natural consequence, the debtor must be presumed to have intended to do that which was the necessary result of his act.¹⁹²

g. Creditors only may be preferred.—(1) **IN GENERAL.**—Though the words “person” and “creditor” are used interchangeably in this subsection, it is clear that only a creditor can receive a preference.¹⁹³ A long line of decisions, many of them already referred to, are to the effect that the relief sought under this section extends only to an avoidance of a preference secured by the lender himself as a creditor, or as the practical agent of one who is a creditor.¹⁹⁴ A payment for transfer to anyone other than a creditor, unless for the latter’s benefit, falls within the remedies indicated in §§ 67-e and 70-e. This was also so under the former law though voidable preferences and fraudulent transfers were regulated by a single section.¹⁹⁵ Then, as now, the elements of these analogous transactions were somewhat different. The practitioner, therefore, should at the outset of a suit to recover decide whether the proposed defendant is a creditor or not. Pleading, proof, and possibly judgment will depend upon such decision. It appearing that when a mortgage was executed and filed the mortgagee was not a creditor, such mortgage may not be attacked.¹⁹⁶

(2) **TRANSFER TO ANOTHER FOR BENEFIT OF CREDITOR.**—As already indicated, a transfer by indirection for the benefit of a creditor is preferential.¹⁹⁷ To constitute a transfer a preference it is not necessary that it be made direct to the creditor.¹⁹⁸ The language of section 60-b shows plainly that this is the

192. *In re Dorr* (C. C. A., 9th Cir.), 28 Am. B. R. 505, 196 Fed. 292, citing *Western Tie & Timber Co. v. Brown*, 196 U. S. 508, 13 Am. B. R. 447, 25 Sup. Ct. 339, 49 L. Ed. 571.

Intent to prefer.—Since the amendment of 1910 to section 60b of the bankruptcy act, if a creditor knows, or has reasonable cause to believe, that its debt will be satisfied in whole or in part by the confession of a judgment within four months of the bankruptcy of the debtor, and a levy and sale of all the personal property of the debtor, to the exclusion of other creditors of the same class, it constitutes the receipt of a preference regardless of any intent on the part of the creditor or the debtor. *Grant v. National Bank of Auburn* (D. C., N. Y.), 37 Am. B. R. 329, 232 Fed. 201.

193. *In re Kayser* (C. C. A., 3d Cir.), 24 Am. B. R. 174, 177 Fed. 383; *Heyman v. Third Nat’l Bank* (D. C., N. Y.), 32 Am. B. R. 716, 216 Fed. 685.

194. *Johnstone v. Babb* (C. C. A., 4th Cir.), 38 Am. B. R. 715.

195. Act of 1867, § 35. In the Revised Statutes this section was broken up into two, §§ 5128, 5129.

196. *In re Clifford* (D. C., Ia.), 14 Am. B. R. 281, 136 eFd. 475.

197. See *e. Made a transfer of his property*.—(2) Method of transfer, *ante*.

198. *Grandison v. Nat. Bank of Rochester* (C. C. A., 2d Cir.), 36 Am. B. R. 438, 231 Fed. 800.

Transfer for benefit of creditor.—In the case of *National Bank of Newport v. Herkimer Bank*, 225 U. S. 178, 28 Am. B. R. 218, 56 L. Ed. 1042, 32 Sup. Ct. 633, Mr. Justice Hughes said: “To constitute a preference, it is not necessary that the transfer be made directly to the creditor. It may be made to another for his benefit. If the bankrupt has made a transfer of his property, the effect of which is to enable one of his creditors to obtain a greater percentage of his debt than another creditor of the same class, circuitry of arrangement will not avail to save it. * * * It is not the mere form or method of the transaction that the act condemns, but the appropriation by the insolvent debtor of a portion of his property to the payment of a creditor’s claim, so that thereby the estate is depleted and the creditor obtains an advantage over other creditors.”

Persons to be benefited.—Where a bankrupt contractor has given an assignment of money due under a building contract to a subcontractor, who has not filed a mechanic’s lien, the owners are not persons to be benefited, within the meaning of sections 60a and 60b of the bankruptcy act. *Jump v. Bernier* (Mass., Sup. Ct.), 35 Am. B. R. 591, 108 M. E. 1027.

purpose, where it declares that a preference is voidable if "the person receiving it or to be benefited thereby, or his agent acting therein," shall have reasonable cause to believe that a preference was intended.¹⁹⁹ To constitute a preferential transfer, it is immaterial to whom the transfer is made, if it be made for the purpose of paying the claims of one creditor in preference to those of others.²⁰⁰ So where an assignment of accounts was made to the president of a bankrupt corporation and he indorsed the notes of the bankrupt which had been previously discounted at a bank, and collected the accounts and turned the proceeds over to the bank, the transfer was preferential and prohibited by the act.²⁰¹ If a transfer be made to a third person merely as an agent or cover for the creditor, who is in effect benefited thereby, it is a

199. *Western Tie & Timber Co. v. Brown* (C. C. A., 8th Cir.), 12 Am. B. R. 111, 129 Fed. 728 (revd. on other grounds, 196 U. S. 502, 13 Am. B. R. 447, 49 L. Ed. 571, 25 Sup. Ct. 339); *Hackney v. Hargreaves Bros.*, 13 Am. B. R. 164, 94 N. W. 822, in which case it was held that a transaction the legal effect of which is to appropriate out of the assets of the bankrupt an amount required to settle with a creditor, and which was subsequently turned over to such creditor, is a preference; *Benjamin v. Chandler* (D. C., Pa.), 15 Am. B. R. 439, 142 Fed. 217; *Page v. Moore* (D. C., Pa.), 24 Am. B. R. 745, 179 Fed. 988.

Payment by indirection.—To effect a preference, it is immaterial to whom a transfer is made, if it be for the purpose of paying the claims of one creditor in preference to those of another; and a transfer made directly, or through a third person, is sufficient. *In re Harrison Bros.* (D. C., Pa.), 28 Am. B. R. 684, 202 Fed. 243.

200. *Hackney v. Hargreaves Bros.*, 13 Am. B. R. 164, 94 N. W. 822, revg. 10 Am. B. R. 213, 68 Neb. 624; *Bank of Wayne v. Gold* (N. Y. App. Div.), 26 Am. B. R. 722, 146 N. Y. App. Div. 296, 130 N. Y. Supp. 942 citing text; *In re Lynden Mercantile Co.* (D. C., Wash.), 19 Am. B. R. 444, 156 Fed. 713; *In re Beerman* (D. C., Ga.), 7 Am. B. R. 431, 112 Fed. 662.

Transfer to one not a creditor.—Defendant, which was engaged in warehousing, sublet space in its plant to bankrupt, whose business was the blending of various kinds of flour, the greater part of which was delivered to defendant by various railroads. Upon shipment of the flour which bankrupt had purchased, bills of lading would be issued to the order of the shipper in care of defendant. The shipper would send a draft upon bankrupt with the bill of lading attached and upon payment of the draft the bill of lading would be delivered to bankrupt who would then surrender it to defendant, and receive a warehouse receipt of the goods. As the flour was received, it would be placed by defendant in various open compartments which were marked, numbered and tagged so as to be readily identified, and when bankrupt had paid a particular draft it would issue orders for the

amount of flour needed for blending, to be taken from the lot upon which it had lifted the bill of lading and to which it was entitled. It appeared bankrupt's employees besides taking flour to which the bankrupt had obtained title by paying the drafts, also removed flour for which no payment had been made and which was still in the custody of defendant as bailee of the shipper. Upon discovering these thefts, defendant called upon bankrupt to make good this shortage which it was unable to do. Thereupon, defendant paid to banks which held drafts and bills of lading, some of which covered flour that had been unlawfully withdrawn and some of which covered other flour, upwards of \$8,000 and bankrupt gave its note to defendant for that amount. As security for the note it turned over to defendant warehouse receipts for flour consigned to its care, thus effecting an actual transfer of so much of the flour covered by the bills of lading as had not been stolen, and also turned over certain other property. Held, that since bankrupt when it unlawfully took the flour from defendant's custody was the debtor solely of the shipper until the flour was paid for, the transfers as security made to defendant were not transfers to a creditor and, therefore, could not be the subject of voidable preferences. *Keystone Warehouse Co. v. Bissell* (C. C. A., 2d Cir.), 30 Am. B. R. 213, 203 Fed. 652.

201. *Grandison v. National Bank of Commerce* (D. C., N. Y.), 34 Am. B. R. 497, 220 Fed. 981, (affd. 36 Am. B. R. 438, 231 Fed. 800), in which the court said: "To constitute a preference it was not necessary that the assignment of the accounts receivable should be made directly to the bank. It was enough that the transaction which resulted in the indorsement of the renewal notes and the subsequent collection of the accounts receivable were for the benefit of the bank. Alexander concededly received the assignment of accounts from the bankrupt to secure him as an indorser on the overdue promissory notes held by the defendant. Such a transfer made by an insolvent falls within the prohibition of the Bankruptcy Act. *Crooks v. People's Nat. Bank*, 3 Am. B. R. 238, 46 N. Y. App. Div. 335, 61 N. Y. Supp. 604."

preference,²⁰² as where, for instance, a transfer made to an accommodation indorser, to protect him from loss on the note, is a preference.²⁰³ It seems to follow, from the last words in the amendment to this subsection, that the suit can be brought not only against the creditor or his agent, but also against a transferee not a creditor.²⁰⁴

(3) **INDORSEER OR SURETY.**—An indorser or a surety may be a creditor within the meaning of the bankruptcy law.²⁰⁵ If an indorser permits or induces payment of a note, with knowledge or reasonable cause to believe that such payment will result in a preference, he receives the benefit of the payment and he is a creditor.²⁰⁶ Thus, where the surety is the president of the bankrupt, and with knowledge of its insolvency directs the payment to the holder of the obligation with intent to relieve himself from liability and to secure an advantage over other creditors, a preference arises which may be recovered from him by the trustee.²⁰⁷ Where the agent or officer of a bankrupt corporation

202. *Alexander v. Redmond* (C. C. A., 2d Cir.), 24 Am. B. R. 620, 180 Fed. 92. A transfer to a third person is invalid under this section as a preference only where that person was acting on behalf of the creditor. *Dean v. Davis* (U. S., Sup. Ct.), 38 Am. B. R. 664, 37 Sup. Ct. 30. In this case an insolvent debtor fearing arrest for forgery procured a loan and gave a mortgage within the four months' period to secure such loan, and the mortgagee took up the notes at a bank, and it was held that the mortgage was not voidable as a preference.

203. *Lazarus v. Eagan* (D. C., Pa.), 30 Am. B. R. 287, 206 Fed. 518.

204. *Walters v. Zimmerman* (D. C., Ohio), 30 Am. B. R. 776, 785, 208 Fed. 62, quoting text.

205. *Swarts v. Siegel* (C. C., Mo.), 8 Am. B. R. 220, 114 Fed. 1001; *Wood v. United States* (D. C., Mass.), 16 Am. B. R. 21, 143 Fed. 424; *In re Hines* (D. C., Pa.), 16 Am. B. R. 495, 144 Fed. 147; *Ludvigh v. Umstradt* (D. C., N. Y.), 17 Am. B. R. 774, 148 Fed. 319; *In re Bailey & Son* (D. C., Pa.), 21 Am. B. R. 911, 166 Fed. 982; *Brown v. Streicher* (D. C., R. I.), 24 Am. B. R. 267, 177 Fed. 473; *Bank of Wayne v. Go'd* (N. Y. App. Div.), 26 Am. B. R. 722, 146 N. Y. App. Div. 296, 130 N. Y. Supp. 943. See Am. Bankr. Dig. § 499.

Guarantors of the payment of a note are "creditors" within the meaning of section 60 of the act, relating to preferences. *Stern v. Paper* (D. C., N. Dak.), 25 Am. B. R. 451, 183 Fed. 228.

206. *Reber v. Shulman & Bro.* (C. C. A., 3d Cir.), 25 Am. B. R. 475, 183 Fed. 564, affg. 24 Am. B. R. 782, 179 Fed. 574; *Kobusch v. Hand* (C. C. A., 8th Cir.), 19 Am. B. R. 379, 156 Fed. 660; *Brown v. Streicher* (D. C., R. I.), 24 Am. B. R. 267, 177 Fed. 473; *Lazarus v. Eagan* (D. C., Pa.), 30 Am. B. R. 287, 206 Fed. 518; *Platt v. Ives* (Sup. Ct. of Errors., Conn.), 32 Am. B. R. 846, 86 Atl. 579; *Matter of Silvernail* (D. C., Kan.), 33 Am. B. R. 59, 218 Fed. 979.

Payment of note to release indorser.—Where the father of a bankrupt, who was

the surety upon his notes given to secure loans, induced him to pay the notes within the four months' period from the proceeds of his business, at a time when he was insolvent, the father is the person "to be benefited" by the preference within the meaning of section 60-b, and is liable to the trustee for the amount of the preferential payments. *In re Sanderson* (D. C., Vt.), 17 Am. B. R. 871, 149 Fed. 273.

The payment by a bankrupt, within four months of the bankruptcy, while insolvent, of his promissory note at its maturity, to a bank which has discounted it for the payee, who indorsed it to the bank, and who, at the time of such payment, was entirely solvent, so far inures to his benefit as that, there being evidence upon which it might be found that he had reasonable ground for belief of the bankrupt's solvency, so that if the payment had been made to him he would have had reasonable cause to believe that it was intended thereby to give him a preference, and his connection with the bankrupt's affairs being of so close a character as to warrant an inference that he, in some way, procured, suggested, or aided such payment, the same should be held to have been preferential, and its repayment to the trustee ordered before such indorser can be allowed to prove any claim against the estate. *Matter of Matthews & Rosenkranz* (Ref., Mass.), 15 Am. B. R. 721.

207. *Kobusch v. Hand* (C. C. A., 8th Cir.), 19 Am. B. R. 379, 156 Fed. 660; *Matter of McCord* (D. C., N. Y.), 22 Am. B. R. 204, 174 Fed. 72.

Right of director of bankrupt to prefer himself over other bondholders.—It would be inequitable and a fraud upon other bondholders of a bankrupt corporation to allow a director, also a bondholder, to prefer himself by appropriating property of the bankrupt to secure an antecedent debt on which he was liable, at a time when the bankrupt was insolvent. *Butterfield v. Woodman* (C. C. A., 1st Cir.), 34 Am. B. R. 510, 223 Fed. 956, modifg. 33 Am. B. R. 154, 216 Fed. 208.

is the indorser on a note of such corporation, payment of the note by his procurement constitutes an unlawful preference.²⁰⁸ Any payment made by a bankrupt, under conditions constituting it a preference, to or for the benefit of an indorser, guarantor, or any other surety on the obligation of the bankrupt, is within the provisions of the section.²⁰⁹

(4) MISAPPROPRIATION OR CONVERSION OF FUNDS.—A person who has misappropriated or converted funds belonging to another may, at the election of the owner of the funds, be treated as a debtor, in which case the owner becomes a creditor, and if he receives a transfer of property to make good the loss occasioned by the misappropriation or conversion, under such circumstances as to constitute a preference, he is a person "to be benefited" by the transfer, and the property transferred may be recovered.²¹⁰ So where a trustee of a trust fund transfers from himself to the trust fund certain property, knowing that a shortage existed in such fund and that he was unable to meet the deficiency, such transfer constitutes a preference which may be recovered.^{210a} A customer of a stockholder who deposits stock and security for

208. *Arnold v. Knapp* (W. Va. Ct. of App.), 34 Am. B. R. 432, 84 S. E. 895.

209. *Stern v. Paper* (C. C. A., 8th Cir.), 28 Am. B. R. 592, 198 Fed. 642, holding also that the fact that the guarantor or indorser did not pay or induce the payment of the debt, but the payment was made by the bankrupt, does not except the case from the operation of the rule.

Richardson v. Shaw & Davidson, 209 U. S. 365, 19 Am. B. R. 717, 52 L. Ed. 835, 28 Sup. Ct. 512, affg. 16 Am. B. R. 842, holding that where by agreement a stockbroker pledges his customer's stocks upon general loans, the customer for whom the stocks are carried on margin by the broker is not a creditor, and does not receive a voidable preference where within the four months' period he closes the transaction, pays the balance owing the broker and receives stocks worth more in the market than the sum paid to take them up; *Robinson v. Roe* (C. C. A., 2d Cir.), 38 Am. B. R. 26, 233 Fed. 936.

Payment by broker of profits due from grain speculation.—Where bankrupt purchased for appellant, who advanced a margin of 3%, options, or the right to buy grain for future delivery, it being his custom to enter into a contract with third parties for the future right to purchase, but under the contract, no grain was delivered to bankrupt and he made no advances thereon, but was accountable to appellant for balances in the latter's favor, if any there were after selling the grain and making such offsets as were chargeable against the appellant, it cannot be said that there was any such pledge, or contract of pledge, that payment made to appellant as profits due him from such transactions would not be the subject of a preference. *In re Dorr* (C. C. A., 9th Cir.), 28 Am. B. R. 505, 196 Fed. 292.

210. Transfer to pay for property converted by bankrupt.—Where a bankrupt, as a private banker, received a note from defendant for collection, which he collected, but the proceeds of which he converted to

his own use or that of his bank, at a time when he was insolvent, and a few days thereafter the bank was closed, on which day the bankrupt and his wife executed and delivered to the defendant a conveyance of certain real estate which he had long theretofore owned, sending at the same time a letter requesting defendant's agent to hold the deed until he had definite notice of the closing of the bank, upon receiving notice of which the defendant, accepted the deed, such acceptance, with knowledge of the conversion and insolvency, was an election to treat the transaction as an indebtedness for which the conveyance was tendered by way of security of indemnity, the defendant becoming a creditor on a par with other general creditors of the estate, and the conveyance constituted a preferential security, voidable in a suit by the trustee. *Atherton v. Green* (C. C. A., 7th Cir.), 24 Am. B. R. 650, 179 Fed. 806.

210a. Transfer to restore embezzled trust funds.—Bankrupt, a testamentary trustee, at a time when insolvent, was discovered by the surety on his bond not to be in possession of some of the securities belonging to the trust estate. At the instigation of the surety and for the purpose of making good the shortage he purchased certain bonds with his own money and placed them, together with the securities belonging to this trust fund which had not gone out of his possession, in a deposit box which, upon his removal as trustee, passed to his successor in trust. Bankrupt was at the time of the transaction testamentary trustee for more than twenty-five other trust estates, in the case of each of which there was a shortage for which he was responsible. In an action by the trustee in bankruptcy to recover of bankrupt's successor the securities so deposited to make up the shortage,—*Held*, that the transfer of the substituted securities must, in equity, be deemed to have been made by bankrupt as an individual dealing with himself as trustee, and that, a contract obligation having existed by reason of bank-

the amount due thereon is not a creditor, and is not preferred when the broker transfers the stock to him upon the payment of the amount due thereon.^{210b}

h. Illustrative cases.—In addition to the cases already cited the cases in the foot-note may be referred to. These cases supplement the authorities already cited but do not readily admit of classification.²¹¹

rupt's default in his trust, the transaction constituted a voidable preference under the bankruptcy act. *Clarke v. Rogers* (C. C. A., 1st Cir.), 26 Am. B. R. 413, 183 Fed. 518, affd, 228 U. S. 534, 30 Am. B. R. 39, 57 L. Ed. 953, 33 Sup. Ct. 587. *Burgoyne v. McKillip* (C. C. A., 8th Cir.), 25 Am. B. R. 387, 182 Fed. 452, in which the court said "Though a demand may be founded on a breach of trust, the entire estate of the recreant trustee is not thereby necessarily impressed with a trust. The holder of the demand cannot, as an ordinary creditor, take and hold transfers of property from the insolvent defaulter free from the provisions of the bankruptcy act respecting preferences."

^{210b.} *Clarke v. Rogers*, 228 U. S. 534, 30 Am. B. R. 39, 57 L. Ed. 953, 33 Sup. Ct. 587.

^{211.} Transactions held not to be preferences.—The following have been held not to be preferences, even within the four months' period: The removal of notes more than four months' old, *Chattanooga Bank v. Rome Iron Co.* (C. C., Ga.), 4 Am. B. R. 441, 102 Fed. 755; the payment of interests on notes, *In re Keller* (D. C., Iowa), 6 Am. B. R. 621, 110 Fed. 348; the payment of installments of rent. *In re Barrett* (Ref., N. Y.), 6 Am. B. R. 199. Compare *In re Lange* (D. C., N. Y.), 3 Am. B. R. 231, 97 Fed. 197; the avails of book accounts assigned as collateral to a present loan, *Young v. Upson* (C. C., N. Y.), 8 Am. B. R. 377, 115 Fed. 192; the collection and application of the avails of collateral security given before the period, *In re Little* (D. C., Iowa), 6 Am. B. R. 681, 110 Fed. 621; the proceeds of a pledged fire insurance policy, *In re West Norfolk Lumber Co.* (D. C., Va.), 7 Am. B. R. 648, 112 Fed. 759. See also *McDonald v. Daskam* (C. C. A., 7th Cir.), 8 Am. B. R. 543, 116 Fed. 276; a payment to an official successor under order of court, *Fry v. Penn Trust Co.* (Sup. Ct., Pa.), 5 Am. B. R. 51, 195 Pa. 343; a payment in pursuance of a valid executory contract more than four months' old, *Sabin v. Camp* (D. C., Oreg.), 3 Am. B. R. 578, 98 Fed. 974. Apparently *contra*: *In re Sheridan* (D. C., Pa.), 3 Am. B. R. 554, 98 Fed. 406; payments to a surety who afterward pays the bankrupt's debt, *In re New* (D. C., Ohio), 8 Am. B. R. 566, 116 Fed. 116; where a sheriff still has in his hands money collected on an execution, *In re Kenney* (D. C., N. Y.), 3 Am. B. R. 353, 97 Fed. 554. Compare however, *In re Blair* (D. C., N. Y.), 4 Am. B. R. 220, 102 Fed. 987; and where a mortgage is taken as security by a lender who knows that the borrower is hard pressed, the latter using the money to pay his debts. *In re Pearson* (D. C., N. Y.), 2 Am. B. R. 482,

95 Fed. 425. See also in re Harpke (C. C. A., 7th Cir.), 8 Am. B. R. 535, 116 Fed. 295; payment of interest on dower, *In re Riddle's Sons* (D. C., Pa.), 10 Am. B. R. 204, 122 Fed. 559.

Transactions held preferences.—The following have been held preferences: Attachments, *In re Burlington Malting Co.* (D. C., Wis.), 6 Am. B. R. 369, 109 Fed. 777; *In re Schenkein* (Ref., N. Y.), 7 Am. B. R. 162, 113 Fed. 421; though whether this will continue to be held under the changed conditions resulting from the amendments of 1903 may be doubted; a transfer of all the bankrupt's assets to a liquidator. *In re Wertheimer* (Ref., N. Y.), 6 Am. B. R. 187; a cash sale of all property to an outsider and payment in full of several creditors, *Boyd v. Lemon Gale Co.* (C. C. A., 6th Cir.), 8 Am. B. R. 81, 114 Fed. 647; the taking back of goods, whether hypothecated or sold, and the application of their value on account or in full, *In re Klingaman* (Ref., Iowa), 2 Am. B. R. 44; *Silberstein v. Stal*, 4 Am. B. R. 626, 32 N. Y. Misc. 353, 66 N. Y. Supp. 646; a payment after insolvency by means of a postdated check, *In re Lyon* (D. C., N. Y.), 7 Am. B. R. 412, 114 Fed. 326; affd, 10 Am. B. R. 25, 121 Fed. 723; a loan by a banker to the bankrupt of the amount of the latter's deposit, *In re Cobb* (D. C., N. Car.), 3 Am. B. R. 129, 96 Fed. 821; a payment on the bankrupt's note after its sale to and discount by a bank, *In re Waterbury Furniture Co.* (D. C., Conn.), 8 Am. B. R. 79, 114 Fed. 225; the making of a lease, *Carter v. Goodykoontz* (D. C., Ind.), 2 Am. B. R. 224, 94 Fed. 108; repayment of a loan out of a certain fund under an agreement entered into when the loan was made. *Torrance v. Winfield Nat. Bank* (Sup. Ct., Kan.), 11 Am. B. R. 185, 66 Kan. 177; agreement that chattel mortgage executed prior to four months shall be lien on certain specified articles made within said period, *First Nat. Bank of Holdrege v. Johnson* (Sup. Ct., Neb.), 10 Am. B. R. 208. See also *In re Colton, etc., Co.* (D. C., N. Y.), 8 Am. B. R. 257, 115 Fed. 158; *In re Metzger, etc. Co.* (D. C., Ark.), 8 Am. B. R. 307, 114 Fed. 957; *Swarts v. Siegel* (C. C. A., 8th Cir.) 8 Am. B. R. 690, 117 Fed. 13.

The practitioner should, however, note that the provocation for many of these decisions—the necessity of surrender of "innocent" partial payments—is now gone. It will bear repetition that none of them are now valuable unless they show the essential element of voidable preferences; "reasonable cause to believe that a preference was intended."

III. WHAT PREFERENCES ARE VOIDABLE. ²¹²

a. **In general.**—Prior to the amendment of 1903, this subsection was regarded as broad enough to include a preference according to subsection *a*, as construed by the Supreme Court in *Carson v. Chicago Title & Trust Co.*,²¹³ where the broad distinction was made between said subsections showing that under subsection *b*, a transfer from the bankrupt may be avoided by his trustee, subject to the limitation among others, that the creditor had reason to believe that a preference was intended, while under subsection *a* the intent of the bankrupt is not material.²¹⁴ But since the amendatory act of 1903, a preference is a name only, unless it may be avoided. Under the law of 1867, preferences were *per se* void.²¹⁵ This, however, seems often to have been a distinction without a difference. Strictly, the preference being void, no title passed to the creditor preferred, and the words "may recover the property," etc., in § 39 of that law, were surplusage. Preferences now are not void, but voidable, *i. e.*, title has passed and recovery must be had. This is doubtless in line with the policy of the law, as evidenced by § 70-a, to protect intervening innocent purchasers. The resultant distinctions have been somewhat discussed.²¹⁶ The fact to be noted here is, however, that this subdivision closely fits both in phrase and in purpose the corresponding clauses in the law of 1867. Cases under that law are thus still applicable, both as to what is "reasonable cause to believe" and the practice on and measure of damages in suits to recover.²¹⁷

b. **Reasonable cause to believe a preference will result.**—(1) **IN GENERAL.**—The former law and the present are here not exactly equivalent; though the phrase "reasonable cause to believe" occurs in both. Its meaning is not easily explained. Each case will turn on its own facts.²¹⁸

(2) **TIME OF CAUSE TO BELIEVE.**—It was held under the act of 1867 that reasonable cause to believe must exist at the time of the alleged preference.²¹⁹ The present section provides that "if at the time of the transfer, or of the

²¹². See Am. Bankr. Dig. §§ 482-518.

²¹³. 182 U. S. 438, 5 Am. B. R. 814, 45 L. Ed. 1171, 21 Sup. Ct. 906.

²¹⁴. *In re Andrews* (C. C. A., 1st Cir.), 10 Am. B. R. 387, 144 Fed. 922, *affd.* 14 Am. B. R. 247, 135 Fed. 599.

²¹⁵. *Atkins v. Spear*, 8 Metc. (Mass.), 490; *Zahn v. Fry*, Fed. Cas. 18,198; *Rison v. Knapp*, Fed. Cas. 11,861.

²¹⁶. See *In re Phelps* (Ref., N. Y.), 3 Am. B. R. 396; *In re Cobb* (D. C., N. Car.), 3 Am. B. R. 129, 96 Fed. 821.

Lien of voidable preference.—Notwithstanding the rule that a preferential transfer is avoidable, and not void, and that recovery must be had, it has been held that the lien of a trust mortgage, constituting a preference, is discharged by the bankruptcy, and that the creditors claiming thereunder have no priority over a claim arising under a prior unfiled chattel mortgage. *Rouse v. Ottenwess & Huxoll* (C. C. A., 6th Cir.), 31 Am. B. R. 115, 208 Fed. 881.

²¹⁷. See cases cited later under this section.

²¹⁸. For instance: *North v. Taylor*, 6 Am. B. R. 233, 62 N. Y. App. Div. 631, 70 N. Y.

Supp. 359; *Crooks v. People's Bank*, 3 Am. B. R. 238, 46 N. Y. App. Div. 335, 61 N. Y. Supp. 604; *Beck v. Connell* (Sup. Ct.), 8 Am. B. R. 500, *affg. s. c.*, 6 Am. B. R. 93; *Levor v. Seiter*, 8 Am. B. R. 459, 69 N. Y. App. Div. 33, 74 N. Y. Supp. 499; *Matter of Bartheleme* (Ref., N. Y.), 11 Am. B. R. 67; *Baden v. Bertenshaw* (Sup. Ct., Kan.), 11 Am. B. R. 308, 74 Pac. 639; *Ryttenberg v. Schefer* (D. C., N. Y.), 11 Am. B. R. 652, 131 Fed. 313; *Pratt v. Christie*, 12 Am. B. R. 1, 95 N. Y. App. Div. 282, 88 N. Y. Supp. 585; *In re Coffey* (Ref., N. Y.), 19 Am. B. R. 148, 165. Compare also *In re Wyly* (D. C., Tex.), 8 Am. B. R. 604, 116 Fed. 38, and *In re Bullock* (D. C., N. Car.), 8 Am. B. R. 646, 116 Fed. 667; *Long v. Farmers' State Bank* (C. C. A., 8th Cir.), 17 Am. B. R. 103, 147 Fed. 360; *In re Burlage Bros.* (D. C., Iowa), 22 Am. B. R. 410, 169 Fed. 1006; *Bergdall v. Harrigan* (C. C. A., 3d Cir.), 33 Am. B. R. 394, 217 Fed. 943. See Am. Bankr. Dig. §§ 509-518.

²¹⁹. *In re Hunt*, Fed. Cas. 6,881; *Crump v. Chapman*, Fed. Cas. 3,455; *In re Oumette*, Fed. Cas. 10,622.

entry of judgment, the bankrupt be insolvent" and the person receiving the preference "shall *then* have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable." The word "then" refers apparently to the time of the transfer or the entry of the judgment;²²⁰ it would seem that a creditor may enforce a judgment entered at a time when he had no cause to believe his debtor insolvent, although at the time he enforces it by execution he has such cause to believe, or has actual knowledge that the enforcement of his judgment will give him a preference.²²¹

(3) INTENT TO PREFER; EFFECT OF AMENDMENT OF 1910.—If there was reasonable cause to believe that a voidable preference will be effected by the transaction, the intent of the debtor is immaterial.²²² This rule was not firmly established prior to the amendment of 1910, as there were many cases holding that the intent of the debtor was an indispensable element.²²³ Reasonable cause to believe a preference was *intended* is not now essential. Since the amendment of 1910 there must be a reasonable cause to believe that the transfer or judgment will *effect* a preference. The effect of the transaction becomes paramount, being substituted for the intent of the debtor. The change made by the amendatory act does not dispense with the necessity of proving "reasonable cause to believe."²²⁴ But the proof of such "reasonable cause to believe" is now to be directed to the effect of the transfer, rather than the intent of the debtor in making it. If the creditor knows or has "reasonable cause to believe" that his debt will be satisfied in whole or in part by the transfer to the exclusion of any of the other creditors of the same class, it is a preference,

220. *Rosenman v. Coppard* (C. C. A., 5th Cir.), 35 Am. B. R. 786, 228 Fed. 114; *Sheppard-Strassheim Co. v. Black* (C. C. A., 7th Cir.), 33 Am. B. R. 574, 211 Fed. 643; *Stern v. Paper* (C. C. A., 8th Cir.), 28 Am. B. R. 592, 198 Fed. 642; *In re Leach* (C. C. A., 6th Cir.), 22 Am. B. R. 599, 171 Fed. 622; *Kentucky Bank & Trust Co. v. Pritchett* (Okla. Sup. Ct.), 33 Am. B. R. 190, 143 Pac. 338.

The words "shall then have reasonable cause to believe that the enforcement of a judgment or transfer would effect a preference" not only refer to the time when the transfer is made, that is when the mortgage is given, but mean that the creditor taking it must then have had reasonable cause to believe that the *then* financial condition of the debtor was such that the enforcement of the security would work a preference. *Matter of Gaylord* (D. C., N. Y.), 35 Am. B. R. 544, 225 Fed. 234.

221. *Galbraith v. Whitaker* (Sup. Ct., Minn.), 32 Am. B. R. 113, 138 N. W. 772.

222. *Schmidt v. Bank of Commerce* (Sup. Ct., N. Mex.), 25 Am. B. R. 904, 110 Pac. 613; *In re Andrews* (D. C., Mass.), 14 Am. B. R. 247, 135 Fed. 599; *Brewster v. Goff Lumber Co.* (D. C., Pa.), 21 Am. B. R. 106, 164 Fed. 124; *Western Tie & Lumber Co. v. Brown*, 196 U. S. 502, 13 Am. B. R. 447, 25 Sup. Ct. 339, 49 L. Ed. 571, affg. 12 Am.

B. R. 111, 129 Fed. 728, 64 C. C. A. 256; *Benedict v. Deshel*, 11 Am. B. R. 20, 177 N. Y. 1, 68 N. E. 999.

Intent to prefer.—In the case of *Alexander v. Redmond* (C. C. A., 2d Cir.), 24 Am. B. R. 620, 180 Fed. 92, the court said: "But it is surely enough to show that he had reasonable cause to believe that there was such intent, without inquiring into the actual mental attitude of the person from whom he receives the property transferred. If he has reasonable cause to believe that that person is insolvent and has also reasonable cause to believe that the effect of the transfer will be to enable the transferee to obtain a greater percentage of his debt than any other creditor of the same class, the requirements of the concluding part of section 60 are fully met."

223. *Hardy v. Gray* (C. C. A., 1st Cir.), 16 Am. B. R. 387, 144 Fed. 922, 75 C. C. A. 562; *In re First Nat. Bank of Louisville* (C. C. A., 6th Cir.), 18 Am. B. R. 766, 155 Fed. 100, 84 C. C. A. 16; *Tumlin v. Bryan* (C. C. A., 5th Cir.), 21 Am. B. R. 319, 165 Fed. 166, 91 C. C. A. 200, 21 L. R. A. (N. S.), 960; *Kimmerle v. Farr* (C. C. A., 6th Cir.), 26 Am. B. R. 818, 189 Fed. 295.

224. *Rogers v. American Halibut Co.* (Mass. Sup. Ct.), 31 Am. B. R. 576, 103 N. E. 689; *Saule v. First Nat'l Bank* (Sup. Ct., Idaho), 32 Am. B. R. 536, 140 Pac. 1098.

regardless of the intent of the debtor.²²⁵ As the section now stands there must be proof, both of insolvency of the bankrupt at the time of the transfer and reasonable cause to believe on the part of the transferee that such transfer would effect a preference, in order to set aside the transfer as a preference.²²⁶ On the other hand, when a debtor is in failing or insolvent circumstances, he has a right to prefer one creditor in preference to another, and if accepted by the creditor in good faith such preference will be sustained, even though it has the effect to delay, hinder or defeat other creditors.²²⁷ And where a petition in bankruptcy alleged the insolvency of the bankrupt at the time of the execution of a chattel mortgage, the adjudication is not *res judicata* upon the issue as to whether the mortgage constituted a voidable preference.²²⁸ Many, if not all the rules as to proof of intent are applicable to proof of effect; the cases bearing upon what constitutes "reasonable cause to believe that a preference was intended," decided prior to the amendment of 1910, are still in force.²²⁹

(4) ACTUAL KNOWLEDGE NOT REQUIRED.—The cases under the act of 1867 and the present law, as amended, permit the statement that "reasonable cause to believe," does not require proof either of actual knowledge or actual belief, but only such surrounding circumstances as would lead an ordinarily prudent business man to conclude that the transfer will result in a preference.²³⁰ The

225. *Patterson v. Baker Grocery Co.* (Sup. Ct., Ore.), 33 Am. B. R. 740, 144 Pac. 673; *Heyman v. Third National Bank* (D. C., N. J.), 32 Am. B. R. 716, 216 Fed. 685; *Ogden v. Reddish* (D. C., Ky.), 29 Am. B. R. 531, 200 Fed. 977.

Intent to prefer immaterial.—In the case of *Herron Co. v. Moore* (C. C. A., 9th Cir.), 31 Am. B. R. 221, 208 Fed. 134, the court said: "Under the bankruptcy act, section 60, as amended by the act of 1910, it is no longer necessary in order to establish a preference, to prove the existence of the debtor's intent to prefer. It is sufficient if it is shown that the creditor receiving the alleged preferential payment had at the time when it was made, reasonable cause to believe that the bankrupt was insolvent, and that in accepting and retaining the same he would receive a larger per cent. of his debt than the other creditors of the same class."

Under the amendment of 1910, the test of a preferential payment is, whether the person receiving the payment, or to be benefited thereby, or his agent acting therein, at the time the payment was made, had reasonable cause to believe that in accepting and retaining said payment he would receive a larger percentage of his debt than any other creditor of the same class. In *re Harrison Bros.* (D. C., Pa.), 28 Am. B. R. 684, 202 Fed. 243.

Notwithstanding the amendment of 1910, the element of reasonable cause to believe remains as a fact necessary to be alleged and proven. *Carey v. Donohue* (C. C. A., 6th Cir.), 31 Am. B. R. 210, 209 Fed. 328, *revd.* on other grounds, 240 U. S. § 430, 36 Am. B. R. 704, 60 L. Ed. 726, 36 Sup. Ct. 386.

226. *Matter of Chicago Car Equipment Co.* (C. C. A., 7th Cir.), 31 Am. B. R. 617, 211 Fed. 638; *Sheppard-Strassheim Co. v. Black* (C. C. A., 7th Cir.), 33 Am. B. R. 574, 211 Fed. 643; *Beall v. Bank of Bowden* (D. C., Ga.), 34 Am. B. R. 186, 219 Fed. 316; *Matter of Gaylord* (D. C., N. Y.), 35 Am. B. R. 544, 225 Fed. 234; *Canthorn v. Burley State Bank* (Sup. Ct., Idaho), 33 Am. B. R. 794, 144 Pac. 1608; *Batchelder v. Home Nat'l Bank* (Sup. Jud. Ct., Mass.), 32 Am. B. R. 555, 105 N. E. 1052; *Kentucky Bank & Trust Co. v. Pritchett* (Sup. Ct., Okla.), 33 Am. B. R. 190, 143 Pac. 338.

227. *Kentucky Bank & Trust Co. v. Pritchett* (Sup. Ct., Okla.), 33 Am. B. R. 190, 143 Pac. 338.

228. *Sheppard-Strassheim Co. v. Block* (C. C. A., 7th Cir.), 33 Am. B. R. 574, 211 Fed. 643.

229. *Debus v. Yates* (D. C., Ky.), 30 Am. B. R. 823, 193 Fed. 427, in which case the court exhaustively discusses the subject of preferences prior to and since the amendment of 1903.

230. *Hussey v. Richardson-Roberts Dry Goods Co.* (C. C. A., 8th Cir.), 17 Am. B. R. 511, 138 Fed. 598; *Rosenman v. Coppard* (C. C. A., 5th Cir.), 35 Am. B. R. 786, 228 Fed. 114; *Matter of Gaylord* (D. C., N. Y.), 35 Am. B. R. 544, 225 Fed. 234; *Heyman v. Third National Bank* (D. C., N. J.), 32 Am. B. R. 716, 216 Fed. 685; *Arthur v. Harrington* (D. C., N. Y.), 32 Am. B. R. 216, 211 Fed. 215; *In re Jacobs* (Ref., La.), 1 Am. B. R. 518; *In re Richards* (D. C., Wis.), 2 Am. B. R. 518, 95 Fed. 258; *Crittenden v. Barton*, 5 Am. B. R. 775, 59 N. Y. App. Div. 555, 69 N. Y. Supp. 559; *Sebring v. Wellington*, 6 Am. B. R. 671, 63 N. Y. App.

Div. 498 71 N. Y. Supp. 788; Hackney v. Raymond Bros. Clarke Co. (Sup. Ct., Neb.), 10 Am. B. R. 213, 68 Neb. 624, 94 N. W. 822, 99 N. W. 675; Sundheim v. Ridge Ave. Bank (D. C., Pa.), 15 Am. B. R. 132, 138 Fed. 951; In re Hines (D. C., Pa.), 16 Am. B. R. 495, 144 Fed. 543; In re Virginia Hardwood Mfg. Co. (D. C., Ark.), 15 Am. B. R. 135, 139 Fed. 209; In re Armstrong (D. C., Iowa), 16 Am. B. R. 583, 145 Fed. 202; Stevenson v. Miliken-Tomlinson, 13 Am. B. R. 201, 99 Me. 320, 59 Atl. 472; Suffel v. McCartney Nat. Bank, 16 Am. B. R. 259, 127 Wis. 208, 106 N. W. 837; In re Mills Co. (D. C., N. Car.), 20 Am. B. R. 501, 162 Fed. 42; Rogers v. Fidelity Sav. Bank & Loan Co. (D. C., Ark.), 23 Am. B. R. 1, 172 Fed. 735; Rogers v. American Halibut Co. (Mass. Sup. Ct.), 31 Am. B. R. 576, 216 Mass. 227, 103 N. E. 689.

Cases under Act of 1867.—Buchanan v. Smith, 16 Wall. 277; Rison v. Knapp, Fed. Cas. 11,861; In re McDonough, Fed. Cas. 8,775; Webb v. Sachs, Fed. Cas. 17,325.

Absolute knowledge of insolvency is not required. All that is necessary is the possession by the creditor, at the time, of such information relative to the debtor's affairs as should lead a reasonably prudent person to conclude that the property of the debtor at a fair valuation would not be sufficient to pay his debts. In re Pfaffinger (D. C., Ky.), 18 Am. B. R. 807, 154 Fed. 528; Getts v. Janesville Grocery Co. (D. C., Wis.), 21 Am. B. R. 5, 163 Fed. 417.

Knowledge is not necessary, nor even belief, but only reasonable cause to believe, which is a very different thing. Pratt v. Columbia Bank (D. C., N. Y.), 18 Am. B. R. 406, 415, 157 Fed. 137. Neither knowledge nor actual belief are required to be shown. In re Neill-Pinckney-Maxwell Co. (D. C., Pa.), 22 Am. B. R. 401, 170 Fed. 481; Dulany v. Waggaman (Sup. Ct., Dist. Col.), 22 Am. B. R. 36, 37 Wash. L. Rep. 370.

Inquiry by ordinarily prudent man.—It is sufficient if the facts brought home to the person sought to be affected are such as would produce action and inquiry on the part of "an ordinarily intelligent man" (Grant v. Bank, 97 U. S. 80, 24 L. ed. 971); "a prudent business man" (Bank v. Cook, 95 U. S. 343; Toof v. Martin, 13 Wall. 40); "a person of ordinary prudence and discretion" (Wager v. Hall, 16 Wall. 584; In re McDonald [D. C., So. Car.], 24 Am. B. R. 446, 178 Fed. 487, affd. 25 Am. B. R. 948, 184 Fed. 986); "an ordinarily prudent man" (In re Eggert [C. C. A., 7th Cir.], 4 Am. B. R. 449, 102 Fed. 735; McElvain v. Hardesty [C. C. A., 2d Cir.] 22 Am. B. R. 320, 169 Fed. 320); "a prudent man" (Dutcher v. Wright, 94 U. S. 553, 24 L. ed. 130); "an ordinarily intelligent and prudent business man" (Wright v. Sampter [D. C., N. Y.], 18 Am. B. R. 355, 358, 152 Fed. 196).

"He who deliberately shuts his eyes and ears to means of knowledge, and as to matters which he says 'he is not interested in,' has reasonable ground to believe what ordi-

narly diligent inquiry could ascertain." In re Coffey (Ref., N. Y.), 19 Am. B. R. 148, 166.

Failure to inquire.—A preference may result although the creditor had no actual knowledge of the insolvency of his debtor. All that is necessary under section 60-b is that the facts surrounding and attending the transfer are such that an ordinary business man having knowledge of the same facts, would have believed that the bankrupt was insolvent. In such a case the creditor's conclusion that he had no ground to believe the bankrupt was insolvent is not controlling and indeed, is of little if any weight. If a transfer is made under such circumstances that an ordinarily intelligent man would have been put on inquiry to make an investigation which, if made, would have shown insolvency, then the transferee is chargeable with such knowledge as the investigation would have disclosed, and the transfer will amount to an unlawful preference. Failure actually to investigate will afford no excuse under such circumstances. Matter of States Printing Co. (C. C. A., 7th Cir.), 38 Am. B. R. 526, 238 Fed. 775.

Instances of reasonable cause to believe.—It has been held that a creditor, who receives a check of \$4,000 on the day before the filing of an involuntary petition against his debtor, a corporation, has reasonable cause to believe that a preference was intended. Wright v. Skinner Manufacturing Co. (C. C. A., 2d Cir.), 20 Am. B. R. 527, 162 Fed. 315; Morris v. Tannenbaum (Ref., N. Y.), 26 Am. B. R. 368.

An indirect repurchase by a creditor of goods to the amount of \$1,475 from an insolvent debtor within the four months' period, and a resale of the same for about \$1,000 is a preference, and the creditor will be held to have had reasonable cause to believe that such was the intention. In re Andrews (C. C. A., 1st Cir.), 16 Am. B. R. 387, 144 Fed. 922, affg. 14 Am. B. R. 247, 135 Fed. 599.

Where a creditor takes a transfer of the residence of one partner within the four months' period and a short time before had taken a like transfer of the residence of the other partner he will be deemed to have had reasonable cause to believe that the firm was insolvent. Brewster v. Goff (D. C., Pa.), 21 Am. B. R. 239, 164 Fed. 124.

Where creditors of bankrupt accepted in full of their claims in an attempted settlement of bankrupt's affairs a dividend amounting to \$6364 on the dollar, derived from certain insurance moneys having been previously informed by letter that other claims on notes amounting to \$4,900 would be paid by the proceeds of personal property, represented to be worth \$2,500, but actually worth less than half that amount, they had reasonable cause to believe that a preference was intended. Shultz v. Boyt Saddlery Co. (Sup. Ct., Iowa), 33 Am. B. R. 32, 147 N. W. 897.

Facts and circumstances disclosed by inquiry.—If the facts and circumstances

creditor must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency.²³¹ Notice of facts which would incite a person of reasonable prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would develop.²³² It is to

proved to have been within the knowledge and observation of the creditor or as to which he was actually put on inquiry, and inquiry would have disclosed, were such as would naturally cause a business man of ordinary care and intelligence—an ordinarily careful and prudent man of intelligence and reasonable experience in business matters—to believe, then it should be held, that the creditor had reasonable cause to believe the debtor was insolvent, and that the taking and enforcement of the security or transfer "would effect a preference." *Matter of Gaylord* (D. C., N. Y.), 35 Am. B. R. 544, 225 Fed. 234.

231. *Kuttig Manufacturing Co. v. Edwards* (C. C. A., 8th Cir.), 20 Am. B. R. 349, 160 Fed. 619; *In re Houghton Web Co.* (D. C., Mass.), 26 Am. B. R. 202, 185 Fed. 213; *Shale v. Farmers' Bank* (Sup. Ct., Kans.), 25 Am. B. R. 888, 109 Pac. 408, citing text; *Jacobs v. Saperstein* (Mass. Sup. Ct.), 38 Am. B. R. 405, 114 N. E. 360.

232. *Coder v. McPherson* (C. C. A., 8th Cir.), 18 Am. B. R. 523, 152 Fed. 951; *Pittsburg Plate Glass Co. v. Edwards* (C. C. A., 8th Cir.), 17 Am. B. R. 447, 148 Fed. 377; *In re Leader* (D. C., Ark.), 26 Am. B. R. 668, 190 Fed. 624; *Oollett v. Bronx Nat. Bank* (D. C., N. Y.), 29 Am. B. R. 454, 211 Fed. 111; *Herron Co. v. Moore* (C. C. A., 9th Cir.), 31 Am. B. R. 221, 208 Fed. 134; *Matter of Gaylord* (D. C., N. Y.), 35 Am. B. R. 544, 225 Fed. 234; *First Bank of Mayville v. Alexander* (Okla. Sup. Ct.), 36 Am. B. R. 132, 153 Pac. 646, quoting text; *Matter of Miller* (D. C., Ohio), 34 Am. B. R. 275, 221 Fed. 471; *Matter of Edwards* (D. C., Ga.), 33 Am. B. R. 530, 217 Fed. 102; *Conners v. Brockport Nat'l Bank* (D. C., Maine), 32 Am. B. R. 882, 214 Fed. 847; *Heyman v. Third Nat'l Bank* (D. C., N. J.), 32 Am. B. R. 716, 216 Fed. 685; *Russell's Trustee v. Mayfield Lumber Co.* (O. Ct. of App., Ky.), 32 Am. B. R. 357, 164 S. W. 783; *Galbraith v. Whitaker* (Sup. Ct., Minn.), 32 Am. B. R. 113, 138 N. W. 772.

Extent of inquiry.—Facts which would put an intelligent business man upon inquiry constitute "reasonable cause to believe," if intent to prefer would be discovered by following up the inquiry. *Stern v. Paper* (D. C., N. Dak.), 25 Am. B. R. 451, 183 Fed. 228; *Tilt v. Citizens' Trust Co.* (D. C., N. J.), 27 Am. B. R. 320, 191 Fed. 441, affd. 29 Am. B. R. 906, 200 Fed. 410.

Letters and telegrams sent by a debtor to its creditors, which merely show that it is in embarrassed circumstances and not able to meet its obligations as they matured, do not constitute notice of insolvency within the meaning of that term as used in the bankruptcy act, but, when unaccompanied by qualifying circumstances are sufficient

to put the creditor upon inquiry. *In re Varley v. Bauman Clothing Co.* (D. C., Ala.), 26 Am. B. R. 840, 191 Fed. 459.

Suggested critical embarrassment of debtor.—Within the four months prior to bankruptcy, payments had been made by the bankrupts on notes for a lumber account which had frequently gone to protest and been the subject of constant complaint. Notwithstanding this, the claimants had accepted an order for more lumber and were about to fill it, when they learned that the bankrupts were in difficulty and did not do so. They were also advised, on inquiry of a bank where the bankrupts were in business, that their condition had improved and it was thought that they would pull through. *Held*, that this suggested critical embarrassment was enough to put claimants on inquiry and that their claim for the balance due on the notes could not be allowed without surrendering the payments received during the four months' period which constituted voidable preferences. *In re Deutsche* (D. C., Pa.), 25 Am. B. R. 348, 182 Fed. 435.

Assignment of accounts by corporation to officer.—Assignments of accounts, made from time to time, as security for antecedent debts, by a corporation to its president who knew or should have known that the company was then insolvent, the assignee permitting the company to collect the accounts so assigned and use the proceeds as it saw fit, constitute voidable preferences under section 60 of the Bankruptcy Act. *In re Richards, Inc.* (D. C. Sup. Ct.), 28 Am. B. R. 636. But see *Grandison v. Robertson*, (D. C., N. Y.), 34 Am. B. R. 609, 220 Fed. 985 (affd. 36 Am. B. R. 452, 231 Fed. 785), where it was held that in the absence of evidence showing that the bank receiving the benefit of the assignment had knowledge of the effect thereof upon the affairs of the corporation, the bank did not have reasonable cause to believe that the corporation was insolvent.

Mortgage given as security for renewal note.—Where bankrupt borrowed a sum of money from a bank on his own note, which was renewed from time to time, and a few days after the note finally became due at a time when he was in financial distress which was then quite generally known executed a mortgage to the bank for the amount thereof, in the absence of satisfactory explanation that the note had been paid at the time, it will be presumed that the mortgage was given as security for the old loan, so as to indicate a knowledge on the part of the bank of bankrupt's financial uncertainty and an intent to secure a preference. *In re Hirshowitz* (D. C., Pa.), 28 Am. B. R. 571, 199 Fed. 202.

be remembered, however, that the same circumstances which to some minds would merely give ground for suspicion may afford evidence which to other minds would carry conviction, that they not only showed reasonable cause to believe, but actually had created a belief.²³³ If a creditor accepts a transfer under circumstances which would lead a man of ordinary prudence and sagacity to believe that he was being preferred by the debtor, over other creditors of the same class, without making investigation, he will be charged with all the knowledge which he would have acquired had he performed his duty in this regard.²³⁴ A creditor is not chargeable with knowledge such as could only be disclosed by the bankrupt's books of account to which the creditor had no access.²³⁵

(5) **MERE GUESS OR SUSPICION INSUFFICIENT.**—There must be something more than a mere guess or suspicion.²³⁶ Reasonable cause to believe is not the

233. *Batchelder v. Home Nat'l Bank* (Sup. Jud. Ct., Mass.), 32 Am. B. R. 555, 105 N. E. 1052.

234. *In re McDonald* (D. C., So. Car.), 24 Am. B. R. 446, 453, 178 Fed. 487, affd. 25 Am. B. R. 948; *Russell's Trustee v. Mayfield Lumber Co.* (Ct. of App., Ky.), 32 Am. B. R. 357, 164 S. W. 783.

Loss of stock by fire to put creditor on inquiry.—In the case of *In re Leader* (D. C., Ark.), 26 Am. B. R. 668, 674, 190 Fed. 624, the court said: "But a creditor cannot entirely close his eyes and stop his ears in order to keep himself in ignorance. Payment in the ordinary course of business by a going concern is very much different from payment by a concern that has suspended business and is in course of liquidation. This difference is emphasized when the suspension has been caused by fire. Anderson knew facts which forced upon him the conviction that the partnership was insolvent, and he could not avoid the belief that the payment of the order would constitute a preference. It is idle to declare a belief in opposition to an obvious fact. Dogmatic assertion cannot stand in the face of positive demonstration. The fact that the entire stock of goods of the partnership had been destroyed was in itself sufficient to put a reasonably prudent creditor on notice. Anderson knew there would at least be a loss amounting to the difference between the cash value of the goods destroyed which was about \$13,000.00 and the amount of the insurance, which was \$7,000.00. He knew, as a result of the fire, that there was a depreciation of assets in the neighborhood of \$6,000.00. He also knew that the loss had not been adjusted, and must have realized that it was within the probabilities that the amount collected would be less than \$7,000.00, as it afterwards turned out."

Notice from financial agency of debtor's financial condition.—A creditor, which, after receiving notice from a commercial agency as to the financial condition of a debtor, immediately sent its agent to interview the debtor who, without making inquiries except of the debtor, procured a mortgage as security for a pre-existing debt and, with knowl-

edge that the debtor would soon become a bankrupt, had it recorded, will be deemed to have had "reasonable cause to believe that the enforcement of such * * * transfer would effect a preference," within the meaning of section 60a. of the Bankruptcy Act. *Matter of Edwards* (D. C., Ga.), 33 Am. B. R. 530, 217 Fed. 102.

235. *In re Wolf Co.* (D. C., Pa.), 21 Am. B. R. 73, 164 Fed. 449, affd. *sub nom. Sharpe v. Allender* (C. C. A., 3d Cir.), 22 Am. B. R. 431, 170 Fed. 589.

Examination of books.—Where at the time a bank received a chattel mortgage on hotel equipment as security from bankrupt, its cashier, after personally inspecting the hotel equipment and bankrupt's books, checking up the greater part of bankrupt's liabilities and the bills of cost for the property, was satisfied that bankrupt was solvent, the bank became entitled to the benefit of the rule that reasonable cause to believe that a transfer and the effect of its enforcement will operate as a preference does not exist where the creditor examines the debtor's books which do not reveal insolvency. *Dougherty v. First National Bank of Canton* (C. C. A., 6th Cir.), 28 Am. B. R. 263, 197 Fed. 241.

236. *Off v. Hakes* (C. C. A., 7th Cir.), 15 Am. B. R. 696, 142 Fed. 364; *Carey v. Donohue* (C. C. A., 6th Cir.), 31 Am. B. R. 210, 209 Fed. 238, *revd.* on other grounds, 240 U. S. 430, 36 Am. B. R. 704, 60 L. Ed. 726, 36 Sup. Ct. 386; *Heyman v. Third National Bank* (D. C., N. Y.), 32 Am. B. R. 716, 216 Fed. 685; *Batchelder v. Home Nat'l Bank* (Sup. Jud. Ct., Mass.), 32 Am. B. R. 555, 105 N. E. 1052.

Knowledge inferred.—Whether or not there was reasonable cause to believe that a preference was intended may be inferred from all the facts and circumstances of the case, but their determination must be something more than a guess, and the transferee must have had more than reasonable cause to suspect. *Forbes v. Howe*, 102 Mass. 427.

The court in *In re Eggert* (C. C. A., 7th Cir.), 4 Am. B. R. 449, 102 Fed. 735, affg. 3 Am. B. R. 541, 98 Fed. 843, reviews the authorities very exhaustively and comes to

equivalent of reasonable cause to suspect.²³⁷ The creditor is not to be charged with knowledge of his debtor's financial condition from mere non-payment of his debt, or from circumstances, which give rise to mere suspicion in his mind of possible insolvency.²³⁸ If the bankrupt was concededly unbusinesslike

the following conclusion, per Jenkins, J.: "The resultant of all these decisions we take to be this: That the creditor is not to be charged with knowledge of his debtor's financial condition from mere non-payment of his debt, or from circumstances, which give rise to mere suspicion in his mind of possible insolvency; that it is not essential that the creditor should have actual knowledge of a belief in his debtor's insolvency, but that he should have reasonable cause to believe his debtor to be insolvent; that if facts and circumstances with respect to the debtor's financial condition are brought home to him, such as would put an ordinarily prudent man upon inquiry, the creditor is chargeable with knowledge of the facts which such inquiry should reasonably be expected to disclose." This case was followed and approved in *Stuart v. Farmers' Bank of Cuba City* (Sup. Ct., Wis.), 21 Am. B. R. 403, 177 N. W. 820.

In the case of *Newman v. Tootle-Campbell Dry Goods Co.* (Mo. Ct. of App.), 31 Am. B. R. 399, 160 S. W. 825, the court said: "Judicial expressions on the subject of what will and what will not constitute constructive knowledge emphasize the distinction between notice of facts and circumstances which would incite a man of ordinary prudence to an inquiry under similar circumstances and notice of circumstances that would merely excite suspicion. The former is equivalent to notice of all facts which a reasonably diligent inquiry would disclose (*Coder v. McPherson* [C. C. A., 8th Cir.], 18 Am. B. R. 123, 152 Fed. 951, 82 C. C. A. 99), while the matter is deemed insufficient to constitute reasonable cause to believe that a preference is intended, and will not put the creditor upon inquiry."

Suspicion and fear alone insufficient.—Proof of knowledge or notice of facts which give a creditor, or a person to be benefited by a preference, reasonable cause to believe at the time of the transfer that it is intended to give a preference thereby, is indispensable to the establishment of a voidable preference. Suspicion, fear and facts that arouse suspicion and fear in the mind of the creditor, or the party to be benefited, but give no reasonable ground for him to believe that a preference is intended by the transfer, do not make such a preference voidable. *Stern v. Paper* (C. C. A., 8th Cir.), 28 Am. B. R. 592, 198 Fed. 642.

237. *Putnam v. U. S. Trust Co.* (Mass. Sup. Ct.), 36 Am. B. R. 658, 111 N. E. 969, in which it was held that it is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of the facts as to induce a reasonable belief of his debtor's insolvency.

Mere suspicion is not sufficient to charge creditors with knowledge of, or reasonable cause to believe their debtor insolvent at the time of receipt of payments from him. There must be evidence of facts sufficient to put a reasonably prudent person upon inquiry, which if pursued would show that the debtor was insolvent and that a preference would result from the payments. *Nichols v. Elken et al.* (C. C. A., 8th Cir.), 35 Am. B. R. 365, 225 Fed. 689.

238. *First Nat. Bank of Philadelphia v. Abbott* (C. C. A., 8th Cir.), 21 Am. B. R. 436, 165 Fed. 853; *Arthur v. Harrington* (D. C., N. Y.), 32 Am. B. R. 216, 211 Fed. 215; *Beall v. Bank of Bowden* (D. C., Ga.), 34 Am. B. R. 186, 219 Fed. 216.

Suspicion that preference will result.—The well-settled rule of law is that mere grounds of suspicion that a debtor is insolvent or that a payment made by him is intended to create a preference are insufficient to establish the fact that the creditor who received it has reasonable cause to believe that a preference was intended thereby. There must be substantial evidence of reasonable grounds for such belief. *Sparks v. Marsh* (D. C., Ala.), 24 Am. B. R. 280, 177 Fed. 739; *Grant v. National Bank*, 97 U. S. 80, 24 L. Ed. 971; *Stucky v. Masonic Savings Bank*, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640; *Hussey v. Richardson-Roberts Dry Goods Co.* (C. C. A., 8th Cir.), 17 Am. B. R. 511, 148 Fed. 598, 78 C. C. A. 370; *Tumlin v. Bryan* (C. C. A., 5th Cir.), 21 Am. B. R. 319, 165 Fed. 166, 91 C. C. A. 200, 21 L. R. A. (N. S.) 960; *First National Bank v. Abbott* (C. C. A., 8th Cir.), 21 Am. B. R. 436, 165 Fed. 852, 91 C. C. A. 538.

In *Grant v. National Bank*, 97 U. S. 80, 24 L. Ed. 971, Mr. Justice Bradley, speaking of the provision "having reasonable cause to believe such person insolvent" in the Bankruptcy Act of 1867, said:

"It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt."

A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further. He may feel anxious about his claim and have a strong desire to secure it, and yet such belief as the Act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances, is not prohibited by the law. . . . Hence the Act, very wisely, as we think, instead of making a payment or a security

and slovenly in his business transactions, a failure to maintain his credit by prompt payments and a shortness of cash and absence of free capital, continuing for a long period without insolvency are not of themselves sufficient to put on inquiry all who deal with him.²³⁹ If the suspicion is based upon facts which would incite an intelligent business man to an inquiry which would have disclosed that the transfer would effect a preference, it is equivalent to "reasonable cause to believe," within the meaning of the section.²⁴⁰

(6) KNOWLEDGE OF INSOLVENCY.—(I) *Effect of amendment of 1910.*—Prior to the amendment of 1910, to make a transfer such a preference as is voidable under § 60-b it must have been actually intended on the debtor's part, or there must have existed what the law regards as the equivalent of such an actual intent on his part, and such an intent is not to be conclusively presumed from the mere fact that the debtor knows himself to be insolvent.²⁴¹ The amendment of 1910 obviates the requirement of proof of intent on the part of the debtor, but retains the requirement of insolvency.

(II) *Presumption where fact of insolvency is known.*—If insolvency is known to exist, or if the creditor had reasonable cause to believe that it existed, he will be presumed to have "reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference." While proof of belief in insolvency is not now necessary,²⁴² the element of insolvency should appear, for it will be impossible to show that there is a reasonable cause to believe that a preference will be effected by the transaction, unless it is shown that

void for a mere suspicion of the debtor's insolvency, requires, for that purpose, that his creditor should have some reasonable cause to believe him insolvent. He must have a knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinarily intelligent man."

Suspicion and fear, and facts that arouse suspicion and fear in the mind of the creditor, but give no reasonable ground for him to believe that the debtor intends a preference by his payment or security, do not make such a preference voidable. *Powell v. Gates City Bank* (O. C. A., 8th Cir.), 24 Am. B. R. 316, 178 Fed. 609; *Kimmerle v. Farr* (C. C. A., 6th Cir.), 26 Am. B. R. 818, 189 Fed. 295.

It is not enough that a creditor have some cause to suspect the insolvency of his debtor, but he must have such a knowledge of fact as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debts. *In re Carlile* (D. C., N. Car.), 29 Am. B. R. 373, 199 Fed. 612.

The mere failure to meet a note promptly is not sufficient in itself to place a creditor on inquiry especially when the bankrupt had a good business and was apparently making money. *Voorhees v. Nat'l Shawmut Bank* (Sup. Ct., Mass.), 32 Am. B. R. 400, 105 N. E. 382.

²³⁹ *Brookheim v. Greenbaum* (C. C. A., 2d Cir.), 34 Am. B. R. 686, 225 Fed. 635, in which it was sought to set aside a payment by the bankrupt of \$1,200 a few weeks before bankruptcy, upon the ground that it con-

stituted a voidable preference; it appeared that the bankrupt was doing a large business during the time in question and was most of the time in financial difficulty owing to the slipshod manner in which he transacted his business; that he kept no complete books, was always borrowing and requesting defendant to endorse his checks; that he had dealt with the defendant for many years; that the payment in question was on a note which had run for about twenty months, and that such payments had frequently been made before. It was held that the evidence was insufficient to charge the defendant with notice of the bankrupt's insolvency.

²⁴⁰ *Stern v. Paper* (D. C., No. Dak.), 25 Am. B. R. 451, 183 Fed. 228.

Effect of failure to make inquiry.—If the degree of knowledge is such as to engender fear that the transfer will effect a preference, so strong that the preferred creditor refrains from availing himself of the means at hand for ascertaining the truth, in order to keep himself in the dark in regard thereto and to be in a position to claim that he did not have reasonable cause to believe that the transfer to him would work to a preference, the case is covered by the statute. *Ogden v. Reddish* (D. C., Ky.), 29 Am. B. R. 531, 200 Fed. 977.

²⁴¹ *In re Mayo Contracting Co.* (D. C., Mass.), 19 Am. B. R. 551, 157 Fed. 469.

²⁴² *In re H. C. King Co.* (D. C., Mass.), 7 Am. B. R. 619, 113 Fed. 110. But see *Des Moines Sav. Bank v. Morgan Co.*, 12 Am. B. R. 781, 123 Iowa 432.

the person receiving it had reasonable cause to believe that the debtor was insolvent.²⁴³

(III) *Proof of reasonable cause to believe insolvency.*—Knowledge of insolvency is not necessary, nor even a belief, but simply reasonable cause to believe that the debtor was insolvent when the preference was given.²⁴⁴ Reasonable cause to believe a preference intended will be imputed where the circumstances are such that the creditor must have known the purpose and effect of the transfer.²⁴⁵ It has been held sufficient that a transfer of the insolvent's property is made, which has the effect to give a preference, and that the party who receives it has reasonable cause to believe that it is intended by the party who procures the transfer, or who gives to the transfer the effect of a preference, that it should have that effect, although the insolvent is innocent of that intention.²⁴⁶ It is not necessary for a creditor to know or have reasonable cause to believe that the debtor was insolvent, where a mortgage or pledge is made, within the four months' period, to secure an antecedent debt.²⁴⁷ The reasonable cause to believe must have existed either before or at the time the

243. Ex post facto knowledge that the debtor was, at the time of the preference, insolvent is not material, nor does it matter, *per se*, what knowledge the debtor had on the subject. The test is whether the creditor who is charged with having received a voidable preference had at the time of receiving it such information as ought to have led a reasonably prudent man to the conclusion that a preference was thereby intended. *In re Pfaffinger* (D. C., Ky.), 18 Am. B. R. 807, 154 Fed. 528; *Hewitt v. Boston Straw Board Co.* (Mass. Sup. Ct.), 31 Am. B. R. 652, 101 N. E. 424; *First Nat'l Bank of Cleveland v. Orten* (Sup. Ct., Okla.), 33 Am. B. R. 108, 142 Pac. 1096.

244. Merchants' National Bank v. Cook, 95 U. S. 346, 24 L. Ed. 412; *In re McDonald* (D. C., So. Car.), 24 Am. B. R. 446, 178 Fed. 487, *affd.* 25 Am. B. R. 948; *Shale v. Farmers' Bank* (Sup. Ct., Kans.), 25 Am. B. R. 888, 109 Pac. 408; *In re Gibson* (D. C., So. Dak.), 27 Am. B. R. 401, 191 Fed. 665; *Dougherty v. First Nat. Bank* (C. C. A., 6th Cir.), 28 Am. B. R. 263, 197 Fed. 241. See Am. B. R. Dig. § 513.

Reasonable cause to believe insolvency.—Where a preference is given, the transaction is voidable by the trustee, if there are sufficient facts and circumstances having significance in reference to the debtor's financial condition, brought home to the preferred creditor or which he must or ought to have seen or known, to put him on inquiry, which, followed up, would inform him of the insolvency. *Spencer v. Nekemoto* (D. C., Hawaii), 24 Am. B. R. 517.

A creditor cannot be said to have had reasonable cause to believe a preference is effected unless the evidence shows that he knew, or ought to have known, the substantial truth as to the bankrupt's financial condition. *In re Houghton Web Co.* (D. C., Mass.), 26 Am. B. R. 202, 185 Fed. 213.

Inquiry of debtor as to financial condition.

—Where the duty of inquiry as to his debtor's solvency is imposed upon a creditor, it is not met by inquiry alone of the debtor whose answer, in the circumstances of the case, could readily have been found to be untrue. *McGirr v. Humphreys Grocery Co.* (D. C., Ohio), 26 Am. B. R. 518, 192 Fed. 55.

Merely cursory inquiries made of the bankrupt as to his financial condition do not meet the requirement as to investigation. *Gering v. Leyda* (C. C. A., 8th Cir.), 26 Am. B. R. 137, 186 Fed. 110.

245. Wilson v. Mitchell-Woodbury Co. (Mass. Sup.), 31 Am. B. R. 837, 102 N. E. 119; *Russell's Trustee v. Mayfield Lumber Co.* (Ct. of App., Ky.), 32 Am. B. R. 357, 164 S. W. 733.

The treasurer of a corporation is presumed to know its true financial condition. *Matter of Silvernail* (D. C., Kan.), 33 Am. B. R. 59, 218 Fed. 979.

Subsequent discovery of insolvency.

The receipt of a chattel mortgage as security for an existing debt, within four months of the bankruptcy of the mortgagor, does not constitute a voidable preference, where the mortgagee after due inquiry thought the mortgagor solvent, although it was subsequently found that he was insolvent. *Matter of Gaylord* (D. C., N. Y.), 35 Am. B. R. 544, 225 Fed. 234.

246. Benedict v. Dessel, 11 Am. B. R. 20, 177 N. Y. 1, 68 N. E. 999; *Parker v. Black* (D. C., N. Y.), 16 Am. B. R. 202, 143 Fed. 560. Compare *In re Andrews* (C. C. A., 1st Cir.), 16 Am. B. R. 387, 144 Fed. 922, holding in effect that it is necessary to show that the debtor actually intended to give a preference, unless there exists what the law regards as the equivalent thereof; otherwise the reasonable cause to believe that there was such intention cannot exist.

247. In re Mills Co. (D. C., N. Car.), 20 Am. B. R. 501, 162 Fed. 42; *In re Bailey & Son* (D. C., Pa.), 21 Am. B. R. 911, 166 Fed. 982.

payment was made; so where a note payable at a bank was "certified" as paid out of the bankrupt's deposits in the bank on the day of maturity, and the same day the creditor was informed as to the bankrupt's insolvency, evidence showing that the note was certified prior to receiving such information will disprove the intent to prefer.²⁴⁸

(IV) *Belief of insolvency question of fact; burden of proof.*—Whether or not the creditor has reasonable cause to believe the debtor insolvent is a question of fact²⁴⁹ for the jury, and where the evidence justified a submission of the question, the finding of the jury is not reviewable.²⁵⁰ Direct evidence of the creditor's knowledge of his debtor's insolvency, or of cause to believe that a preference will result from the transfer, is not essential; the creditor comes within the inhibition where the substantial and material facts are of such significance that the creditor knew or ought to have known of the bankrupt's financial condition.²⁵¹ Where the referee and bankruptcy court have considered the conflicting evidence as to the reasonable cause to believe that a preference was intended, their finding should not be disturbed, unless it clearly appears that they have fallen into some error of law or have committed some serious mistake of fact in reaching their conclusion.²⁵² The burden of showing that the person receiving the preference had knowledge or reasonable cause to believe that the debtor was insolvent is upon the trustee.²⁵³

248. *Matter of Frazin and Oppenheim* (C. C. A., 2d Cir.), 29 Am. B. R. 214, 201 Fed. 86.

Time of belief as to insolvency.—The question of insolvency and knowledge thereof is to be determined as of the date when a chattel mortgage, alleged to be a preference was filed for record, and this date is to be adopted for the purpose of determining the four months' period and the legality of the preference. *Matter of Bunch, Commission Co.* (D. C., Kan.), 35 Am. B. R. 526, 225 Fed. 243. In a suit by a trustee in bankruptcy to recover alleged preferential payments and transfers, the solvency or insolvency of the bankrupt must be determined as of the date of the payments and transfers. *Rosenman v. Coppard* (C. C. A., 5th Cir.), 35 Am. B. R. 786, 228 Fed. 114.

249. *Hackney v. Raymond Bros. Clarke Co.* (Sup. Ct., Nebr.), 10 Am. B. R. 213, 214, 68 Neb. 624, 94 N. W. 822, 99 N. W. 675; *Laundry v. First Nat. Bank* (Sup. Ct., Kan.), 11 Am. B. R. 233, 66 Kan. 750, 71 Pac. 259; *Deland v. Miller & Cheney Bank*, 11 Am. B. R. 744, 119 Iowa 368, 93 N. W. 304; *In re Andrews* (D. C., Mass.), 14 Am. B. R. 247, 135 Fed. 599; *Thomas v. Adelman* (D. C., N. Y.), 14 Am. B. R. 510, 136 Fed. 973; *Upson v. Mount Morris Bank*, 14 Am. B. R. 6, 103 N. Y. App. Div. 367, 92 N. Y. Supp. 1101; *Wetstein v. Francisus* (C. C. A., 2d Cir.), 13 Am. B. R. 326, 133 Fed. 900; *Turner v. Fisher* (D. C., Cal.), 13 Am. B. R. 243, 133 Fed. 594; and is not reviewable by the Supreme Court; *Kaufman v. Tredway*, 195 U. S. 271, 12 Am. B. R. 602, 49 L. Ed. 190, 25 Sup. Ct. 33; *Kentucky Bank & Trust Co. v. Pritchett* (Sup. Ct., Okla.), 33 Am. B. R. 190, 143 Pac. 338; *Jacobs v. Saperstein* (Mass. Sup. Ct.), 38 Am. B. R. 405, 114 N. E. 360.

250. *Ridge Ave. Bank v. Sundheim* (C. C. A., 3d Cir.), 16 Am. B. R. 863, 145 Fed. 798; *Coleman v. Decatur Egg Case Co.* (C. C. A., 8th Cir.), 26 Am. B. R. 248, 251, 186 Fed. 136; *Utah Assn. of Credit Men v. Boyle Furniture Co.* (Sup. Ct., Utah), 26 Am. B. R. 867, 117 Pac. 800; *Shale v. Farmers' Bank* (Sup. Ct., Kans.), 25 Am. B. R. 888, 109 Pac. 408.

251. *Jacobs v. Saperstein* (Mass. Sup. Ct.), 38 Am. B. R. 405, 114 N. E. 360.

252. *Brookheim v. Greenbaum* (C. C. A., 2d Cir.), 34 Am. B. R. 686, 225 Fed. 635; *Kentucky Bank & Trust Co. v. Pritchett* (Sup. Ct., Okla.), 33 Am. B. R. 190, 143 Pac. 338; *Coder v. Arts* (C. C. A., 2d Cir.), 18 Am. B. R. 523, 152 Fed. 943; *First Nat. Bank of Philadelphia v. Abbott* (C. C. A., 8th Cir.), 21 Am. B. R. 436, 165 Fed. 853.

Findings of fact as to an alleged voidable preference by a trial court, after consideration of conflicting evidence, will be presumed to be correct, and this presumption is materially strengthened by the master's prior findings to the same effect. *Boswell National Bank v. Simmons* (C. C. A., 8th Cir.), 26 Am. B. R. 865, 190 Fed. 735; *Nichols v. Elken et al.* (C. C. A., 8th Cir.), 35 Am. B. R. 365, 225 Fed. 689.

253. *Clifford v. Morrill* (D. C., Mass.), 36 Am. B. R. 805, 230 Fed. 190.

The burden is on the trustee to show that the defendant had reasonable cause to believe that the payment to it would effect a preference. Where what is shown would merely create in the defendant a suspicion that bankrupt was merely unable to pay his debts, the fact that it had "reasonable cause to believe" is not proved. *Beall v. Bank of Bowden* (D. C., Ga.), 34 Am. B. R. 186, 219 Fed. 316.

(V) *Payments by insolvent in ordinary course of business.*—Payments made by the debtor, even while insolvent, and received by the creditor, without any intent to injure the other creditors is not a voidable preference.²⁵⁴ Payments received by a creditor on promissory notes or on account, in the ordinary transaction of business with an insolvent, are not necessarily voidable, even if the creditor did not make inquiry as to the financial standing of his debtor. The acceptance of such payments with no special purpose of obtaining an advantage over other creditors and in accordance with the creditor's general method of collecting outstanding accounts, will not subject him to liability; in such a case there may well be an absence of knowledge or reasonable cause to believe that the debtor was insolvent, or that a preference was effected by such payments.²⁵⁵ Thus, where a bankrupt, prior to adjudication makes small payments on outlawed debts for the purpose of reviving them, the persons receiving such payments having no reasonable cause to believe that preferences would result, such payments are not fraudulent as to the other creditors and may not be avoided as preferences.²⁵⁶

(VI) *Knowledge of debtor's financial difficulties.*—A creditor has reasonable cause to believe a debtor to be insolvent when such a state of facts is brought to the creditor's notice, respecting the affairs and pecuniary condition of the debtor, as would lead a prudent business person to the conclusion that he is unable to meet the payment of his obligations as they mature in the ordinary course of business.²⁵⁷ Where the creditor knew that the debtor's business was bad, and it was necessary to continually press the debtor for payment, the creditor may be said to have had reasonable cause to believe that the debtor was insolvent and that a preference was intended.²⁵⁸ Where a creditor has

254. *In re First Nat. Bank of Louisville* (C. C. A., 6th Cir.), 18 Am. B. R. 766, 155 Fed. 100; *Hardy v. Gray* (C. C. A., 1st Cir.), 16 Am. B. R. 387, 144 Fed. 922; *Tumlin v. Bryan* (C. C. A., 5th Cir.), 21 Am. B. R. 319, 165 Fed. 166.

Payments on notes during insolvency.—Where the only thing to affect claimants holding notes of the bankrupts with notice of the bankrupts' insolvency was the fact that during the year prior to bankruptcy these notes had gone to protest with considerable frequency, it was insufficient to render payments made on such notes during the four months' period voidable as preferences, particularly where claimant had gone to see the bankrupts about one of these protested notes and had been told that the plant was under better management and that in the future bankrupts would be able to pay their bills more promptly. *In re Deutschle & Co.* (D. C., Pa.), 25 Am. B. R. 348, 182 Fed. 435.

255. *Nichols v. Elkins* (C. C. A., 8th Cir.), 35 Am. B. R. 365, 225 Fed. 689; *Butterfield v. Woodman* (C. C. A., 1st Cir.), 34 Am. B. R. 510, 223 Fed. 956; *Wolff Mfg. Co. v. Ratheal Shoe Co.* (Mo. Kans. City App.), 35 Am. B. R. 895, 180 S. W. 396; *Matter of Soferenko* (D. C., Mass.), 32 Am. B. R. 32, 210 Fed. 562; *Grandison v. Robertson* (D. C., N. Y.), 34 Am. B. R. 609, 220 Fed. 985.

256. *In re Banks* (D. C., N. Y.), 31 Am. B. R. 270, 207 Fed. 662.

257. *Patterson v. Boher Grocery Co.* (Sup. Ct., Ore.), 33 Am. B. R. 740, 144 Pac. 673.

Knowledge by a creditor that payments to him are out of funds which, if liquidation were had, would be needed equally by other creditors brings him within the language of section 60-b, making a transfer voidable. *Schener v. Katsoff* (D. C., N. Y.), 37 Am. B. R. 476, 233 Fed. 473.

258. *Thomas v. Adelman* (D. C., N. Y.), 14 Am. B. R. 510, 136 Fed. 973. The mere fact of taking security is not of itself sufficient to show knowledge. *Matter of Alden* (Ref., Ohio), 16 Am. B. R. 362. Where a teller of a bankrupt bank cashes his own check against the funds of the bank, he will be held to have had knowledge of the insolvency of the bank, and the transaction constitutes a preference. *In re Plant* (D. C., Ga.), 17 Am. B. R. 272, 148 Fed. 37.

A debtor's fear about his credit should put a pressing creditor upon inquiry as to the situation of it and the necessity for it. He cannot neglect to investigate, be intent on security, and purposely ignorant and blind, or intend to be, of his circumstances until after he gets the security, and escape being held to have had reason to believe what the effect of the giving of it will be. *In re Coffey* (Ref., N. Y.), 19 Am. B. R. 148, 165. See *Dean v. Davis* (C. C. A., 4th Cir.), 31 Am. B. R. 808, 212 Fed. 88 (aff'd 38 Am. B. R. 664), where the creditor receiving the presence was urged to loan the money to meet a very urgent demand.

repeatedly pressed the debtor for the payment of his debt, and checks previously given therefor had been dishonored, the creditor has sufficient notice of the debtor's insolvency to render a transfer preferential.²⁵⁹ However, it has been ruled that the fact that a firm is unable to meet all its obligations as they fall due is not alone sufficient to cause a reasonable belief that it is insolvent.²⁶⁰ A bank may loan money on a bill of sale of the debtor's property to permit him to compromise with his creditors and to go on with his business, where upon investigation it appears that the debtor has sufficient property to pay his debts.²⁶¹ The fact that most of the bankrupt's indebtedness to a creditor was past due at the time of a payment on account within the four months' period is not sufficient to charge the creditor with notice of the bankrupt's insolvency, and that a preference was intended.²⁶²

(VII) *Pleading cause to believe insolvency.*—Where in an action to recover a preference the complaint alleges that the defendant had reasonable cause to believe that his debtor was insolvent; an averment in defense that the defendant had no knowledge of the debtor's insolvency is insufficient.²⁶³

(7) *PURPOSE AND EFFECT TO BE CONSIDERED.*—Courts cannot permit to be done by indirection what the law forbids to be directly done, and, without regard to the form, they consider the purpose and effect of the transaction however devious the ways by which it is accomplished.²⁶⁴ Under the former law, any transfer out of due course of trade was *prima facie* evidence of fraud;²⁶⁵ even in the absence of this provision, the same rule probably applies to preferences under the law of 1898.²⁶⁶ The amendment of 1903 provided in effect that, in order to make a payment a preference, it must have been made by the debtor with intent to prefer, and the creditor who received it must have had reasonable cause to believe that a preference was intended,²⁶⁷ and the amendment of 1910 has still further emphasized the importance of

259. *Grandison v. Nat. Bank of Commerce*, (D. C., N. Y.), 34 Am. B. R. 497, 220 Fed. 981, in which the evidence showed that the bank had pressed for payment of its indebtedness, and that discounted notes and a draft had been protested for nonpayment and were not renewed until several weeks thereafter, and it was held that transfers of book accounts to secure the payment of the indebtedness were preferential. See also *Pittsburg Plate Glass Co. v. Edwards* (C. C. A., 8th Cir.), 17 Am. B. R. 447, 148 Fed. 377; *Conners v. Bucksport Nat. Bank* (D. C., Me.), 32 Am. B. R. 882, 214 Fed. 847.

260. *Canthorn v. Burley State Bank* (Sup. Ct., Idaho), 33 Am. B. R. 794, 144 Pac. 1608.

261. *In re Bartlett* (D. C., Pa.), 22 Am. B. R. 891, 172 Fed. 679; *Shelton v. First Nat. Bank of Mannsville* (Sup. Ct., Okl.), 27 Am. B. R. 587, 31 Okla. 217.

262. *In re Goodhile* (D. C., Iowa), 12 Am. B. R. 374, 130 Fed. 782. In this case the court laid down the rule that under the present law the condition of the debtor's affairs must be known to be such that prudent business men would conclude that the aggregate of the debtor's property, at a fair valuation, was not sufficient to pay his debts, before there is a reasonable cause to believe that the debtor is insolvent, and

that a preference would, therefore, be the result of a payment while in such condition. See *Bardes v. First Nat. Bank*, 12 Am. B. R. 771, 122 Iowa 443; *Butler Paper Co. v. Goembel* (C. C. A., 7th Cir.), 16 Am. B. R. 26, 143 Fed. 295; *First Nat. Bank of Philadelphia v. Abbott* (C. C. A., 8th Cir.), 21 Am. B. R. 436, 165 Fed. 853.

263. *Plummer v. Myers* (D. C., Pa.), 14 Am. B. R. 805, 137 Fed. 660; *American Lumber, etc., Co. v. Taylor* (C. C. A., 3d Cir.), 14 Am. B. R. 231, 137 Fed. 321.

264. *Roberts v. Johnson* (C. C. A., 4th Cir.), 18 Am. B. R. 132, 136, 151 Fed. 567, 570; *Wickwire v. Webster City Bank* (Sup. Ct., Iowa), 27 Am. B. R. 157, 133 N. W. 100; *Johnson v. Hanley Hoyer Co.* (D. C., R. I.), 26 Am. B. R. 748, 188 Fed. 752; *Morris v. Tannenbaum* (Ref., N. Y.), 26 Am. B. R. 368; *In re McDonald & Sons* (D. C., S. Car.), 24 Am. B. R. 446, 178 Fed. 487, *aff'd* 25 Am. B. R. 948, 184 Fed. 986.

265. Act of 1867, § 35, R. S. § 5130.

266. *Walbrun v. Babbitt*, 16 Wall. 577. Compare *In re Eggert* (D. C., Wis.), 3 Am. B. R. 541, 98 Fed. 843; *In re Andrews* (C. C. A., 1st Cir.), 16 Am. B. R. 387, 144 Fed. 922.

267. *Rutland Co. Nat. Bank v. Graves* (D. C., Vt.), 19 Am. B. R. 446, 156 Fed. 168.

the effect of the payment, by making it a preference, if the creditor receiving it had reasonable cause to believe that a preference would be thereby effected.

(8) EVIDENCE OF REASONABLE CAUSE TO BELIEVE.—Where there is no evidence tending to show that a creditor had reasonable cause to believe that payments made by the bankrupt would result in a preference a recovery cannot be had;²⁶⁸ the law presumes that such payments are legal and the burden of proof is on the trustee, seeking to recover them, to overcome this presumption.²⁶⁹ This burden may be shifted to the person to whom the transfer was made, where it appears that the parties are relatives and the circumstances were such as to put the transferee upon his guard.²⁷⁰ Payments by a concern

268. *Keith v. Gettysburg Nat. Bank*, 10 Am. B. R. 762, 23 Pa. Super. Ct. 14; *In re Neill-Pickney-Maxwell Co.* (D. C., Pa.), 22 Am. B. R. 401, 170 Fed. 481; *Matter of States Printing Co.* (C. C. A., 7th Cir.), 38 Am. B. R. 526, 238 Fed. 775.

269. *See Deland v. Miller & Cheney Bank*, 11 Am. B. R. 744, 119 Iowa 368; *Getts v. Janesville Grocery Co.* (D. C., Wis.), 21 Am. B. R. 5, 163 Fed. 417; *Feilbach Co. v. Russell* (C. C. A., 6th Cir.), 37 Am. B. R. 285, 233 Fed. 412; *Rosenman v. Coppard* (C. C. A., 5th Cir.), 35 Am. B. R. 786, 228 Fed. 114.

Reasonable cause to believe must be proven.—The plaintiff must prove, in order to establish his cause of action, that when the creditor received the payment he had reasonable ground to believe that it was intended as a preference. *Benedict v. Deshel*, 11 Am. B. R. 29, 177 N. Y. 1, 68 N. E. 999; *In re Leach* (C. C. A., 6th Cir.), 22 Am. B. R. 600, 171 Fed. 622; *Harder v. Clark* (City Ct., N. Y.), 23 Am. B. R. 756, 66 Misc. 584, 123 N. Y. Supp. 1102; *Reber v. Schulman & Bro.* (D. C., Pa.), 24 Am. B. R. 782, 179 Fed. 574, *affd.* 25 Am. B. R. 475, 183 Fed. 564; *Kimmerle v. Farr* (C. C. A., 6th Cir.), 26 Am. B. R. 818, 823, 189 Fed. 295, *citing* *text Jackson v. Sedgwick* (D. C., N. Y.), 26 Am. B. R. 836, 189 Fed. 508; *Beall v. Bank of Bowden* (D. C., Ga.), 34 Am. B. R. 186, 219 Fed. 316; *In re Hull* (D. C., Ohio), 34 Am. B. R. 447, 224 Fed. 796; *Dunlap v. Seattle Nat. Bank* (Wash. Sup. Ct.), 38 Am. B. R. 937, 161 Pac. 364; and in the case of *Pyle v. Texas Transportation and Terminal Co.*, 238 U. S. 90, 34 Am. B. R. 843, 59 L. Ed. 1215, 35 Sup. Ct. 667, it was stated that "whether such 'reasonable cause to believe' existed is a question of fact and the burden of proof is upon the trustee." In such case it appeared that cotton exporters drew drafts on a foreign bank and attached thereto forged railroad bills of lading and the drafts were paid by the bank. The exporters thereafter shipped cotton, taking port bills of lading, which were delivered to the bank to be substituted for the forged bills of lading. Before the cotton had left this country, the exporters were adjudicated bankrupts, and the trustee in bankruptcy brought an action against the foreign bank, the steamship company on which the cotton was shipped, and its agent in whose possession the cotton then was, to recover the same on the ground

that the shipment constituted a voidable preference. The evidence was examined and held insufficient to establish that the defendant bank had "reasonable cause to believe" that by transferring the genuine bills of lading to them, a preference was intended or given within the meaning of this section. *Soule v. First Nat'l Bank* (Sup. Ct., Idaho), 32 Am. B. R. 536, 140 Pac. 1098.

Burden of proof of elements of a voidable preference.—In order to recover an alleged preference a trustee in bankruptcy must show by a preponderance of evidence (1) that the alleged preferential transfer was made within four months of the filing of the petitions in bankruptcy; (2) that bankrupt was insolvent at the time of the transfer within the provisions of the bankruptcy act; (3) that the creditor knew, or had reasonable cause to believe, that bankrupt was insolvent and that such transfer was intended as a preference and (4) that the effect of the transfer was to give the preferred creditor a greater percentage of his claim than other creditors of the same class could obtain from the bankrupt's estate if the transfer is permitted to stand. *Utah Assn. of Credit Men v. Boyle Furniture Co.* (Sup. Ct., Utah), 26 Am. B. R. 867, 17 Pac. 800.

The burden of proof is on the trustee alleging the invalidity or voidability of the transfer. He must prove the insolvency of the debtor, at the time the security was given, and establish the existence of other creditors of the same class at that time, and that the enforcement of the security or transfer will operate to give them a lesser percentage of their debt than the secured creditor will receive by reason of the security given by such debtor, and he must also prove the existence of the "reasonable cause to believe." All this must be done by a fair preponderance of all the evidence in the case, and where inferences from proved facts are to be drawn, the rule obtains that if two inferences of substantially equal weight may reasonably be drawn from the proved facts, then that inference shall prevail which sustains the transfer or security. *Matter of Gaylord* (D. C., N. Y.), 35 Am. B. R. 544, 225 Fed. 234.

270. *In re Sanger* (D. C., W. Va.), 22 Am. B. R. 145, 169 Fed. 722, in which case it appeared that a sister-in-law of one of two partners loaned him money on several

which has suffered a complete loss of its stock of goods, and has suspended business and is in course of liquidation, are presumptively made for the purpose of preference.²⁷¹ The unrequested repayment of a loan, with a letter stating that the money can no longer be used, is not sufficient alone to establish reasonable cause to believe that a preference will be effected.²⁷² The protest of a debtor's checks, however, long continued, is sufficient to put a bank on inquiry as to the debtor's financial condition.²⁷³ Evidence that a judgment was paid out of the proceeds of the sale of real estate in an effort to obtain funds to accomplish a compromise with creditors of the bankrupt, which was abandoned because of the insanity of the bankrupt, the transaction appearing to have been in good faith, does not show that a preference was intended or that the payment was accepted in the belief that a preference would result.²⁷⁴ What constitutes reasonable cause to believe may depend upon the circumstances of the case; direct evidence is not essential.²⁷⁵

(9) SALE OF ENTIRE STOCK.—The sale of an entire stock of goods of a retail merchant is a suspicious circumstance *per se*, naturally calculated to put the purchaser on inquiry.²⁷⁶ Such a purchase is presumptively questionable,

occasions, upon the understanding that security would be given therefor, and less than a month prior to his adjudication she received a promissory note of the firm, secured by a deed of trust upon certain personal property, and it was held that the burden is upon her, in seeking to establish a lien under said deed, to show that the transaction was in good faith and without knowledge on her part of the grantor's insolvency.

271. *In re Leader* (D. C., Ark.), 26 Am. B. R. 688, 674, 190 Fed. 624.

272. *Wright v. Sampter* (D. C., N. Y.), 18 Am. B. R. 355, 358, 152 Fed. 196.

273. *Connors v. Brockport Nat'l Bank* (D. C., Maine), 32 Am. B. R. 882, 214 Fed. 847.

274. *Templeton v. Wollens* (C. C. A., 2d Cir.), 29 Am. B. R. 208, 200 Fed. 257.

275. *Whitwell v. Wright* (N. Y. App. Div.), 23 Am. B. R. 747, 136 App. Div. 246, 120 N. Y. Supp. 1065; *Coleman v. Decatur Egg Case Co.* (C. C. A., 8th Cir.), 26 Am. B. R. 248, 186 Fed. 136; *Jacobs v. Saperstein* (Mass. Sup. Ct.), 38 Am. B. R. 405, 114 N. E. 360; *Batchelder v. Home Nat. Bank* (Mass. Sup. Ct.), 32 Am. B. R. 555, 105 N. E. 1052.

276. *In re Knopf* (D. C., S. Car.), 16 Am. B. R. 432, 146 Fed. 109; *Dokken v. Page* (C. C. A., 8th Cir.), 17 Am. B. R. 228, 147 Fed. 438; *Allen v. McMannes* (D. C., Wis.), 19 Am. B. R. 276, 156 Fed. 615; *McElvain v. Hardesty* (C. C. A., 8th Cir.), 22 Am. B. R. 320, 169 Fed. 32; *Gering v. Leyda* (C. C. A., 8th Cir.), 26 Am. B. R. 137, 186 Fed. 110.

Sale of entire stock of goods.—Where a creditor after repeated efforts to secure payment of his claim of \$13,000, finally went to the bankrupt's place of business, and being told by the bankrupt that he was unable to pay a cent, persuaded the bankrupt to "sell" him practically the entire stock in trade, and the creditor made no

effort, by examination of books or questions to the bankrupt, to ascertain the financial condition of the latter, there was evidence upon which a jury might find that the creditor at the time of receiving the transfer had reasonable cause to believe a preference was intended to be given him. *Coleman v. Decatur Egg Case Co.* (C. C. A., 8th Cir.), 26 Am. B. R. 248, 186 Fed. 136.

Effect of sale of bankrupt's stock of goods; payment to release surety of co-maker of bankrupt's note.—Where bankrupt within the four months' period, while insolvent, and with intent to give a preference, which intent was known to defendant, sold to defendant his entire stock of goods and with the proceeds took up a note, for the amount of which defendant was bound to indemnify bankrupt's co-maker, the transfer was such that defendant was "benefited thereby" within the meaning of § 60 of the bankruptcy act, so as to render it a voidable preference, which the trustee in bankruptcy could recover in an action brought therefor, wherein the complaint alleged that defendant had received a preference, not in the disposition of the proceeds of the sale, but in the disposition of the stock itself. *Huntington v. Baskerville* (C. C. A., 8th Cir.), 27 Am. B. R. 219, 192 Fed. 813.

Sale of stock of goods in bulk.—A sale of a stock of goods in bulk in compliance with the State statute is not invalid under section 60-b, because one creditor was omitted by the vendor from his statement to the vendee, where the vendee acted in good faith in compliance with the State statute, because conveyances which are null and void as against creditors under State laws and are not in good faith and for a present fair consideration, and none other, are fraudulent and void under the provisions of the bankruptcy act. *Friend v. Rosenfeld-Rovig Co.* (Wash. Sup. Ct.), 35 Am. B. R. 678, 151 Pac. 776.

and casts the burden of proof on the purchaser to show that he had no notice of facts or circumstances sufficient to arrest his attention, puts him on inquiry, and requires him to use such means of knowledge as were at hand in order to learn whether the seller is not in financial difficulty, and whether a general statement, such as that the book accounts are insufficient to pay the mercantile creditors, was true.²⁷⁷

d. Belief or knowledge of agent or attorney.—Here the statute states the rule of law, *i. e.*, that any knowledge possessed by the agent of the creditor may be imputed to the latter;²⁷⁸ but not if, when acquired, the agent was acting in his own interest.²⁷⁹ And where the agent of the creditor is also the agent of the bankrupt, it may not be presumed that he will communicate his knowledge of the debtor's financial condition to the creditor.²⁸⁰ This general rule extends to such agents as attorneys-at-law,²⁸¹ but not where the attorney acquired it while acting as attorney for the debtor;²⁸² to sub-agents,²⁸³ but not, it seems, to attorneys of such sub-agents;²⁸⁴ and to credit men.²⁸⁵ This latter rule, though supported by high authority, may be doubted; it would leave a tempting loophole to the "diligent" creditor. The rule may, under certain conditions, be held to apply to the officer of a corporation, where he receives

^{277.} *Allen v. McMannes* (D. C., Wis.), 19 Am. B. R. 276, 280, 156 Fed. 615, and cases cited; *Dean v. Davis* (C. C. A., 4th Cir.), 31 Am. B. R. 808, 212 Fed. 88, *affd.* 38 Am. B. R. 664.

^{278.} *Rogers v. Palmer*, 102 U. S. 263, 26 L. Ed. 164; *Sage v. Wynkoop*, Fed. Cas. 12,215. See also *Babbitt v. Kelley*, 9 Am. B. R. 335, 95 Mo. App. 529, 70 S. W. 384; *Off v. Hakes* (C. C. A., 7th Cir.), 15 Am. B. R. 696, 142 Fed. 364; *In re Nassau* (D. C., Pa.), 15 Am. B. R. 793, 140 Fed. 912; *In re Hughes* (D. C., N. Y.), 25 Am. B. R. 556, 183 Fed. 872.

Knowledge of trustee of township imputed to township; scope of trustee's duties.—Knowledge of the insolvency of the treasurer of a township and of his indebtedness to the township by reason of defalcation coming to one of the trustees, a brother of the insolvent treasurer, is deemed to have come to such trustee officially and is imputable to the township. But where such trustee has knowledge of and participates in a scheme, where by means of the transfer of his homestead in fraud of other creditors, the insolvent treasurer pays his indebtedness to the township and thereby gives a preference, such fraudulent act, being without the scope of the trustee's official duties, will not be deemed to be the act of the township, in the absence of formal direction of the board of trustees as an organization. *Painter v. Township of Napoleon* (D. C., Ohio), 26 Am. B. R. 324, 190 Fed. 637.

^{279.} *Crooks v. People's Bank*, 3 Am. B. R. 238, 46 N. Y. App. Div. 335, 61 N. Y. Supp. 604; *Rogers v. American Halibut Co.* (Mass. Sup. Ct.), 31 Am. B. R. 576, 103 N. E. 689; *Matter of Miller* (D. C., Ohio), 34 Am. B. R. 275, 221 Fed. 471.

^{280.} **Agent who is also agent of bankrupt.**—While generally the knowledge of an agent of a creditor that his debtor is insolvent at

the time payments are made will be imputed to the principal, this rule does not apply where the agent of the creditor is at the same time closely connected with the bankrupt as a managing agent, for the reason that the agent's interests are at the time adverse to those of the principal and it cannot be presumed that he will communicate his knowledge of the debtor's financial condition to the creditor. *Scott County Milling Co. v. Powers* (Miss. Sup. Ct.), 38 Am. B. R. 725, 73 So. 792.

^{281.} *In re Ebert* (Ref., Wis.), 1 Am. B. R. 340; *In re Dunavant* (D. C., N. Car.), 3 Am. B. R. 41, 96 Fed. 542; *Rogers v. Palmer*, 102 U. S. 263, 26 L. Ed. 164; *Vogle v. Lathrop*, Fed. Cas. 16,985; *Brown v. Jefferson County Bank*, 9 Fed. 258; *Hewitt v. Boston Straw Board Co.* (Mass. Sup. Ct.), 31 Am. B. R. 652, 101 N. E. 424; *Connors v. Brockport Nat'l Bank* (D. C., Me.), 32 Am. B. R. 531, 200 Fed. 977.

Knowledge of creditor's agent of proposed assignment.—Where bankrupt gave a mortgage to a creditor to secure a pre-existing debt, which was withheld from record by the mortgagee's attorney, for ten days, the fact that before the mortgage was recorded bankrupt spoke to the mortgagee's attorney about making an assignment, which he did, in fact, subsequently make, is sufficient to charge the mortgagee with reasonable cause to believe that the mortgage would operate as a preference. *Ogden v. Reddish* (D. C., Ky.), 29 Am. B. R. 531, 200 Fed. 977.

^{282.} *In re Ebert* (Ref., Wis.), 1 Am. B. R. 340; *Mayer v. Hermann*, Fed. Cas. 9,344; *The Distilled Spirits*, 11 Wall. 356.

^{283.} *Storrs v. City of Utica*, 17 N. Y. 104.

^{284.} *Hoover v. Wise*, 91 U. S. 308, 23 L. Ed. 392.

^{285.} *Constam v. Haley* (C. C. A., 6th Cir.), 30 Am. B. R. 650, 206 Fed. 260.

a preference from another corporation of which he was at the time a stockholder.²⁸⁶ And it has been held that a bank which received a note from another bank for collection is an independent contractor and not an agent, and that therefore the knowledge of the agent of the bank which collected the note, in receiving payment of the note, that the payor was insolvent may not be imputed to the bank which transmitted the note for collection.²⁸⁷ But the knowledge of the president of a bank as to the bankrupt's financial condition will be imputed to the bank.²⁸⁸

e. Recovery of preference.—(1) **IN GENERAL.**—While all the elements of a voidable preference previously outlined exist, the property affected or its value may be recovered. But the proof must show that the bankrupt made the transfer with intent to prefer, and that the creditor who received them had reasonable cause to believe that a preference was intended.²⁸⁹ A transfer made with intent to give a preference may be set aside, even if recorded within the four months' period, for in a fraudulent transaction the grantee is presumed to be a party to the fraud, and does not occupy the position of an innocent holder for value.²⁹⁰ A trustee is entitled to recover property, transferred within the statutory period, under an agreement made anterior to such period, where it was in payment of an antecedent debt. But he has no right to recover exempt property or the proceeds thereof.²⁹¹ Where the directors of a corporation transferred to themselves, prior to the four months' period, assets of the corporation in payment of antecedent debts, such transfer is invalid under general principles, independent of the bankruptcy act, and may be recovered by the trustee.²⁹² The trustee of a bankrupt member of a partnership may not recover firm assets which have been transferred preferentially; the right to recover in such a case is that of the creditors of the firm.²⁹³ The creditor may, in certain cases, retain possession of the property transferred pending the determination of the question as to whether the transfer was preferential.²⁹⁴ And if an actual present consideration was advanced by the creditor at the time of the transfer, he may be permitted to retain so much of the proceeds of the sale of the property as will compensate him for such advancement.²⁹⁵ The action of a referee in bankruptcy allowing or disallowing a claim is a judgment, final in the absence of a review; but, where there was no express adjudication that a preference was not created and the record clearly repels all implication of such determination, the trustee is not prevented from suing to recover a preference from the creditor whose claim was

²⁸⁶ *Benner v. Blumauer-Frank Drug Co.* (D. C., Wash.), 28 Am. B. R. 798, 197 Fed. 363.

Knowledge of officer of corporation.—The knowledge of the secretary and treasurer of a corporation at the time of an alleged preferential payment by him to it, is not chargeable to the corporation, but knowledge of his insolvency conveyed to the president of the corporation may be imputed to it. *Arthur v. Harrington* (D. C., N. Y.), 32 Am. B. R. 216, 211 Fed. 215.

²⁸⁷ *Balcomb v. Old National Bank* (C. C. A., 7th Cir.), 29 Am. B. R. 329, 201 Fed. 679.

²⁸⁸ *Connors v. Brockport Nat'l Bank* (D. C., Me.), 32 Am. B. R. 882, 214 Fed. 847.

²⁸⁹ *Rutland County Nat. Bank v. Graves* (D. C., Vt.), 19 Am. B. R. 446, 156 Fed. 168;

In re Leach (C. C. A., 6th Cir.), 22 Am. B. R. 599, 171 Fed. 622; *In re Carlile* (D. C., N. Car.), 29 Am. B. R. 373, 199 Fed. 612; *Putnam v. U. S. Trust Co.* (Mass. Sup. Ct.), 36 Am. B. R. 658, 111 N. E. 969.

²⁹⁰ *Matter of McKane* (D. C., N. Y.), 19 Am. B. R. 103, 158 Fed. 647.

²⁹¹ *Vitzthum v. Large* (D. C., Ia.), 20 Am. B. R. 666, 162 Fed. 685.

²⁹² *In re Salvator Brewing Co.* (D. C., N. Y.), 25 Am. B. R. 536, 183 Fed. 910.

²⁹³ *Rubinstein v. Lottow* (Mass. Sup. Ct.), 35 Am. B. R. 243, 220 Mass. 156, 107 N. E. 718.

²⁹⁴ *In re Blake* (D. C., N. Y.), 22 Am. B. R. 612, 171 Fed. 298.

²⁹⁵ *Jackson v. Sedgwick* (D. C., N. Y.), 26 Am. B. R. 836, 189 Fed. 508.

allowed.²⁹⁶ A suit for the recovery of preferences is a controversy between the trustee and the preferred creditor, and is not a part of the "proceedings in bankruptcy."²⁹⁷

(2) **RECOVERY BY TRUSTEE ONLY.**—Subsection *b* provides that a preference is voidable by the trustee, and he may recover the property or its value. There is no authority in any one else to maintain the required action. Any other rule, even were the statute not clear on this point, would lead to confusion. The right of a trustee to recover a preference is not assignable.²⁹⁸ All property, including that fraudulently or preferentially transferred, vests in the trustee by virtue of the adjudication and of his appointment; he represents the creditors in all matters pertaining to such property and they have no remedy which will reach such property except through him.²⁹⁹ But, if the trustee refuses to sue, or if no trustee has been appointed, it has been held that a creditor may be permitted to do so for the benefit of all.³⁰⁰ It is unfortunate that, in cases where the outlook seems hopeless, and one creditor or a combination of creditors at their own expense proceed and recover, they must share with the others the fruits of their zeal.³⁰¹ To be sure, the amendatory act of 1903 saves to them their reasonable expenses,³⁰² but in assets cases this is of little importance. Pro-rating among all may be equitable; but, where a few bear the burden and heat of the day, the hangers-back should not share in the reward. This is, however, a basic weakness of all bankruptcy systems, and a feasible lawful remedy is not yet in sight.

(3) **AGAINST WHOM ACTION BROUGHT.**—The words of subsection *b* are clear: the recovery must be had of the person "receiving it or to be benefited thereby."³⁰³ Where the proceeds of an execution sale have been paid to a

296. *Stearns Salt & Lumber Co. v. Hammond* (C. C. A., 6th Cir.), 33 Am. B. R. 484, 217 Fed. 559.

297. *McCulloch v. Davenport Savings Bank* (D. C., Iowa), 35 Am. B. R. 765, 226 Fed. 309.

298. *Belding-Hall Mfg. Co. v. Mercer, etc., Lumber Co.* (C. C. A., 6th Cir.), 23 Am. B. R. 595, 175 Fed. 335; *Strong v. Durdle* (Wash. Sup. Ct.), 38 Am. B. R. 635, 162 Pac. 6; *Lovell v. Latham & Co.* (D. C., Ala.), 32 Am. B. R. 191, 211 Fed. 374, citing text. Compare *In re Downing* (D. C., N. Y.), 27 Am. B. R. 309, 192 Fed. 683, *affd.* 29 Am. B. R. 228, 201 Fed. 93.

Right to file cross-bill.—In a suit by a trustee in bankruptcy to set aside alleged preferential transfers of property by the bankrupt, creditors of the transferee should not be allowed to file a cross-bill seeking to impress a trust on the property transferred or purchased by the transferees with moneys of the bankrupt, and to be subrogated to the right, title and interest of the trustee. *Lovell v. Latham Co.* (D. C., Ala.), 32 Am. B. R. 191, 211 Fed. 374.

299. *Lovell v. Latham & Co.* (D. C., Ala.), 32 Am. B. R. 191, 211 Fed. 374, citing text.

300. Compare under § 11, *ante*; *Casey v. Baker* (D. C., N. Y.), 32 Am. B. R. 311, 212 Fed. 247. See also on the general proposition that only a trustee should sue, *Glenny v. Langdon*, 98 U. S. 20, 25 L. Ed. 43; *In re Rothschild* (Ref., Ga.), 5 Am. B. R. 587.

Right of creditors to bring suit before or after petition filed; intervention of trustee.

—Section 64-b (2) of the bankruptcy act impliedly recognizes the right of a creditor to institute proceedings to recover, for the benefit of the estate of the bankrupt, property fraudulently or preferentially transferred by him either before or after the filing of the petition, wherein it provides that, when such property shall have been recovered by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery shall be paid out of the bankrupt estate; and where such a suit is pending at the time of the election of a trustee, he is entitled to become a party plaintiff. *Frost v. Latham & Co.* (C. C., Ala.), 25 Am. B. R. 313, 181 Fed. 866.

301. For an unsuccessful attempt to cure this defect in the bankruptcy system, see *In re McNamara*, 2 N. B. N. Rep. 341.

302. Bankr. Act, § 64-b (2) as amended.

303. See under this section, subtitle "*Creditors only may be preferred*," *ante*, p. 897.

Liability of third person, privy to illegal preference.—It seems that a third person cannot be held liable to repay the amount of an illegal preference because he was a privy to the payment, as this section provides that in such a case a recovery may be had from the creditor who receives the payment. *Rubenstein v. Lottow* (Mass. Sup. Ct.), 35 Am. B. R. 243, 220 Mass. 156, 107 N. E. 718.

judgment creditor, before the filing of an involuntary petition, the remedy is by action by the trustee against the creditor for having received a preference.³⁰⁴ An action may be maintained against the board of trustees of a township to recover a preference.³⁰⁵

(4) IN WHAT COURT; THE AMENDMENTS OF 1903.—The subject has been discussed in detail elsewhere.³⁰⁶ The condition of things prior to the amendatory act was almost intolerable, the State courts being unconsciously hostile and their calendars so crowded as to preclude speedy trials. The sentence at the end of subsection *b* was inserted by the amendatory act of 1903. The words inserted in § 23-b by the same act clearly refer to this new sentence and remove all doubt that hereafter, as under the law of 1867, all suits to avoid preferences may be brought either in the district court or in the State court which would have had jurisdiction had not bankruptcy intervened. If an action be pending in a State court, in which the trustee is a party, the determination of which will settle the question as to the existence of a preferential transfer, the comity existing between the State court and the court of bankruptcy will ordinarily require the action to be continued in the State court.³⁰⁷ It is thought that where the Federal district court is convenient of access, suits of this character will hereafter be brought in that court, and their determination hastened by a reference to the referee, as special master. Where adjudication was had in one district the trustee may seek to recover property preferentially transferred, by a suit in a district court in another district, where the property was found and the transferee resided.³⁰⁸ Such suits are analogous to judgment creditors' suits to set aside fraudulent conveyances, and are, therefore, properly within the equity jurisdiction of the court.³⁰⁹ It has been held that an action to recover money preferentially transferred should be brought on the law side of the court.³¹⁰ But a suit by a trustee in bankruptcy to recover the value of certain personal property, alleged to have been fraudulently transferred by the bankrupt to enable the transferee to obtain

304. *In re Bailey* (D. C., Or.), 16 Am. B. R. 289, 144 Fed. 214. See also *Benjamin v. Chandler* (D. C., Pa.), 15 Am. B. R. 439, 142 Fed. 217.

305. *Painter v. Township of Napoleon* (D. C., Ohio), 19 Am. B. R. 412, 156 Fed. 289; s. c., 26 Am. B. R. 324, 199 Fed. 637.

306. See discussion under Section Twenty-three of this work.

307. *Davis v. Planters' Trust Co.* (D. C., Ky.), 28 Am. B. R. 495, 196 Fed. 970.

Proceeding in district court after intervening in state court.—Where a trustee in bankruptcy, after commencing a suit in the United States District Court to set aside a mortgage as preferential and fraudulent, intervenes in a suit in the State court to foreclose the same mortgage, and finds that he cannot fully protect the interests of the bankrupt estate in said court, and it appears that the jurisdiction of said court to grant equitable relief is doubtful, he may proceed in the District Court. The doctrine of election of inconsistent remedies is not involved. *Hawkins v. Dannenberg Co.* (D. C., Ga.), 37 Am. B. R. 262, 234 Fed. 752.

308. *Hills v. McKinniss Co.* (D. C., Ohio), 26 Am. B. R. 329, 188 Fed. 1012.

309. *Pound v. New York Exchange Bank*

(D. C., N. Y.), 10 Am. B. R. 343, 124 Fed. 992; *Wall v. Cox*, 181 U. S. 244, 5 Am. B. R. 727, 45 L. Ed. 845, 21 Sup. Ct. 642; *Parker v. Black* (D. C., N. Y.), 16 Am. B. R. 202, 143 Fed. 560, affd. 18 Am. B. R. 15, 151 Fed. 18; *Off v. Hakes* (C. C. A., 7th Cir.), 15 Am. B. R. 696, 142 Fed. 364; *Houghton v. Stiner*, 92 N. Y. App. Div. 171, 87 N. Y. Supp. 10; *Stern v. Mayer*, 16 Am. B. R. 763, 99 N. Y. App. Div. 427, 91 N. Y. Supp. 292; *Volkommer v. Frank*, 14 Am. B. R. 695, 107 N. Y. App. Div. 594, 95 N. Y. Supp. 324; *Lesser v. Bradford Realty Co.*, 17 Am. B. R. 524, 116 N. Y. App. Div. 212, 101 N. Y. Supp. 571; *Matter of Plant* (D. C., Ga.), 17 Am. B. R. 272, 148 Fed. 37; *Mason v. Herkimer County Bank* (D. C., N. Y.), 21 Am. B. R. 98, 163 Fed. 920, affd. *sub nom.* *National Bank of Newport v. Herkimer County Bank*, 225 U. S. 90, 28 Am. B. R. 218, 56 L. Ed. 995, 32 Sup. Ct. 657. See discussion of cases cited in *Johnson v. Hanley Hoyer Co.* (D. C., R. I.), 26 Am. B. R. 748, 188 Fed. 752; *Allen v. Grey* (N. Y. Ct. of App.), 25 Am. B. R. 423, 201 N. Y. 504, 94 N. E. 652.

310. *First State Bank of Milliken v. Spencer* (C. C. A., 8th Cir.), 33 Am. B. R. 594, 219 Fed. 503.

an unlawful preference, ought not to be maintained in a court of equity, over the objection of the defendant, the plaintiff having an adequate remedy at law.³¹¹ The bankruptcy court has jurisdiction in a suit to recover a preference although the relief sought requires the application of a State law.³¹² The power of the bankruptcy court in a suit by the trustee to set aside preferences is not limited to the mere avoidance of the preference and decreeing that the trustee recover the property or its value, but as a court of equity it may enforce the equitable rights of the defendant as against other creditors of the bankrupt.³¹³ The words "any court of bankruptcy," seem to imply that the district court, while so sitting, is still exercising its bankruptcy jurisdiction. The referee is not a "court of bankruptcy" within the meaning of this clause,³¹⁴ although the parties may stipulate that a suit to recover a voidable preference may be heard and determined by the referee, in which case it constitutes in effect an arbitration.³¹⁵ And where a referee determines that certain payments

311. *Warmath v. O'Daniel* (C. C. A., 6th Cir.), 20 Am. B. R. 101, 159 Fed. 87.

Adequate remedy at law.—Although equity has cognizance of constructive fraud as well as actual fraud, the question whether a bill in equity lies to set aside a preferential payment of money to the creditor of a bankrupt being doubtful, a demurrer to the bill will be overruled, reserving to defendant the right to raise the question of jurisdiction at the final hearing. *Johnson v. Hanley Hoyer Co.* (D. C., R. I.), 26 Am. B. R. 748, 188 Fed. 752.

To establish a liability under section 60-b of the Bankruptcy Act no actual fraud need be shown. That section merely condemns a transfer by a bankrupt within four months for the purpose of creating a preference, and hence the legal remedy is entirely adequate and no relief is offered in equity that the law does not afford. *Simpson v. Western Hardware & Metal Co.* (D. C., Wash.), 35 Am. B. R. 851, 227 Fed. 304.

312. *Miller v. New Orleans Acid & Fertilizer Co.*, 211 U. S. 496, 21 Am. B. R. 416, 53 L. ed. 300, 29 Sup. Ct. 173, affg. 117 La. 821, 42 S. E. 329.

Recovery of preference in violation of state law.—The bankruptcy court has jurisdiction of an action by a trustee in bankruptcy, without the consent of the defendants, to recover preferential payments alleged to have been made in violation of section 66 of the New York Stock Corporation Law, which includes a provision giving the right to proceed against creditors who have received transfers of property or preferential payments when the corporation was insolvent, to recover the payments made to the defendants herein. Under such statute such transfers are voidable only when they are made with the intent to give a preference. When it is shown that they were so made, the person receiving the same by means of any prohibited act or deed "shall be bound to account therefor to its creditors or stockholders or their trustees." *Grandison v. Robertson* (D. C., N. Y.), 34 Am. B. R. 609, 220 Fed. 985, mod. 36 Am. B. R. 452, 231 Fed. 785.

313. *Allen v. McMannes* (D. C., Wis.), 19 Am. B. R. 276, 156 Fed. 615.

314. *In re Overholzer* (Ref., No. Dak.), 23 Am. B. R. 10, holding that where upon the petition of a trustee, the referee in charge issued an order directed to the grantee of real estate to show cause why the conveyance should not be set aside as preferential, the proceeding must be dismissed where, upon the return day, the grantee appears specially by attorney and objects to the jurisdiction of the court; *In re Keystone Press, Inc.* (D. C., Minn.), 29 Am. B. R. 715, 203 Fed. 710, holding that the referee, in a proceeding by a secured creditor who seeks to have turned over to it the proceeds of a sale of the bankrupt's property free from liens, has jurisdiction to determine whether or not such creditor has received a preference, where such creditor claims the right to prove any part of his debt as an unsecured claim, but that the referee cannot determine the existence of the preference for the purpose of recovering the property transferred.

315. *Stipulation to refer to referee to hear and determine; review.*—Where in an action by a trustee in bankruptcy to recover an alleged preference, the parties stipulate and agree that the case shall be heard, tried and determined before a referee, naming him; that upon filing the report of the referee judgment may be entered by the clerk in conformity therewith without further notice; that either party may enter an order to the foregoing effect without further notice, and the court in approving the stipulation added thereto the following "judgment shall not be entered until after ten days' notice of the filing of the report of the referee, and of the judgment proposed to be entered." the court has no power to examine the evidence, rulings of the referee or the findings of fact, and if conclusions of law sufficient to support the judgment directed are supported and justified by the findings of fact, then the judgment must be entered. Such a trial before a referee is little more than an arbitration. *Grant v. National Bank of Auburn* (D. C., N. Y.), 37 Am. B. R. 329, 232 Fed. 201.

by a bankrupt were preferential, in proceedings properly before him, and the person to whom such payments were made acquiesces in such determination, he is concluded thereby, and may not resist the subsequent recovery of such payments in a suit in the bankruptcy court.³¹⁶

(5) **PERMISSION TO SUE.**—While not strictly necessary, good practice seems to require the trustee to ask permission to bring a suit to avoid a preference.³¹⁷

(6) **PRACTICE.**—The practice in such suits is regulated by the rules applicable to the court in which they are brought. The right to a jury trial is considered elsewhere.³¹⁸ Careful pleading is essential. In order to recover the bill must allege and the proof must sustain the four statutory elements constituting a preference.³¹⁹ Some of the more valuable discussions on practice under the present law will be found in the foot-note.³²⁰ In a suit by a

316. *Breit v. Moore* (C. C. A., 9th Cir.), 34 Am. B. R. 295, 220 Fed. 97.

317. *In re Mersman* (Ref., N. Y.), 7 Am. B. R. 46. But see *Chism v. Bank* (Sup. Ct., Miss.), 5 Am. B. R. 56, 27 So. 610. See also under Section Forty-seven, *ante*.

318. See Section Nineteen of this work, *ante*.

Questions for jury.—In an action by the trustee of a bankrupt to recover an alleged preferential payment, it was not error for the court to submit to the jury the question of bankrupt's insolvency at the time of such payment and of defendant's knowledge that a preference was thereby intended. *Bergdoll v. Harrigan* (C. C. A., 3d Cir.), 33 Am. B. R. 394, 217 Fed. 943.

319. *Painter v. Napoleon Township* (D. C., Ohio), 19 Am. B. R. 412, 156 Fed. 289, holding that a bill, in an action to recover the payment of a township, which fails to allege that the enforcement of the transfer constituting the alleged preference will be to enable the said board of trustees to obtain a larger percentage of its debts than any other creditor of the same class, is demurrable; *Mayes v. Palmer* (C. C. A., 8th Cir.), 31 Am. B. R. 225, 208 Fed. 97; *Utah Association of Creditmen v. Boyle Furniture Co.* (Utah Sup. Ct.), 31 Am. B. R. 488, 136 Pac. 572, holding that an allegation substantially in the language of the statute is sufficient. See Am. B. R. Dig. § 672.

Sufficiency of complaint in an action by a trustee to set aside a preference, see *Lesser v. Bradford Realty Co.*, 17 Am. B. R. 524, 116 N. Y. App. Div. 212, 101 N. Y. Supp. 571, affg. 15 Am. B. R. 123; *Wilson v. Citizens' Trust Co.* (D. C., Ga.), 37 Am. B. R. 86, 233 Fed. 697.

A petition by a trustee is insufficient which fails to allege and prove insolvency and reasonable cause to believe that a preference was intended. *In re Leach* (C. C. A., 6th Cir.), 22 Am. B. R. 599, 171 Fed. 622; *Taylor v. Nichols*, 23 Am. B. R. 310, 134 N. Y. App. Div. 787, 119 N. Y. Supp. 1042; *Rodolph v. First Nat. Bank of Tulsa* (Sup. Ct., Okla.), 28 Am. B. R. 897, 121 Pac. 629; *Carey v. Donohue* (C. C. A., 6th Cir.), 31 Am. B. R. 210, 209 Fed. 328; *revd. on other grounds*, 240 U. S. 430, 36 Am. B. R.

704, 60 L. Ed. 726, 36 Sup. Ct. 386; *Crim v. Rice* (C. C. A., 2d Cir.), 37 Am. B. R. 329, 232 Fed. 570.

A trustee may sue to recover property received as a voidable preference without allegation or proof of a demand and refusal. *McCulloch v. Davenport Savings Bank* (D. C., Ia.), 35 Am. B. R. 765, 226 Fed. 309.

Suit by trustee to recover deposits; petition.—A petition in a suit by a trustee in bankruptcy under section 60-b of the Bankruptcy Act to recover deposits made by the bankrupts with the defendants, which alleges that the deposits were not general, that the bankruptcy had no right to check against the same, and that the defendant had the deposits made upon special account "for the purpose of transferring and appropriating the same to its alleged indebtedness," is sufficient upon general demurrer. *Wilson v. Citizens' Trust Co.* (D. C., Ga.), 37 Am. B. R. 86, 233 Fed. 697.

Action to compel surrender of property; waiver.—Where in an action to compel the defendants to surrender property they appear specially, but not to raise the question of jurisdiction of their persons, and claim that because they are adverse claimants and reside in other States where the property is located, the court has no jurisdiction to make any summary order, and no motion has been made to quash the service of process nor any exception taken to it, the objection will be deemed to have been waived, although the service was invalid. *Alco Film Corporation v. Alco Film Service* (C. C. A., 2d Cir.), 37 Am. B. R. 307, 234 Fed. 55.

320. *Crooks v. People's Bank*, 3 Am. B. R. 238, 46 N. Y. App. Div. 335, 61 N. Y. Supp. 604; *In re Nelson* (D. C., Wis.), 1 Am. B. R. 63, 98 Fed. 76; *Chism v. Bank* (Sup. Ct., Miss.), 5 Am. B. R. 56, 27 So. 610; *Hicks v. Langhorst* (C. C. A., Ohio), 6 Am. B. R. 178; *Richter v. Nimmo*, 6 Am. B. R. 680, 64 N. Y. App. Div. 619, 72 N. Y. Supp. 1125; *Martin v. Bigelow*, 7 Am. B. R. 218, 36 N. Y. Misc. 298, 73 N. Y. Supp. 443; *Brown v. Guichard*, 7 Am. B. R. 515, 77 N. Y. App. Div. 642, 79 N. Y. Supp. 1127.

Further hearing.—Where in a suit by a trustee in bankruptcy to recover alleged preferences, it appears that the question,

trustee to recover land mortgaged by the bankrupt within the four months' period without consideration, a plea of title, derived from one in whose favor the land court of Massachusetts had decreed the registration of title to the land, will be overruled.³²¹ A proceeding to set aside an illegal preference must be governed, as to pleading and practice, by the laws and rules of the court wherein it is instituted; if instituted in a Federal court it is governed by the Federal equity practice.³²² The trustee may settle or compromise a suit to recover an alleged voidable preference, when deemed advisable for the interests of the creditors, and the court may, in its discretion, refuse to set aside or vacate the agreement.³²³

(7) DOWER IN PROPERTY COVERED BY PREFERENTIAL TRANSFER.—A wife's release of dower can survive only so long as it attends the conveyance of her husband, and when the conveyance of the husband in which the wife joins is set aside as constituting a preference, the effect is to revive the wife's right of dower.³²⁴

f. Property or its value.—(1) IN GENERAL.—Similar words were used in the law of 1867. The option of suing for the property or for its value rests with the trustee. These words are doubtless merely expressive of the rule of law. It has been held that interest should be allowed either from the time a demand was made upon the transferee for the return of the property transferred, or, in case no demand was made, from the date of the commencement of a suit to recover such property.³²⁵ Where property is transferred by a bankrupt to a third person at the instance of a creditor and the money received by the bankrupt is paid to the creditor the trustee cannot recover both the property and the money.³²⁶ In most cases, the value, *i. e.*, damages, is demanded. This in effect ratifies the title which passed through the preference.³²⁷ The liability to restore or repay is a *quasi* contractual obligation imposed by the act upon the preferred creditor, and a suit in assumpsit rather than trespass is the proper form, in those jurisdictions where the distinction between these classes of suits is still retained.³²⁸ Suits to recover the property in specie should only be brought where it can be identified and is found in

whether the effect of an assignment of accounts receivable by the bankrupt would be to enable any one of the bankrupt's creditors to obtain a greater percentage of his debt than any other creditors of the same class, was not tried out at the hearing, and that no finding on the issue was made by the judge, the issue may be decisive of the validity of the assignment, and the case should stand for a further hearing and trial. *Rubenstein v. Lottow* (Mass. Sup. Ct.), 35 Am. B. R. 243, 220 Mass. 156, 107 N. E. 718.

321. *Morris v. Small* (Cir. Ct., Mass.), 20 Am. B. R. 138, 160 Fed. 142.

322. *Westall v. Avery* (C. C. A., 4th Cir.), 22 Am. B. R. 673, 171 Fed. 626.

323. Application to set aside settlement.—The District Court may, in its discretion, deny the petition of holders of liens on the bankrupt's property, who had not presented their claims against the estate, to set aside and vacate an agreement by the trustee in bankruptcy to settle a suit to have a mortgage on the same property declared invalid as a preference, and to compel the trustee to

prosecute said suit to final judgment. *Stanrod & Co. v. Utah Implement-Vehicle Co.* (C. C. A., 9th Cir.), 35 Am. B. R. 280, 223 Fed. 517.

324. *Matter of Lingafelter* (C. C. A., 6th Cir.), 24 Am. B. R. 656; *Marsh v. Walters* (C. C. A., 6th Cir.), 34 Am. B. R. 85, 220 Fed. 805.

325. *Utah Association of Creditmen v. Boyle Furniture Co.* (Utah Sup. Ct.), 31 Am. B. R. 488, 136 Pac. 572; *Kaufman v. Tredway*, 195 U. S. 271, 12 Am. B. R. 682, 49 L. Ed. 190, 25 Sup. Ct. 33; *Ourmen v. Talcott* (D. C., N. Y.), 23 Am. B. R. 572, 175 Fed. 261, holding that interest is recoverable from the date on which the goods that were transferred as a preference were sold by the transferee.

326. *Golden & Co. v. Loving* (Ct. of App., D. C.), 33 Am. B. R. 469, 42 Wash. L. Rep. 818.

327. *Compare Winslow v. Clark*, 47 N. Y. 261.

328. *Reber v. Ellis Bros.* (D. C., Pa.), 25 Am. B. R. 567, 185 Fed. 313.

the hands of the person preferred. If the property transferred cannot be restored in kind, its value may be recovered.³²⁹ If the trustee proceeds in equity to recover the actual property transferred, he is only entitled to a delivery of the property and may not have judgment for depreciation or other consequential damages.³³⁰ If a transfer be made within the four months' period in part for a present consideration and in part payment of an antecedent indebtedness, a recovery may be had for the balance of the value of the property transferred after deducting the value of the present consideration.³³¹ Where the preference consists of suffering or permitting a judgment which has become a lien, the trustee has, it is thought, the option of suing under § 60-b or under § 67-e.³³² Though the words "recover the property or its value"³³³ do not exactly describe the purpose of such a suit where the transaction amounts to a preference, nor do the words "recover and reclaim the same by legal proceedings,"³³⁴ describe the purpose where the transaction is a fraudulent transfer, the prayer of the bill or complaint may be easily adapted to the circumstances and may be to annul the lien or to recover possession of the property if seized on execution, or otherwise as the facts require. In any event, the pleading should show a demand and refusal to restore.³³⁵ Where the purchaser has sold the property and the evidence shows that he received as much or more than the trustee could have realized from the same property, he will not, in a suit by the trustee to set aside the preferential transfer, be held in an amount in excess of the proceeds of the sale by him.³³⁶

(2) DAMAGES.—If the suit is for value, the judgment, if granted, should be for the worth of the property, not the amount realized under the execution sale by the preferential transferee.³³⁷ He is also entitled to the gross proceeds.³³⁸ Nor can the court allow by way of reduction of damages such amounts as the preferred creditor has paid to other creditors out of the avails

329. *McElvain v. Hardesty* (C. C. A., 8th Cir.), 22 Am. B. R. 320, 169 Fed. 32.

330. *Ernst v. Mechanics and Metals Nat. Bank* (C. C. A., 2d Cir.), 29 Am. B. R. 289, 201 Fed. 664, affg. 31 Am. B. R. 291, 200 Fed. 287. See same case on Appeal to U. S. Supreme Court, *Hotchkiss v. National City Bank*, 231 U. S. 50, 31 Am. B. R. 291, 302, 58 L. Ed. 115, 34 Sup. Ct. 20.

Depreciation.—In a suit in equity by a trustee in bankruptcy to recover specific securities deposited with a bank, within four months of bankruptcy, the plaintiff cannot recover for depreciation of the securities intermediate the decision of the original suit in the District Court and their final delivery, especially where the parties had stipulated that the securities might be sold by the bank at the best price obtainable, at such times as might seem best to its officers. *Hotchkiss v. National City Bank* (C. C. A., 2d Cir.), 34 Am. B. R. 544, 223 Fed. 533.

331. *In re Manning* (D. C., S. Car.), 10 Am. B. R. 500, 123 Fed. 181.

332. See *In re Adams* (Ref., N. Y.), 1 Am. B. R. 94; *In re Gray*, 3 Am. B. R. 647, 47 N. Y. App. Div. 554, and, perhaps, § 70-e. See also *In re Mersman* (Ref., N. Y.), 7 Am. B. R. 46.

333. Bankr. Act, § 60-b.

334. Bankr. Act, § 67-a.

335. *In re Phelps* (Ref., N. Y.), 3 Am. B. R. 396; *Schuman v. Flickenstein*, Fed. Cas. 12,826.

336. *Allen v. McMannes* (D. C., Wis.), 19 Am. B. R. 276, 156 Fed. 615.

As to recovery of proceeds of sale of goods preferentially transferred, where such goods were retained under agreement with a receiver in bankruptcy, see *Ommen v. Talcott* (D. C., N. Y.), 23 Am. B. R. 572, 175 Fed. 259, revd. in part 26 Am. B. R. 689, 188 Fed. 401.

337. An action of assumpsit by a trustee in bankruptcy to recover the actual amount at which a creditor received and accepted property from the bankrupt as a payment upon its claim, alleged to constitute a preference, is not objectionable because it does not appear that the creditor received money or money's worth for the property. *Stearns Salt & Lumber Co. v. Hammond* (C. C. A., 6th Cir.), 33 Am. B. R. 484, 217 Fed. 559; *Clarion Bank v. Jones*, 21 Wall. 325.

338. *Traders' Bank v. Campbell*, 14 Wall. 87.

of the property transferred.³³⁹ If the latter includes exempt articles, their value cannot be included in the judgment.³⁴⁰

(3) *Costs*.—This is regulated by the law and rules of practice applicable to the court where the suit is brought.³⁴¹

IV. SET-OFF OF A SUBSEQUENT CREDIT.

a. Prior to amendments of 1903.—Subsection *c* which, standing by itself, seems clear enough, was wrenched and twisted and fought over by the bar and the courts in an effort to escape the innocent preference doctrine of *Carson v. Chicago Title & Trust Co.* The controversy raged about the word "recoverable." The question was whether this had reference to a voidable preference only or also to a mere preference in fact. If the former, then subsequent credits after a payment in due course of trade could not be set off, and the creditor not only found the door of the court shut to him if he refused to surrender, but the estate to be distributed increased by his goods sold, perhaps, on the strength of the confidence inspired by such payment. Nothing could be more inequitable. On the other hand, some courts gave a wide meaning to the subsection and declared it applicable even to the technical preference defined in subsection *a*. The question did not reach the Supreme Court before the amendatory act. But it was held in very exhaustive opinions both by Referee James and by Judge Shiras of the Northern District of Iowa that this subdivision of the section applies only to cases where the preferred creditor is compelled against his will to return what he has received and is therefore limited to proceedings taken under subsection *b* and does not apply to a case where he seeks to enforce a claim which the trustee recites under section 57-g on the ground of preference.³⁴² The authorities each way are indicated in the foot-note.³⁴³

b. Meaning of subsection c.—Nor is it likely now that it will be necessary to determine the question. The cases which attempt to enlarge its meaning all turn on the manifest inequity of doing otherwise. Such inequity no longer exists. Only voidable preferences need now be surrendered. Common sense and syntax connect the word "recoverable" in subsection *c* with

³³⁹ *North v. House*, Fed. Cas. 10,310.

³⁴⁰ *Grow v. Ballard*, Fed. Cas. 5,848; *Brock v. Terrill*, Fed. Cas. 1,914.

³⁴¹ Compare *Collins v. Gray*, Fed. Cas. 3,013.

Contribution by one compelled to surrender preference.—A preferred creditor of a bankrupt, who has been compelled to surrender his preference in a suit by the trustee in bankruptcy, is benefited thereby as an unsecured creditor, and is bound to contribute ratably as a general creditor toward payment of counsel fees rendered in the commencement and prosecution of the preference suit in the name of the trustee and with his consent. *Matter of Stearns Salt & Lumber Co.* (C. C. A., 6th Cir.), 35 Am. B. R. 264, 225 Fed. 1.

³⁴² *In re Christensen* (D. C., Ia.), 4 Am. B. R. 202, 101 Fed. 802.

³⁴³ Compare *Kimball v. Rosenham Co.* (C. C. A., 8th Cir.), 7 Am. B. R. 718, 114 Fed. 85; *Morey Mfg. Co. v. Schiffer* (C. C. A., 8th Cir.), 7 Am. B. R. 670, 114 Fed. 447; *Gans v. Ellison* (C. C. A., 3d Cir.), 8 Am.

B. R. 153, 114 Fed. 734; *Kahn v. Export, etc., Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 157, 115 Fed. 290; *McKey v. Lee* (C. C. A., 7th Cir.), 5 Am. B. R. 267, 105 Fed. 923; *In re Ryan* (D. C., Ill.), 5 Am. B. R. 396, 105 Fed. 760; *In re Sechler* (D. C., Kan.), 5 Am. B. R. 579, 106 Fed. 484; *In re Southern, etc., Co.* (D. C., Ga.), 6 Am. B. R. 633, 111 Fed. 518; *In re Thompson's Sons* (Ref., Pa.), 6 Am. B. R. 663; *affd. s. c.*, 7 Am. B. R. 214, 112 Fed. 651; *In re Soldosky* (D. C., Minn.), 7 Am. B. R. 123, 111 Fed. 511; *with, contra*, *In re Arndt* (D. C., Wis.), 4 Am. B. R. 773, 104 Fed. 234; *In re Keller* (D. C., Iowa), 6 Am. B. R. 334, 109 Fed. 118; *In re Oliver* (D. C., Mo.), 6 Am. B. R. 626, 109 Fed. 784; *In re Steers Lumber Co.* (D. C., N. Y.), 6 Am. B. R. 315, 110 Fed. 738; *affd. s. c.*, 7 Am. B. R. 332, 112 Fed. 406; *In re Bailey* (D. C., Vt.), 7 Am. B. R. 26, 112 Fed. 406; *In re Jones* (D. C., S. Car.), 10 Am. B. R. 513, 123 Fed. 128. A summary of cases, pro and con will be found in *In re Topliff* (D. C., Mass.) 8 Am. B. R. 141, 114 Fed. 323.

"recover" in subsection *b*. Standing alone, subsection *a* is nothing but an explanation or definition of a preference. The latter is not recoverable, unless the element of reasonable cause to believe appears. Only against a preference so recoverable then may subsequent credits granted the debtor be set off. The cases holding this doctrine are thought still in point. The practitioner should, however, note that to entitle to the set-off, the credit must be "in good faith," "without security,"³⁴⁴ and result in "property which becomes a part of the debtor's estate;" also, that any payments on the new credit must be deducted before the set-off is allowed. If the creditor acted in good faith, extended credit without security, and the money or property actually passed into the debtor's possession, he is entitled to the set-off, and he need not show that the money or property remained in the debtor's possession until his bankruptcy.³⁴⁵ The right of the creditor to set off a new credit given in good faith is restricted to the amount of the new credit remaining unpaid at the time of the adjudication.³⁴⁶ The rule stated in this subsection is an extension of that phrased in § 68-a.³⁴⁷ Here there is not that mutuality of debt required there. Were there, subsection *c* would be unnecessary.

V. PREFERENCES TO BANKRUPT'S ATTORNEY.

a. In general.—In connection with subsection *d* relative to preferences to bankrupt's attorney, § 64-b (3), on attorney's priorities, should also be read. The services referred to in section 64-b (3) are those already rendered, while the services referred to in this subsection are those "to be rendered," which are paid for in advance "in contemplation of the filing of a petition by or against" the bankrupt. The compensation for the latter services depends both as to payment and amount on the acts of the parties, and what the statute does is to recognize the validity of the payment, but subjects the reasonableness of the amount to the supervision of the court.³⁴⁸ Section 60-d

³⁴⁴. Compare *In re Tanner* (Ref., N. Y.), 6 Am. B. R. 196.

³⁴⁵. *Kaufman v. Tredway*, 195 U. S. 271, 12 Am. B. R. 682, 49 L. Ed. 190, 25 Sup. Ct. 33; *In re Morrow & Co.* (D. C., Ohio), 13 Am. B. R. 392, 134 Fed. 686; *Price v. Derbyshire Coffee Co.*, 21 Am. B. R. 280, 128 N. Y. App. Div. 472, 112 N. Y. Supp. 830; *Grandison v. Nat. Bank of Commerce of Rochester* (C. C. A., 2d Cir.), 36 Am. B. R. 438, 231 Fed. 800.

Property must become part of estate.—In the case of *Bank of Wayne v. Gold* (N. Y. App. Div.), 26 Am. B. R. 722, 146 N. Y. App. Div. 296, 130 N. Y. Supp. 942, the court says: "Counsel for appellant further urges that in any event it was entitled to recover certain advances made by it in connection with the mortgaged property after it had taken possession thereof under the mortgage, and before the bankruptcy proceedings were begun. This claim is made under subdivision 'c' of section 60 of the Bankruptcy Act. Reference to this provision of the act discloses that the further credit given the debtor by the creditor, which may be set off as therein provided, must not only be given in good faith and without security, but must also result in property which becomes a part of the debtor's estate. Collier on

Bankruptcy (8th ed.), p. 677. Whether any recovery for such alleged expenditure could in any event be had in the present action it is unnecessary now to determine; for the proof does not disclose that any part thereof resulted in any advantage to, or increase of, the mortgaged property. Having apparently voluntarily relinquished possession of the mortgaged property without then making any claim on account of such expenditure and the proceeds of the sale being now in the possession of the trustee, it would seem that the proper method to collect such amount, if any, as it may be entitled to receive because of this claim would be by presentation thereof in the orderly course of the administration of the bankrupt's estate in the bankruptcy court."

³⁴⁶. *Grandison v. Nat. Bank of Commerce of Rochester* (C. C. A., 2d Cir.), 36 Am. B. R. 438, 231 Fed. 800.

³⁴⁷. See an effort to connect the two in *In re Ryan* (D. C., Ill.), 5 Am. B. R. 396, 105 Fed. 760.

³⁴⁸. *Furth v. Stahl*, 10 Am. B. R. 442, 205 Pa. St. 439; *Pratt v. Bothe* (C. C. A., 6th Cir.), 12 Am. B. R. 529, 130 Fed. 670.

Exception in favor of attorneys.—In the case of *In re Kross* (D. C., N. Y.), 3 Am. B. R. 187, 190, 96 Fed. 816, Brown, J., used

is a part of the original bankruptcy act of 1898 and intended by Congress to be a part of the uniform system of bankruptcy to be consistently administered by the courts given jurisdiction.³⁴⁹ A payment of money or a transfer of property by a bankrupt made in contemplation of bankruptcy to an attorney or counselor in consideration of future professional services, does not constitute a preference under § 60-b.³⁵⁰ The transfer to the attorney for his services must relate solely to contemplated bankruptcy and may not cover compensation for other services.³⁵¹ The only legal services which may be paid or secured under this provision are those directly connected with the bankruptcy proceeding; it was not the intent that an honest insolvent should lose the benefit of the act because he had no cash in hand with which to pay a lawyer to prepare the petition and schedules; but as to past services the claim

the following language: "While by the general terms of the act, the debtor is required to turn over all his unexempt property to the trustee, an exception is here created in favor of an attorney, to a reasonable amount, for services to be rendered to the debtor in bankruptcy; although this is valid so far only as subsequently approved by the court. The charges to be 'approved' are, I cannot doubt, for the same services which the 'fee' is designed to be allowed for under section 64, subd. b, par. 3. Both paragraphs are to be construed together, so that it becomes immaterial in the result whether the attorney obtains his compensation in the first instance from the bankrupt under section 60 refunding what, if anything, is disallowed by the court, or whether he waits for an allowance by the court under section 64. The latter is evidently the more convenient and desirable practice, and considering that prior payment for an attorney's services to the bankrupt is expressly allowed by section 60, I cannot agree to any such construction of the act as would deprive the attorney of a proper compensation for a necessary service, merely because he did not take it out of the estate at his own estimate in advance."

The transfer of an automobile to an attorney by a bankrupt prior to bankruptcy, the proceeds of a sale thereof to be applied on account of disbursements and fees for services rendered and to be rendered, is not invalid, where it appears that a reasonable fee for services rendered to the date of the transfer was equal to the value of the property transferred, since by section 60-b, a debtor, in contemplation of bankruptcy, may fully pay an attorney reasonable compensation for services to be rendered, and it is immaterial whether the payment is made at or after the professional engagement is entered into. In *re Cummins* (D. C., N. Y.), 28 Am. B. R. 385, 196 Fed. 224.

349. In *re Wood & Henderson*, 210 U. S. 246, 20 Am. B. R. 1, 5, 52 L. Ed. 1046, 28 Sup. Ct. 621.

350. In *re Wood & Henderson*, 210 U. S. 246, 20 Am. B. R. 1, 5, 52 L. Ed. 1046, 28 Sup. Ct. 621; *Haffenberg v. Chicago Title & Trust Co.* (C. C. A., 7th Cir.), 27 Am. B. R. 708, 192 Fed. 874.

Future services.—In *re Furth v. Stahl*, 205 Pa. St. 439, 10 Am. B. R. 442, Mr. Justice Mitchell, after quoting section 60-d, says: "A pledge or payment for a consideration given in the present or to be given in the future, whether in money or goods or services, is not a preference. The object of prohibiting preferences is to prevent favoritism, whether for secret benefit to himself or other reason among a debtor's creditors who ought in fairness to stand on the same footing. A transaction by which the debtor parts with something now, in return for something he acquires or is to acquire in the future, is not within the mischief the act was aimed against. Section 60, therefore, expressly recognizes this class of transactions, but as it is capable of abuse, provides for a re-examination and reduction if necessary to a reasonable amount, by the court on petition of the trustee or a creditor."

This same section was before the court of appeals for the sixth circuit in the case of *Pratt v. Bothe* (C. C. A., 6th Cir.), 12 Am. B. R. 529, 130 Fed. 670. In that case Judge Severans, speaking for the court, said: "It would rather seem that Congress, engaged, as many signs indicate, in guarding the assets of those in contemplation of bankruptcy, to the end that they might be brought without unnecessary expenditure to the hands of the trustee for distribution to creditors, while it would not deny to the debtor the right to employ and pay for legal assistance in his affairs during that critical period, yet proposed a restraint upon that privilege by requiring that such payment should be reasonable in amount—in short, proposed to apply to the incipient stage of bankruptcy the provident economy which it sought to apply to the administration of the bankrupt estate. It may have been thought that there was the same reason for such restraint at that stage of affairs as subsequently. And it is to be observed that the transaction would not become the subject of revision unless bankruptcy ensued. It put attorneys, solicitors and proctors in no worse position than it did some classes of those having business with the debtor."

351. *Tripp v. Mitschrich* (C. C. A., 8th Cir.), 31 Am. B. R. 662, 211 Fed. 424.

of the lawyer is no better than that of any other creditor.³⁵² If the services performed were reasonably necessary for the protection of the interests of the bankrupt, in contemplation of bankruptcy, compensation may be made therefor out of the bankrupt estate; the only question open in such a case being the reasonableness of the charge.³⁵³ The law gives him the option, either of collecting his compensation in advance or of asking its allowance, as entitled to priority, under § 64-b (3); with, however, this exception, that, if he elects to pursue the former and presumably more tempting method, the court has the power to inquire into the payment and the trustee to recover any excess for the benefit of the estate.³⁵⁴ This re-examination has been held merely a part of the proceeding and therefore not affected by the now abrogated doctrine that suits to recover preferences must be brought in the State courts,³⁵⁵ and where this method is pursued the amount thus attempted to be used is subject to revision in the court of original jurisdiction, and not elsewhere.³⁵⁶ Where payments are made to an attorney in the settlement of a running account, he is in the same position as any other creditor whose claim has been paid within the four months' period.³⁵⁷ The general subject of the employment and compensation of attorneys is considered elsewhere.³⁵⁸

b. Practice.—Section 60-d is *sui generis* and does not contemplate the bringing of plenary suits for the recovery of preferential transfers in any jurisdiction. It recognizes the temptation of a failing debtor to deal too liberally with his property in employing counsel to protect him in view of financial reverses and probable failure. It recognizes the right of such debtor to have the aid and advice of counsel and in contemplation of bankruptcy proceedings which shall strip him of his property to make provisions for a reasonable compensation to his counsel, and in view of the circumstances the act makes provision that the bankruptcy court administering the estate may if the trustee or any creditor questions the transaction, re-examine it with a view to a

³⁵² Magee v. Fox (C. C. A., 2d Cir.), 36 Am. B. R. 161, 229 Fed. 395.

³⁵³ Matter of Humphreys (D. C., N. Car.), 34 Am. B. R. 655, 221 Fed. 997. In the case of *In re Wood & Henderson*, 210 U. S. 246, 20 Am. B. R. 1, 52 L. Ed. 1046, 28 Sup. Ct. 621, the court said: "The act recognizes the right of * * * a debtor to have the aid and advice of counsel, and, in contemplation of bankruptcy proceedings which shall strip him of his property, to make provisions for reasonable compensation to his counsel. And in view of the circumstances, the act makes provision that the bankruptcy court administering the estate may, if the trustee or any creditor question the transaction, re-examine it with a view to a determination of its reasonableness."

What constitutes transfer in contemplation of bankruptcy.—The fact that it might have occurred to a bankrupt when he made an assignment for the benefit of creditors that proceedings in bankruptcy might thereafter be instituted either by or against him, and that the attorney to whom the collection of moneys was intrusted might deduct his fees therefrom, coupled with the fact that he afterwards attempted to do so, cannot be considered as a payment in contemplation of the filing of a petition in bankruptcy, within

the meaning of subdivision *d*. *Matter of Galler* (D. C., N. J.), 32 Am. B. R. 629, 216 Fed. 558.

³⁵⁴ But compare *In re Stolp* (D. C., Wis.), 29 Am. B. R. 32, 199 Fed. 488, holding that the services must be actually rendered, if at all, before the institution of bankruptcy proceedings, and the payment or transfer specified in subsection *d* cannot apply to services rendered as specified in section 64-b, providing for an allowance to the bankrupt's attorney as part of the cost of administration, since the latter section refers to services rendered after the bankruptcy proceedings are instituted, to aid the bankrupt in performing his duties under the Act.

³⁵⁵ *In re Lewin* (D. C., Vt.), 4 Am. B. R. 632, 103 Fed. 850. The purpose and intent of this section has been carefully considered in the case of *In re Habegger* (C. C. A., 8th Cir.), 15 Am. B. R. 198, 71 C. C. A. 607, 139 Fed. 123.

³⁵⁶ *Lazarus v. Prentice* (Sup. Ct., U. S.), 234 U. S. 263, 32 Am. B. R. 559, 58 L. Ed. 1305, 34 Sup. Ct. 851.

³⁵⁷ *In re Shiebler & Co.* (D. C., N. Y.), 20 Am. B. R. 777, 163 Fed. 545.

³⁵⁸ See discussion under Section Sixty-two of this work.

determination of its reasonableness.³⁵⁹ This section added a feature to the bankruptcy act not found in former acts regulating practice and procedure in bankruptcy, therefore, adjudications upon other provisions of the bankruptcy act or concerning the judiciary acts giving jurisdiction to the courts of the United States have no binding effect in the construction of this section.³⁶⁰ There is no provision for the enforcement of this section in another court of bankruptcy, where the bankrupt may be personally served with process in a plenary suit; such court is not given authority to re-examine the transaction.³⁶¹ A State court has no jurisdiction to re-examine the transfer of property to counsel.³⁶² The practice on proceedings of this character—the attorney being usually an officer of the court—is both simple and summary. Being rarely resorted to, there are no stated rules or forms applicable. The amount paid must appear in Schedule B (4) of a voluntary petition. Proceedings to test the propriety of payments to an attorney for all services, namely, those rendered before the payment, as well as those services to be rendered in the bankruptcy proceeding itself, should be taken in the form of a motion to fix the allowance and for an order directing the return of the balance unless an issue is raised.³⁶³ The motion may be heard on affidavits or orally. A suit to recover will rarely be necessary; though an order to restore, if not obeyed, is perhaps not now the foundation for a proceeding in contempt.³⁶⁴ Since this section makes no provision for the service of process, it seems that such reasonable notice should be given to the parties affected, either by mail or otherwise as the court shall direct, so that an opportunity may be given them to appear in court and contest the reasonableness of the charges in question.³⁶⁵ Any notice to the attorney directed by the court is sufficient.³⁶⁶

c. **Illustrative cases.**—Other cases which have originated under this subsection are collated in the foot-note.³⁶⁷

³⁵⁹ In re Wood & Henderson, 210 U. S. 246, 20 Am. B. R. 1, 5, 52 L. Ed. 1046, 28 Sup. Ct. 621.

³⁶⁰ In re Wood & Henderson, 210 U. S. 246, 20 Am. B. R. 1, 5, 52 L. Ed. 1046, 28 Sup. Ct. 621.

³⁶¹ In re Wood & Henderson, 210 U. S. 246, 20 Am. B. R. 1, 5, 52 L. Ed. 1046, 28 Sup. Ct. 621.

³⁶² In re Wood & Henderson, 210 U. S. 246, 20 Am. B. R. 1, 5, 52 L. Ed. 1046, 28 Sup. Ct. 621.

³⁶³ In re Shiebler & Co. (D. C., N. Y.), 20 Am. B. R. 777, 163 Fed. 545; Tripp v. Mitschrich (C. C. A., 8th Cir.), 31 Am. B. R. 662, 211 Fed. 424. In re Wood & Henderson, 210 U. S. 246, 20 Am. B. R. 1, 5, 52 L. Ed. 1046, 28 Sup. Ct. 621, Mr. Justice Day said, referring to section 60-d: "This section does not undertake to provide for a plenary suit, but for an examination and order in the course of the administration of the estate with a view to permitting only a reasonable amount thereof to be deducted from it because of payments of money or transfers of property to attorneys or counselors in contemplation of bankruptcy proceedings."

³⁶⁴ Cominger v. Louisville Trust Co., 184 U. S. 18, 7 Am. B. R. 421, 49 L. Ed. 413,

22 Sup. Ct. 293. Compare In re Sims, Fed. Cas. 12,888.

Payment to attorney in contemplation of bankruptcy; recovery of excess.—A petition by a trustee, for a re-examination by the court of payments by a debtor to an attorney in contemplation of bankruptcy, is a condition precedent to any determination by the referee that any portion of the amount paid to an attorney, as specified in the section, may be recovered by the trustee for the benefit of the estate as an excess over and above what is reasonable. Matter of Union Dredging Co. (D. C., Del.), 35 Am. B. R. 555, 225 Fed. 188.

³⁶⁵ In re Wood & Henderson, 210 U. S. 246, 20 Am. B. R. 1, 5, 52 L. Ed. 1046, 28 Sup. Ct. 621; Haffenberg v. Chicago Title & Trust Co. (C. C. A., 7th Cir.), 27 Am. B. R. 708, 192 Fed. 874.

³⁶⁶ In re Lewin (D. C., Vt.), 4 Am. B. R. 632, 103 Fed. 850.

³⁶⁷ In re Lewin (D. C., Vt.), 4 Am. B. R. 632, 103 Fed. 850; In re Kross (D. C., N. Y.), 3 Am. B. R. 187, 96 Fed. 816; In re Goodwin, 2 N. B. N. Rep. 445; In re Tollett, 2 N. B. N. Rep. 1096; In re Corbett (D. C., Wis.), 5 Am. B. R. 224, 104 Fed. 872. Compare also, under the law of 1867, In re Sidle, Fed. Cas. 12,844; In re Sims, Fed. Cas. 12,888.

SECTION SIXTY-ONE.

DEPOSITORIES FOR MONEY.

§ 61. **Depositories for Money.**—*a* Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.

Analogous provisions: In U. S.: None in the law; but see General Order XXVIII under the law of 1867.

In Eng.: See miscellaneous provisions in General Rules.

Cross-references: To the law: Distribution of consideration of composition on confirmation, § 12-e.

Duty of trustee to deposit money in designated depository, and disbursement thereof, § 47-a(3) (4).

Filing bonds and suits thereon, § 50-h.

To the General Orders: Payment of money deposited by check or warrant, XXIX.

SYNOPSIS OF SECTION.

I. Depositories for Money, 929.

- a. *Designation of banks*, 929.
- b. *Depository to give bond; suit thereon*, 930.
- c. *Disbursement of moneys by depositories*, 930.

I. DEPOSITORIES FOR MONEY.¹

a. **Designation of banks.**—This section is new. Under the law of 1867, the practice was the same, but rested on the authority of a general order merely.² The provisions of this section and of section 47-a (3) are mandatory in form and should not be departed from unless the consent of all interested parties has been obtained.³ The designation of banks is usually made by a standing order of the district court.

1. See also Am. B. R. Dig. § 580.

2. Act of 1867, General Order XXVII.

3. *Huttig Manfg. Co. v. Edwards* (C. C. A., 8th Cir.), 20 Am. B. R. 349, 354, 160 Fed. 619.

Liability of trustee.—Where a trustee, having deposited money of the bankrupt estate to his own account instead of in a

designated depository, pays therefrom to the bankrupt the amount set apart to him as exempt, as soon as set apart, by and with the approval of the referee, he should not be required to repay and deposit such sum in a designated depository. *Matter of Barnett* (D. C., Ga.), 32 Am. B. R. 585, 214 Fed. 263.

b. Depository to give bond; suit thereon.—The depository must give a bond, which should be large enough to cover the amount on deposit at any time. The fact that a bond has been given by a bank or trust company does not authorize a bankruptcy court to make summary orders directing the payment of deposits to receivers and trustees in bankruptcy while the affairs of the bank or trust company are being liquidated under a State law.⁴ It is provided in § 50-h that bonds of "designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions." The reasonable if not necessary implication from the phrase "in the name of the United States" is that the suit shall be brought not by the United States, but by the trustee or other person injured in the name of the United States.⁵ The beneficiaries under a bond given pursuant to this section include all depositing trustees and receivers of bankrupt estates, who should be made parties to a suit on such bond.⁶ There is no right of subrogation under such a bond until the creditors have obtained from the principal or the surety payment not merely of the penalty, but of the debtor's entire obligation.⁷

c. Disbursement of moneys by depositories.—This is regulated by General Order XXIX. It is suggested that deposits by trustees be always in the name of, say "John Doe, as Trustee of Richard Roe, in Bankruptcy No. 765."⁸ Each check should indicate the purpose for which it was drawn. Checks on the funds, if on the clerk's deposit, must be signed by the latter and countersigned by the judge;⁹ if on a trustee's deposit, must be signed by the latter and countersigned by the referee. A bank which pays a check not so countersigned may do so at its peril.¹⁰ This general order has been construed somewhat strictly.¹¹ Perhaps this is wise in exceptional cases. Still, a reasonable observance of proper safeguards against unauthorized withdrawals seems enough.

4. *Matter of Bologh* (D. C., N. Y.), 25 Am. B. R. 726, 185 Fed. 825.

Preference upon dissolution of depository.

—Funds in the possession of a receiver or trustee in bankruptcy, which belong to the bankrupt estate, will be deemed to be "money paid into court" within the meaning of the New York Banking Law; and where such funds have been deposited by a receiver or trustee in a trust company which has been designated as a depository for the moneys of bankrupt estates under section 61 of the Bankruptcy Act, and which has also been designated by the State comptroller as a depository of all funds or moneys paid into court, he is entitled upon a dissolution of the trust company to a preference over its general creditors by virtue of section 190 of the New York Banking Law under which debts due from a trust company as a designated depository shall be given a preference. *Morris v. Carnegie*

Trust Co. (N. Y., Sup. Ct.), 29 Am. B. R. 884, 154 N. Y. App. Div. 596, 139 N. Y. Supp. 969.

5. *Illinois Surety Co. v. United States* (C. C. A., 7th Cir.), 36 Am. B. R. 82, 226 Fed. 665.

6. *Illinois Surety Co. v. United States* (C. C. A., 7th Cir.), 36 Am. B. R. 82, 226 Fed. 665.

7. *Illinois Surety Co. v. United States* (C. C. A., 7th Cir.), 36 Am. B. R. 82, 226 Fed. 665.

8. *In re Carr* (D. C., N. Car.), 9 Am. B. R. 58, 17 Fed. 572.

9. Sometimes they take the form of a court order, attested by the clerk. See also *Trustees' Combined Dividend check and Receipt*, in "Supplementary Forms," *post*.

10. *In re Cobb* (D. C., N. Car.), 7 Am. B. R. 58, 17 Fed. 572.

11. *Id.*

SECTION SIXTY-TWO.

EXPENSES OF ADMINISTERING ESTATES.

§ 62. **Expenses of Administering Estates.**—*a* The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred.

Analogous provisions: In U. S.: Act of 1867, § 28, R. S., §§ 5099, 5127A, 5127B; Act of 1800, § 29.

In Eng.: Act of 1883, § 73.

Cross-references: To the law: Duties or referees in respect to administration of estates, § 39.

Trustees to account for expenses of administration, § 47.

Priority of cost of administering estates, § 64-b (2) (3).

SYNOPSIS OF SECTION

EXPENSES OF ADMINISTERING ESTATES.

I. Expenses of Administering Estates, 932.

- a. *Scope of section*, 932.
- b. *Priority of payment*, 932.
- c. *Auctioneer's services*, 932.
- d. *Appraiser's services and fees*, 933.
- e. *Sums paid for preservation of property*, 933.
- f. *Allowances to assignees for the benefit of creditors*, 933.
- g. *Practice on allowance*, 934.

II. Employment and Compensation of Attorneys, 934.

- a. *In general*, 934.
- b. *Employment of attorney for the trustee*, 935.
- c. *Compensation for attorneys*, 935.
 - (1) IN GENERAL, 935.
 - (2) FOR CLAIMANTS, 937.
 - (3) FOR PETITIONING CREDITORS IN INVOLUNTARY CASES, 937.
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 - (I) *Appointed in bankruptcy*, 938.
 - (II) *Appointed by State court*, 939.
 - (5) FOR BANKRUPTS IN INVOLUNTARY CASES, 940.
 - (6) FOR BANKRUPTS IN VOLUNTARY CASES, 940.
 - (7) FOR TRUSTEES, 941.
 - (8) FOR ASSIGNEE PRIOR TO BANKRUPTCY, 943.
- d. *Effect of amendments of 1903*, 943.

I. EXPENSES OF ADMINISTERING ESTATES.¹

a. **Scope of section.**—Clearly the disbursements authorized by this section are (1) the “actual and necessary expenses,” (2) incurred by officers² in the administration of estates. These include such disbursements as for service of process, for advertising and giving notices, for perpetuating testimony, for the trustee’s bond,³ for the rent,³ insurance, and other necessary expenses attending the closing out of a going business, for the fees of the appraisers, and for the compensation of attorneys employed by the trustee. Under the former law, the words were “all necessary disbursements made by him (the assignee) in the discharge of his duty.”⁴ The expenses properly chargeable against a bankrupt estate for administration are those which pertain to the property belonging to the estate; such expenses may not be charged against property which is subject to valid liens nor against those who have vested rights in the bankrupt’s property.⁵ The close connection between this section and § 64-b is apparent. Indeed, “expenses of administering estates” here seems to be the equivalent of “the cost of administration” in § 64-b (3).

b. **Priority of payment.**—There is nothing either here or in § 64 to indicate the order of payment in case the assets are not sufficient to pay these expenses and the priority debts. Nor has the question yet been squarely up.⁶ A fair construction perhaps would be that “expenses of administering” are the same as the “cost of administration” in § 64-b (3), with the result that they will be paid only in case there is sufficient cash on hand to care for (1) taxes, (2) the cost of preserving the estate, and (3) the filing fees paid by creditors.⁷ Whether such expenses should be paid ahead of a valid specific lien at the time of the bankruptcy is a question.⁸ A trustee will be surcharged the amount of penalties incurred for a failure to pay taxes, if there were funds of the estate available for the purpose when the taxes were due.⁹

c. **Auctioneer’s services.**—The courts are reluctant to allow a trustee any sum in payment of the fees of an auctioneer.¹⁰

1. See also Am. B. R. Dig. § 584 and cross references thereunder.

2. Bankr. Act. § 1 (18); *Wilson v. Penn.*, etc., Co. (C. C. A., 3d Cir.), 8 Am. B. R. 169, 114 Fed. 742.

Payment from separate fund.—Where the trustee received a sum of money from bankrupt as the result of a successful prosecution for concealment of assets, which fund it was agreed should be used to defray the expenses of the bankruptcy administration, he can not charge his expenses against the general estate. *Matter of Di Cola* (C. C. A., 3d Cir.), 33 Am. B. R. 389, 217 Fed. 743.

3. Consult *In re Wiessner* (D. C., N. Y.), 8 Am. B. R. 415, 115 Fed. 421.

4. Act of 1867, § 28, R. S. § 5099.

5. *Matter of Ranch* (D. C., Va.), 36 Am. B. R. 75, 226 Fed. 982 citing text; *Matter of O’Gara Coal Co.* (C. C. A., 7th Cir.), 38 Am. B. R. 131, 235 Fed. 883.

6. Note *In re Burke* (Ref., Ohio), 6 Am. B. R. 502.

7. See Bankr. Act, § 63-a-b (1) (2).

8. *In re Frick* (Ref., Ohio), 1 Am. B. R. 719. *Contra: In re Tebo* (D. C., W. Va.), 4 Am. B. R. 235, 101 Fed. 419; *In re*

Bourlier Cornice & Roofing Co. (D. C., Ky.), 13 Am. B. R. 585, 133 Fed. 958. *In Matter of Ranch* (D. C., Va.), 36 Am. B. R. 75, 226 Fed. 982, it was held that since the words “of estates” and “bankrupt’s estates,” as used in sections 62 and 64-b respectfully relating to the payment of costs of administration, refer to the unincumbered assets generally as distinguished from property upon which there is a specific lien, only such costs as are necessarily incident to the preservation of the particular estate, its conversion into money, and payment thereof to the lienor, are entitled to payment in preference to a landlord’s lien for rent.

9. *Matter of Monsarrat* (D. C., Hawaii), 25 Am. B. R. 820, 3 U. S. Dist. Ct. Haw. 641.

10. **Payment of fees of auctioneer.**—In the case of *In re Pegues*, 3 N. B. R. 80, Fed. Cas. 10,907, it was said: “The law contemplates that the assignee shall himself sell the property of the estate. There may be cases in which it will be proper to employ an auctioneer, but the necessity for so doing should be first shown to the court and leave obtained.” This language was quoted with approval by Judge Longyear in the case of

d. Appraisers' services and fees. When property is to be administered through the bankruptcy court it is often important that a reliable inventory be made at as early date as possible. The appraisal should be made carefully and accurately and compensation therefor, based on the nature of the estate and the circumstances of the case, should be paid and charged against the estate.¹¹

e. Sums paid for preservation of property.—The trustee may be allowed for all sums necessarily paid for the preservation of the estate. If such sums have been paid by other parties he may, with the approval of the court, repay them especially if they had an interest in the preservation of the property, and if there were circumstances which necessitated prompt action on their part. Thus, if creditors prior to the appointment of a trustee should pay for liens which were being enforced in order to save the property for the estate they would be subrogated to the rights of the lienors.¹² And it has been held that where creditors have secured a lien of which they are deprived by the operation of the bankruptcy law, and the full benefit of their litigation accrues to others, the bankruptcy court may make a reasonable allowance as an indemnity for the cost and expenses through which such benefit has been obtained.¹³ The compensation of a receiver in bankruptcy lies in the sound discretion of the court. This rule also applies to marshals in taking care of property.¹⁴ Where expenses are incurred by a trustee in the preservation of property subject to mortgage, solely in the interest of creditors generally, they should be paid out of the estate, and may not be charged against the mortgagees.¹⁵

f. Allowances to assignee for the benefit of creditors.—An assignee for the benefit of creditors is not entitled to compensation merely by virtue of his office; his sole claim to any reward is measured by the extent of his labors in preserving the estate.¹⁶ Where he has in good faith protected and preserved property to the benefit of the estate of the bankrupt he is entitled to payment of his legitimate expenses and to compensation for his services and for the services of his attorney out of the proceeds of the property he has received,¹⁷ and the trustee in bankruptcy may properly allow his expenses in converting the property into money, but to the extent only to which his conversion of it into money has saved the estate in bankruptcy similar expenditure.¹⁸ Thus, money paid by the assignee for the benefit of creditors, to discharge valid liens upon the property, may be allowed him.¹⁹ An assignee for the benefit of creditors may also be allowed sums which, pursuant to the terms of the

In re Sweet (D. C., Mich.), 9 N. B. R. 48, Fed. Cas. 13,688.

11. Appraisers; fees.—Appraisers should make a careful and accurate inventory; it should be more than a mere formality, especially where receivers are operating a business. An allowance of two hundred and fifty dollars apiece to three appraisers should be approved, where it appears that the case was extraordinary, the business consisting of thirty stores scattered over New England, and that the receiver and trustee have handled over \$66,000.00. *Matter of Mills Tea & Butter Co.* (D. C., Mass.), 37 Am. B. R. 154, 235 Fed. 812.

12. *In re Gregg*, 3 N. B. R. 529, Fed. Cas. 5,976.

13. *In re Lesser* (D. C., N. Y.), 3 Am. B. R. 815, 100 Fed. 433. See also *In re Lit-*

tle River Lumber Co. (D. C., Ark.), 3 Am. B. R. 682, 107 Fed. 558.

14. *In re Scott* (D. C., N. Car.), 3 Am. B. R. 625, 99 Fed. 404. As to compensation for services of custodian of property, see *In re Prichardt* (D. C., Wis.), 29 Am. B. R. 524, 198 Fed. 879.

15. *In re Vulean Foundry & Machine Co.* (C. C. A., 3d Cir.), 24 Am. B. R. 825, 180 Fed. 671.

16. *Matter of Sobol* (D. C., N. Y.), 35 Am. B. R. 804, 230 Fed. 652. See also *Am. B. R. Dig.* § 586.

17. *Bramble v. Brett* (C. C. A., 8th Cir.), 36 Am. B. R. 526, 230 Fed. 385.

18. *MacDonald v. Moore*, 15 N. B. R. 26, 1 Abb. N. C. 53; *Burkholder v. Stump*, 4 N. B. R. 579, Fed. Cas. 2,165; *In re Cohn*, 6 N. B. R. 379, Fed. Cas. 2,966.

19. *Livingston v. Bruce*, 1 Blatch. 318.

assignment, he has paid over to the creditors.²⁰ Where an assignee for the benefit of creditors remains in possession of the property with the consent of the referee, and performs valuable services for the estate, his expenses and compensation for such services, up to the time of the adjudication, should be paid as disbursements.²¹

g. Practice on allowance.—Expenses of administration must be reported in detail under oath, and examined and approved by the court. Where the allowance is for the compensation of the trustee's attorney, he should always file an affidavit specifying the services performed. But such an allowance may be made without a notice to creditors.²² Agreements and stipulations as to payment of costs and expenses, entered into by the attorneys for the respective parties have been sanctioned, and if fair and equitable will be enforced and carried into effect according to their terms.²³ As a rule, all disbursements by the trustee are itemized in his verified reports, and formally allowed on the coming up of such reports for confirmation.

II. EMPLOYMENT AND COMPENSATION OF ATTORNEYS.²⁴

a. In general.—Section 62 strictly only has to do with disbursements by the attorney for the trustee. For convenience, however, the subject of attorneys and their compensation is generally discussed here.²⁵ Economy in the administration of estates is the policy of the present law,²⁶ and is to be strictly enforced.²⁷ This principle should be kept in mind in fixing the compensation of attorneys.²⁸ Courts will require satisfactory evidence to show necessity of legal aid on the part of the trustee.²⁹ Attorneys should be allowed reasonable compensation for services rendered, but only when they are beneficial

²⁰. *Craig v. Thompson*, 12 N. B. R. 81, Fed. Cas. 3,320, 2 Dill. 513; *Jones v. Kinney*, 4 N. B. R. 649, Fed. Cas. 7,473, 5 Ben. 259.

²¹. *In re Pattee* (D. C., Ct.), 16 Am. B. R. 450, 143 Fed. 994.

Services of assignee.—In the case of *In re Pauley* (Ref., N. Y.), 2 Am. B. R. 333, Referee Hotchkiss, writing the opinion, holds that a general assignee in possession, prior to bankruptcy, will be allowed out of the estate his disbursements in preserving the same, and that he will also be allowed reasonable fees as custodian of the estate, but he cannot be given fees as assignee, and that the attorneys of such assignee should not be allowed, except in unusual circumstances, anything out of the estate.

In the case of *Peter Paul Book Co.* (D. C., N. Y.), 5 Am. B. R. 105, 104 Fed. 786, the court held that no allowance can be made by a court of bankruptcy to an assignee under a general assignment for services rendered as custodian of the property prior to the filing of the petition in bankruptcy against the assignor, even though such services appear to have been for the benefit of the general creditors. The court, however, said the bankruptcy court is authorized to make an allowance for services rendered in preserving the estate subsequent to filing the petition.

²². *In re Stotts* (D. C., Iowa), 1 Am. B.

R. 641, 93 Fed. 438. Compare *In re Brinker*, Fed. Cas. 1,882.

²³. *King Hardware Co. v. Christopher* (C. C. A., 5th Cir.), 34 Am. B. R. 422, 222 Fed. 224.

²⁴. See also Am. B. R. Dig. §§ 101–113.

²⁵. See also Bankr. Act, § 64-b (3).

²⁶. *Matter of Frank Meis* (Ref., Ky.), 18 Am. B. R. 104.

²⁷. *In re Ketterer Manufacturing Co.* (D. C., Pa.), 19 Am. B. R. 646, 155 Fed. 987.

²⁸. *In re Lang* (D. C., Tex.), 11 Am. B. R. 794, 127 Fed. 755.

²⁹. **Necessity of employment of counsel by trustee.**—*In re Davenport* (D. C. Tex.), 3 N. B. R. 77, Fed. Cas. 3,587, holding that while in prosecuting or defending suits the assignee had the right to employ counsel, and also had the right to obtain legal advice whenever really necessary to enable him to act for the interests of the estate or of creditors, still an allowance to an assignee for the services of counsel in connection with the compromise of an ordinary claim could not be allowed, it being a proceeding of such a character that an assignee of ordinary intelligence would be able to act for himself and without the aid of an attorney. But *In re Colwell* (D. C., Mass.), 15 N. B. R. 92, it was held that an allowance was proper to the trustee for procuring the services of counsel to investigate as to the affairs of the estate, although no litigation resulted.

to the estate.³⁰ An application to the court for the removal of an attorney for a trustee or receiver will be considered, but will not be granted unless clearly shown to be necessary for the interests of creditors and the estate.³¹

b. **Employment of attorney for the trustee.**³²—This is carefully regulated by statute in England; and the law there, being expressive of the experience of centuries, may be consulted with profit. The reported cases under the law of 1867, while not numerous, are valuable.³³ Under the present law, it has been held that the trustee's attorney may be chosen by the creditors in the same way the trustee is chosen;³⁴ although the better opinion is that he should employ his attorney himself without interference from the creditors.³⁵ Also, that the attorney should not have been the attorney for the bankrupt,³⁶ or for an interest adverse to the general creditors.³⁷ It is the duty of the trustee to employ counsel to protect the interests of the estate in pending litigations.³⁸

c. **Compensation of attorneys.**—(1) **IN GENERAL.**—An attorney's right to compensation is incident to his employment. Whether it shall be paid out of the assets of a bankrupt estate is the question considered here. It has been held that, under § 64-b (3), the attorneys for the petitioning creditors and for the bankrupt in involuntary cases have an absolute right to compensation;³⁹ the amount only is discretionary. It is suggested, however, that the clause "as the court may allow" has relation to all the words of the subdivision and not merely to the clause "and to the bankrupt in voluntary cases."⁴⁰ Such a view would harmonize the statute and the practice under it. But this discretion must be sound and not unrestrained; it is subject to review.⁴¹ Generally speaking, the determination as to the amount to be paid

30. *Randolph v. Scruggs*, 190 U. S. 533; 10 Am. B. R. 1, 47 L. Ed. 1165, 23 Sup. Ct. 710; *In re Zier & Co.* (D. C., Ind.), 11 Am. B. R. 527, 142 Fed. 102; *In re Covington* (D. C., N. Car.), 13 Am. B. R. 150, 132 Fed. 884; *In re Duran Mercantile Co.* (D. C., N. Mex.), 29 Am. B. R. 450, 199 Fed. 961.

31. *In re Champion Wagon Co.* (D. C., N. Y.), 28 Am. B. R. 51, 193 Fed. 1004.

32. See also Am. B. R. Dig. § 106.

33. For instance, *In re Drake*, Fed. Cas. 4,058; *In re Davenport*, Fed. Cas. 3,587; *In re Noyes*, Fed. Cas. 10,371. For an order of appointment under the present law, see "Supplementary Forms," *post*.

34. *In re Smith* (Ref., N. Y.), 1 Am. B. R. 37; *In re Little River Lumber Co.* (D. C., Ark.), 3 Am. B. R. 682, 101 Fed. 558.

35. *In re Abram* (D. C., Cal.), 4 Am. B. R. 575, 103 Fed. 272; *In re Arnett* (D. C., Tenn.), 7 Am. B. R. 522, 112 Fed. 770; *In re Baber* (D. C., Tenn.), 9 Am. B. R. 406, 119 Fed. 525; *Matter of Columbia Iron Works* (D. C., Mich.), 14 Am. B. R. 526, 142 Fed. 234.

36. *In re Teuthorn* (Ref., Mass.), 5 Am. B. R. 767.

Attorney for bankrupt.—A trustee or receiver should not ordinarily employ the attorney who represents the bankrupt or one representing interests in a litigation which are adverse to the general estate, or in conflict with other interests represented by the trustee; and where there are matters in

controversy between different classes of creditors, the court will usually decline to authorize the employment by the trustee of an attorney representing one of such classes. *In re Smith* (C. C. A., 6th Cir.), 29 Am. B. R. 628, 203 Fed. 369.

37. *In re Rusch* (D. C., Wis.), 5 Am. B. R. 565, 105 Fed. 607; *In re Kelly Dry Goods Co.* (D. C., Wis.), 4 Am. B. R. 528, 102 Fed. 747.

38. *In re McKenna* (D. C., N. Y.), 15 Am. B. R. 4, 137 Fed. 611.

39. *In re Curtis* (C. C. A., 7th Cir.), 4 Am. B. R. 17, 100 Fed. 784, approved and followed in *Smith v. Cooper* (C. C. A., 5th Cir.), 9 Am. B. R. 755, 120 Fed. 230. Compare *In re Smith* (D. C., N. Car.), 5 Am. B. R. 559, 108 Fed. 39.

40. *In re Morris* (D. C., N. Car.), 11 Am. B. R. 145, 125 Fed. 841; *In re Kross* (D. C., N. Y.), 3 Am. B. R. 187, 96 Fed. 816.

41. *In re Curtis* (C. C. A., 7th Cir.), 4 Am. B. R. 17, 100 Fed. 784; *In re Burrus* (D. C., Va.), 3 Am. B. R. 296, 97 Fed. 926; *Smith v. Cooper* (C. C. A., 5th Cir.), 9 Am. B. R. 755, 120 Fed. 230. But it will not usually be disturbed. *In re Tebo* (L. C., W. Va.), 4 Am. B. R. 235, 101 Fed. 419.

Review of exorbitant fee.—Still, in the exercise of its judicial discretion, the court will not allow an attorney's fee which is exorbitant, though recommended by the referee. *In re Carr* (D. C., N. Car.), 8 Am. B. R. 635, 116 Fed. 556; *Matter of Grant* (C.

attorneys will not be disturbed on appeal except for manifest error.⁴² Whether compensation shall be allowed depends on the facts of each case.⁴³ In determining the amount of compensation, the value of the estate must be taken into consideration.⁴⁴ It is not so much what was done by the attorney, as what was really required.⁴⁵ The court should not be called upon to settle differences between counsel as to what proportion of the total amount allowed each should receive.⁴⁶ The bankrupt should act in good faith and not delay the proceedings in order to have a fee allowed to his attorney.⁴⁷ Neither the attorney for petitioning creditors in involuntary bankruptcy proceedings, nor the attorney for the bankrupt, can be allowed compensation out of a fund derived from the sale of property under mortgage foreclosure proceedings, where it appears that such bankruptcy proceedings were of no benefit to the mortgagee.⁴⁸ But if a mortgagee has his lien enforced in such proceedings and thus profits by the result he may be charged with counsel fees.⁴⁹ If the right to attorney's fees for the collection of a mortgage debt depends upon a statute requiring notice of foreclosure, such right is inchoate dependent upon suit being brought after notice and non-payment by the mortgagor; if bankruptcy intervene prior to the foreclosure, the mortgagee will not be entitled to attorney's fees.⁵⁰ In some jurisdictions the claim of a mortgagee for attorney's fees incurred by him in protecting his lien during bankruptcy proceedings of the mortgagor will be allowed where the mortgage contained a stipulation that the mortgagee should be paid attorney's fees in case he was obliged to employ counsel.⁵¹ If the referee is not satisfied as to the services rendered by an attorney, he may suspend the hearing for a reasonable time,⁵² and it is his duty to reduce the

C. A., 2d Cir.), 38 Am. B. R. 210, 238 Fed. 132, holding that the amount to be allowed as compensation for attorneys is within the discretion of the court, and the determination will not be disturbed unless there is a plain abuse of discretion.

42. *Matter of Atcherley* (D. C., Hawaii), 25 Am. B. R. 827; *Matter of Iron Clad Mfg. Co.* (C. C. A., 2d Cir.), 33 Am. B. R. 69, 215 Fed. 877.

43. See *In re Evans* (D. C., N. Car.), 8 Am. B. R. 730 (and modification on rehearing in foot-note), 116 Fed. 909.

Waiver.—Where attorneys for the bankrupt, for the trustee and petitioning creditors, and for the trustee himself, all waive in writing the deposit in a composition proceeding in a sum sufficient to pay their fees, in order to expedite and facilitate the proceeding, they may not thereafter insist upon payment out of the estate. It seems that if the bankrupt be benefited by the waiver he himself should pay the attorneys. *Matter of Frischnecht* (C. C. A., 2d Cir.), 34 Am. B. R. 530, 233 Fed. 417.

44. *In re Ellett Electric Co.* (D. C., N. Y.), 28 Am. B. R. 453, 196 Fed. 400.

45. *In re Connell & Sons* (D. C., Pa.), 9 Am. B. R. 474, 120 Fed. 846.

46. *Hall v. Reynolds* (C. C. A., 8th Cir.), 36 Am. B. R. 721, 231 Fed. 946.

47. *In re Woodward* (D. C., N. Car.), 2 Am. B. R. 692, 95 Fed. 955. Thus, a fee will not be allowed for defending the bank-

rupt for contempt. *In re Mayer* (D. C., Wis.), 4 Am. B. R. 238, 101 Fed. 695.

48. *In re Goldville Mfg. Co.* (D. C., N. Car.), 10 Am. B. R. 552, 118 Fed. 892. As to allowance to attorney for services performed for mortgagee on foreclosure, see *In re Claussen & Co.* (D. C., N. Car.), 21 Am. B. R. 34, 164 Fed. 300.

49. *In re Torchia* (D. C., Pa.), 26 Am. B. R. 188, 185 Fed. 576.

50. *In re Weiland* (D. C., Ga.), 28 Am. B. R. 620, 197 Fed. 116.

51. *Matter of Ferreri* (D. C., La.), 26 Am. B. R. 659, 188 Fed. 675.

In Pennsylvania, the bankruptcy court may, under the settled rule of practice, reduce an attorney's commission, stipulated for in the bond and mortgage. *In re Wendel* (D. C., Pa.), 18 Am. B. R. 665, 152 Fed. 672.

Stipulation of fees in mortgage.—Where a mortgage made by the bankrupt stipulated for payment of attorney's fees upon foreclosure and the mortgagee came into the bankruptcy court, proved his claim, and a private sale of the property was made by the trustee, this sale is not an equivalent of a foreclosure, and the attorney's fee provided for in the mortgage should not be allowed. *In re Roche* (C. C. A., 5th Cir.), 4 Am. B. R. 370, 101 Fed. 956.

52. *In re Dreeben* (D. C., Tex.), 4 Am. B. R. 140, 101 Fed. 110.

amount allowed by a trustee as counsel fees if they are excessive.⁵³ Compensation cannot be allowed save for "professional services actually rendered." Additional precedents will be found under the appropriate paragraphs, *post*.

(2) FOR CLAIMANTS.—Attorneys for mere claimants are not entitled to allowances out of the estate;⁵⁴ not even attorneys for the petitioning creditors for services after the appointment of the trustee,⁵⁵ nor attorneys for creditors who object to the allowance of claims of other creditors.⁵⁶ But where the trustee has refused or neglected to recover assets or resist a questionable claim, and individual creditors do this for the benefit of all, their attorneys will be allowed compensation for so doing;⁵⁷ attorneys who come to the assistance of the trustee in proceedings instituted by him to compel the bankrupt to disclose property retained by him, may be compensated.⁵⁸

(3) FOR PETITIONING CREDITORS IN INVOLUNTARY CASES.⁵⁹—This allowance is customary. The amount depends on a variety of circumstances, unnecessary to enumerate here. The allowance of a fee to attorneys for petitioning creditors is a matter of right;⁶⁰ the amount of the allowance is not wholly a matter of discretion; it must be reasonable, determined upon evidence of the service performed and of the value of such service; it rests in legal judgment and judicial discretion, but not in unrestrained discretion.⁶¹ The elements to be taken into consideration in making an allowance to attorneys for petitioning creditors are (1) the time properly required to be spent on the controversy; (2) the intricacy of the questions involved; (3) the amount involved; (4) the strenuousness of the opposition encountered; (5) the results achieved therein; as well as (6) the policy of the bankruptcy act toward economy in administration.⁶² The counsel fees allowed in proceedings

53. *Matter of Ferreri* (D. C., La.), 26 Am. B. R. 659, 188 Fed. 675.

54. *In re Smith* (D. C., N. Car.), 5 Am. B. R. 559, 108 Fed. 39; *In re Coventry Evans Furniture Co.* (D. C., N. Y.), 22 Am. B. R. 623, 171 Fed. 673; *In re Allert* (D. C., N. Y.), 23 Am. B. R. 101, 173 Fed. 691.

55. *In re Silverman* (D. C., N. Y.), 3 Am. B. R. 227, 97 Fed. 32.

56. *Matter of Fletcher* (Ref., N. Y.), 10 Am. B. R. 398; *In re Roadarmour* (C. C. A., 6th Cir.), 24 Am. B. R. 49, 177 Fed. 379. See *In re Worth* (D. C., Iowa), 12 Am. B. R. 566, 130 Fed. 927. A claim for such an allowance should be formally presented. *In re Stoddard Bros. Lumber Co.* (D. C., Idaho), 22 Am. B. R. 435, 169 Fed. 190.

57. *In re Groves*, 2 N. B. N. Rep. 466; *In re Little River Lumber Co.* (D. C., Ark.), 3 Am. B. R. 682, 101 Fed. 558.

58. *In re Felson* (D. C., N. Y.), 15 Am. B. R. 185, 139 Fed. 275.

59. See also Am. B. R. Dig. § 104.

60. *Matter of Williams* (D. C., Ohio), 38 Am. B. R. 769.

Right to employ attorney.—A creditor who thinks that an involuntary bankruptcy petition should be filed, has the right to employ an attorney to investigate the legal questions involved, to give such advice as is necessary, to investigate records and to prepare the petition and file it, beyond this, an attorney's services are not necessary, and an allowance

should not be made. *Matter of Sage* (D. C., Ia.), 35 Am. B. R. 625, 225 Fed. 397.

61. *In re Curtis* (C. C. A., 7th Cir.), 4 Am. B. R. 17, 100 Fed. 784; *Smith v. Cooper* (C. C. A., 5th Cir.), 9 Am. B. R. 755, 120 Fed. 230; *In re Southern Steel Co.* (D. C., Ala.), 22 Am. B. R. 476, 169 Fed. 702; *Matter of Williams* (D. C., Ohio), 38 Am. B. R. 762; *Hall v. Reynolds*, (C. C. A., 8th Cir.), 36 Am. B. R. 721, 231 Fed. 946.

62. *Matter of Smith & Oakland Motor Co.* (Ref., N. J.), 32 Am. B. R. 363.

Amount of allowance.—The value of an attorney's services in preparing a petition and filing the same, and procuring the adjudication, should not be more than \$100 in ordinary cases. *Matter of Sage* (D. C., Ia.), 35 Am. B. R. 625, 225 Fed. 397. Where petition was brief and there was no contest, and the attorney did not prepare the schedules or perform duties after adjudication an allowance of \$100 was considered liberal. *Matter of Atkins* (D. C., Ky.), 34 Am. B. R. 794, 225 Fed. 639. Where the bankrupt offered a compromise of forty cents on the dollar, a fee of \$50 has been held sufficient compensation for the attorney for the petitioning creditors, and \$20 for the attorney for the bankrupt. *In re Talton* (D. C., N. C.), 14 Am. B. R. 617, 137 Fed. 178.

Where \$2,000 was distributed, allowance of \$200 to creditors' attorney was approved. *In re Covington* (D. C., N. Car.), 13 Am. B. R. 150, 132 Fed.

for seizing and holding the property of an alleged bankrupt are for special services, and are a distinct matter.⁶³ Where two proceedings are started by attorneys representing different creditors, and are thereafter consolidated by order of the court, only a single attorney's fee will be allowed, and this should be equitably divided.⁶⁴ Where two petitions are presented, the first being defective and being shown to be in bad faith, and was subsequently amended to include acts of bankruptcy not alleged in the first petition, the attorneys for the second petitioning creditors are entitled to an allowance for services in securing the adjudication.⁶⁵ Compensation should be paid to attorneys for petitioning creditors out of the fund remaining for distribution to unsecured creditors and not out of the proceeds of the sale of incumbered property, prior to the payment of valid liens.⁶⁶ An allowance will not be permitted for services rendered before proceedings were begun,⁶⁷ nor for services rendered necessary by the attorney's own negligence,⁶⁸ nor for solicitation of other creditors to join in the petition.⁶⁹ Attorneys for petitioning creditors who are afterwards appointed trustees are not entitled to allowances for services as attorneys in addition to their commissions as trustees, after appointment as such.⁷⁰

(4) FOR RECEIVERS.—(I) *Appointed in bankruptcy*.⁷¹—The rules applicable to the compensation of attorneys for the trustee apply also to those

884. In an important case, an allowance of \$12,500 was cut down by the circuit court of appeals to \$2,000. In re Curtis (C. C. A., 7th Cir.), 4 Am. B. R. 17, 100 Fed. 784. A fee of \$5,000 to attorneys for petitioning creditors was allowed where the estate created by the acts of such attorneys approximated \$15,000 in value, and it appeared that the services rendered required a high grade of ability and energy, that the time employed was sufficient to command equal compensation in private practice, that the results had been accomplished against the most strenuous opposition, and the creditors had received the full amount of their claims. In re Berkowitz (Ref., N. J.), 22 Am. B. R. 236. For other cases dealing with the amount of allowance to the attorney for petitioning creditors, see In re Woodard (D. C., N. Car.), 2 Am. B. R. 692, 95 Fed. 955; In re Silverman (D. C., N. Y.), 3 Am. B. R. 227, 97 Fed. 325; In re Harrison Mercantile Co. (D. C., Mo.), 2 Am. B. R. 419, 95 Fed. 123; In re Ghiglione (D. C., N. Y.), 1 Am. B. R. 580, 93 Fed. 186.

63. Hoffschlaeger Co. v. Young Nap (D. C., Hawaii), 12 Am. B. R. 526, 2 U. S. D. C. Hawaii 108.

64. In re McCracken & McLeod (D. C., La.), 12 Am. B. R. 95, 129 Fed. 621; In re Coney Island Lumber Co. (D. C., N. Y.), 29 Am. B. R. 91, 199 Fed. 197, holding that but one allowance, based on actual value, can be made for all services rendered to the parties whose rights are embodied in and depend upon the application of the petitioning creditors.

65. In re Southern Steel Co. (D. C., Ala.), 22 Am. B. R. 476, 169 Fed. 702. See also Matter of Fischer (C. C. A., 2d Cir.), 23 Am. B. R. 427, 175 Fed. 531.

66. Matter of Rauch, (D. C., Va.), 36 Am. B. R. 75, 226 Fed. 982.

Compensation of attorneys for petitioning creditors out of general fund.—Where it appeared that the property of a bankrupt consisted largely of real estate heavily incumbered by liens which would have to be paid before the petitioning and other unsecured creditors could realize anything, it was error for the referee to decree compensation to be paid the attorneys for the petitioning creditor out of the proceeds of a sale of the property when made, it being impossible to ascertain what surplus, if any, would remain for the unsecured creditors after payment of liens. In re Gillaspie (D. C., W. Va.), 27 Am. B. R. 59, 190 Fed. 88. See also In re Freeman (D. C., Ga.), 27 Am. B. R. 16, 190 Fed. 48, holding that where, upon the filing of an involuntary petition in bankruptcy, by a small creditor, the alleged bankrupt's answer the next day admitting bankruptcy, and thereupon the referee, without notice to other creditors, passes an order of adjudication, the proceeding will be deemed only nominally an involuntary one, and fees of attorneys for the petitioning creditors will not be paid out of the proceeds of the sale of bankrupt's stock of goods to the detriment of one holding a valid mortgage thereon, who participated in the proceedings, if at all, only for the purpose of objecting.

67. Matter of Hart & Co. (D. C., Hawaii), 16 Am. B. R. 725.

68. In re Francis Levy Outfitting Co., Ltd. (D. C., Hawaii), 29 Am. B. R. 8.

69. Matter of Sage, (D. C., Ia.), 35 Am. B. R. 625, 225 Fed. 397.

70. Holland v. Mollwaine (C. C. A., 4th Cir.), 34 Am. B. R. 416, 223 Fed. 777.

71. See also Am. B. R. Dig. § 107.

appointed for receivers.⁷² Ordinarily the duties of a receiver in bankruptcy neither require nor justify the employment of an attorney, and no claim for such services is chargeable *per se* against the estate predicated alone upon the fact of employment and services rendered.⁷³ An attorney for a receiver will be allowed compensation for services only to the extent that the services were rendered in behalf of the estate or to its benefit,⁷⁴ and the fixing of the compensation to be made rests in the sound discretion of the district judge.⁷⁵ No allowance will be made to the receiver for services rendered by his attorney in the interest of petitioning creditors who were his clients.⁷⁶ The receiver should engage counsel who stand independent of the parties to the litigation, and the estate is not chargeable for services which may be given to the receiver by the attorney for either party during the continuance of such relation.⁷⁷ The number of attorneys employed by a receiver should not enter into the allowance of fees, which should be made as though one attorney had been employed.⁷⁸

(II) *Appointed by State court.*⁷⁹—Where a receiver has been appointed in a State court in an action antagonistic to the interests of the general creditors of the bankrupt, an attorney employed by the receiver will not be allowed compensation for his services.⁸⁰ A State court may not encumber the assets of the bankrupt's estate for services performed by attorneys for a receiver after the proceedings in which he was appointed have been suspended by bankruptcy.⁸¹ Services rendered by an attorney of a receiver appointed in a State court which are beneficial to the estate of a bankrupt corporation, may, in pursuance of unmistakable equitable consideration, be paid for out of the estate.⁸²

72. See "For Trustees," in this section, *post*.

73. *In re T. E. Hill Co.* (C. C. A., 7th Cir.), 20 Am. B. R. 73, 159 Fed. 73.

74. *In re Ketterer Manufacturing Co.* (D. C., Pa.), 19 Am. B. R. 646, 155 Fed. 987; *In re Huddleston* (D. C., Ga.), 21 Am. B. R. 669, 167 Fed. 428. Text, cited and approved in *In re Leonard* (D. C., Nev.), 24 Am. B. R. 97, 103, 177 Fed. 503.

75. *Matter of Cash-Papworth, Grow-sir* (C. C. A., 2d Cir.), 31 Am. B. R. 709, 210 Fed. 24.

76. *In re Oppenheimer* (D. C., Pa.), 17 Am. B. R. 59, 146 Fed. 140; *In re Falkenberg* (D. C., N. Mex.), 30 Am. B. R. 718, 206 Fed. 835.

77. *In re Kelley Dry Goods Co.* (D. C., Wis.), 4 Am. B. R. 523, 102 Fed. 748.

Agreement by receiver to employ attorney if appointed.—No allowance should be made to attorneys who have been employed by a trust company acting as receiver and trustee under an agreement made in advance that if such attorneys procured its appointment they should be retained as advisors. *In re Smith* (C. C. A., 6th Cir.), 29 Am. B. R. 628, 203 Fed. 369.

78. *In re Falkenberg* (D. C., N. Mex.), 30 Am. B. R. 718, 206 Fed. 835.

79. See also Am. B. R. Dig. § 108.

80. *In re Zier* (C. C. A., 7th Cir.), 15 Am. B. R. 646, 142 Fed. 102, holding that the disallowance of fees in such a case rests

primarily on the fact that the services were not beneficial to the estate.

81. Fees allowed attorneys of receiver in State court.—*In re Rogers* (D. C., Ga.), 8 Am. B. R. 723, 116 Fed. 435, the court said: "The Federal court will decline to recognize the authority of the State court to encumber assets of a bankrupt for the fees and expenses of its officers entered after the proceedings therein were suspended by the bankruptcy proceedings. . . . If the assets are delivered to the trustees by the receiver of the State court, this court will consider any application for compensation which may be made by officers of the State court, and, if allowable, will grant suitable compensation."

82. Compensation of attorneys for receiver of corporation appointed by State court.—Where a fee has been allowed attorneys by a State court for services rendered the receiver of a corporation in that court and ordered to be paid by such receiver out of any funds available for that purpose, and prior to the making of such order the corporation has become bankrupt and its assets have passed under the jurisdiction of the bankruptcy court, such fee is not a priority claim constituting a lien on the assets of the bankrupt corporation. Such claim is allowable only upon equitable considerations for services from which the estate in bankruptcy has derived benefit, and to the extent only that they were beneficial in fact.

(5) FOR BANKRUPTS IN INVOLUNTARY CASES.⁸³—Here the statute limits compensation to services rendered to the bankrupt while performing the duties put on him by the act.⁸⁴ There has been some discussion as to the meaning of the words,⁸⁵ Where there are separate attorneys for different partnership bankrupts but one allowance should be made.⁸⁶ The test seems to be: did the performance of the prescribed duties materially benefit or hasten the administration of the estate,⁸⁷ and, if so, were the services of the bankrupt's attorney both necessary and instrumental to either of those ends? The bankrupt's attorney may not be allowed for services rendered in defending a suit by the trustee to compel the bankrupt to turn over assets,⁸⁸ nor for contesting a petition for adjudication of bankruptcy, nor for attending a first meeting of creditors, where it does not appear that his presence was of assistance to the bankrupt in performing duties required under the act,⁸⁹ nor for resisting the claim of a receiver appointed by a State court prior to adjudication.⁹⁰

(6) FOR BANKRUPTS IN VOLUNTARY CASES.⁹¹—Here the cases take a wide range. The allowance itself and the amount are both discretionary. It has been held on the one hand that the attorney for the bankrupt is merely a general creditor entitled to dividends;⁹² and, on the other, that he is entitled to an allowance for all services to the bankrupt during the proceeding, whether beneficial to the estate or not, even those connected with the discharge; and, in addition, to priority of payment.⁹³ The safer rule is that the bankrupt's attorney is only entitled to compensation out of the estate for services which, though performed for the bankrupt, are really "in aid of the estate and its administration."⁹⁴ This excludes services in connection with the discharge,⁹⁵ and, it is thought, save in exceptional instances, everything done after the appointment of the trustee. But it has been held that an attorney for a

In re Standard Fuller's Earth Co. (D. C., Ala.), 26 Am. B. R. 562, 186 Fed. 578. See *State of Missouri v. Angle* (C. C. A., 8th Cir.), 38 Am. B. R. 394, 236 Fed. 644, affg. 35 Am. B. R. 436, 224 Fed. 525.

83. See also Am. B. R. Dig. § 103.

84. See Bankr. Act, § 7, *ante*; In re Payne (D. C., N. Y.), 18 Am. B. R. 192, 151 Fed. 1,018; In re Woodard (D. C., N. Car.), 2 Am. B. R. 692, 95 Fed. 955.

Compensation of attorney for bankrupt.—An allowance of \$25 to the attorney for the debtor in contemplation of bankruptcy, is sufficient, where he never appeared before the referee and did nothing but prepare bankrupt's schedules which were brief and did not require much labor. In re Fullick (D. C., Pa.), 28 Am. B. R. 634, 201 Fed. 463.

Claim by attorneys for bankrupt examined and held, that \$500, received by them from the debtor in contemplation of bankruptcy, is ample consideration for all services performed and disbursements. *Matter of Union Dredging Co.* (D. C., Del.), 35 Am. B. R. 555, 225 Fed. 188.

85. See foot-notes of next paragraph, where the case in both voluntary and involuntary bankruptcy are collated.

86. In re Eschwege (Ref., N. Y.), 8 Am. B. R. 282.

87. In re Goldville Mfg. Co. (D. C., S. Car.), 10 Am. B. R. 552, 118 Fed. 892; In

re Rosenthal (D. C., Mo.), 9 Am. B. R. 626, 120 Fed. 848.

88. In re Felson (D. C., N. Y.), 15 Am. B. R. 185, 139 Fed. 275; In re Stratemyer (D. C., Hawaii), 14 Am. B. R. 120, 2 U. S. D. C. Hawaii 269.

89. In re Francis Levy Outfitting Co., Ltd. (D. C., Hawaii), 29 Am. B. R. 8.

90. *Whitla & Nelson v. Boyd* (C. C. A., 9th Cir.), 32 Am. B. R. 469, 213 Fed. 587.

91. See also Am. B. R. Dig. § 103.

92. In re Beck (D. C., Iowa), 1 Am. B. R. 535, 92 Fed. 889.

93. In re Cross (D. C., N. Y.), 3 Am. B. R. 187, 96 Fed. 816; *Matter of Hitchcock* (D. C., Hawaii), 17 Am. B. R. 664.

A reasonable fee for the bankrupt's attorney, as part of the costs of administration, is entitled to priority of payment out of the proceeds of the sale of mortgaged property. *Matter of Meis* (D. C., Ky.), 18 Am. B. R. 104.

94. In re Mayer (D. C., Wis.), 4 Am. B. R. 238, 101 Fed. 695, 697; In re Terrill (D. C., Vt.), 4 Am. B. R. 625, 103 Fed. 781; In re Anderson (D. C., S. Car.), 4 Am. B. R. 640, 103 Fed. 854.

95. In re Brundin (D. C., Minn.), 1 Am. B. R. 296, 112 Fed. 306; In re Averill, 1 N. B. N. 544; In re Duran Mercantile Co. (D. C., N. Mex.), 29 Am. B. R. 450, 199 Fed. 961. See also *Ex parte Hale*, Fed. Cas. 5,910.

voluntary bankrupt is entitled to an allowance for services reasonably necessary to enable the bankrupt to perform his duties under the act and to secure the benefit of its provisions, including his discharge when entitled thereto.⁹⁶ Legal services to a bankrupt in having his exemption allowed is a matter between the bankrupt and his attorneys and fees therefor are not allowable.⁹⁷ Also, where an offer of composition has been confirmed, the bankrupt must pay his attorney in the matter.⁹⁸ It is well settled, too, that where the bankrupt's attorney has received compensation from the bankrupt or any one else shortly before the bankruptcy and the amount is as much as he would have been allowed in the proceeding, no further sum should be paid.⁹⁹ The allowance in voluntary cases is usually to cover services in drawing the petition and schedules and until the first meeting of creditors, and should be moderate, rather than the opposite.¹⁰⁰

(7) FOR TRUSTEES.¹⁰¹—The fees of the attorney for the trustee are strictly an expense of administration and are payable as provided in this section.¹⁰² The trustee is not entitled to a counsel fee upon an order rejecting a claim not prosecuted in good faith.¹⁰³ It was held early in the administration of the present law that a trustee who was also an attorney could be allowed the same fees that would have been paid to other competent counsel,¹⁰⁴ but later cases do not sustain that holding, the trustee's fee being limited by § 48 and General Order XXXV (3).¹⁰⁵ When an attorney accepts the office of trustee he surrenders for the time his standing in the court of bankruptcy as attorney for creditors, and must look to them, not to the bankrupt estate or the court, for his compensation.¹⁰⁶ And where an attorney for creditors seeking to remove a trustee is subsequently employed as attorney for the new trustee, his compensation must be limited to services rendered after his employment as attorney for the trustee.¹⁰⁷ As a general rule an allowance should not be made to a trustee in bankruptcy for compensation for an attorney employed by him for doing such things for the protection and benefit of the estate as do not

96. *In re Christianson* (D. C., No. Dak.), 23 Am. B. R. 710, 175 Fed. 867.

97. *In re Castlebury* (D. C., Ga.), 16 Am. B. R. 480, 143 Fed. 1,018; *Matter of Bohrmann* (D. C., Ga.), 34 Am. B. R. 801, 224 Fed. 287.

98. *In re Marti* (D. C., N. Y.), 18 Am. B. R. 250, 151 Fed. 780.

99. *In re O'Connell* (D. C., N. Y.), 3 Am. B. R. 422, 98 Fed. 83; *In re Smith* (D. C., N. Car.), 5 Am. B. R. 559, 108 Fed. 39; *Matter of Union Dredging Co.* (D. C., Del.), 35 Am. B. R. 555, 225 Fed. 188. Compare *In re Goodwin*, 2 N. B. N. Rep. 445.

100. Compare *In re Carolina Cooperage Co.* (D. C., N. Car.), 3 Am. B. R. 154, 96 Fed. 950; *Matter of Meis* (D. C., Ky.), 13 Am. B. R. 104, holding that where there had been no litigation and where the services to the bankrupt had not been onerous, an allowance of \$75 was excessive and should be reduced to \$25.

Two per cent. of the amount realized from the estate has been held a proper allowance. *Matter of Meis* (D. C., Ky.), 18 Am. B. R. 104.

101. See also Am. B. R. Dig. § 106.

102. *In re Burke* (Ref., Ohio), 6 Am. B. R. 502; *In re Stotts* (D. C., Iowa), 1 Am. B. R. 641, 93 Fed. 438.

Action to recover preference.—The reasonable fee of counsel employed by the trustee to recover a voidable or fraudulent preference made by the bankrupt constitutes a part of the trustee's expenses, and as such a part of the costs and expenses of administration entitled to preferential payment. *Page v. Rogers* (C. C. A., 6th Cir.), 17 Am. B. R. 854, 149 Fed. 194; *revd.* on other grounds, 211 U. S. 575, 21 Am. B. R. 496, 53 L. Ed. 332, 29 Sup. Ct. 159.

103. *Matter of Rome* (D. C., N. J.), 19 Am. B. R. 820, 162 Fed. 971.

104. *In re Mitchell* (Ref., Pa.), 1 Am. B. R. 687.

105. Compare *In re Muldaur*, Fed. Cas. 9,905. Judge Ray in the case of *In re McKenna* (D. C., N. Y.), 15 Am. B. R. 4, 157 Fed. 611, holds that a trustee is not entitled to compensation for services rendered as an attorney; *In re Felson* (D. C., N. Y.), 15 Am. B. R. 185, 139 Fed. 275; *In re Halbert* (C. C. A., 2d Cir.), 13 Am. B. R. 399, 134 Fed. 236.

106. *In re Evans* (D. C., N. C.), 8 Am. B. R. 730, 116 Fed. 909.

107. *In re Fidler & Son* (D. C., Pa.), 23 Am. B. R. 16, 172 Fed. 632.

require professional skill, but are well within the ability of a person possessing ordinary intelligence and business capacity.¹⁰⁸ The determinative question is not whether it is agreeable and convenient to the trustee to have attorneys to act for him, but whether it is reasonably necessary for the welfare of the estate that counsel should be so employed. This rule, in the absence of special elements of difficulty, has general application with respect to such matters as the payment of taxes, the collection of rents, the payment for water and electricity, and the continuance of insurance in force. But where there are special difficulties in successfully attending to such matters, which could be overcome through the personality of a certain attorney, but probably would have proved insurmountable without his intervention, compensation may be allowed.¹⁰⁹ The amount of the allowance depends on a variety of circumstances, viz.: The time employed, the difficulty of the legal questions involved, the result achieved, the amount at stake, and the size of the estate.¹¹⁰ The allowance should be moderate, rather than large.¹¹¹ The fee of an attorney of a trustee for services rendered in the recovery of assets may not depend upon agreement between the attorney and trustee and be deducted from the amount of the recovery; the right to and payment for such services depends absolutely upon the discretion of the court.¹¹² An allowance should not be made for services rendered before the appointment of the trustee.¹¹³ Allowances should not be made until the services are rendered, or usually, until the final meeting of

108. *Matter of Union Dredging Co.* (D. C., Del.), 35 Am. B. R. 555, 225 Fed. 188; *In re Knight* (Ref., Ohio), 5 Am. B. R. 560.

109. *Matter of Union Dredging Co.* (D. C., Del.), 35 Am. B. R. 555, 225 Fed. 188.

110. *In re Knight* (Ref., Ohio), 5 Am. B. R. 560; *In re Burrus* (D. C., Va.), 3 Am. B. R. 296, 97 Fed. 926. Compare also, for an attempt to establish compensation on a sliding scale basis, *In re Smith* (Ref., N. Y.), 2 Am. B. R. 648. See also *In re Drake*, Fed. Cas. 4,058; *In re Noyes*, Fed. Cas. 10,371; *In re Treadwell*, 23 Fed. 442; *In re Rude* (D. C., Ky.), 4 Am. B. R. 319, 101 Fed. 805; *In re McKenna* (D. C., N. Y.), 15 Am. B. R. 4, 137 Fed. 611; *Matter of Ninam* (Ref., Mich.), 14 Am. B. R. 515, allowing fee of \$2,500 where the attorney by his diligence recovered assets valued at \$16,000; *In re Hoffman* (D. C., Wis.), 23 Am. B. R. 19, 173 Fed. 234.

The attorneys allowance may be \$75 where the report of the trustee shows assets received to the amount of \$7,500. *In re Lang* (D. C., Tex.), 11 Am. B. R. 794, 127 Fed. 755. An allowance of \$15,000 has been held not to be excessive. *Page v. Rogers* (C. C. A., 6th Cir.), 17 Am. B. R. 854, 149 Fed. 194; *rev'd* on other grounds, 211 U. S. 575, 21 Am. B. R. 496, 53 L. Ed. 332, 29 Sup. Ct. 159.

Fees dependent upon size of estate and services rendered.—Counsel for the trustee of a bankrupt estate involving \$16,147, whose duties were laborious, extending over several years and in four or five different courts, should not be granted an allowance in excess of \$2,500, where the assets, which had been recovered by attorneys for so-called antecedent creditors were in safe hands,

and the legal question involved was whether the antecedent creditors should share with the other creditors. *Matter of Atkins* (D. C., Ky.), 34 Am. B. R. 794, 225 Fed. 639.

Considerations in arriving at amount of compensation.—*In Matter of Metallic Specialty Mfg. Co.* (D. C., Pa.), 32 Am. B. R. 446, 215 Fed. 937, the Court said: "It is the duty of everyone connected with the administration of the bankruptcy laws to make sure that the fund which would otherwise be distributed among creditors is not diminished by the payment of any fees or charges except those intended by the acts of Congress to be paid. Counsel for the trustee both as representing the trustee and therefore the Court, and as members of the bar are in an especial sense to have all their acts, and emphatically their claims to compensation, pass under the supervision of the Courts. As the compensation allowed by the court is in fact usually paid by creditors or the bankrupt, the power to fix the amount of compensation ought to be exercised with that degree of care and discriminating judgment which any one should exercise who is spending the money of another."

111. *In re Talton* (D. C., N. Car.), 14 Am. B. R. 617, 137 Fed. 178. Compare *In re Knight* (Ref., Ohio), 5 Am. B. R. 560, with *In re Curtis* (C. C. A., 7th Cir.), 4 Am. B. R. 17, 100 Fed. 784. See also *In re Davenport*, Fed. Cas. 3,587; *In re Cook*, 17 Fed. 328.

112. *Matter of Stemper* (D. C., Ariz.), 34 Am. B. R. 806, 222 Fed. 690.

113. *In re N. Y. Mail Steamship Co.*, Fed. Cas. 10,210.

creditors. Where the service has been unusual or protracted or the amount asked for is large in proportion to the estate, a notice to creditors of the intention to apply is good practice, though doubtless not essential.¹¹⁴ An allowance to attorneys for the trustee in bankruptcy intended to cover services still to be rendered, but expressly limited to ordinary services, does not cover extraordinary and, at the time, unexpected and unanticipated services rendered by counsel, and an additional allowance may be granted.¹¹⁵ A trustee's attorney should not be deprived of his compensation because he had previously acted for the bankrupt;¹¹⁶ but where attorneys have acted for a receiver and been paid for their services, they should not be allowed compensation for services as attorneys to the petitioning creditors.¹¹⁷ The trustee is entitled upon an accounting to amounts reasonably expended by him for the services of an attorney, made necessary for the preservation of the estate which had been assigned to him as assignee for creditors prior to his appointment as trustee.¹¹⁸

(8) FOR ASSIGNEE PRIOR TO BANKRUPTCY.¹¹⁹—Attorneys for an assignee, in possession prior to bankruptcy, should not be allowed fees out of the estate, save in unusual circumstances.¹²⁰

d. Effect of amendments of 1903.—Generally speaking, the policy of the law as amended as to attorneys' allowance is, perhaps, more liberal than was that of the original act.¹²¹ Within proper limits, such a tendency is in aid of administration. The courts may be relied on to check any effort to carry it too far. The amendment of § 64-b (2) should also be read in this connection. It is in line with the practice as previously established in some of the districts.¹²²

114. Consult *In re Arnett* (D. C., Tenn.), 7 Am. B. R. 522, 112 Fed. 770; *Ex parte Whitcomb*, Fed. Cas. 17,529.

115. *Matter of Metallic Specialty Mfg. Co.* (D. C., Pa.), 32 Am. B. R. 446, 215 Fed. 937.

116. *In re Dimm & Co.* (D. C., Pa.), 17 Am. B. R. 119, 144 Fed. 402.

The attorney for the trustee is entitled to recover from him the amount, included in a composition, for services rendered to the trustee in the collection of debts, although the plaintiff also acted as attorney for the bankrupt. *Keyes v. McKirrow* (Mass. Sup. Ct.), 9 Am. B. R. 322, 180 Mass. 261, 62 N. E. 259.

117. *In re Southern Steel Co.* (D. C., Ala.), 22 Am. B. R. 476, 169 Fed. 702.

Employment by trustee of attorneys representing creditors.—Attorneys who acted for the receiver and trustee and conducted a contest over a claim filed by bankrupt's wife, who were also the attorneys for certain creditors having claims in a large amount, may be paid compensation for services actually rendered for the benefit of the estate, it appearing the interests of their clients with respect to the contested claim were not adverse to any class of creditors, that the estate was not prejudiced by their advice to contest the claim, and that it had

been the practice in the district to permit the attorneys for the petitioning creditors to represent the trustee where their interests were not adverse to the general creditors, and to allow attorneys for creditors to advise him. *In re Smith* (C. C. A., 6th Cir.), 29 Am. B. R. 628, 203 Fed. 369.

118. *In re Byerly* (D. C., Pa.), 12 Am. B. R. 186, 128 Fed. 637. See also *Randolph v. Scruggs*, 190 U. S. 533, 10 Am. B. R. 1, 47 L. ed. 1165, 23 Sup. Ct. 710.

119. See also Am. B. R. Dig. § 108.

120. *In re Pauly* (Ref., N. Y.), 2 Am. B. R. 333. In *Randolph v. Scruggs*, 10 Am. B. R. 1, 190 U. S. 533, 47 L. ed. 1165, 23 Sup. Ct. 710, a claim for services beneficial to the estate was allowed. See *ante* under "Allowances for assignees for benefit of creditors."

Attorneys for assignees.—As to the compensation of attorneys for general assignees, paid them prior to bankruptcy, see *Louisville Trust Co. v. Cominger*, 184 U. S. 18, 7 Am. B. R. 421, 46 L. ed. 413, 22 Sup. Ct. 293; *In re Klein & Co.* (D. C., N. Y.), 8 Am. B. R. 559, 116 Fed. 523. Compare *In re Mays* (D. C., W. Va.), 7 Am. B. R. 764, 114 Fed. 600.

121. Compare Bankr. Act, §§ 2(3), 40, 48.

122. *In re Felson* (D. C., N. Y.), 15 Am. B. R. 185, 139 Fed. 275.

SECTION SIXTY-THREE.

DEBTS WHICH MAY BE PROVED.

§ 63. **Debts Which may be Proved.**—*a* Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract, express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

b Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

Analogous provisions: In U. S.: As to provable debts in general, Act of 1867, § 19, R. S., § 5067; Act of 1841, § 5; Act of 1800, § 39; As to unliquidated claims, Act of 1867, § 19, R. S., § 5067; As to contingent claims, Act of 1867, § 19, R. S., § 5068; Act of 1841, § 5; Act of 1800, § 39; As to surety debts, Act of 1867, § 19, R. S., §§ 5069, 5070.

In Eng.: Act of 1883, § 37.

Cross-references: To the law: Definition of debt, § 1(11).

Proof of claims against partnership, § 5; of claims of partnership against partners and *vice versa*, § 5-g.

Suits by and against bankrupts upon provable debts, § 11-a.

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See also Supplementary Forms, *post*; Hagar and Alexander's Bankruptcy Forms (2d ed.).

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- b. *Judgments for fines and penalties*, 979.
- c. *Alimony due to accrue*, 980.
- d. *Rent to accrue*, 980.
- e. *Debts outlawed by a statute of limitation*, 983.
- f. *Commissions of trustee*, 984.
- g. *Cross-references*, 984.

I. HISTORY AND COMPARATIVE LEGISLATION.

A clear understanding of what is a provable debt is important to either the due administration of, or practice under, all bankruptcy laws. If provable, a debt is the basis of its owner's right to a *pro rata* share in the estate; if provable, with certain exceptions, always stated in the statute,¹ it is barred by the discharge. The earlier statutes were inclined to go far afield in defining such debts. Of late, the tendency has been to make the phrasing generic, and leave its construction to the courts. Thus, the present English law, after excepting all "demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust," in substance declares provable: "all debts and liabilities, present or future, certain or contingent."² The same tendency is apparent in the United States. Section 19 of the law of 1867 was phrased in greater detail than § 63 of the present statute.³ Much of it was expressive of existing rules of law; these are unquestionably still in force, even though omitted from the act of 1898. The omission of other provisions, not expressive of general rules, seems to warrant the view that having been dropped out, they are no longer the law. These differences are considered in appropriate paragraphs, *post*.

II. DETERMINATION OF PROVABILITY.

a. As affected by statute.—Subsection *a* indicates those "debts" that are provable; subsection *b* those debts which, because unliquidated at the time of the petition, are not immediately provable, but may be when liquidated. "Debt" and "liability" are here used somewhat loosely. The definition of the former in § 1 (11) seems hardly applicable, as it results in the truism: a debt is a debt. The tendency of the courts has been to give a somewhat narrow meaning to the word.⁴ Strictly, a debt is "something owed." Here this is immaterial; the five subdivisions of subsection *a* indicate the only obligations of the debtor which are, strictly speaking, provable.

b. Defenses to allowance.—In general every existing claim upon which an action at law or in equity could be maintained at the time of the filing of the petition is provable in bankruptcy, and any defense which might have been urged had action been brought on the claim may be urged against its allowance in bankruptcy.⁵ If the claim is not enforceable because of some State statute,

1. See Bankr. Act, § 17.

2. Eng. Act of 1883, § 37.

3. The difference between the two statutes in this particular are tersely stated in a previous edition, as follows (3d ed., p. 380): "The following are the most important differences: first, omission from the present act of any express provision authorizing the proving of contingent debts and liabilities, or the liability of the bankrupt, as surety, indorser, or guarantor; second, omission of any express provision as to the proving of damages resulting from a conversion or trespass by the bankrupt; third, omission of any express provision as to the apportionment of rent and proving for the same; fourth, the embodiment in the present act of an express provision as to proving a judgment recovered after the commencement of proceedings in

bankruptcy upon a debt at that time provable; fifth, the embodiment of an express provision making costs incurred by the bankrupt in certain suits by and against him provable debts; sixth, the embodiment of a provision that unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such a manner as it shall direct, and may thereafter be proved and allowed against the bankrupt's estate; seventh, the lack of any general provision as to the time when a debt must have become fixed and owing in order to be provable."

4. In re Sutherland, Fed. Cas. 13,639; In re Foye, Fed. Cas. 5,021; Wilson v. Bank, 3 Fed. 391.

5. In re Prescott, 9 N. B. R. 385, Fed. Cas. 11,389, 5 Biss. 523.

and this clearly appears from the character of the claim itself, it is not to be regarded in a strict sense as a provable debt.⁶ Thus it has been held that a *feme covert* may set up her coverture as a defense to a claim made against her estate.⁷ And if a corporation enters into an *ultra vires* contract upon which it could not bring an action it cannot prove a claim arising thereon in bankruptcy.⁸ So contracts void because of the consideration being illegal or because the contract is against public policy cannot be the foundation of a debt provable or at least allowable in bankruptcy.⁹ So as to stock gambling transactions. But the burden of proof rests upon those disputing a contract apparently valid.¹⁰ So if the statute of frauds would be a defense to an action it may be set up as an objection to the allowance of a claim.¹¹ The considerations here referred to relate more to the allowance of the claim than to the mere presentation of it for the purpose of proof.

c. "Proved" and "allowed."—In this connection, it is important to recall the difference between a debt which may be proved and one which may be allowed. As has been stated, every claim on which an action in law or in equity might have been maintained may be proved;¹² whether a debt so proved will be allowed is decidedly another matter. This distinction is perhaps somewhat artificial, the words "proved and allowed" being in § 63 yoked together and their equivalency to "provable" apparently taken for granted.¹³ A disallowed claim and a non-provable debt are not identical things; and where a debt is disallowed because without foundation the claimant does not have a non-provable debt.¹⁴ It has been held that the term "provable debt" is not limited in its meaning to a debt against the allowance of which no defense can be successfully interposed; as where a claim is disallowed for the reason that it was barred by the statute of limitations it is nevertheless a provable debt, so far at least as the bankrupt's discharge therefrom is concerned.¹⁵

6. In re Talbot (D. C., Mass.), 7 Am. B. R. 29, 110 Fed. 924, in which case it was held that in Massachusetts, a wife's claim for money advanced to her husband from her separate estate as a loan cannot be enforced by either legal or equitable proceedings, and so cannot be proved against her husband's estate in bankruptcy.

Claims unauthorized by statute.—Claims for merchandise sold and delivered to a co-operative company, on credit, in violation of a statutory inhibition, are not provable debts in bankruptcy, so as to entitle the holders thereof to petition for the adjudication in bankruptcy of said association. In re Wyoming Valley Co-operative Association (D. C., Pa.), 28 Am. B. R. 462, 198 Fed. 436.

7. In re Rachel Goodman, 8 N. B. R. 380, Fed. Cas. 5,540, 5 Biss. 401.

8. In re Jaycox & Greene, Fed. Cas. 7,233, 12 Blatch. 209.

Purchase of its own stock contrary to law by bankrupt corporation.—Where bankrupt, a corporation, purchased from claimant shares of its own stock in a manner contrary to the provisions of the Oklahoma statutes relating to the purchase by a corporation of its capital stock, the transaction was void and fraudulent as to its creditors and a claim for the balance due on the purchase price should be disallowed. Matter of Sapulpa Produce Co. (Ref., Okla.), 26 Am. B. R. 900.

9. In re Chandler, 9 N. B. R. 514, Fed. Cas. 590, 6 Biss. 53; In re Greene, 15 N. B. R. 198, Fed. Cas. 5,751; *Ex parte* Jones, 17 Ves. 332; *Lowe v. Waller*, 1 Dougl. 736; In re Young, Fed. Cas. 18,145, 6 Biss. 53; *Ex parte* Mumford, 15 Ves. 289; *Lehman v. Strassberg*, 2 Woods, 554; *Ex parte* Cottrell, 2 Cowp. 742; *Ex parte* Daniels, 14 Ves. 191.

10. See *Hill v. Levy* (D. C., Va.), 3 Am. B. R. 374, and note, 99 Fed. 94. As to gambling contracts, see In re Dorr (C. C. A., 9th Cir.), 26 Am. B. R. 408, 186 Fed. 276; In re Norris (D. C., Minn.), 26 Am. B. R. 945, 190 Fed. 101, and also discussion, *post*, under this section, sub-title "Gambling transactions."

11. *Capell v. Trinity Church*, 11 N. B. R. 536, Fed. Cas. 2,392.

12. See In re Jordan, 2 Fed. 319.

13. Note that the words "provable debts" occur in § 17, and the words "provable claims" in § 59-b.

14. *Lesser v. Gray*, 236 U. S. 70, 34 Am. B. R. 8, 59 L. ed. 471, 35 Sup. Ct. 227.

15. *Hargadine, etc., Dry Goods Co. v. Hudson* (C. C. A., 8th Cir.), 10 Am. B. R. 225, 122 Fed. 232, affg. 6 Am. B. R. 657. Where a firm gives a promissory note to secure an existing indebtedness of one of the members, the statute of limitation is not a bar to the provability of the note, although the original

But this does not affect the question of the "provability" of a debt for the purpose of determining whether or not it should be paid out of the estate. It would seem better, therefore, to retain the distinction between the "provability" and "allowability" of a debt; the latter term including the former and requiring in addition thereto a determination as to whether the debt is a valid claim against the estate.

d. *Ex contractu* and *ex delicto*.—(1) IN GENERAL.—Liabilities grounded in contract are, almost without exception, provable. So also are judgments grounded in tort.¹⁶ Whether mere liabilities *ex delicto* may be liquidated and thus become provable has been doubted.

(2) RULE UNDER FORMER LAW.—Under the former law, such claims, if "on account of any goods or chattels wrongfully taken, converted or withheld," i. e., if in conversion, were provable, but only after being duly liquidated.¹⁷ With the single exception next noted, other liabilities sounding in tort were not.¹⁸ Debts created by the fraud or embezzlement of the bankrupt were, by the terms of another section, made provable, but were also declared not dischargeable.¹⁹

(3) RULE UNDER PRESENT LAW.—Even the clause above quoted has been omitted from the present law; the same is silent as to the provability of debts in fraud or for embezzlement. Hence, the argument that such mere liabilities are not provable. But, strictly, debts grounded in tort are as much liabilities as are those entirely *ex contractu*, and a distinction between those actually liquidated at the time the petition is filed and those which may be thereafter liquidated is somewhat artificial.²⁰ Besides, § 17 now excepts from dischargeable debts many "provable debts" that are unliquidated torts; the words "judgments in actions" in § 17-a (2) having now given place to the word "liabilities." It would seem, therefore, that liabilities for torts *per se*, and not merely those provable on the theory of quasi-contracts,²¹ may now be liquidated and proven and allowed, at least all those that are both *in praesenti* debts as (distinguished from fines or duties).²²

(4) CLAIMS TORTUOUS IN CHARACTER BASED ON CONTRACT.—The Supreme Court has held that subsection *a* of this section, defining provable debts, must be read in connection with § 17 limiting the operation of discharges, in which the provable character of claims for fraud in general is recognized, by excepting from a discharge claims for frauds which have been reduced to judgment, or which were committed by the bankrupt while acting as an officer, or in a fiduciary capacity; and that, therefore, if a debt originates, or is "founded upon an open account, or upon a contract, expressed or implied," it is provable against the bankrupt's estate, though the creditor may

indebtedness was so barred. *Dacovich v. Schley* (C. C. A., 5th Cir.), 13 Am. B. R. 752, 134 Fed. 72.

16. *In re Pltnam* (D. C., Cal.), 27 Am. B. R. 923, 193 Fed. 464, citing text.

17. Act of 1867, § 19, R. S., § 5061; *In re Bailey*, Fed. Cas. 729; *In re Hennocksburgh*, Fed. Cas. 6,367; *Weaver v. Voils*, 68 Ind. 191.

18. *In re Schuchardt*, Fed. Cas. 12,483; *Gilman v. Cate*, 63 N. H. 278.

19. Act of 1867, § 33, R. S., § 5117.

20. On the other hand, it is, of course, true that much practical inconvenience would

result from the doctrine stated in the text. Consult section seventeen. See also the limitation of the English statute to unliquidated damages "by reason of a contract, promise, or breach of trust;" Act of 1883, § 37.

21. See *In re Hirschman* (D. C., Utah), 4 Am. B. R. 715, 104 Fed. 69, and *In re Filer* (Ref., N. Y.), 5 Am. B. R. 582, for the prevailing rule before the amendatory act of 1903. And compare *In re Lazarovic* (Ref., Kan.), 1 Am. B. R. 476, and *In re Cushing* (Ref., N. Y.), 6 Am. B. R. 22.

22. For instance, fines for crimes, alimony, and rent to accrue.

elect to bring his action in trover, as for a fraudulent conversion, instead of *in assumpsit* for a balance due upon an open account.²³ In other words, if a party has a cause of action which, at his election, he may maintain either upon a contract or in tort, then such cause of action becomes a provable debt.²⁴ If the claimant elects to sue in tort upon his claim, his debt is not thereby deprived of its provable character,²⁵ but if he proves his claim as founded on an implied contract, he will be deemed to have waived the tort, and will be precluded from a recovery based thereon.²⁶ It is a well settled rule that where a tort-feasor, by conversion of personal property, has sold the property converted and received cash therefor, the true owner may sue him for money had and received as on an implied contract.²⁷ It follows that a claim based upon such a transaction is a provable debt. It has, therefore, been held that an obligation resting upon an officer or other person occupying

23. *Crawford v. Burke*, 195 U. S. 176, 12 Am. B. R. 659, 49 L. Ed. 147, 25 Sup. Ct. 9, revg. 201 Ill. 581. And see *Clarke v. Rogers*, 228 U. S. 534, 30 Am. B. R. 39, 57 L. Ed. 953, 33 Sup. Ct. 587; *Friend v. Talcott*, 228 U. S. 27, 30 Am. B. R. 31, 57 L. ed. 718, 33 Sup. Ct. 505. See cases digested *Am. Bankr. Dig.* § 845.

24. *Reinhardt v. Freiderich* (Ind. App. Ct.), 34 Am. B. R. 633, 635, 108 N. E. 258, citing *Collier on Bankruptcy* (9th ed.), 396, 853, 870, and the following cases: *Crawford v. Burke*, 195 U. S. 176-194, 12 Am. B. R. 659, 25 Sup. Ct. 9, 49 L. Ed. 147; *In re Hirschman* (D. C., Utah), 4 Am. B. R. 715, 104 Fed. 69; *Clarke v. Rogers* (C. C. A., 1st Cir.), 26 Am. B. R. 413, 183 Fed. 518; *Disler v. McCauley*, 7 Am. B. R. 138, 66 N. Y. App. Div. 42, 73 N. Y. Supp. 270; *In re Filer* (D. C., N. Y.), 5 Am. B. R. 835, 125 Fed. 261, *Tinker v. Colwell*, 193 U. S. 473, 11 Am. B. R. 568, 24 Sup. Ct. 505, 48 L. Ed. 754; *Barrett v. Prince* (C. C. A., 7th Cir.), 16 Am. B. R. 64, 143 Fed. 302.

25. *Crawford v. Burke*, 195 U. S. 176, 12 Am. B. R. 659, 49 L. ed. 147, 25 Sup. Ct. 9.

Effect of waiver.—When a tort is of a character which may be waived and an action *quasi ex contractu* maintained, the claim is a debt within the meaning of the bankruptcy act and provable. *First National Bank v. Bamfuth* (Vt. Sup. Ct.), 37 Am. B. R. 315, 96 Atl. 600.

26. *Standard Varnish Wks. v. Haydock* (C. C. A., 6th Cir.), 16 Am. B. R. 286, 143 Fed. 318; *In re Hirschman* (D. C., Utah), 4 Am. B. R. 715, 104 Fed. 69; *Bunting Stone Hardware Co. v. Alexander* (Tex. Civ. App.), 38 Am. B. R. 631, 190 S. W. 1152, holding that where a creditor stands, either in the proceeding in bankruptcy or in a suit in a State court, upon a contract as originally made, he waives any right arising thereon in tort, and the claim as a consequence becomes one provable in bankruptcy and from which the bankrupt is released when discharged.

Waiver of tort, and recovery on quasi-contract.—In the case of *Clarke v. Rogers* (C. C. A., 1st Cir.), 26 Am. B. R. 413, 183 Fed. 518, the court said: "A claim based

on a tort as known at common law is undoubtedly provable whenever it may be resolved into an implied contract. For example, it is a settled rule that where a tort-feasor by conversion of personal property has sold the property converted, and received cash therefor, the true owner may sue him for money had and received as on an implied contract. This, of course, is a mere fiction of law; but, like all other such fictions, it is effectual when it will accomplish the ends of justice. So that, in that case, the owner of the property may proceed for a tort, or, at his option, on an implied contract, which would entitle him to make proof under section 63. An illustration appears in *Tindle v. Birkett*, 205 U. S. 183, 186, 18 Am. B. R. 121, 27 Sup. Ct. 493, 51 L. Ed. 762. On the other hand, a mere tort, for example, a trespass involving a mere destruction of property, does not lay the foundation for a proceeding under that section. The force of *Crawford v. Burke*, 195 U. S. 176, 12 Am. B. R. 659, 25 Sup. Ct. 9, 49 L. Ed. 147, is not correctly understood by the appellee here. This is made plain by what is said in *Dunbar v. Dunbar*, 190 U. S. 340, 350, 10 Am. B. R. 139, 23 Sup. Ct. 757, 47 L. Ed. 1084, in the opening paragraph; so that the result of it all is that claims for mere torts, like personal injuries and injuries to real property, are not provable, as was determined by the Circuit Court of Appeals for the Third Circuit in *Brown & Adams v. United Button Co.* (C. C. A., 3d Cir.), 17 Am. B. R. 565, 149 Fed. 48; 79 C. C. A. 70, 8 L. R. A. (N. S.) 961, and by the Circuit Court of Appeals for the Second Circuit in *In re New York Tunnel Co.* (C. C. A., 2d Cir.), 20 Am. B. R. 25, 159 Fed. 688, 86 C. C. A. 556."

27. *Clarke v. Rogers* (C. C. A., 1st Cir.). 26 Am. B. R. 413, 183 Fed. 518 (affd. 228 U. S. 534, 30 Am. B. R. 39, 57 L. Ed. 953, 33 Sup. Ct. 587), citing, as an illustrative case, *Tindle v. Birkett*, 205 U. S. 183, 18 Am. B. R. 121, 51 L. Ed. 762, 27 Sup. Ct. 493; *Reynolds v. New York Trust Co.* (C. C. A., 1st Cir.), 26 Am. B. R. 698, 699, 188 Fed. 611.

a fiduciary capacity to restore to a fund money which he has embezzled is contractual in its nature, and gives rise to a provable debt in behalf of the beneficiaries against his bankrupt estate.²⁸ A creditor whose claim is grounded in tort is not entitled to priority, even one whose claim rests on conversion. Once the goods are sold and the avails mingled with the debtor's funds, such a creditor's claim is for damages only.²⁹

(5) FRAUD OR CONNIVANCE.—A claim based upon a fraudulent connivance with the bankrupt to impose upon other creditors, as where money was advanced to the bankrupt to give him a fictitious commercial rating, is not allowable.³⁰ And where transactions between the bankrupt and the creditor were such as to indicate an intention to overreach the other creditors and obtain an undue advantage over them, their claims, although provable, may be disallowed.³¹

e. The debt must have existed when the petition was filed.—Here the statute is not entirely harmonious. Subsection a (4), unlike the other subdivisions, has no words of time. The rule is that the provability of a claim depends upon its status at the time the petition is filed.³² If it be then owing it may be proved; if it become due after the filing of the petition, even if before the

28. *Clarke v. Rogers* (C. C. A., 1st Cir.), 26 Am. B. R. 413, 183 Fed. 518, affd. by Supreme Court in 228 U. S. 534, 30 Am. B. R. 39, 57 L. Ed. 953, 33 Sup. Ct. 587, holding that where a trustee converts trust funds to his own use, a liability is created which is provable in the bankruptcy proceedings of such trustee as a liability founded "upon an open account, or upon a contract, express or implied."

29. *Ungewitter v. Von Sachs*, Fed. Cas. 14,343.

30. *In re Friedman* (D. C., Wis.), 21 Am. B. R. 213, 164 Fed. 131.

31. *Clere Clothing Co. v. Union Trust & Savings Bank* (C. C. A., 9th Cir.), 35 Am. B. R. 419, 224 Fed. 363, in which it appeared that a clothing company, with other creditors effected a composition, advancing for that purpose money which it borrowed from a bank. The trustee made a bill of sale of the merchandise of the bankrupt to the clothing company, which put them on sale. The bankrupt was then reorganized, the president of the clothing company gaining control. Thereafter the reorganized company claimed to have sold the merchandise to the clothing company, taking its note. The clothing company presented claims based on this note and on a note for merchandise sold to the bankrupt. It was held that, on all the evidence, the claims should be rejected, as the reorganized corporation was merely an agent of the claimant, and that a corporation may not for a period of over a year so intertwine its affairs and business transactions with a second company as to virtually create the relationship of principal and agent, and then upon the insolvency of the second company insist upon the payment of alleged debts incurred in the very transactions by which the relationship was created.

Holder of promissory note and stock for loan with option to elect which he will take;

failure to elect before bankruptcy.—A person, who loans money to a corporation on its promissory note and also takes shares of its stock at par for the amount of the loan, under an agreement providing that he shall have his election whether to become the absolute owner of the shares and surrender the note, or to surrender the shares and demand payment of the note, and does not elect which position he will assume until the indebtedness of the company has accumulated to such an extent as to render it a bankrupt, is estopped from demanding his rights as a creditor, under the agreement. *Matter of Silvernail Co.* (D. C., Kan.), 33 Am. B. R. 57, 218 Fed. 977.

32. *In re Burka* (D. C., Mo.), 5 Am. B. R. 12, 107 Fed. 674; *In re Garlington* (D. C., Tex.), 8 Am. B. R. 602, 115 Fed. 999; *Swartz v. Fourth Bank* (C. C. A., 8th Cir.), 8 Am. B. R. 673, 117 Fed. 1, 54 C. C. A. 387; *In re Adams* (D. C., Mass.), 12 Am. B. R. 368, 130 Fed. 381, holding that a creditor cannot prove for an indebtedness arising between the filing of an involuntary petition and the adjudication of his debtor as a bankrupt; *In re Coburn* (D. C., Mass.), 11 Am. B. R. 212, 126 Fed. 218; *In re Simon* (D. C., N. Y.), 28 Am. B. R. 611, 197 Fed. 105. Compare *In re Bingham* (D. C., Vt.), 2 Am. B. R. 223, 94 Fed. 796; *In re Reliance, etc., Co.* (D. C., Pa.), 4 Am. B. R. 49, 100 Fed. 619; *In re Swift* (C. C. A., 1st Cir.), 7 Am. B. R. 374, 112 Fed. 315, affg. s. c., 5 Am. B. R. 335, 105 Fed. 493; *In re Crawford*, Fed. Cas. 3,363; *In re Ward*, 12 Fed. 325; *In re Morrill*, 19 Fed. 874; *Fowler v. Kendall*, 44 Me. 448.

A breach of contract may result from the filing of a petition, and in such a case the claim for damages ripens simultaneously with the filing of the petition. *In re Swift* (C. C. A., 1st Cir.), 7 Am. B. R. 375, 112 Fed. 315; *In re National Wire Corp.* (D.

adjudication, it is not "absolutely owing."³³ Where a vendee under an executory contract of sale is adjudicated an involuntary bankrupt, the vendor's claim for damages for breach of the contract is not provable.³⁴ The word "and" in the form of proof prescribed by the Supreme Court requiring that it should state that the debt proved existed "at and before filing of the petition for adjudication of bankruptcy" must be construed either "or" or "and," as the circumstances may require.³⁵ In addition to claims upon which actions could be brought debts existing at the time of the filing of the petition but not then payable are provable in bankruptcy, and being provable the holder of such debts may be a petitioner to have the debtor involuntarily adjudged a bankrupt.³⁶ And so where money was received by a bankrupt intended to be used for gambling purposes, a considerable portion of it being in his hands at the time of the filing of the petition, the claimant may base his claim upon money had and received, and prove his claim regardless of the intended use of the money.³⁷

f. Equitable debts.—It has always been the law in England that equitable demands may be proved in bankruptcy.³⁸ Cases under the former law to the

C. Conn.), 22 Am. B. R. 186, 166 Fed. 631. Thus, the obligation of a contract guaranteeing the redemption of corporate stock, three years after date of issue, is a provable claim, although the time for redemption has not arrived at the date of bankruptcy. In *re Pettingill* (D. C., Mass.), 14 Am. B. R. 728, 137 Fed. 840; In *re Neff* (C. C. A., 6th Cir.), 19 Am. B. R. 23, 157 Fed. 57, affg. 19 Am. B. R. 911.

The status of a claim must depend upon its provability at the time the petition was filed. It cannot be benefited by its status at a later date. In *re Neff* (C. C. A., 6th Cir.), 19 Am. B. R. 23, 157 Fed. 57; In *re Reading Hosiery Co.* (D. C., Pa.), 22 Am. B. R. 562, 171 Fed. 195; *Matter of Sterne & Levi* (Ref., Tex.), 26 Am. B. R. 535, 539, citing text. In *re Board of County Com'rs v. Hurley* (C. C. A., 8th Cir.), 22 Am. B. R. 209, 212, 169 Fed. 92, the court said: "The status of claims at the time of the filing of the petition in bankruptcy, and not at any subsequent time, fixes the rights of their owners to share in the distribution of the estate of the bankrupt. . . . Thus the filing of a petition upon which a subsequent adjudication of bankruptcy is rendered places all the property of the bankrupt which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him *in custodia legis*. . . . On that date the property of the bankrupt passes from his control to the court or its receiver, and thence to the trustee. . . . Indeed, the condition at the time of the filing of the petition measures the extent of the estate and the rights of all creditors of the bankrupt and all parties interested in the property." See *Synnot v. Tombstone Consol. Mines Co.* (C. C. A., 9th Cir.), 31 Am. B. R. 421, 208 Fed. 251, citing text.

Debts not existing when petition was filed.—The debts founded upon open account

or upon contract, express or implied, that are provable under this section, include only such as existed at the time of the filing of the petition in bankruptcy. *Lavelo v. Reeves*, 227 U. S. 625, 29 Am. B. R. 493, 57 L. Ed. 676, 33 Sup. Ct. 365.

Where a claim for damages is contingent at the date of an assignment, and not an existing demand presently due, but not presently payable, even though resting upon a contract and capable of liquidation, is not provable. So where under an assignment for benefit of creditors the lessors have the right to enter upon the premises and terminate the lease, or at their election to demand damages, a claim for damages at the date of assignment was contingent and not provable. *Cotting v. Hooper, Lewis & Co.* (Mass. Sup. Ct.), 34 Am. B. R. 23, 107 N. E. 931.

33. *Phenix Nat. Bank v. Waterbury*, 20 Am. B. R. 140, 123 App. Div. 453, 108 N. Y. Supp. 391, affd. 23 Am. B. R. 250, 197 N. Y. 161, 90 N. E. 435.

34. In *re Inman & Co.* (D. C., Ga.), 23 Am. B. R. 556, 175 Fed. 312.

35. In *re Swift* (C. C. A., 1st Cir.), 7 Am. B. R. 374, 112 Fed. 315, affg. 5 Am. B. R. 335.

36. In *re Alexander*, 4 N. B. R. 178, Fed. Cas. 161.

37. In *re Norris* (D. C., Minn.), 26 Am. B. R. 945, 190 Fed. 101, in which case it was held that where claimants base their claims, not upon their contracts, but upon money had and received, they will be allowed the amount of their original investments, irrespective of whether the money was intended to be used by the bankrupt for gambling purposes, it appearing from the evidence that a considerable part of the money was in bankrupt's possession just prior to bankruptcy, not having been employed in gambling, but converted by bankrupt to his own use.

38. *Ex parte Yonge*, 3 Ves. & B. 31; *Ex parte Williamson*, 2 Ves. 252; *Ex parte Dewdney*, 15 Ves. 479.

same effect are numerous.³⁹ Such claims are provable under the present bankruptcy law, and the Federal courts administering the general law of equity, as accepted in England, and as generally accepted in this country, will recognize and establish an equitable claim within the purview of the general rules of equity, though under the decisions of the State court it has no status.⁴⁰ In bankruptcy proceedings which are summary and equitable in their nature, the creditor may invoke the principle of law that money secured by false and fraudulent representations of material facts may be recovered back by proving a demand for money had and received by the bankrupts to their use.⁴¹ The claim of an assignee for the benefit of creditors and his attorney, for services rendered both prior and subsequent to the bankruptcy, is provable, where such services were beneficial to the estate.⁴² If a mortgagee bids in at foreclosure sale the property covered by the mortgage, and takes title he may prove his claim for the amount equitably due on the mortgage debt, to be ascertained by deducting the value of the property.⁴³

g. Debts against more than one person.—If the debt is of such a nature that an action upon contract to collect it could be brought against the bankrupt, it is provable, although it might be collected from others. The test is: could the claimant have maintained an action against the bankrupt? Thus, in a case of principal and agent, if the principal has become a bankrupt, the claim may be proved in bankruptcy against him.⁴⁴ So the holder of a joint obligation

39. For instance, *Sigsby v. Willis*, Fed. Cas. 12,849; *In re Buckhause*, Fed. Cas. 2,086.

Proof of equitable claims.—In *In re Blandin*, 5 N. B. R. 39, Fed. Cas. 1,527, 1 Low. 543, Judge Lowell of the district court of Massachusetts decided that the wife of a bankrupt might prove in bankruptcy as a creditor of the estate of her husband, for money realized by him out of the property which she held as her separate estate, under the statutes of Massachusetts, the evidence clearly showing that the transaction between her and her husband was intended to be a loan and not a gift. In rendering his opinion the judge said: "It seems to me to be the intent of that statute to give all creditors an equal share of the assets without regard to the mode in which their rights might have been enforced if there had been no bankruptcy; and that the debtor should be discharged from all debts and demands which are liquidated or capable of liquidation. In respect to both debtors and creditors the act is highly remedial, and the district court is vested with most ample equitable powers to enable it to work out full remedies to all persons. It has always been the law of England that equitable demands may be proved in bankruptcy; *Ex parte Williamson*, 2 Ves. Sr. 252; *Ex parte Taylor*, 2 Rose, 175. 'A commission in bankruptcy,' said Lord Eldon, 'is nothing more than a substitution of the authority of the lord chancellor, enabling him to work out the payment of those creditors who could by legal action or equitable suit have compelled payment.' *Ex parte Dewdney*, 15 Ves. 498. The nine-

teenth section of our statute (Act of 1867) makes provable all debts and liabilities, in language broad enough certainly to cover such as a trustee owes to his *cestui que trust*, or a partner to his copartner; and so of demands which, but for the bankruptcy, would be properly cognizable in a court of admiralty. If this be not so, I do not see how the law can be uniform, for proof of debts will depend on the remedies given in the several States, in one of which the very same debt might be sued at law which in another must be prosecuted in equity, and in some of which there is no distinction between law and equity."

40. *James v. Gray* (C. C. A., 1st Cir.), 12 Am. B. R. 573, 131 Fed. 401; *In re Peasley* (D. C., N. H.), 14 Am. B. R. 496, 137 Fed. 190.

41. *In re Arnold & Co.* (D. C., Mo.), 13 Am. B. R. 320, 133 Fed. 789, holding that a claim for money obtained by the bankrupt, to use in gambling ventures, through false representations may be proved. To the same effect see *In re Norris* (D. C., Minn.), 26 Am. B. R. 945, 190 Fed. 101.

42. *Randolph v. Scruggs*, 10 Am. B. R. 1, 190 U. S. 533, 47 L. Ed. 1,165 23 Sup. Ct. 710.

43. *In re Dix* (D. C., Pa.), 23 Am. B. R. 689, 176 Fed. 882. And see *In re Davis* (C. C. A., 3d Cir.), 23 Am. B. R. 446, 174 Fed. 556. Both of these cases arose under the laws of Pennsylvania in which State there is no provision for a deficiency judgment on the bond accompanying the mortgage.

44. *In re Troy Woolen Co.*, 8 N. B. R. 412, Fed. Cas. 14,203.

tion can prove his claim against any and every person whom he could have sued.⁴⁵ A holder of a note which has become due and has been protested, if protest were necessary, may prove against the maker or any indorser.⁴⁶ If one holds a firm obligation indorsed by one or more of the individual members, all of whom as a firm and as individuals afterward go into bankruptcy, he may prove his entire claim against the partnership estate, and the estate of each individual indorser; but in the aggregate can recover no more than his full claim.⁴⁷

h. Provability as affected by the person proving.—(1) **IN GENERAL.**—An assignee of the creditor has a provable debt if his assignor had, even if the assignment post-dates the bankruptcy.⁴⁸ But where the creditor is a debtor of the bankrupt in a larger sum than the amount claimed, such claim is not provable.⁴⁹ An executor may prove a debt against the bankrupt, notwithstanding a provision in the will for a deduction of any debt due the testator from the bankrupt.⁵⁰ A person who is induced by a materially false and fraudulent statement to take stock in a corporation which subsequently becomes bankrupt, may rescind his contract to take the stock and prove his claim for the amount paid.⁵¹ A bondholder holding a bond secured by a trust mortgage may prove the amount of the bond where the property is sold free of liens and the mortgage trustee did not take steps to foreclose the mortgage.⁵² Other

45. Proof where several liable.—The obligee in a bond, or the holder of a claim upon which several parties are personally liable, may prove his claim against each of the estates of those who become bankrupt, and may at the same time pursue the others at law, and he may recover notwithstanding payments after the bankruptcy by other obligors or by their estates dividends from each estate in bankruptcy upon the full amount of his claim at the time the petition in bankruptcy was filed therein, until from all sources he has received full payment of his claim, but no longer. *Board of County Commissioners v. Hurley* (C. C. A., 8th Cir.), 22 Am. B. R. 209, 169 Fed. 92.

One holding promissory notes on which third parties, as well as bankrupt, are liable, may prove his claim against bankrupt's estate, and, notwithstanding that payments on account of said notes have been made by such third parties after bankruptcy, he is entitled to be allowed dividends on the full amount of his claim as it stood when the petition was filed, until from all sources he has received full payment of his claim. *In re Simon* (D. C., N. Y.), 23 Am. B. R. 611, 197 Fed. 105.

46. *Downing v. Traders' Bank*, 11 N. B. R. 371, 2 Dill, 136.

47. *In re Howard, Cole & Co.*, 4 N. B. R. 571, Fed. Cas. 6,750; *Mead v. Bank*, 2 N. B. R. 173, Fed. Cas. 9,366, 6 Blatch. 185; *Emery v. Bank*, 7 N. B. R. 217, Fed. Cas. 4,446, 3 Cliff. 507; *Board of County Commissioners v. Hurley* (C. C. A., 8th Cir.), 22 Am. B. R. 209, 169 Fed. 92. See discussion under Section Five, *ante*, and for limitations on the doctrine there stated, see La-

moille, etc., *Bank v. Stevens' Estate* (D. C., Vt.), 6 Am. B. R. 164, 107 Fed. 245, and *Shattuck v. Bugh* (Ref., N. Y.), 6 Am. B. R. 56.

Provability of individual notes of partner to firm, pledged as security for firm obligation.—A partner, under a firm contract made by him personally with a firm creditor, pledged as collateral for a firm obligation on which he was indorser, certain notes made by him individually to the firm for personal loans, and, after bankruptcy of the firm and its members, the creditor sold the collateral pursuant to the terms of the contract. *Held*, that the obligation of the partner on his notes to the firm was wholly independent of his obligation as indorser on the firm notes and that the purchaser of the individual notes was entitled to prove a claim thereon against the individual estate of such partner. *In re White* (C. C. A., 7th Cir.), 25 Am. B. R. 541, 183 Fed. 310.

48. *In re Goodman Shoe Co.* (D. C., Pa.), 3 Am. B. R. 200, 96 Fed. 494; *In re American Specialty Co.* (C. C. A., 2d Cir.), 27 Am. B. R. 463, 191 Fed. 807; *In re Murdock*, Fed. Cas. 9,939; *In re Pease*, Fed. Cas. 10,880. For method of proving assigned claims, see discussion under Section Fifty-seven, *ante*.

49. *In re Gerson* (D. C., Pa.), 5 Am. B. R. 850, 105 Fed. 891.

50. *In re Woods* (D. C., Pa.), 13 Am. B. R. 240, 133 Fed. 82.

51. *Davis v. Louisville Trust Co.* (C. C. A., 6th Cir.), 25 Am. B. R. 621, 181 Fed. 10.

52. *United States Trust Co. v. Gordon* (C. C. A., 6th Cir.), 33 Am. B. R. 300, 216 Fed. 929.

instructive cases on this general subject, in particular those where the creditor is the customer of a stockbroker, will be found in the foot-note.⁵³

(2) TRANSACTIONS BETWEEN HUSBAND AND WIFE.—Where the common-law disability of the wife has been abolished by statute, she may have a provable debt against her husband's estate,⁵⁴ even if a statute prohibits a suit by her against her husband;⁵⁵ but her claim is usually looked on with suspicion.⁵⁶ A bankrupt's note to his wife is provable, especially when it does not appear that at the time it was given the husband was in debt.⁵⁷ Under a statute conferring upon a married woman the same powers in respect to her property as if she were unmarried, it has been held that a contract to pay for a wife's services is not a provable debt;⁵⁸ and under a statute giving to a married woman her individual earnings "except those accruing from labor performed for her husband, or in his employ, or payable by him," the wife's claim for wages earned as bookkeeper in her husband's store is not provable.⁵⁹ But it would be otherwise under a statute authorizing contracts to be made by and between husband and wife as though they were unmarried.⁶⁰ If still a *feme covert*, a wife who is bankrupt may allege her coverture as a defense and prevent proof.⁶¹ Under a statute rendering invalid a direct gift of corporate stock from husband to wife, her loan of the certificates, indorsed in blank to him, creates no allowable claim against his estate.⁶²

(3) SERVICES OF MINOR CHILD.—The presumption is that a father is entitled to the wages of his minor child. This is overcome by evidence that the child has been emancipated and thus permitted to receive for his own use the compensation or wages earned by him. Unless such evidence is adduced, the father is the proper party to prove a claim for the child's services.⁶³ The claim of a minor son against his bankrupt father for services rendered will

53. In re Ervin (D. C., Pa.), 6 Am. B. R. 356, 109 Fed. 135; *affd.* as Wallerstein v. Ervin (C. C. A., 3d Cir.), 7 Am. B. R. 256, 112 Fed. 124; also In re Ervin (D. C., Pa.), 7 Am. B. R. 480, 114 Fed. 596; In re Clark (D. C., Wash.), 7 Am. B. R. 96, 111 Fed. 893; In re Swift (D. C., Mass.), 5 Am. B. R. 415, 106 Fed. 65; *affd.* s. c., 7 Am. B. R. 374, 112 Fed. 315; In re Graff (D. C., N. Y.), 8 Am. B. R. 744, 117 Fed. 343; In re Chase (D. C., Mass.), 13 Am. B. R. 294, 133 Fed. 79.

Director of bankrupt corporation who invests money in another corporation, organized to take over the assets of the bankrupt, may, under certain circumstances be held to be a creditor of the bankrupt. In re Holbrook Shoe & Leather Co. (D. C., Mont.), 21 Am. B. R. 511, 165 Fed. 973.

54. In re Novak (D. C., Ia.), 4 Am. B. R. 311, 101 Fed. 800; Hawk v. Hawk (D. C., Ark.), 4 Am. B. R. 463, 102 Fed. 679; In re Neiman (D. C., Wis.), 6 Am. B. R. 329, 109 Fed. 113. This is not the rule in Massachusetts. In re Talbot (D. C., Mass.), 7 Am. B. R. 29, 110 Fed. 924. But see In re Nickerson (D. C., Mass.), 8 Am. B. R. 707, 116 Fed. 1003; Matter of Crumling (D. C., Pa.), 32 Am. B. R. 656, 214 Fed. 503.

Claim of wife for services.—Where bankrupt's wife, during the entire period for which she claimed compensation, acted as bookkeeper, collector and assistant in the

business for her husband, an agreement to compensate her will be implied. In re Cox (D. C., N. Mex.), 29 Am. B. R. 456, 199 Fed. 952.

55. In re Domenig (D. C., Pa.), 11 Am. B. R. 552, 128 Fed. 146.

56. So also of a child's claim for alleged services, rendered a bankrupt father. In re Brewster (Ref., N. Y.), 7 Am. B. R. 486.

57. In re Kyte (D. C., Pa.), 21 Am. B. R. 110, 164 Fed. 302.

58. In re Kaufman (D. C., N. Y.), 5 Am. B. R. 104, 104 Fed. 768, construing section 21 of the New York Domestic Relations Law; In re Suckle (D. C., Ark.), 23 Am. B. R. 861, 176 Fed. 828, constituting Ark. Stats. (Kirby), § 5213.

59. In re Winkles (D. C., Wis.), 12 Am. B. R. 696, 132 Fed. 590, construing section 2343 of the Revised Statutes of Wisconsin, 1898. But see In re Cox (D. C., N. Mex.), 29 Am. B. R. 456, 199 Fed. 952.

60. Moore v. Crandall (C. C. A., 9th Cir.), 5 Am. B. R. 517, 205 Fed. 689.

61. In re Goodman, Fed. Cas. 5,540.

62. In re Tucker (D. C., Mass.), 17 Am. B. R. 247, 148 Fed. 928. But see Tucker v. Curtin (C. C. A., 1st Cir.), 17 Am. B. R. 354, 148 Fed. 929, as to loan of certificates to firm of which the husband was a member.

63. Matter of Haskell (D. C., Mass.), 36 Am. B. R. 428, 228 Fed. 819.

not be allowed unless there is substantial proof of emancipation and that the son performed the services under a *bona fide* agreement as to payment therefor.⁶⁴

i. **Provability as affected by fraud or preference.**—Here there is some confusion owing to doubt as to the exact meaning of "provable."⁶⁵ Since the amendment of § 57-g by the act of 1903, there can be little doubt; all preferences and the more common frauds, both constructive and in fact, being voidable. If the transaction upon which the debt is based was fraudulent as against the other creditors it is not provable.⁶⁶ But a creditor must have been guilty of some moral turpitude or some breach of duty whereby other creditors were deceived to their damage to constitute such a fraud as will estop him from sharing with them in the distribution of the proceeds of the estate of his debtor in bankruptcy. A wilful intent to deceive or such negligence as is tantamount thereto is an essential element of such an estoppel.⁶⁷ In short, if the fraud may be attacked under either § 60-b or § 70-e, the debt clearly is now not provable until the claimant surrenders his advantage. If the creditor compels the trustee to recover, the claim, because shorn of fraud, as it were, by force, continues not provable. The omission of claims due to the officers of a corporation, from a credit statement issued by the corporation to its creditors, will not estop the officers from proving such claims in the absence of a showing of knowledge of the fraud, or that any creditor extended credit relying on such statement.⁶⁸ If it is asserted that the contract upon which the claim was based was obtained by fraudulent representations, it must appear that the contract was seasonably disaffirmed; if the bankrupt had availed itself of the benefit of the contract for nearly four years after the fraud was discovered, the claim will not be vitiated.⁶⁹ The numerous cases under the former law are probably no longer in point.⁷⁰ So also of some of those under the new law, prior to the amendatory act.⁷¹

j. **Cross-references.**—In addition to the references in the preceding paragraphs, the practitioner will find much that bears on the provability of debts under § 17. He should also have in mind the doctrine of set-off, discussed under § 68.

III. FIXED LIABILITY ABSOLUTELY OWING.

a. **In general.**—Subsection *a* (1) provides that debts may be proved and allowed which are "a fixed liability, as evidenced by a judgment or an instru-

64. *Matter of Kanter* (D. C., Maine), 32 Am. B. R. 776, 215 Fed. 276.

Emancipation of child; claim for services.—Where bankrupt employed his minor son at a stated salary, but it appeared that the son was at the time living with his parents, paying for his board out of the wages paid him by bankrupt, there was no such emancipation of the son as would justify the allowance of his claim for unpaid wages. *In re Riff* (D. C., Ark.), 30 Am. B. R. 594, 205 Fed. 406.

65. *In re Owings* (D. C., Mo.), 6 Am. B. R. 454, 109 Fed. 623. *Contra*: *In re Richard* (D. C., N. Car.), 2 Am. B. R. 507, 94 Fed. 633.

66. *In re Lansaw* (D. C., Mo.), 9 Am. B. R. 167, 118 Fed. 365; *In re Royce Dry Goods Co.* (D. C., Mo.), 13 Am. B. R. 257, 133 Fed. 100, holding that where property of a bank-

rupt corporation is traced to the hands of a managing officer, and such officer fails to account for such property in excess of his demands against the corporation, his claim against the corporation should be rejected.

67. *Crouder v. Allen-West Commission Co.* (C. C. A., 8th Cir.), 32 Am. B. R. 134, 213 Fed. 177.

68. *Spencer v. Lowe* (C. C. A., 8th Cir.), 29 Am. B. R. 876, 198 Fed. 361.

69. *Matter of Tear-off Bottle Seal Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 694, 224 Fed. 492.

70. For instance: *In re Black*, Fed. Cas. 1,459; *In re Schwartz*, Fed. Cas. 12,506; *In re Arnold*, Fed. Cas. 551; *In re Rundle et al.*, Fed. Cas. 12,138.

71. *In re Lazarovic* (Ref., Kan.), 1 Am. B. R. 476; *In re Norcross* (Ref., Mo.), 1 Am. B. R. 644.

ment in writing, absolutely owing at the time of the filing of the petition whether then payable or not, etc." In the former law, the words were: "debts * * * existing." The words "fixed liability, absolutely owing" would, therefore, be an unfortunate limitation were it not for the broader words of subdivision (4).⁷²

b. **Whether then payable or not.**—These words of the statute characterize the debt rather than the time of payment. To be provable under subdivision (1), a debt must be a fixed liability absolutely owing at the time the petition is filed; but the time of payment is immaterial.⁷³ The status of the debt at the time of filing the petition controls; if it be owing at that time it is provable.⁷⁴ This statutory provision is further emphasized by the provision for the allowance of interest to or a rebate of interest after the date of bankruptcy.⁷⁵ This phrasing has been most discussed in considering the provability of a contract of indorsement not fixed by default and protest until after the petition was filed,⁷⁶ and in respect to the provability of a claim for rent to accrue after bankruptcy under a lease for a term of years.⁷⁷ It has also been well considered in connection with a bond to secure an annuity.⁷⁸ Likewise, when the contract was one of yearly employment.⁷⁹ Indeed, the words "absolutely owing" seem to have been a stumbling block in the lower courts; the upper courts have found more equity in the words "founded * * * upon contract, express or implied" in subdivision (4).⁸⁰

c. **Evidenced by a judgment.**—(1) **IN GENERAL.**—It follows from the language of the section that, with the rare exception noted later, all judgments actually entered at the date of the bankruptcy are provable debts. A judgment is primarily absolutely owing when rendered and entered.⁸¹ The rendering of a verdict is not, it seems, a judgment entitling such verdict to proof.⁸² For instance, a verdict against a bankrupt for damages for personal

72. See under this section *post*, under title "*Founded on Contract, Express or Implied.*"

73. In re Swift (D. C., Mass.), 5 Am. B. R. 415, 111 Fed. 893. The probability of a claim depends upon its status at the time the petition is filed. In re Pettingill & Co. (D. C., Mass.), 14 Am. B. R. 728, 137 Fed. 143; Matter of Joralemon-Oliver Co. (C. C. A., 2d Cir.), 32 Am. B. R. 467, 213 Fed. 625.

74. Debt "absolutely owing."—The status of a claim at the time of filing the petition in bankruptcy, and not at any subsequent time, fixes the right of the owner to share in the distribution of the estate of the bankrupt. If it be owing at the time of the filing of the petition it may be proved; but if it becomes due only after the filing of the petition, even if before adjudication, it is not a claim to be considered as "absolutely owing." Matter of Mullings Clothing Co. (D. C., Conn.), 37 Am. B. R. 166, 230 Fed. 681.

Liability of building and loan association to shareholders.—The liability of a bankrupt building and loan association to shareholders for amounts paid in and proportions of profits, if any, is fixed, and provable in bankruptcy, notwithstanding the fact that it may require examination of books to ascertain the exact amount due to each shareholder.

It is treated as an anticipatory breach of a contract. Merchants' National Bank v. Continental Building & Loan Association (C. C. A., 9th Cir.); 37 Am. B. R. 439, 232 Fed. 828.

75. Compare, for similar words, Act of 1867, § 19, R. S., § 5067.

76. See discussion, *post*, under this section, subtitle "*Indorser and Surety Debts.*"

77. Matter of Mullings Clothing Co. (D. C., Conn.), 37 Am. B. R. 166, 230 Fed. 681. A claim for rent contingent upon the election of the lessor to enter and terminate the lease or to demand damages is not provable. Cotting v. Hooper, Lewis & Co., 34 Am. B. R. 23, 107 N. E. 931.

78. Cobb v. Overman (C. C. A., 4th Cir.), 6 Am. B. R. 324, 109 Fed. 65, revg. Bray v. Cobb (D. C., N. Car.), 3 Am. B. R. 788, 100 Fed. 270, and holding that the bond of a bankrupt to secure the payment of an annuity for life is provable.

79. In re Sil erman Bros. (D. C., Mo.), 4 Am. B. R. 83, 101 Fed. 219, revg. s. c., 2 Am. B. R. 15.

80. See in this section, *post*; subtitle "*Continuing Contracts.*"

81. Moore v. Douglas (C. C. A., 9th Cir.), 36 Am. B. R. 740, 230 Fed. 399.

82. Black v. McClelland, Fed. Cas. 1,462.

injuries, where no judgment had been entered thereon prior to the bankruptcy proceedings is not a fixed liability evidenced by a judgment within this clause, and is not a provable debt.⁸³ It was the evident purpose of the provision relative to the provability of a fixed liability "as evidenced by a judgment," to cover judgments arising in tort as well as those arising upon other obligations or liabilities.⁸⁴ In some cases, as where the debt is for alimony, support of a bastard, and the like, the courts will look beyond the form of the judgment, and will ascertain the nature of the liability, the original cause of action.⁸⁵ This doctrine has not been strictly observed where the application was for an injunction to prevent the arrest of the bankrupt or injury to his estate.⁸⁶ If the judgment has resulted in a void or voidable lien, because within four months of the bankruptcy, it is still a provable debt, the lien only being affected.⁸⁷ Indeed, it seems the debt on which the judgment was founded, if otherwise provable, may be proved in its stead. A judgment is provable, even if an appeal has been taken thereon, but dividends on it should be withheld.⁸⁸ But where under a State statute a judgment is not final until

83. Effect of verdict of jury.—In the case of *Black v. McClelland*, Fed. Cas. 1,462, the court, in speaking of the effect of a verdict of a jury upon the provability of the amount thereof, said: "Now, a claim which has not obtained the condition of a fixed liability cannot be characterized as a debt due and payable, either presently or at a future day, and such is the immature character of a mere verdict before judgment. It is subject to the control and discretion of the court, and may be superseded altogether by arresting judgment upon it or by the allowance of a new trial. No action could be maintained upon it. It does not bear interest, and no determinate character is impressed upon it until the court has pronounced its judgment that the plaintiff do recover from the defendant the amount of it."

This case was discussed in the case of *In re Ostrom* (D. C., Minn.), 26 Am. B. R. 273, 185 Fed. 988, and held to be controlling under the present bankruptcy act. The court said: "The Act of 1867, under which the proceeding arose (Rev. St., section 5067), did not contain the words 'fixed liability' which appear in the present act. The decision of the Supreme Court of Minnesota in *Kent v. Chapel*, 67 Minn. 420, 70 N. W. 2, to the effect that after a verdict there is no further uncertainty about the claim, and the decision in the case of *Clay v. Railroad Company*, 104 Minn. 1, 115 N. W. 949, to the effect that a verdict becomes property and passes to the representatives the same as though it had been reduced to a judgment, are not controlling upon the national courts because this is not a case where those courts are bound to follow the decisions of the State court.

"Even if it can be said, in accordance with those decisions, that a verdict created a fixed liability, yet it is not a fixed liability evidenced by a judgment or instrument in writing, conditions which must by the

present act, be complied with before even a fixed liability can become a provable debt."

84. *Moore v. Douglas* (C. C. A., 9th Cir.), 36 Am. B. R. 740, 230 Fed. 399.

85. *Turner v. Turner* (D. C., Ind.), 6 Am. B. R. 289, 108 Fed. 785.

A decree for alimony is neither a fixed liability evidenced by a judgment nor a debt within the meaning of the bankrupt act *Wetmore v. Wetmore*, 196 U. S. 68, 13 Am. B. R. 1, 49 L. Ed. 390, 25 Sup. Ct. 172.

A father's liability under an agreement with his divorced wife to pay her for the support of his minor children until they respectively become of age is not a provable debt against his estate. *Dunbar v. Dunbar*, 190 U. S. 340, 10 Am. B. R. 139, 47 L. Ed. 1084, 23 Sup. Ct. 757. See also *In re Hubbard* (D. C., Ill.), 3 Am. B. R. 528, 98 Fed. 710.

86. For instance: See *In re Lewensohn* (D. C., N. Y.), 3 Am. B. R. 596, 99 Fed. 73; *In re Cole* (D. C., N. Y.), 5 Am. B. R. 760, 108 Fed. 837, and *In re Sullivan* (Ref., N. Y.), 2 Am. B. R. 30. And examine *In re Fife* (D. C., Pa.), 6 Am. B. R. 258, 109 Fed. 880.

87. See discussion under Section Sixty-seven of this work. *Doyle v. Heath* (Sup. Ct., R. I.), 4 Am. B. R. 705, 22 R. I. 213; *In re Pease* (Ref., N. Y.), 4 Am. B. R. 547.

88. *Matter of Berlin Dye Works and Laundry Co.* (D. C., Cal.), 34 Am. B. R. 823, 225 Fed. 683 (revg. 34 Am. B. R. 452), holding that a judgment of the Superior Court of California directing the payment of money, from which the defendant had appealed, but without giving a supersedeas bond, at the time a petition in bankruptcy was filed against him, is a final judgment and provable in bankruptcy; *affd. sub. nom. Moore v. Douglas* (C. C. A., 9th Cir.), 36 Am. B. R. 740, 230 Fed. 399. Compare *In re Yates* (D. C., Cal.), 8 Am. B. R. 69, 114 Fed. 365; *In re Sheehan*, Fed. Cas. 12,737.

the action has terminated, and such action is pending until its final determination on appeal, or until the time for appeal has passed, such judgment is not a "fixed liability absolutely owing at the time of filing the petition" if an appeal was pending at such time.⁸⁹ A claim evidenced by a judgment recovered more than ten years prior to bankruptcy is not provable, unless renewed as required by statute.⁹⁰ A judgment barred by the statute of limitations is a provable claim, where it may be enforced under the State statute in the discretion of the court.⁹¹ A judgment note, with a waiver of exemptions, is a provable claim.⁹² And so is a judgment for damages for a breach of promise of marriage.⁹³ But a judgment for a penalty is not a provable debt.⁹⁴

(2) IMPEACHING JUDGMENTS.—Here the English doctrine is much broader than our own.⁹⁶ Full faith and credit being necessarily given to the judgments of the State courts when pleaded in the Federal courts, it was, under the former law, held that a judgment of a State court could not be impeached when presented as a claim in bankruptcy, but resort must be had to the State court.⁹⁷ That it is conclusive between the bankrupt and the judgment creditor is elementary. But where the rights of general creditors have intervened, the English rule that such a judgment is but *prima facie* evidence of a provable debt is fairer. The law in the United States seems, however, to be that the trustee or a creditor may attack it in the bankruptcy proceeding for fraud or collusion, but not otherwise.⁹⁸ A judgment not regular on its face, or by a court which did not have jurisdiction of the subject-matter, may of course be attacked anywhere; but jurisdiction need not affirmatively appear,⁹⁹ nor can the recitals of the judgment, as a rule, be contradicted in a collateral proceeding. Where the amount of a claim has been determined by a State court, and judgment entered therein, such judgment is conclusive upon the bankruptcy court, and the judgment creditor will not be permitted to prove for a greater amount.¹⁰⁰

89. Matter of Berlin Dye Works and Laundry Co. (Ref., Cal.), 34 Am. B. R. 452 affd. sub. nom. Moore v. Douglas (C. C. A., 9th Cir.), 36 Am. B. R. 740, 230 Fed. 399, holding that under California Code of Civil Procedure, § 577 judgment is not final until time to appeal has passed, or a determination on appeal, in which the court said: "Cases in States where judgments become final and binding and may be resorted to and used as evidence and for all purposes for which a judgment may be resorted to, immediately upon their rendition, are clearly distinguishable from judgments rendered in the courts of the State of California and which are not final until their final determination upon appeal or until the time for appeal has passed. Such is the case of *Re Sheehan*, 8 N. B. R. 345, Fed. Cas. 12,737; *In re Lorde* (D. C., N. Y.), 16 Am. B. R. 201, 144 Fed. 320."

90. *In re Farmer* (D. C., N. Car.), 9 Am. B. R. 19, 116 Fed. 763.

91. *In re Rebman* (C. C. A., 9th Cir.), 17 Am. B. R. 767, 150 Fed. 759.

92. *Claster v. Soble*, 10 Am. B. R. 446, 22 Pa. Super. Ct. 631.

93. *In re McCauley* (D. C., N. Y.), 4 Am. B. R. 122, 101 Fed. 223; *In re Fire* (D. C., Pa.), 6 Am. B. R. 258, 109 Fed. 880; *Fin-*

negan v. Hall (N. Y. Sup. Ct.), 6 Am. B. R. 648, 35 Misc. 773, 72 N. Y. Supp. 347.

94. Matter of Abrahamson and Fickhandler (C. C. A., 2d Cir.), 32 Am. B. R. 156, 210 Fed. 878.

96. See *In re Phelps* (Ref., N. Y.), 3 Am. B. R. 434; affd. on review without opinion, and cases cited; and in general, see cases digested Am. Bankr. Dig. § 820.

97. *In re Campbell*, Fed. Cas. 2,349; *McKinsey v. Harding*, Fed. Cas. 8,866; *In re Burns*, Fed. Cas. 2,183. *Contra*: *Ex parte O'Neil*, Fed. Cas. 10,527.

98. See *Candee v. Lord*, 2 N. Y. 269. And compare *Hassell v. Wilcox*, 130 U. S. 493, 32 L. Ed. 1001, 9 Sup. Ct. 590.

Attack by creditors.—The reduction of an alleged debt to judgment in a State court before bankruptcy does not exempt it from attack by or on behalf of creditors who would be injuriously affected by its allowance, when such allowance is sought in bankruptcy proceedings. Matter of Continental Engine Co. (C. C. A., 7th Cir.), 37 Am. B. R. 102, 234 Fed. 58.

99. *In re Columbia Real Estate Co.* (D. C., Ind.), 4 Am. B. R. 411, 101 Fed. 965.

100. *Handlan v. Walker* (C. C. A., 8th Cir.), 29 Am. B. R. 4, 200 Fed. 566.

d. Evidenced by an instrument in writing.—(1) *IN GENERAL.*—To be provable under this subdivision, a debt, if not a judgment, must rest on an instrument in writing.¹⁰¹ An instrument in writing includes any document or written evidence of the agreement whence the debt arises, such as bonds for definite sums, promissory notes, bills of exchange, drafts, checks and the like. A bill of sale to secure the purchase price of goods purchased by the bankrupt may be unenforceable against the other creditors, because unrecorded, but a claim for the unpaid purchase price is nevertheless provable as an unsecured claim against the bankrupt's estate.¹⁰²

(2) **BILLS AND NOTES.**—(I) *In general.*—A note or bill of exchange is provable against the bankrupt maker; it is the debt evidenced by the note which is provable. A usurious note is not provable,¹⁰³ but where the claim could be established apart from such note and unaffected by it, the creditor should be permitted to prove it.¹⁰⁴ And so while the mere giving of notes to evidence or in prepayment of a clearly conditional obligation would not annul the condition or make an otherwise unprovable claim allowable in bankruptcy, the provision in the agreement that notes are to be given and that they shall be negotiable is evidence of the intention of the parties that the amounts stated in the notes are to be payable in any event.¹⁰⁵ Where a note is given for a gambling debt, and indorsed by the holder to the claimant, the burden is on him to show that he is a holder in due course.¹⁰⁶

(II) *Who may prove because of promissory note.*¹⁰⁷—The holder of a promissory note permitting him to prove it against the maker's estate is one who has a legal interest in it, and a mere dummy cannot be considered such holder.¹⁰⁸ Where one of two or more joint makers of a note is a bankrupt, each of the

101. As to sufficiency of instrument to bind parties, see *Matter of Structural Steel Co.* (Ref., Ohio), 13 Am. B. R. 373.

Return on cancellation of lease by lessor when property was obtained by a bankrupt under a lease terminable at the option of the lessor, and the lessee agreed to pay on the termination of the lease a fixed return charge, it was held that the lessor having terminated the lease within the time for proving claims, his action in so doing created a fixed liability or ascertained amount presently payable provable under section 63a(1) of the Bankruptcy Act. *Matter of Clark Shoe Company* (D. C., Mass.), 32 Am. B. R. 238, 211 Fed. 341.

Amount due under lease of personal property.—Where a storekeeper leases apparatus for conveying cash and carrying parcels under a contract providing that in case of default in making payments the whole amount shall become due without notice or demand for the entire period of the lease, and that the lessor may upon the bankruptcy of the lessee enter the premises and take possession of the apparatus, and it appears that the lessee has defaulted in the payment of an installment of rent payable in advance, prior to his bankruptcy and that thereafter the lessor took possession of the apparatus thereby terminating the lease, the lessor is only entitled to prove his claim for the installment due at the date of the bankruptcy. *Matter of Miller Bros. Grocery Co.* (C. C.

A., 6th Cir.), 33 Am. B. R. 704, 219 Fed. 851.

102. *In re Burlage Bros.* (D. C., Ia.), 22 Am. B. R. 410, 169 Fed. 1006.

103. *Matter of Wilde's Sons* (D. C., N. Y.), 13 Am. B. R. 217, 133 Fed. 562, stating the law as to the rights of banks in respect to usurious contracts.

104. *In re Robinson* (D. C., Mass.), 14 Am. B. R. 626, 136 Fed. 994.

105. *Matter of Wisconsin Engine Co.* (C. C. A., 7th Cir.), 37 Am. B. R. 106, 234 Fed. 281.

106. *In re Hill & Sons* (D. C., Pa.), 26 Am. B. R. 133, 187 Fed. 214. See as to effect of loan of money to be used for gambling purposes, *In re Norris* (D. C., Minn.), 26 Am. B. R. 945, 190 Fed. 101.

107. As to proof of instruments generally, see Am. Bankr. Dig. § 823; as to claims of bankrupt's indorsers or guarantors, Id. § 825; as to claims against bankrupt as indorser, Id. § 826.

108. *Matter of Collins* (D. C., Ia.), 37 Am. B. R. 692, 235 Fed. 937.

Notes executed by licensee.—Provisions of a contract for an exclusive patent license examined and held that certain notes executed by the licensee were in consideration of the grant of the license and are provable against the bankrupt estate of the licensee. *Matter of Wisconsin Engine Co.* (C. C. A., 7th Cir.), 37 Am. B. R. 106, 234 Fed. 281.

other joint obligors may prove against his estate for a proportionate share of the amount which they have been required to pay because of his insolvency.¹⁰⁹ Although a note has been paid by an endorser, the holder may prove it in full against the estate in bankruptcy of the maker, and receive dividends thereon. Any surplus over the amount actually due the holder will be held in trust for the endorser.¹¹⁰ The holder of negotiable paper of a bankrupt cannot, by filing a claim based thereon and assigning the same to an innocent purchaser, defeat the right of the trustee in bankruptcy to assert defenses against the claim which he could have interposed had the claim not been assigned.¹¹¹

(III) *Notes of corporations.*—Notes of a bankrupt corporation, given for the purchase of stock of another corporation if authorized by its charter, and in the absence of fraud, are valid claims against it.¹¹² A claim of an accommodation indorser on a note made for the benefit of a *de facto* corporation which he paid in full, may be allowed, in bankruptcy proceedings of the corporation.¹¹³ A note given by a corporation for the indebtedness of another, for which it is in no way responsible, is not provable against the corporation.¹¹⁴ Notes given by the executive officers of a corporation, in their individual names, the proceeds of which are used for corporate purposes, are provable against the corporation.¹¹⁵ Notes given for the payment of corporate stock, transferred without being stamped as required by a State law, are provable in bankruptcy,

109. *Wright v. Rumph* (C. C. A., 5th Cir.), 38 Am. B. R. 235, 238 Fed. 138.

110. *Young v. Gordon* (C. C. A., 4th Cir.), 33 Am. B. R. 522, 219 Fed. 168.

111. *Matter of Partridge Lumber Co.* (D. C., N. J.), 33 Am. B. R. 537, 215 Fed. 973.

112. *In re N. Y. Car Wheel Works* (D. C., N. Y.), 15 Am. B. R. 571, 141 Fed. 430; s. c., 14 Am. B. R. 595, 139 Fed. 421. But see *In re Smith Lumber Co.* (D. C., Tex.), 13 Am. B. R. 123, 132 Fed. 618, holding that where the purchase of its own stock by a corporation renders it insolvent and results in a fraud upon the rights of creditors, a note given upon such purchase in the hands of the payee is not provable.

Notes of bankrupt corporation.—Notes signed by a bankrupt corporation by its president and secretary and which are under the corporate seal and were given for moneys indisputably advanced at the time, are *prima facie* a liability of the bankrupt. *Spencer v. Lowe* (C. C. A., 8th Cir.), 29 Am. B. R. 876, 198 Fed. 361.

113. *Matter of Kelley & Co.* (D. C., Conn.), 32 Am. B. R. 877, 215 Fed. 155.

114. *Corporate notes for payment of debt of another.*—In the case of *Mapes v. German Bank* (C. C. A., 8th Cir.), 23 Am. B. R. 713, 176 Fed. 89, the court said: "The officers of a trading corporation undoubtedly have authority to make and deliver its promissory notes for the just debts of the corporation, and the acts of such officers in this regard are presumed to be lawfully done, when no notice to the contrary is received by the holder of the paper. But it is beyond the powers of the corporation and its officers alike to make accommodation paper, or to guarantee or to pay the obligations of others

in which it has no interest, and from which it derives no benefit."

Assumption of debts of old corporation by new corporation.—Where a new corporation was organized, upon the failure of a prior corporation, the stockholders being different from the old in numbers and proportion of stock held, and the debts of the former corporation not having been assumed by the new corporation, nor the entire assets of the old taken over, and where a bank holding the notes of the old corporation took the notes of the new one with the proceeds of which the old notes were taken up, to the knowledge of the bank, there was no valuable consideration moving to the new corporation for taking up the notes of the old and the bank was chargeable with notice of such want of consideration and could not prove the new notes against the estate in bankruptcy of the new corporation. *In re Standard Clothing Co.* (D. C., Ala.), 26 Am. B. R. 124, 187 Fed. 172.

115. *Loans evidenced by notes of officers of bankrupt.*—A claim upon a loan, evidenced by the individual notes of the executive officers of the bankrupt corporation, is provable against the corporation, where it appears that the loan was actually made to it, and that the notes were taken by the officers merely for business reasons. *Flower v. Central National Bank* (C. C. A., 8th Cir.), 35 Am. B. R. 79, 223 Fed. 323; *Hogin v. Central National Bank* (C. C. A., 8th Cir.), 35 Am. B. R. 81, 223 Fed. 325. Claim by purchaser of a note, executed in the name of a bankrupt corporation by its president, disallowed. *Matter of Continental Engine Co.* (C. C. A., 7th Cir.), 37 Am. B. R. 102, 234 Fed. 58.

notwithstanding the State law forbids legal proceedings in the State court based on the transfer of stock for which the notes were given.¹¹⁶

(3) **STIPULATION FOR PAYMENT OF COLLECTION FEES.**—Collection fees stipulated to be paid in a promissory note due before the filing of the maker's petition in bankruptcy, but which was not placed in the hands of an attorney for collection until after such time, are not absolutely owing at the time of the filing of the petition and are not provable.¹¹⁷ The stipulation to pay a certain sum as the expense of collection does not create a "fixed liability" where no services were rendered in making the collection before the bankruptcy.¹¹⁸ Where such notes are placed in the hands of an attorney for collection prior to adjudication the fees stipulated are provable.¹¹⁹

(4) **INTEREST.**—Subdivision (1) permits the proof of a debt evidenced by a written instrument; "with any interest thereon which would have been recoverable at that date (the time of filing the petition) or with a rebate of interest upon such as were not then payable and did not bear interest." As a provable debt a note or other instrument in writing is limited to the principal and interest thereon that would have been recoverable at the time of the filing of the petition in bankruptcy.¹²⁰ The interest due at such time is a part of the provable debt.¹²¹ Interest stops on all unsecured debts at such time.¹²² But this rule has no application to estates which are solvent.¹²³ If the debt is due subsequent to bankruptcy only the interest due at the time the petition is filed can be added; the interest not then accrued must be rebated.¹²⁴

116. *Matter of Wyllie, Jr.* (D. C., N. Y.), 32 Am. B. R. 145, 210 Fed. 954.

117. *In re Keeton* (D. C., Tex.), 11 Am. B. R. 367, 126 Fed. 426; s. c., 11 Am. B. R. 370, 126 Fed. 429; *In re Garlington* (D. C., Tex.), 8 Am. B. R. 602, 115 Fed. 999; *In re Gebhard* (D. C., Pa.), 15 Am. B. R. 381, 140 Fed. 571; *In re Thompson Milling Co.* (D. C., Tex.), 16 Am. B. R. 454, 144 Fed. 314; *In re Hersey* (D. C., Ia.), 22 Am. B. R. 863, 171 Fed. 998; *British & American Mortgage Co. v. Stuart* (C. C. A., 5th Cir.), 31 Am. B. R. 465, 210 Fed. 425, holding that a claim for attorney's fees based upon a mortgage which provides that the mortgagor shall pay attorney's fees and the costs of collection, is not provable where the mortgage was not due at the date of bankruptcy. See Am. Bankr. Dig. § 824.

118. *McCabe v. Patton* (C. C. A., 3d Cir.), 23 Am. B. R. 335, 174 Fed. 217.

A statute authorizing such a stipulation on a promissory note cannot be extended to include such a stipulation in a chattel mortgage. But if the services of an attorney in the collection of such a note had been performed prior to the filing of the petition the fees stipulated to be paid would have been provable as a debt against the estate of the bankrupt. *In re Chadwick* (D. C., Ohio), 15 Am. B. R. 528, 140 Fed. 674.

119. *In re Edens & Co.* (D. C., So. Car.), 18 Am. B. R. 643, 151 Fed. 940; *Merchants' Bank v. Thomas* (C. C. A., 5th Cir.), 10 Am. B. R. 299, 121 Fed. 306.

Only reasonable fee allowed.—Where bankrupts gave to claimant bank certain notes which contained provisions that in case they were not paid when due and payable and if

they were placed in the hands of an attorney for collection, the holder should be paid 10% additional on the principal and interest due thereon, as an attorney's fee, such provision called for the payment only of a reasonable attorney's fee for services actually rendered in conformity with its terms. *Mechanics' American National Bank v. Coleman* (C. C. A., 8th Cir.), 29 Am. B. R. 396, 204 Fed. 24.

120. *In re Chandler* (C. C. A., 8th Cir.), 25 Am. B. R. 865, 184 Fed. 387. As to proof of interest generally, see Am. Bankr. Dig. § 848.

121. *In re Fenn* (D. C., Vt.), 22 Am. B. R. 833, 172 Fed. 620.

When interest allowable.—Interest is allowable on claims strictly against the assets of a bankrupt only up to the time of filing the petition in bankruptcy. Where the proceeds, derived from the sale by the trustee of the real property of the bankrupt's deceased husband, which descended to her subject to an equitable lien for his debts, are more than sufficient to pay the principal of his debts, interest should be allowed until the date of the sale. *Matter of McAusland* (D. C., N. J.), 37 Am. B. R. 519, 235 Fed. 173.

122. *Sexton v. Dreyfus*, 219 U. S. 339, 25 Am. B. R. 363, 365, 55 L. Ed. 244, 31 Sup. Ct. 256; *Shawnee County v. Hurley* (C. C. A., 8th Cir.), 22 Am. B. R. 209, 94 C. C. A. 362, 169 Fed. 92.

123. *Matter of McAusland* (D. C., N. J.), 37 Am. B. R. 519, 235 Fed. 173.

124. *In re Chandler* (C. C. A., 7th Cir.), 25 Am. B. R. 865, 184 Fed. 387. See also *In re Orne*, Fed. Cas. 10,581.

The rate of interest of course depends upon the State law; if the rate is usurious only the amount legally chargeable may be included as a part of the debt, unless the usury affects the validity of the note, in which case the entire debt is vitiated.¹²⁵

e. Indorser and surety debts.—(1) **LIABILITY OF INDORSERS.**—The present statute contains no equivalent to § 5069 of the Revised Statutes,¹²⁶ and it was for some time doubted whether an indorser whose liability became fixed after the bankruptcy could prove against the bankrupt's estate.¹²⁷ It is now thought that, in spite of this omission and the persuasive argument based on the harmonies of the statute, *contra*,¹²⁸ such liabilities, because on "contract, express or implied," are provable. The rules of law applicable when the indorser or surety is already liable for a debt of the bankrupt have been considered.¹²⁹ His claim is in no sense contingent, for he proves the fixed liability of the bankrupt to the principal debtor. But where such person is merely an accommodation party, he will not be allowed to prove his debt.¹³⁰ Where the liability of an indorser becomes fixed after his petition is filed, and prior to the expiration of the time for proof of claims, it is provable as a debt.¹³¹ Where the indorsers of the notes of a bankrupt corporation take

125. *In re Worth* (D. C., Ia.), 12 Am. B. R. 566, 130 Fed. 927. See *In re Kellogg* (C. C. A., 2d Cir.), 10 Am. B. R. 7, 121 Fed. 333.

126. Act of 1867, § 19.

127. See *In re Schaefer* (D. C., Pa.), 5 Am. B. R. 92, 104 Fed. 973, as overruled by the same judge in *In re Gerson* (D. C., Pa.), 5 Am. B. R. 89, 105 Fed. 891; the later ruling, *affd. s. c.*, 6 Am. B. R. 11, 107 Fed. 897. See also *In re Marks* (Ref., N. Y.), 6 Am. B. R. 641.

128. Thus see *Collier on Bankruptcy* (3d ed.), pp. 382, 383.

129. See discussion under Sections Sixteen and Fifty-seven of this work. Compare *In re Smith* (Ref., N. Y.), 1 Am. B. R. 37; *Smith v. Wheeler*, 5 Am. B. R. 46, 55 N. Y. App. Div. 170, 66 N. Y. Supp. 780; *Hayer v. Comstock* (Sup. Ct., Ia.), 7 Am. B. R. 493, 115 Iowa 187; *In re Lamson* (D. C., N. Y.), 22 Am. B. R. 635, 171 Fed. 516; *Whitwell v. Wright* (Sup. Ct., N. Y.), 23 Am. B. R. 747, 136 App. Div. 246, 120 N. Y. Supp. 1065.

130. *In re Dunningan*, 2 N. B. N. Rep. 755. Compare, on this general subject, *Zartman v. Hines* (Ref., N. Y.), 6 Am. B. R. 139.

131. *Moch v. Market St. Nat. Bank* (C. C. A., 3d Cir.), 6 Am. B. R. 11, 107 Fed. 897; *In re Smith* (D. C., R. I.), 17 Am. B. R. 112, 146 Fed. 912; *In re Semmer Glass Co.* (C. C. A., 2d Cir.), 14 Am. B. R. 25, 135 Fed. 77; *Gorman v. Wright* (C. C. A., 4th Cir.), 14 Am. B. R. 135, 136 Fed. 164; *Heyman v. Third Nat. Bank* (D. C., N. J.), 32 Am. B. R. 716, 216 Fed. 685.

Reimbursement to indorsers.—Where certain directors of a bankrupt corporation having indorsed notes which were discounted and the proceeds used in the company's business, paid the notes at maturity, they are as much entitled to reimbursement as if each had contributed his share in cash and will be permitted to prove a claim therefor

against the bankrupt's estate. *In re Salvatore Brewing Co.* (C. C. A., 2d Cir.), 28 Am. B. R. 56, 193 Fed. 989.

Trustee of indorser also trustee of maker.—Where a partnership and each of its two members have been adjudicated bankrupt and the trustees of the firm are also trustees of each individual member, under the provisions of sections 172, 185 and 186 of the New York Negotiable Instruments Law, a claim, based upon notes made by one of the bankrupts and indorsed by the other member of the firm and which had not matured when bankruptcy intervened, is provable against the individual estate of such indorser, although no notice of non-payment was given to him. *In re McIntyre & Co.* (D. C., N. Y.), 28 Am. B. R. 459, 198 Fed. 579.

Contingent liability of endorser.—A surety or an indorser for a bankrupt, whose liability is contingent, cannot prove a claim of his own by reason of such liability. It is only the creditor's claim which is provable. An indorser on the note of a bankrupt who pays the note cannot prove a claim on the note and also on the implied promise of the bankrupt made at the time of the indorsement to repay him in case he is compelled to pay such note. A corporation prior to bankruptcy executed a trust mortgage to secure bonds issued and delivered to secure indorsers of its notes. On the foreclosure of the mortgage after bankruptcy of the corporation a deficiency judgment was entered, and the trustee under the mortgage filed a proof of claim based thereon. The notes were all assigned to one party who advanced money to the indorsers who paid said notes. *Held*, that the claim on the deficiency judgment should be rejected, but the claim on the notes should be allowed without deduction on account of the enforcement of the collateral; that on taking up the notes the indorsers were entitled to prove their claims for the full amount thereof and

up the notes and the bonds of the corporation held as collateral are turned over to such indorsers, the latter are then in the attitude of sureties, having paid the principal debt of the principal, and are therefore subrogated to the collateral held by the creditor.¹³² Where one of the indorsers, who pay the note or become liable therefor, is a bankrupt, the indorsers may prove a proportionate share of the note against the co-indorser.¹³³

(2) SURETY AND CORPORATE BONDS.—Where the liability of the principal upon an administration bond has been legally liquidated and ascertained, both as to the amount and the person to whom due, so as to fix the liability of the surety thereon at the time of the filing of a petition in bankruptcy, by or against such surety, such liability is a provable debt.¹³⁴ The liability of a surety on a bond of an officer whose duty it is to collect and pay over public funds becomes fixed on the officer's failure to make payments of the money collected, and if such failure occurs prior to the adjudication of the bankrupt surety, such liability is provable against his estate.¹³⁵ And in the case of an indemnity bond to secure the performance of a building contract, a bankrupt principal is relieved from his obligation upon discharge, and the surety may pay it off and be subrogated to the rights of the creditor and have the pro rata part of the bankrupt's estate applied to the principal debt.¹³⁶ Where a surety pays the amount of the damages secured, he is entitled to share with all the creditors of the bankrupt, but not to the prejudice of the beneficiary obligees of the bond.¹³⁷ Corporate bonds issued under proper statutory authority to secure the payment of money borrowed for the transaction of the business of the corporation are valid claims.¹³⁸ The holders of the bonds of a corporation, secured by a trust mortgage on the property of the corporation,

receive a dividend on the full amount of such claims and then apply the proceeds of the mortgaged property applicable to the payment of the balance of the claim on the bonds or deficiency judgment. *Matter of Astoroga Paper Co.* (D. C., N. Y.), 37 Am. B. R. 751, 234 Fed. 792.

132. In such a case the indorsers, regarded as sureties, entitled to subrogation, can obtain no more from the collateral originally delivered to the creditor than the creditor itself could have done. They can claim only the amount paid by them with interest, and upon the payment of such sum the bonds and other bonds issued as interest thereon, will be liquidated. *Sauve v. Fleschutz* (C. C. A., 8th Cir.), 34 Am. B. R. 49, 219 Fed. 542.

133. *Wright v. Rumph* (C. C. A., 5th Cir.), 38 Am. B. R. 235, 238 Fed. 138.

134. *Hibbard v. Bailey* (C. C. A., 3d Cir.), 12 Am. B. R. 104, 129 Fed. 575, revg. 10 Am. B. R. 545, 123 Fed. 185. As to liability of firm on note given to surety of one of the members on an official bond, see *In re Speer Bros.* (D. C., Or.), 16 Am. B. R. 524, 144 Fed. 910. As to liability under bail bond to United States for person indicted for stealing funds of a bankrupt estate, see *In re Caponigri* (D. C., N. Y.), 27 Am. B. R. 513, 193 Fed. 291.

135. *Loeser v. Alexander* (C. C. A., 6th Cir.), 24 Am. B. R. 75, 176 Fed. 265.

136. *Williams et al. v. U. S. Fidelity Co.*, 236 U. S. 549, 34 Am. B. R. 181, 59 L. Ed. 713, 35 Sup. Ct. 289, revg. 28 Am. B. R.

802; *Murphy v. Nicholson* (N. J. Ct. of Errors and App.), 34 Am. B. R. 670, 94 Atl. 62; *United States v. Illinois Surety Co.* (C. C. A., 7th Cir.), 38 Am. B. R. 880, 226 Fed. 653.

Distribution between surety of bankrupt and other creditors.—A surety company gave a bond securing persons furnishing labor or material to a municipal contractor. In express terms the obligation was joint and several. By a contemporaneous agreement the contractor indemnified the surety company against any payments that the latter might make under the bond. After the contractor had incurred debts exceeding the amount of the bond several creditors sued both the contractor and the surety in the State court and the surety was permitted to pay the amount of its liability on the bond into court, which was subsequently distributed, each creditor receiving about 50 per cent. of his debt. Thereafter the contractor was adjudged a bankrupt and its plant sold by the trustee. *Held*, that the surety's claim for the amount paid into court, for which it also held a judgment, should be allowed; but other creditors must credit the dividend received from the State court and confine themselves to the balance. *Matter of American Product Co.* (C. C. A., 3d Cir.), 35 Am. B. R. 54, 224 Fed. 401.

137. *Matter of American Product Co.* (D. C., Pa.), 34 Am. B. R. 367, 222 Fed. 126.

138. *In re Waterloo Organ Co.* (C. C. A., 2d Cir.), 13 Am. B. R. 477, 134 Fed. 341.

and not the trustee, are entitled to prove their individual claims on the bonds against the bankrupt corporation.¹³⁹

f. Liabilities for taxes.—While taxes are not in a strict sense debts, they are so regarded for many purposes under the bankruptcy act, and they are legally due and owing on the day they are assessed, although not payable until after adjudication.¹⁴⁰ While technical proof of them is not required and they must be paid even if not presented for proof, they are to be treated as provable debts or demands embraced in the class “founded upon an open account or upon a contract express or implied,”¹⁴¹ for various purposes—including that of computing the indebtedness of an alleged bankrupt.¹⁴² A sum exacted by a State for the privilege of increasing the capital stock of a corporation is a provable debt entitled to a *pro rata* distribution with the debts of other general creditors.¹⁴³

g. Other debts falling within this paragraph.—The liability of a director of a savings bank under a statute for loss of funds embezzled by an officer constitutes a “fixed liability absolutely owing,” within the meaning of this section.¹⁴⁴ An agreement by a son to pay interest on a certain sum to his father during his lifetime, and to pay the principal to the father's heirs within five years after his death, is not a “fixed liability absolutely owing,” and the amount agreed to be paid is not a provable claim against the son's bankrupt estate.¹⁴⁵

IV. OPEN DEBT ACCOUNTS: CONTRACTS.

a. Debt founded on open account.—Subdivision 4 of this subsection makes a debt “founded on an open account” provable and allowable. These words, in view of the words that follow, seem almost unnecessary. It is meant thereby to permit a creditor to prove for a balance due on a running account between him and the bankrupt. If a debt is founded upon an open account its provability is not affected by the fact that the creditor has elected to sue as for a fraudulent conversion rather than for a balance due,¹⁴⁶ or for damages

139. *Mackay v. Randolph Macon Coal Co.* (C. C. A., 8th Cir.), 24 Am. B. R. 719, 178 Fed. 881.

Bonds payable only from surplus which has never existed.—Where bonds of a bankrupt company expressly declare on their face that both the principal and interest are payable only out of certain named funds to be created out of the surplus earnings of the company, and there never have been any surplus earnings, there cannot be a fixed liability absolutely owing to the holders of the bonds. *Synnott v. Tombstone Consol. Mines Co.* (C. C. A., 9th Cir.), 31 Am. B. R. 421, 208 Fed. 251.

A provision in the bonds of a bankrupt corporation, that at maturity any surplus shall be divided between the bondholders and stockholders, does not defeat the holders' claim to prove as general creditors for principal and interest. *Matter of Interborough Realty Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 541, 223 Fed. 646.

140. *In re Sherwood* (C. C. A., 2d Cir.), 31 Am. B. R. 769, 210 Fed. 754; *Hecox v. Teller County* (C. C. A., 8th Cir.), 28 Am.

B. R. 525, 198 Fed. 634; *In re Flynn* (D. C. Mass.), 13 Am. B. R. 720, 134 Fed. 145; *In re Fisher & Co.* (D. C., N. J.), 17 Am. B. R. 404, 148 Fed. 907. See Am. Bankr. Dig. § 840.

141. *In re United States Button Co.* (D. C., Del.), 15 Am. B. R. 390, 140 Fed. 495, *affd.* 17 Am. B. R. 565, 149 Fed. 48.

142. *Kaw Boiler Works v. Schull & Anderson* (C. C. A., 8th Cir.), 36 Am. B. R. 531, 230 Fed. 587.

143. *Matter of York Silk Mfg. Co.* (D. C., Pa.), 26 Am. B. R. 650, 188 Fed. 735.

144. *In re Brown* (C. C. A., 9th Cir.), 21 Am. B. R. 123, 164 Fed. 673; *In re Walker* (C. C. A., 9th Cir.), 21 Am. B. R. 132, 164 Fed. 680.

145. *In re Hartman* (D. C., Pa.), 21 Am. B. R. 610, 166 Fed. 776.

146. *Crawford v. Burke*, 195 U. S. 176, 12 Am. B. R. 659, 49 L. Ed. 147, 25 Sup. Ct. 9, *revd.* 201 Ill. 581; *Kreitlein v. Ferger*, 238 U. S. 21, 34 Am. B. R. 862, 59 L. ed. 118, 435 Sup. Ct. 685, *revd.* 28 Am. B. R. 908, 52 Ind. App. 199.

sustained in consequence of false and fraudulent representations.¹⁴⁷ Payments made by the bankrupt on an open account within the four months' period do not affect the provability of the balance due, provided the net result of transactions evidenced by the account is the enrichment of the bankrupt estate.¹⁴⁸

b, Debt founded on a contract, express or implied.—(1) IN GENERAL.—Subdivision 4 also provides that a debt may be proved and allowed which is "founded on a contract, express or implied." These are the most generic and valuable words in the subsection. The contract must, of course, be founded on a legal consideration, not against public policy, and, if by a corporation, not *ultra vires*.¹⁴⁹ The claim need not be evidenced by a judgment or instrument in writing. But it is the debt resting on the contract, and not the contract liability that is provable. If there is no present liability under the contract when proof is made there can be no provable claim.¹⁵⁰ Where a contract is broken by the bankruptcy of the debtor, damages may be recovered for the breach.¹⁵¹ But if the contract is of such a nature that it may be consummated notwithstanding the bankruptcy of one of the parties, such bankruptcy does not constitute a breach of the contract, nor does it authorize

147. *Tindle v. Birkett*, 205 U. S. 183, 18 Am. B. R. 121, 51 L. Ed. 762, 27 Sup. Ct. 493, affg. 15 Am. B. R. 179, 183 N. Y. 267, 76 N. E. 25.

148. *Wild & Co. v. Provident Life & Trust Co.*, 214 U. S. 292, 22 Am. B. R. 109, 53 L. Ed. 1003, 29 Sup. Ct. 619; *Jaquith v. Alden*, 189 U. S. 78, 9 Am. B. R. 733, 47 L. Ed. 717, 23 Sup. Ct. 649. In the case of *Yaple v. Dahl-Millikan Grocery Co.*, 193 U. S. 526, 11 Am. B. R. 596, 48 L. Ed. 776, 24 Sup. Ct. 552, it was held where a creditor has a claim upon an open account for goods sold and delivered during the period of four months before the adjudication in bankruptcy, the account being made up of debits and credits, leaving a net amount due from the bankrupt estate, that payments made under such circumstances did not constitute preferences which the creditor was bound to surrender before proving his claim in bankruptcy.

149. As to illegal contracts see Am. Bankr. Dig. § 840; as to *ultra vires* acts of corporations, see *Idem*, § 850.

Illegal or immoral consideration.—In the absence of proof, an illegal or immoral consideration should not be assumed. *Matter of Wray* (C. C. A., 2d Cir.), 37 Am. B. R. 28, 233 Fed. 418.

Corporate contract by lumber company to guaranty the completion of a building contract held *ultra vires*. In re *Smith Lumber Co.* (D. C., Tex.), 13 Am. B. R. 118, 132 Fed. 618. See also In re *Waterloo Organ Co.* (C. C. A., 2d Cir.), 13 Am. B. R. 466, 134 Fed. 341; *Forsyth v. Woods*, 11 Wall. 484; *Buckner v. Street*, Fed. Cas. 2,098; In re *Chandler*, Fed. Cas. 2,590; In re *Young*, Fed. Cas. 18,145; In re *Jaycock*, Fed. Cas. 7,244; In re *Green*, Fed. Cas. 5,751. Compare

also In re *Ervin* (D. C., Pa.), 7 Am. B. R. 480, 114 Fed. 596.

Public policy not opposed by brewers' contract with bankrupt saloon keeper restricting the bankrupt from selling any other beer than that manufactured by the brewer. *Matter of Clark* (Ref., Cal.), 21 Am. B. R. 776.

Illegal contract for sale of liquors not established without proof that the sale was illegal at place where made. *Jacobs v. Balentine Breweries Co.* (C. C. A., 1st Cir.), 27 Am. B. R. 918, 193 Fed. 393.

Agreement to repurchase capital stock.—Where a corporation, when selling shares of the capital stock to claimant, agreed to repurchase the same after the expiration of three years, upon claimant's giving notice that he so desired, such contract is invalid and cannot be made the basis of a claim in the bankruptcy proceedings of the corporation, especially in view of section 664 of the New York Penal Law forbidding the purchase by a corporation of its capital stock except out of surplus profits arising from the business of the corporation. In re *Tichenor-Grand Co.* (D. C., N. Y.), 29 Am. B. R. 409, 203 Fed. 720.

150. In re *Ellis* (C. C. A., 6th Cir.), 16 Am. B. R. 221, 143 Fed. 103, where a subcontractor was held to have no claim provable in bankruptcy for materials furnished to a contractor, where the agreement between them required no payment, unless payment was made to the contractor by the owner.

151. In re *National Wire Corp.* (D. C., Conn.), 22 Am. B. R. 186, 166 Fed. 631; In re *Inman & Co.* (D. C., Ga.), 22 Am. B. R. 524, 175 Fed. 31; *Matter of Desnoyers Shoe Company* (D. C., Ill.), 32 Am. B. R. 51, 210 Fed. 533.

the rescission or abandonment of such contract.¹⁵² The form of the contract is not material so long as it imposes a contractual obligation upon the debtor; as for instance, stock certificates issued by a corporation, entitling the holder to purchase merchandise, and to receive dividends thereon out of the profits of the corporation; such certificates being payable in merchandise after two years, are contracts of the corporation and the amount due thereon is provable against its estate.¹⁵³

(2) GAMBLING TRANSACTIONS.—If the contract is illegal because in violation of a statute prohibiting betting and gaming, it may not be provable, but this rule will not prevent the allowance of a claim where money was fraudulently procured by the bankrupt to bet on horse races.¹⁵⁴ The rule applies to speculative contracts for the future delivery of cotton and grain, no actual delivery being intended.¹⁵⁵ The provability of claims based on "bucket shop" transactions will depend largely upon State statutes; if such transactions are unlawful, debts arising therefrom are not provable.¹⁵⁶ If the contract involves the purchase and the actual delivery of the stock or grain, it is not a gambling transaction, although it provides for future delivery, and the payment was "on a margin."¹⁵⁷

152. In re Morgantown Tin Plate Co. (D. C., W. Va.), 25 Am. B. R. 836, 184 Fed. 109 (revd. in part, but on other grounds, 26 Am. B. R. 851, 191 Fed. 9), citing Carey v. Nagle, Fed. Cas. 2,403; Vandegrift v. Cowles Eng. Co., 161 N. Y. 435, 444, 45 N. E. 941, 48 L. R. A. 685.

153. In re Spot Cash Hooper Co. (D. C., Tex.), 26 Am. B. R. 546, 188 Fed. 861.

154. In re Arnold (D. C., Mo.), 13 Am. B. R. 320, 133 Fed. 789.

Where bankrupt had issued to claimants certificates stating, in substance, that he had received certain sums of money in full payment for a specified number of shares in the "pool" of a company, under whose name bankrupt was doing business, and it was further provided in the certificates that the company would invest the money according to its judgment and pay the holders their *pro rata* shares of the profits on hand on the first of each month, claimants having the option to withdraw the whole or any part of their money on the first of any month upon ten days' notice of intention so to do and the company being privileged to cancel the certificate on the first day of any January upon thirty days' notice. It was held that the relation created was that of lender and borrower, and not that of partners, so that claimants were entitled to prove, in bankruptcy proceedings, for the money advanced, notwithstanding the fact that such money was intended to be used in a gambling enterprise. In re Norris (D. C., Minn.), 26 Am. B. R. 945, 190 Fed. 101.

155. In re Aetna Cotton Mills (D. C., S. Car.), 22 Am. B. R. 629, 171 Fed. 994.

156. Transactions with bucket shop.—In the case of Streeter v. Lowe (C. C. A., 1st Cir.), 25 Am. B. R. 774, 184 Fed. 263, it appeared that a customer of the bankrupt who was a stockbroker, filed a proof of claim for the balance due from the bank-

rupt on account of the purchase and sale of stock by the bankrupt for the account of such customer. The trustee objected to the claim on the ground that it was founded upon wagering contracts and therefore was invalid. It appeared that the bankrupt had rendered accounts to the creditor in which the transactions were treated as real sales and purchases and in these accounts he entered also certain cash payments actually made as margins by the creditor to the bankrupt. The evidence showed, however, that the bankrupt was the keeper of a bucket shop, neither making nor intending real sales and purchases of stock, but only wagers on its price, and that the creditor understood that the transactions were wagers and did not intend that the orders which he gave the bankrupt should be carried out by actual sale or purchase. It was held that the creditor was not entitled to prove a claim for the entire balance alleged to be due on account of purchases and sales, but that under Rev. Laws of Mass. Chap. 99, sec. 4, providing for the recovery of payments made on margins, the creditor was entitled to have his claim allowed to the extent of the cash payments actually made as margins and interest thereon.

157. Actual delivery contemplated.—Under section 8416 of the Revised Code of Montana subjecting to a penalty "any person conducting any brokerage business, bucket shop or office where grain or other securities are sold on margins," where bankrupt, a stockbroker, converted stock which had been left in his possession to secure the balance due him on the purchase price, about one-fourth of which had been paid, under an agreement stating that the stock had been sold "with the distinct understanding that actual delivery is contemplated," a claim against bankrupt's estate for the difference between the value of the

(3) OWING AT TIME OF FILING PETITION.—Subdivision 4 does not repeat the words “absolutely owing at the time of the filing of the petition against him,” but it is provable that they should be read therein,¹⁵⁸ for it is evident that the status of a debt founded on a contract is to be determined as of the time when the petition was filed.¹⁵⁹ If it be owing at the time of the filing of the petition it may be proved; but if it becomes due only after the filing of the petition, even if before adjudication, it is not a claim to be considered as one absolutely owing.¹⁶⁰ For instance, where an agreement takes effect on a certain day, which is subsequent to the filing of a petition against the bankrupt, the indebtedness arising from such agreement is not a provable claim against his estate.¹⁶¹

(4) BREACH OF WARRANTY.—A claim for damages for breach of warranty upon a sale of personal property is for a debt founded upon a contract and is provable, although the amount thereof is undetermined.¹⁶² And this rule obtains although because of actual fraud in the sale there might be an independent claim purely in tort.¹⁶³ But the term “represent and warrant” does not imply a promise to reimburse claimants for damages on account of the failure of a certain tract of land to cut as much timber as represented.¹⁶⁴

(5) BREACH OF EXECUTORY CONTRACT.—(I) *In general*.—A claim for damages for the breach of an executory contract is provable, if it may be liquidated under section 63-b.¹⁶⁵ Such doubt as may have arisen as to the provability of such a claim is caused by the conflict in authorities as to whether an action will lie for damages for the breach of an executory contract before the stipulated time of complete performance has arrived.¹⁶⁶ If the damages resulting from the breach may be definitely ascertained there seems no good reason why a claim based thereon should not be admitted to proof.¹⁶⁷

stock at the time of bankruptcy and the balance due is not illegal as based upon a contract prohibited by law. *In re Dorr* (C. C. A., 9th Cir.), 26 Am. B. R. 408, 186 Fed. 276.

158. *In re Swift* (C. C. A., 1st Cir.), 7 Am. B. R. 374, 112 Fed. 315. See also *Matter of Jorolemon-Oliver Co.* (C. C. A., 2d Cir.), 32 Am. B. R. 467, 213 Fed. 625.

159. *In re Adams* (D. C., Mass.), 12 Am. B. R. 368, 130 Fed. 788; *In re Birgham* (D. C., Vt.), 2 Am. B. R. 223, 96 Fed. 79; *In re Pettingill* (D. C., Mass.), 14 Am. B. R. 728, 137 Fed. 443. Compare *In re Gerson* (C. C. A., 3d Cir.), 6 Am. B. R. 11, 107 Fed. 897, holding that while the liability of an indorser on a note does not become fixed and absolute until after his bankruptcy, it may still be proved against his estate, if such liability has become fixed within the time limited for proving claims; *Colman Co. v. Withoft* (C. C. A., 9th Cir.), 28 Am. B. R. 328, 195 Fed. 250; *Synnott v. Tombstone Consol. Mines Co.* (C. C. A., 9th Cir.), 31 Am. B. R. 421, 208 Fed. 251; *Cotting v. Hooper, Lewis & Co.*, 34 Am. B. R. 23, 107 N. E. 931.

160. *Zavelo v. Reeves*, 227 U. S. 625, 29 Am. B. R. 493, 57 L. Ed. 676, 33 Sup. Ct. 365; *Phoenix Nat. Bank v. Waterbury*, 197 N. Y. 161, 90 N. E. 435; *Board of County Com-*

missioners v. Hurley (C. C. A., 8th Cir.), 22 Am. B. R. 209, 169 Fed. 92; *Matter of Mullings Clothing Co.* (D. C., Conn.), 37 Am. B. R. 166, 230 Fed. 681.

161. *Phoenix Nat. Park Bank v. Waterbury* (N. Y., Ct. of App.), 23 Am. B. R. 250, 197 N. Y. 161, 90 N. E. 435.

162. *In re Grant Shoe Co.* (C. C. A., 2d Cir.), 12 Am. B. R. 349, 130 Fed. 881, affg. 11 Am. B. R. 48, 125 Fed. 576.

163. *Grant Shoe Co. v. Laird Co.* 212 U. S. 445, 21 Am. B. R. 484, 53 L. Ed. 591, 29 Sup. Ct. 332.

164. *Switzer & Johnson v. Henking* (C. C. A., 6th Cir.), 19 Am. B. R. 300, 153 Fed. 784.

165. *In re Spittler* (D. C., Conn.), 18 Am. B. R. 425, 151 Fed. 942; *In re National Wire Corp.* (D. C., Conn.), 22 Am. B. R. 186, 166 Fed. 631.

166. See discussion of this question and cases cited in *In re Stern* (C. C. A., 2d Cir.), 8 Am. B. R. 569, 16 Fed. 604.

167. *In re Stoeber* (D. C., Pa.), 11 Am. B. R. 345, 127 Fed. 304; *In re Stern* (C. C. A., 2d Cir.), 8 Am. B. R. 569, 116 Fed. 604.

Breach of written contract; measure of damages.—A claim for damages arising out of the breach of a written contract whereby bankrupt was to purchase certain articles to be produced by claimant is provable; and

(II) *Anticipatory breach*.—It is well established that if a party to an executory contract has by his own act made compliance with such contract impossible, or had repudiated its terms, the doctrine of anticipatory breach applies, and the other party may elect to defer suit until the time of performance has elapsed, or he may sue at once for the breach.¹⁶⁸ Under this doctrine where a contract is renounced before performance is due, and the renunciation goes to the entire contract, and is absolute and unequivocal the breach is complete and a cause of action immediately arises on the contract.¹⁶⁹ Whether the intervention of bankruptcy proceedings, especially in case of involuntary proceedings, constitutes an anticipatory breach giving rise to a claim provable in bankruptcy has been variously determined;¹⁷⁰ but it has now been finally determined that bankruptcy proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement.¹⁷¹ Bankruptcy is a

the measure of damages is the difference between the contract price and the cost of production. *Pratt v. Auto Spring Repairer Co.* (C. C. A., 1st Cir.), 28 Am. B. R. 483, 196 Fed. 495.

Measure of damages under subscription with mercantile agency.—Where a mercantile agency contracted with the bankrupts whereby it agreed to furnish information regarding the character and credit of persons in business in the United States and Canada to the bankrupts for the period February 1, 1910, to April 30, 1911, for the sum of \$150 "payable May 1, 1910," and from the date of the contract until a petition in bankruptcy was filed against the bankrupts on March 4, 1910, such agency did whatever it was called upon to do, but no service was rendered subsequent thereto, the agency was entitled to prove its claim for \$150 against the estate upon the theory that the written contract at the basis of the claim was a promise to pay a definite sum of money contained in a non-negotiable instrument in writing. *In re Glick* (D. C., N. Y.), 25 Am. B. R. 871, 184 Fed. 967, citing with approval decision of Referee Hotchkiss in *Matter of Buffalo Mirror & Beveling Co.* (Ref., N. Y.), 15 Am. B. R. 122.

168. Application and effect of doctrine.—As stated by the court in *Board of Commerce v. Security Trust Co.* (C. C. A., 6th Cir.), 34 Am. B. R. 762, 225 Fed. 454: "This doctrine was established in *Roehm v. Horst*, 178 U. S. 1, 44 L. Ed. 953, 20 Sup. Ct. 780, in which the English and American cases are reviewed; was declared by this court in *Weber v. Grand Lodge*, 169 Fed. 522, 533; in *El Paso Cattle Co. v. Stafford*, 176 Fed. 41, 47; was reaffirmed in *The Eliza Lines*, 199 U. S. 119, 129, 50 L. Ed. 115, 26 Sup. Ct. 8, and in *Citizens' Bank v. Davisson*, 229 U. S. 212, 224, 57 L. Ed. 1153, 33 Sup. Ct. 625, and is the settled law in the United States and England. This rule is held to apply also to cases in which, by reason of bankruptcy, disability to perform results. In the case, *In re Neff* (C. C. A., 6th Cir.), 19 Am. B. R. 23, 157 Fed. 57, 61, 84 C. C. A. 561,

it was said by Mr. Justice Lurton, then a judge of this court: 'Bankruptcy is a complete disablement from performance and the equivalent of an out and out repudiation, subject only to the right of the trustee, at his election, to rehabilitate the contract by performance.'

"He cited *In re Swift* (C. C. A., 1st Cir.), 7 Am. B. R. 374, 112 Fed. 315, 50 C. C. A. 264, and *In re Pettingill* (D. C., Mass.), 14 Am. B. R. 728, 137 Fed. 143, in which Judge Putnam and Judge Lowell, respectively, expressed the same opinion. In these cases the authorities are carefully collated and considered."

169. *Roehm v. Horst*, 178 U. S. 1, 44 L. Ed. 953, 20 Sup. Ct. 780; *Matter of Mullings Clothing Co.* (C. C. A., 2d Cir.), 38 Am. B. R. 189, 238 Fed. 58.

170. In support of the provability of the claim.—See *Ex parte Pollard*, 2 Low. 411; *Fed. Cas. No. 11,252*; *In re Swift* (C. C. A. 1st Cir.), 7 Am. B. R. 374, 112 Fed. 315, 319, 321; *In re Stern* (C. C. A., 2d Cir.), 8 Am. B. R. 569, 116 Fed. 604; *In re Pettingill & Co.* (D. C., Mass.), 14 Am. B. R. 728, 137 Fed. 143, 146, 147; *In re Neff* (C. C. A., 6th Cir.), 19 Am. B. R. 23, 157 Fed. 57, 61; are referred to; and see *Pennsylvania Steel Co. v. New York City Ry. Co.* (C. C. A., 2d Cir.), 198 Fed. 721, 736, 744.

To the contrary: *In re Imperial Brewing Co.* (D. C., Mo.), 16 Am. B. R. 110, 143 Fed. 579; *In re Inman & Co.* (D. C., Ga.), 171 Fed. 185; s. c., 23 Am. B. R. 566, 175 Fed. 312; besides which a number of cases arising out of the relation of landlord and tenant are cited: *In re Ellis* (D. C., Mass.), 3 Am. B. R. 564, 98 Fed. 967; *In re Pennewell* (C. C. A., 6th Cir.), 9 Am. B. R. 490, 119 Fed. 139; *Watson v. Merrill* (C. C. A., 8th Cir.), 14 Am. B. R. 453, 136 Fed. 359; *In re Roth & Appel* (C. C. A., 2d Cir.), 24 Am. B. R. 588, 181 Fed. 667; *Colman Co. v. Withoff* (C. C. A., 9th Cir.), 28 Am. B. R. 328, 195 Fed. 250.

171. *Central Trust Company v. Auditorium Assn.*, 240 U. S. 581, 36 Am. B. R. 679, 60 L. Ed. 811, 36 Sup. Ct. 412.

complete disablement from performance of a contract, and the equivalent of an out and out repudiation, subject, of course, to the right of the trustee to carry out the contract for the benefit of the bankrupt estate.¹⁷² It follows that a claim for breach of contract may be proved, although the time of performance had not arrived when the petition was filed, on the theory that the bankruptcy proceedings is an anticipatory breach and a complete disablement on the part of the debtor, thus making him liable for damages immediately upon filing the petition.¹⁷³ A claim for damages for the breach of an executory contract of lease where the lessee is a corporation and has voted to wind up and its stockholders have applied to the court for the appointment of a receiver to wind up its affairs and dissolve the corporation, is a claim founded upon a contract and provable in bankruptcy.¹⁷⁴

(6) CONTINGENT CONTRACTUAL LIABILITIES.—While contingent contractual obligations may not be proved,¹⁷⁵ yet if liabilities thereunder mature by the happening of the contingent event upon which they depend, after the filing of the petition, and in time to admit of proof, they become provable debts.¹⁷⁶ The importance of these doctrines when applied to indorser and surety liabilities has already been considered.¹⁷⁷

(7) CONTINUING CONTRACTS.—A discharge does not operate upon a contract of a continuing character in such a manner as to permit the bankrupt to enjoy the benefit arising therefrom after the filing of the petition, and at the same time exempt him from liability to pay for such subsequent enjoyment.¹⁷⁸ It seems that a bond to pay an annuity may be proved at the penalty of the bond, provided the latter is less than the value of the annuity based on the mortuary tables.¹⁷⁹ Bonds to secure the faithful performance of the duties of another, an officer, are of a continuing nature. There is a cause of action for each breach. The liability, because of those breaches which have occurred before the filing of the petition, is provable, but this does not destroy the continuing obligation of the bond.¹⁸⁰ The liability of a

172. *In re Neff* (C. C. A., 6th Cir.), 19 Am. B. R. 23, 157 Fed. 57.

173. *Wood v. Fisk & Robinson* (N. Y. Sup. Ct.), 31 Am. B. R. 824, 156 N. Y. App. Div. 497, 141 N. Y. Supp. 342; *Matter of Scott, etc., Co. v. Cent. Trust Co.* (C. C. A., 7th Cir.), 32 Am. B. R. 417, 216 Fed. 308, mod. sub. nom. *Central Trust Co. v. Auditorium Assn.*, 240 U. S. 581, 36 Am. B. R. 679, 60 L. Ed. 811, 36 Sup. Ct. 412.

174. *Matter of Mullings Clothing Co.* (C. C. A., 2d Cir.), 38 Am. B. R. 189, 238 Fed. 58.

175. *In re Inman & Co.* (D. C., Ga.), 22 Am. B. R. 524, 175 Fed. 312; *Matter of Jorlemon-Oliver Co.* (C. C. A., 2d Cir.), 32 Am. B. R. 467, 213 Fed. 625.

Liability on poor debtor's bond.—An action on a poor debtor's bond given under the statutes of Maine is not barred by the debtor's discharge in bankruptcy after a breach of the bond rendering the liability of the sureties thereon fixed and not contingent; *Rice v. Murphy* (Sup. Jud. Ct., Maine), 32 Am. B. R. 665, 82 Atl. 842.

176. *In re Smith* (D. C., R. I.), 17 Am. B. R. 112, 146 Fed. 923; *In re James Dunlap Carpet Co.* (D. C., Pa.), 20 Am. B. R.

882, 163 Fed. 541, holding that claims, although contingent when filed, may be proved if they become definite and capable of liquidation within a year of the adjudication. Compare *In re Pettingill & Co.* (D. C., Mass.), 14 Am. B. R. 728, 137 Fed. 143, holding that a claim for a breach of a contract to purchase stock at a fixed date, after the bankruptcy, is provable; *In re Imperial Brewing Co.* (D. C., Mo.), 16 Am. B. R. 110, 143 Fed. 579.

177. See subtitle "*Indorser and Surety Debts*," ante, p.

178. *Robinson v. Pesant*, 8 N. B. R. 426, 53 N. Y. 419.

179. *Cobb v. Overman* (C. C. A., 4th Cir.), 6 Am. B. R. 324, 109 Fed. 65.

Claim for annuity under contract.—Where a bankrupt made a contract upon good consideration to pay a creditor a certain sum per day during the creditor's life, and there was no default at the time of adjudication, the creditor may prove the present worth of the sum during his expectation of life, as shown by the mortality tables. *Matter of Miller* (D. C., Mass.), 35 Am. B. R. 333, 225 Fed. 331.

180. *Fowler v. Kendall*, 44 Me. 448.

defendant in replevin on his bond given to secure the return of the chattels is too contingent, even after judgment in replevin against him, and is thus neither provable nor dischargeable.¹⁸¹ A conditional contract for the purchase of personal property, whereby the purchaser agrees to pay a stipulated monthly rental, based on rates of payment, is a continuing contract, but it does not necessarily bind the purchaser's trustee in bankruptcy to continue payment under the contract, regardless of the extent or value of the trustee's use of the property.¹⁸²

(8) CONTRACT OF EMPLOYMENT AND FOR COMMISSIONS.—Where contracts of employment are made for specified periods of time which are breached by the bankrupt before the expiration thereof, the damages resulting therefrom are provable although at the time of the bankruptcy the contract was not terminated.¹⁸³ A contract for services to be rendered for a bankrupt is executory, and under the principles before stated, the employee may claim damages for the anticipatory breach caused by the probable failure of the employer to perform on account of his bankruptcy.¹⁸⁴ It has been held in contravention of this doctrine that a contract of employment in force at the time of bankruptcy is terminated by operation of law, and that the employee's claim of damages therefor is contingent and not provable.¹⁸⁵ But the decision of the Supreme Court in respect to anticipating breaches of personal contracts has decisively overruled this declaration.¹⁸⁶ So also where a contract has been made for the sale of goods on commission for a specified time a breach either by some act of the bankrupt or by the bankruptcy will give rise to a claim for damages, which is provable.¹⁸⁷ The reason is: There is a contract by which the liability is fixed, that being broken by the bankrupt during the course of performance, amounts to a rescission, a right of action thus vesting immediately in the creditor. A contract or agreement made by directors of a corporation with an officer, to pay compensation for services rendered by such officer, unauthorized by the laws of the State under which the corporation was operating, is not the basis of a valid claim against the corporation.¹⁸⁸

181. *Clemmons v. Brinn* (Sup. Ct., N. Y. App. T.), 7 Am. B. R. 714, 36 Misc. 157, 72 N. Y. Supp. 1066.

182. *In re Daterson Publishing Co.* (C. C. A., 3d Cir.), 26 Am. B. R. 582, 188 Fed. 64.

183. *In re Silverman* (D. C., Mo.), 4 Am. B. R. 83, 101 Fed. 219; *In re Pollard*, Fed. Cas. 11,252; *Orr v. Ward*, 73 Ill. 318; *Stur-giss v. Meurer* (C. C. A., 4th Cir.), 26 Am. B. R. 851, 191 Fed. 9, revg. in part 25 Am. B. R. 836, 184 Fed. 109. As to breach of employment and commission contracts, see Am. Bank Dig. § 839.

184. *Matter of Schultz & Guthrie* (D. C., Mass.), 37 Am. B. R. 604, 235 Fed. 907.

185. *In re Inman & Co.* (D. C., Ga.), 22 Am. B. R. 24, 175 Fed. 312.

Installments of salary which have not been earned and are not due at the time of the filing of a petition in bankruptcy against the employer are not debts then absolutely owing and are not provable. *Matter of Levy & Sons* (D. C., Md.), 31 Am. B. R. 25, 208 Fed. 479.

186. *Central Trust Co. v. Auditorium Assn.*, 240 U. S. 581, 36 Am. B. R. 679, 60 L. Ed. 811, 36 Sup. Ct. 412.

187. As to claim for commissions on contract repudiated by bankrupt, see *In re Saxton Furnace Co.* (D. C., Pa.), 15 Am. B. R. 445, 142 Fed. 293. As to effect of bankruptcy of corporation upon contract containing provisions for revocation in case of dissolution, see *In re Sweetser* (C. C. A., 2d Cir.), 15 Am. B. R. 650, 142 Fed. 131. Claim only allowed for commissions on orders filled by the bankrupt. *In re Ladue Tate Mfg. Co.* (D. C., N. Y.), 14 Am. B. R. 235, 135 Fed. 910.

188. *In re McCarthy Portable Elevator Co.* (D. C., N. J.), 28 Am. B. R. 45, 196 Fed. 247, in which case it was also held that the mere rendition of service does not necessarily carry the right to compensation; but where not performed on the request of the party sought to be charged therewith, the circumstances of its rendition must be such that, in law, it will be presumed to have been rendered for the benefit of such party and not the party rendering it.

Claim by employee for services and expenses.—Claim by a person employed by a bankrupt company, more than three weeks before filing its petition in bankruptcy, to

The annual fee to be paid under a contract with a mercantile agency is a provable debt although only a part of the year has elapsed.¹⁸⁹

(9) BREACH OF COVENANT IN LEASE.—Where the trustee of a bankrupt tenant dispossesses a sub-tenant, a claim of the latter for breach of a covenant of quiet enjoyment contained in his lease, is not a provable debt against the tenant's estate, since it did not constitute "a fixed liability absolutely owing at the time of the filing of the petition."¹⁹⁰ Amounts due for rent of premises used by a bankrupt tenant, as well as any periodical payments reserved in a lease which have accrued at the time of the filing of the petition in bankruptcy are claims presentable and allowable against the estate because they are definite and fixed liabilities owing at the time of the commencement of the bankruptcy proceedings.¹⁹¹ There is no doubt about the bankrupt's liability if he continues to use the premises. Of course it would be different, if by the terms of the contract the rent was all payable in advance and had become due before the petition, although the terms extended beyond that time. So a continuing covenant to pay taxes as they might be assessed throughout a period of years to come, would not be provable in bankruptcy. Failure to pay instalments prior to the petition would give rise to a debt which would be provable, but it would not release the covenantor from liability to pay subsequent assessments.¹⁹² So since covenants that one will warrant and defend a title are not broken until a paramount title is asserted and established, there is no provable debt until that time, notwithstanding there may be adverse claimants; and there being no provable debt the covenantor is not released from the obligation. But if the covenant has been broken, then the party may prove his claim in bankruptcy. A covenant against incumbrances being broken at the time of the conveyance, if an incumbrance did then exist, is a debt provable in bankruptcy. The bankruptcy court has ample power to liquidate the damages.¹⁹³ We will consider hereafter under unliquidated claims the provability of claims for accruing instalments of rent.

(10) IMPLIED CONTRACTS.—This means the same as quasi-contracts. If the view expressed, *ante*, that, since the amendatory acts, all torts can be liquidated and then proved, ultimately prevails, the doctrine permitting the creditor to waive the tort and proceed on the theory of an implied contract, becomes of little importance.¹⁹⁴ If a promise to pay in the form of a due

investigate the operations of the company at a certain place, examined and held to exclude any idea of the claimant having been employed by the receivers of the bankrupt, and that the claim for services and expenses should be disallowed. *Matter of Union Dredging Co.* (D. C., Del.), 35 Am. B. R. 555, 225 Fed. 188.

189. *Matter of Buffalo Mirror & Beveling Co.* (Ref., N. Y.), 15 Am. B. R. 122; *In re Glick* (D. C., N. Y.), 25 Am. B. R. 871, 184 Fed. 967.

190. *In re Pennewell* (C. C. A., 6th Cir.), 9 Am. B. R. 490, 119 Fed. 139. See also *In re Miller* (D. C., Vt.), 13 Am. B. R. 87, 132 Fed. 414. See Am. Bankr. Dig. § 836.

191. *Matter of Mullings Clothing Co.* (D. C., Conn.), 37 Am. B. R. 166, 230 Fed. 681,

holding that a claim for damages to be measured by the difference in the amount of rent which a bankrupt agreed by lease to pay for the whole term and the amount which a new tenant agrees to pay for the balance of the term is a claim for rent.

192. *Murray v. De Rottenham*, 6 Johns. Ch. 52.

193. *Parker v. Bradford*, 45 Ia. 311.

194. Compare generally Keener on Quasi-Contracts.

Waiver of tort.—Though a suit on which a *capias* was issued was in tort that alone will not exclude it from claims provable in bankruptcy, for the tort may be waived, and a judgment had, as upon an implied contract. *Barrett v. Prince* (C. C. A., 7th Cir.), 16 Am. B. R. 64, 143 Fed. 302.

bill is unenforceable because in violation of a State law, relative to the "doing of business" in a State by a foreign corporation, the claim may not be proved upon the theory of an implied contract.¹⁹⁵ A statutory liability may be contractual in its nature and give rise to a provable claim as one based upon an implied contract; for instance it has been held that the liability of a stockholder of a banking corporation under a State statute, arises upon an implied contract, entered into when he acquires his stock, that he will be liable in the manner and to the extent prescribed by the statute.¹⁹⁶

V. JUDGMENTS ENTERED AFTER BANKRUPTCY.¹⁹⁷

Subdivision 5 of subsection *a* permits the proof and allowance of debts "founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, etc." This clause gives statutory recognition to the doctrine of *Boynton v. Ball*,¹⁹⁸ which settled a controversy under the law of 1867, that outlasted the statute itself. The contention was that the debt, being merged in the judgment, and the latter post-dating the bankruptcy, became a new debt which could not be proved, and was, therefore, not discharged.¹⁹⁹ There can now be no doubt. The debt, whether merged or not—and it seems it is not—may be proved in the form of the judgment, provided costs and interest after the bankruptcy are credited. But the judgment must (1) be founded upon a provable debt, and (2) be entered before "the consideration of the bankrupt's application for a discharge," *i. e.*, before the day on which the show cause order returnable thereon is called and heard. This provision manifestly does not include liabilities for torts.²⁰⁰

VI. CLAIMS FOR COSTS.

a. In general.—Subdivisions 2 and 3 of subsection *a* are for the purpose of permitting the proof and allowance of debts founded on a claim for costs incurred prior to the bankruptcy in an action by or against the bankrupt, but which has not yet been taxed. These subdivisions, in a sense, extended the doctrine of *Boynton v. Ball* to costs which were not taxable at the time of the bankruptcy. Costs taxed prior to that time are debts and may be proved as such.²⁰¹ Costs taxed subsequently are not, unless within the terms of

195. *In re Montello Brick Works* (D. C., Pa.), 23 Am. B. R. 375, 174 Fed. 498.

196. *Van Tuyl v. Schwab* (N. Y. App. Div.), 38 Am. B. R. 161, 174 App. Div. 665, 161 N. Y. Supp. 326.

197. For cases digested as to judgments after petition is filed, see Am. Bankr. Dig. § 843.

198. 121 U. S. 457.

199. See *In re Pinkel* (Ref., N. Y.), 1 Am. B. R. 333; *In re McBryde* (D. C., N. Car.), 3 Am. B. R. 729, 90 Fed. 686; *Chase*

v. Farmers & Merchants Nat. Bank (C. C. A., 3d Cir.), 30 Am. B. R. 200, 202 Fed. 904.

200. *Matter of N. Y. Tunnel Co.* (C. C. A., 2d Cir.), 20 Am. B. R. 25, 159 Fed. 688, holding that a claim for damages for causing death by wrongful act is not provable against the estate in bankruptcy of the alleged wrongdoer.

201. *Ex parte Foster*, Fed. Cas. 4,960; *In re O'Neil*, Fed. Cas. 10,527; *Graham v. Pierson*, 6 Hill (N. Y.), 247.

subsection *a* (2) or subsection *a* (3).²⁰² Costs paid by a surety on an appeal bond given by a bankrupt are provable against his estate.²⁰³

b. Costs against an involuntary bankrupt.—By subdivision 2 costs taxable against an involuntary bankrupt who was a plaintiff, at the time of the filing of the petition against him, in a cause of action which would pass to the trustee, but which he declines to prosecute after notice, are provable debts. There are no cases directly applicable to this subdivision. Clearly such costs to be provable must, however, be against one who, when the petition was filed, was a plaintiff in an action which, on the adjudication, passed to the trustee, but which the trustee declines, after notice, to prosecute any further.

c. Costs incurred in good faith in an action to recover a provable debt.—Under subdivision 3 a debt may be proved and allowed which is founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition, in an action to recover a provable debt.²⁰⁴ There was no similar provision in the law of 1867. Thus neither the party litigant nor the sheriff had a provable debt against the estate for the costs or disbursements on an attachment or judgment dissolved or set aside by the bankruptcy.²⁰⁵ On the other hand where such annulled liens were shown to be similar to, and in aid of, the bankruptcy proceeding, the sheriff, or the creditor who had paid him, was often, for equitable reasons, awarded such costs and disbursements out of the estate.²⁰⁶ It is not thought that subdivision (3) has modified these rules. The party litigant now has by statute

202. See *In re Marcus* (D. C., Mass.), 5 Am. B. R. 19, 104 Fed. 331; *Aiken v. Haskins*, 6 Am. B. R. 46, 34 N. Y. Misc. 505, 70 N. Y. Supp. 293.

Provability of costs in suit against bankrupt.—Where, long before bankruptcy proceedings were instituted, claimant had brought an equity suit against bankrupt in the State court, to enjoin the use of a certain word in connection with their business, in which it had been stipulated between the parties that the referee should not be limited to the statutory allowance, but that his fees should be fixed at a certain rate per hour and that each side should pay one-half of the stenographer's bill, the prevailing party to be allowed to tax his share as a disbursement in the case, the claimant, having had a decision in his favor and having paid the stenographer's fees and the referee's fees having been paid prior to the filing of the petition in bankruptcy, was entitled under section 63-a of the bankruptcy act to prove a claim against the bankrupt's estate for these items, the same to be considered as costs in the equity suit rather than as a debt due prior to the institution of bankruptcy proceedings upon a contract express or implied. *In re Brewster & Co.* (C. C. A., 2d Cir.), 24 Am. B. R. 838, 180 Fed. 109.

Liability of customers of bankrupt stockbrokers for costs and expenses.—Customers of bankrupt stockbrokers who find their property in loans while they are entitled to a credit balance, ought not to be called on to

pay any part of the disbursements and should have a docket fee. But customers carrying stocks on margin thereby give the broker the right to pledge them as collateral, and should bear the expense of disentangling the resulting rights in proportion to their interests, but are not entitled to a docket fee. Those customers who fail to establish any claim should not bear any costs. *Matter of Pierson, Jr. & Co.* (D. C., N. Y.), 35 Am. B. R. 213, 25 ed. 889.

203. *In re Lyons Beet Sugar Refining Co.* (D. C., N. Y.), 27 Am. B. R. 610, 192 Fed. 445.

204. **Costs incurred in good faith.**—The mere fact that a creditor believes his debtor to be in financial straits does not preclude him from asserting his legal rights, or impute bad faith to him in so doing, so as to bar his claim for costs where he prosecuted his claim to judgment, issued execution and was proceeding to sell property levied under the execution when the debtor filed a voluntary petition in bankruptcy. *In re Harnden* (D. C., N. Mex.), 29 A. M. B. R. 504, 200 Fed. 173.

205. *Gardner v. Cook*, Fed. Cas. 5,226; *In re Ward*, Fed. Cas. 17,145; *In re Davis*, Fed. Cas. 3,616. See *Matter of Thompson Mercantile Co.* (Ref., Min.), 11 Am. B. R. 579.

206. *In re Williams*, Fed. Cas. 17,705; *In re Welch*, Fed. Cas. 17,367; *In re Jenks*, Fed. Cas. 7,276; *Zeiber v. Hill*, Fed. Cas. 18,206; *In re Holmes*, Fed. Cas. 6,631.

a provable debt for his taxable costs and disbursements; so, perhaps, has the sheriff, if the party does not pay him. But that either has, where the costs and disbursements are incident to a lien dissolved by § 67-f, may be doubted.²⁰⁷ The cases as a rule discuss the right to priority rather than the right to prove.²⁰⁸ There can be no priority under § 64-b (5) where there is no "debt."²⁰⁹ However, the words of the subdivision make it clear that costs can be proven under it only (1) if taxable, (2) in a suit brought by a creditor, (3) on a provable debt, (4) before the filing of the petition, and (5) incurred in good faith. Lacking one or more of these elements, costs are not provable unless within the meaning of subdivision (2).²¹⁰

d. Costs in attachment suits.—The costs and disbursements in an attachment suit pending against a bankrupt at the time of the filing of the petition, the attachment lien being dissolved by the adjudication, are not a claim which should be paid by the trustee out of the bankrupt's estate. The costs and disbursements are a mere incident of the lien and fail with the lien.²¹¹ But it has been held that such a claim incurred in good faith by a creditor though within four months of the bankruptcy, is a provable claim against the estate though the lien is dissolved,²¹² and this seems to be the better authority under the present law. That the costs and disbursements in an attachment suit cannot be proven as a debt against the bankrupt and that the lien for the costs fails with the attachment lien, see the cases, under the act of 1867, cited in the foot-note.²¹³ An examination of the cases under such note shows, however, that in many of them, although it was held that the lien for costs failed with the attachment lien, and although there was no claim therefor against the bankrupt, still the bankruptcy court may, in the exercise of its equitable jurisdiction, require the trustee to pay such charges as have benefited the estate in his hands, though incurred before the bankruptcy; if he received the benefit of the attachment he was obliged to sustain the burden.²¹⁴

VII. UNLIQUIDATED CLAIMS.

a. In general.—Subsection *b* permits the liquidation, and subsequent proof and allowance, of an unliquidated claim against the bankrupt. The law of

^{207.} *In re Young* (D. C., N. Y.), 2 Am. B. R. 673, 96 Fed. 606; *In re Jennings* (Ref., N. Y.), 8 Am. B. R. 358.

^{208.} Compare *In re Allen* (D. C., Cal.), 3 Am. B. R. 38, 96 Fed. 512; *In re Lewis* (D. C., Mass.), 4 Am. B. R. 51, 99 Fed. 935. And generally under § 64-b (5).

^{209.} See Bankr. Act, § 1 (11).

^{210.} Text cited with approval in *In re Harnden* (D. C., N. Mex.), 29 Am. B. R. 504, 200 Fed. 173.

^{211.} *In re Young* (D. C., N. Y.), 2 Am. B. R. 673, 96 Fed. 606.

^{212.} *In re Allen* (D. C., Cal.), 3 Am. B. R. 38, 96 Fed. 512.

Costs of attachment suit under laws of State.—A claim for costs actually and necessarily expended by claimant in an attachment suit brought against the bankrupt in good faith before the filing of the petition in bankruptcy, is a provable claim under section 63 (3) of the bankruptcy act and is entitled to priority under section 64-b (5), where, as in California, the State law provides that the legal costs and dis-

bursements of an attachment suit brought before the commencement of proceedings in insolvency shall be a preferred debt. *In re Amoratie* (C. C. A., 9th Cir.), 24 Am. B. R. 565, 178 Fed. 919.

^{213.} *In re Fortune*, 2 N. B. R. 662, Fed. Cas. 4,955, 1 Low. 306; *Gardner v. Cook*, 7 N. B. R. 346, Fed. Cas. 5,226; *In re Geo. S. Ward*, 9 N. B. R. 349, Fed. Cas. 17,145; *In re Hatje*, 12 N. B. R. 548, Fed. Cas. 6, 215, 6 Biss. 436; *In re Preston*, 6 N. B. R. 545, Fed. Cas. 11,394. See, however, apparently contra, *In re Foster*, Fed. Cas. 4,960, 2 Story, 131; *In re Hausberger*, 2 N. B. R. 92, 2 Ben. 504; *London v. King*, 50 Ga. 302; *In re Preston*, 5 N. B. R. 293.

^{214.} See *In re Fatune*, 2 N. B. R. 662, Fed. Cas. 4,955; *Garden v. Cook*, 7 N. B. R. 346, Fed. Cas. 5,226; *In re Ward*, 9 N. B. R. 349, Fed. Cas. 17,145; *In re Jenks*, 15 N. B. R. 301, Fed. Cas. 7,276; *Zeiber v. Hill*, 8 N. B. R. 239, Fed. Cas. 18,206; *In re Holmes*, 14 N. B. R. 493, Fed. Cas. 6,631.

1867 permitted the liquidation of damages for conversion only; that, as has been shown, was (aside from debts grounded in fraud or embezzlement) the only tortious liability provable. The words of the present law are much broader and seem to be taken from R. S., § 5068, which regulated the liquidation of "contingent debts and contingent liabilities."

b. Effect and purpose of subsection.—Subsection *b* adds nothing to the class of debts which may be proved under subsection *a*; its purpose is to permit an unliquidated claim, coming under the provisions of subsection *a*, to be liquidated as the court shall direct.²¹⁵ It was not intended by the subsection to permit proof of contingent debts, liabilities or demands, the valuation or estimation of which it was substantially impossible to prove.²¹⁶ The present prevailing opinion is that only debts coming within subsection *a* can be liquidated and no tortious liabilities may be, save on the theory of quasi-contract.²¹⁷ A claim for unliquidated damages for loss of future profits is provable in bankruptcy, where it is based on a contract right.²¹⁸ If the nature of the claim is such that it can only be liquidated in a court having exclusive jurisdiction conferred by statute, it cannot be proved.²¹⁹ Cases under the former law will be found in the foot-note.²²⁰

c. Injuries to person or property.—A claim for unliquidated damages for personal injuries alleged to have been caused to a servant by the failure of a master to furnish safe appliances, arises *ex delicto* and is not of such a

^{215.} *Dunbar v. Dunbar*, 190 U. S. 340, 349, 10 Am. B. R. 139, 47 L. Ed. 1084, 23 Sup. Ct. 757.

An unliquidated claim will only be allowed under section 63-b, upon application to the court to direct the manner of liquidation. In *re Silverman Bros.* (D. C., Mo.), 4 Am. B. R. 83, 101 Fed. 219.

Class of provable debts not enlarged by section 63-b.—Section 63-b of the bankruptcy act, providing for unliquidated claims against the bankrupt, which may be liquidated upon application to the court in such manner as it shall direct, and may thereafter be proved and allowed against his estate, adds nothing to the class of debts which may be proved under paragraph *a* of the same section, its purpose being to permit an unliquidated claim coming within the provisions of section 63-a, to be liquidated as the court should direct. *Matter of Roth & Appel* (C. C. A., 2d Cir.), 24 Am. B. R. 588, 181 Fed. 667; In *re Southern Steel Co.* (D. C., Ala.), 25 Am. B. R. 358, 183 Fed. 498; *Matter of Mullings Clothing Co.* (C. C. A., 2d Cir.), 38 Am. B. R. 189, 238 Fed. 58; *Moore v. Douglas* (C. C. A. 9th Cir.), 36 Am. B. R. 740, 230 Fed. 399, affg. 34 Am. B. R. 823, 225 Fed. 683.

^{216.} *Dunbar v. Dunbar*, 190 U. S. 340, 10 Am. B. R. 139, 47 L. Ed. 1084, 23 Sup. Ct. 757.

^{217.} In *re Hirschman* (D. C., Utah), 4 Am. B. R. 715, 104 Fed. 69, holding that subsection *b* covers only such claims as when liquidated are provable debts under the classification of the preceding subsection *a*, and does not authorize the liquidation and proof of claims arising *ex delicto* unless they are of such a nature that the

claimant might at his election waive the tort and recover in quasi-contract. See also In *re Filer* (Ref., N. Y.), 5 Am. B. R. 582; *Matter of United Button Co.* (D. C., Del.), 15 Am. B. R. 390, 140 Fed. 495.

Taxes and premiums of insurance, if they are not a fixed liability, are not such unliquidated claims against the bankrupt as can be proved, for only those claims can be admitted to proof under this provision which can be liquidated by legal proceedings instituted at the time of the bankruptcy. *Matter of Pittsburg Drug Co.* (D. C., Pa.), 20 Am. B. R. 227, 237, 164 Fed. 482.

Negligence in management of estate.—Where an executrix at the time of her bankruptcy was entitled to the management of property bequeathed to her daughter until she became of a certain age which time had not arrived, a proof of claim by the daughter through her guardian, based upon the negligence of the bankrupt in managing the estate, is unliquidated. *Matter of Griffin* (D. C., Mass.), 33 Am. B. R. 894, 188 Fed. 389.

^{218.} *Matter of Manhattan Ice Co.* (D. C., N. Y.), 7 Am. B. R. 408, 114 Fed. 400-n, affd. 8 Am. B. R. 569, 116 Fed. 604.

^{219.} In *re Hawley* (D. C., Wash.), 28 Am. B. R. 58, 194 Fed. 751, in which a claim by a subcontractor against a United States contractor, based upon the bond given by the contractor, was held not provable, because under the statute requiring the bond actions thereon can only be brought in the circuit court.

^{220.} In *re Smith*, Fed. Cas. 12,975; In *re Cook*, Fed. Cas. 3,151; *Ex parte Lake*, Fed. Cas. 7,991; *Abbott v. Rowan*, 33 Ark. 593. See discussion *ante*, subtitle "*Implied contracts*."

nature as to authorize a waiver of the tort and a recovery upon the quasi-contract, and is, therefore, not provable against the master's estate in bankruptcy.²²¹ So, a judgment, in an action under an employer's liability act to recover for personal injuries, is not a provable claim against the bankrupt's estate.²²² A claim for unliquidated damages, resulting from injury to the property of another, not connected with or growing out of any contractual relation, is not a provable debt in bankruptcy.²²³

d. Liquidation, how accomplished.—The liquidation is usually accomplished by a suit in the proper State court, but it can be in the bankruptcy court when all the facts are admitted.²²⁴ The proof of the claim, though unliquidated, may be filed, and thereupon the claim is before the court to be dealt with as the interests of the parties may require; there must be liquidation before proof by such means as the court or referee may direct.²²⁵ If it seems best the referee may withhold action on the claim or postpone the dividend thereon until the status of the claim is fully determined.²²⁶ Unliquidated claims may be liquidated either by a hearing before the referee, by a plenary suit in any court of competent jurisdiction, or by permitting a pending action upon such claims to proceed to judgment.²²⁷ It is not necessary to declare the rules for determining the amount due upon unliquidated claims; ordinarily such determination will be based upon the principles controlling the ascertainment of damages in other cases where there have been breaches of contractual obligations.²²⁸

e. Contingent liabilities.—There is a broad distinction between "unliquidated damages" and "contingent liabilities."²²⁹ The phrase "unliquidated claims" may refer to both. The former law provided for the liquidation of contingent debts and liabilities,²³⁰ and the cases under it, as well as those

^{221.} *Matter of Urgniore & Sons Co.* (Ref., Cal.), 10 Am. B. R. 661. See *ante*, II, d (4) "*Claims tortious in character.*"

^{222.} *In re Crescent Lumber Co.* (D. C., Ala.), 19 Am. B. R. 112, 154 Fed. 724.

A claim by an employee for personal injuries, unliquidated and not reduced to judgment, until after the adjudication in bankruptcy of the employer, is not a debt provable in the bankruptcy proceedings. *Eberlein v. Fidelity & Deposit Co.* (Wis. Sup. Ct.), 37 Am. B. R. 614, 159 N. W. 553.

A claim by the New York State Industrial Commission based upon an award against the bankrupt for personal injuries to an employee, made nearly seven months after bankruptcy and not reduced to judgment, is not provable under this section. *Matter of Rock-away Soda Water Co.* (D. C., N. Y.), 36 Am. B. R. 640.

^{223.} *Brown & Adams v. United Button Co.* (C. C. A., 3d Cir.), 17 Am. B. R. 565, 149 Fed. 48, affg. 15 Am. B. R. 390, 140 Fed. 495.

^{224.} *In re Rouse* (Ref., Ohio), 1 Am. B. R. 393.

^{225.} *In re Rubel* (D. C., Wis.), 21 Am. B. R. 566, 170 Fed. 1021.

^{226.} *In re Mertens* (C. C. A., 2d Cir.), 16 Am. B. R. 825, 144 Fed. 818.

^{227.} *In re Buchan's Soap Corp.* (D. C., N. Y.), 22 Am. B. R. 382, 169 Fed. 1017.

Accounting before referee to determine claim of solvent partner.—Where one part-

ner has paid all the debts of a partnership whose other member has been adjudged a bankrupt, the sum which may be shown upon a partnership accounting to be due him from such other member is a debt which will be discharged by bankruptcy, and therefore provable against the estate of the bankrupt partner. In such case, an accounting being necessary to make proof of claim, the court has power under section 63-b of the bankruptcy act, to order the claim liquidated before the referee. *Matter of Hirth* (D. C., Minn.), 26 Am. B. R. 666, 189 Fed. 926.

^{228.} See *Matter of Structural Steel Car Co.* (Ref., Ohio), 13 Am. B. R. 373; *In re Kenney* (D. C., Ind.), 14 Am. B. R. 611, 136 Fed. 451.

^{229.} Consult *Zimmer v. Schleeauf*, 115 Mass. 52.

230. Bankr. Act, 1867, § 19 (R. S., § 5068), provided as follows: "In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency happens before the order for the final dividends; or he may, at any time, apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained."

under its predecessor, drew a clear distinction between demands whose existence depended on a contingency and existing demands where the cause of action depended on a contingency; the former not being provable in any event and the latter only when liquidated.²³¹ The present law has no similar clause and it has been vigorously asserted that contingent claims cannot now be liquidated or proven.²³² We have already seen, however, that an indorser or a surety may have a provable claim, even if the contingency fixing it does not happen until after the bankruptcy. The same reasoning will doubtless extend to all existing demands based on contract where only the cause of action depends on a contingency. Such a construction harmonizes the statute both as to distribution of assets and to the dischargeability of debts, and explains an omission for which there was no reason, in fact, which, if intentional, was wrong. Such a contingency may, it is thought, be liquidated under the terms of subsection *b*; with, however, this limitation, that both (1) the contingency must happen and (2) the liquidation be accomplished during the time within which a claim may be proven.²³³ The test as to whether a

231. *Raggin v. Magwire*, 15 Wall. 549; *French v. Morse*, 68 Mass. 111; *Jemison v. Blowers*, 5 Barb. (N. Y.) 686; *McNeil v. Knott*, 11 Ga. 142; *In re Mead*, 14 Fed. 287.

232. *In re Imperial Brewing Co.* (D. C., Mo.), 16 Am. B. R. 110, 143 Fed. 579; *In re American Vacuum Cleaner Co.* (D. C., N. J.), 26 Am. B. R. 621, 192 Fed. 939.

Effect of distinction between present act and act of 1867.—Mr. James W. Eaton, the able editor of the third edition of *Collier on Bankruptcy*, uses the following language in commenting upon the inferences to be drawn from the failure of the present act to provide for proof of contingent liabilities as was done under the act of 1867: "The provisions of the act of 1898 concerning the proof of contingent claims differ materially from those contained in the acts of 1841 and 1867. Section 63-a (1) provides for fixed liabilities absolutely owing at the time of the petition but not then payable. Section 57-i provides for the proof of contingent claims of the surety of the bankrupt where the creditor has not proved his claim. G. O. 21 (4) has only to do with the claims of a surety. Apart from these provisions there is nothing in the act of 1898 or the General Orders which refers expressly to contingent claims. It must therefore be assumed that Congress did not intend to include such claims among provable debts. (See cases cited under the preceding paragraph.) This will be seen by a comparison with the terms of the preceding act. Revised Statutes, section 5069 (section 19 of the act of 1867), reads: (Section inserted as in Note 230).

"Clearly, then, in enacting this paragraph (subdivision 1), Congress must have had in mind this liability of sureties and other persons in similar relations, as well as other contingent liabilities, and under the present law such claims or debts cannot be proved unless the liability has become fixed and absolutely owing before the com-

mencement of the proceedings in bankruptcy. Subdivision 4 provides that 'debts are provable which are founded upon an open account or upon a contract express or implied.' But contingent liabilities are not in any proper sense debts; they are mere contracts, and do not become debts until the contingencies happen on which demand for payment can be made. Those contingencies may indeed happen pending proceedings in bankruptcy, but there is no provision in the present act for the proof of such a debt if the liability becomes fixed after the commencement of proceedings but before final dividend. The statute of 1867 did permit proof in such cases, but it is believed that under the present statute it cannot be done. Inasmuch as in all previous bankruptcy acts legislators have thought it necessary to insert an express provision in order to give to one the right to prove such contingent debts and contingent liabilities, the omission of such provisions from the present act seems to show an intention on the part of Congress to leave the liability of the bankrupt on such contracts unaffected. Such construction of the statute cannot be assailed as not in conformity with the spirit and tendency of bankruptcy legislation. It is true that such liabilities, if not provable, are not in any way affected by a discharge. And there may be many liabilities which, in consequence, will remain outstanding against the bankrupt after the proceedings in bankruptcy. But to a certain extent that was true under the former act. Under all bankruptcy laws there is a certain date fixed after which debts which come into existence may be collected from the after-acquired property of the bankrupt. That time, under the present act, is the date of filing the petition."

233. Bankr. Act, § 57-n, and discussion under Section Fifty-seven of this work, subtitle "*Time limitation on allowance of claims.*"

claim is really contingent or simply one unliquidated by legal proceedings is this: Have all the facts necessary to be proved to fasten liability already occurred? If so the claim is not contingent. But as long as it remains uncertain whether a contract will ever give rise to an actual liability and there is no manner of removing the uncertainty by calculation, it is too contingent to be a provable debt.²³⁴ Thus, it has been held, in respect to leases, that, although a landlord's claim was not a fixed liability at the time the petition was filed, if it was liquidated within the year, it became a provable debt.²³⁵ A claim for future services under a written contract with the bankrupt for a term of years is a contingent liability and not provable in bankruptcy.²³⁶ The conditional preliminary proof authorized by the former law should, however, not be permitted.²³⁷ A claim cannot be proved for a breach of a covenant in a lease to the effect that the lessee would after re-entry indemnify the lessor against all loss of rents and other payments which might occur by reason of the termination of the lease, since in such a case the damages, if any, could not be ascertained until the term of the lease had expired as originally limited, or there had been a reletting.²³⁸

VII. WHAT DEBTS ARE NOT PROVABLE.

a. In general.—From what has already been said, it results that substantially all liabilities either *ex contractu* or *ex delicto*, provided they are liquidated either before the bankruptcy, or, if not, thereafter, are provable debts under the terms of subsection *b*. There are exceptions, which, and the reasons for them, are considered here.

b. Judgments for fines and penalties.—These are not provable,²³⁹ though there is authority the other way.²⁴⁰ Penalties imposed under a State statute *after adjudication* of a corporation in bankruptcy, for failure to file reports and the like, are not fixed liabilities absolutely owing at the time of the filing of the petition, and are not provable debts.²⁴¹ Fines are provable, if at all, only because "a fixed liability absolutely owing." But the criminal

²³⁴. Matter of Mullings Clothing Co. (D. C., Conn.), 37 Am. B. R. 166, 230 Fed. 681; decree set aside (C. C. A., 2d Cir.), 38 Am. B. R. 189, 238 Fed. 58.

²³⁵. Moch v. Market Street Bank (C. C. A., 3d Cir.), 6 Am. B. R. 11, 107 Fed. 897; In re Dunlap Carpet Co. (D. C., Pa.), 20 Am. B. R. 882, 163 Fed. 541; In re Coloris Mfg. Co. (D. C., Pa.), 24 Am. B. R. 609, 179 Fed. 722.

Allowance of contingent claims; claim for salary due after bankruptcy.—In the absence of statutory language expressly directing the allowance of contingent claims, the holder thereof will not be permitted in bankruptcy proceedings to share in the distribution of the assets with those creditors whose claims were absolute at the time of the filing of the petition. Thus, where one was employed by a bankrupt under an executory contract, which at the time of the filing of an involuntary petition had a number of months to run, and had been paid up to that date, a claim for salary for the month following the filing of the petition, during which time claimant was unemployed, cannot be proven under section 63 of the bankruptcy act of 1898. In re American

Vacuum Cleaner Co. (D. C., N. J.), 26 Am. B. R. 621, 192 Fed. 939.

²³⁶. Matter of Montague & Gillet, Inc. (D. C., N. Y.), 32 Am. B. R. 106, 212 Fed. 452.

²³⁷. Compare foot-note 230, *ante*.

²³⁸. In re Shaffer (D. C., Mass.), 10 Am. B. R. 633, 124 Fed. 111; In re Ells (D. C., Mass.), 3 Am. B. R. 564, 98 Fed. 967. See also Evans v. Lincoln Co., 10 Am. B. R. 401, 204 Pa. St. 448, 54 Atl. 321. Compare Matter of Mullings Clothing Co. (C. C. A., 2d Cir.), 38 Am. B. R. 189, 238 Fed. 58.

²³⁹. In re Sutherland, 3 N. B. R. 314, Fed. Cas. 13,639; People v. Spalding, 10 Paige 284, affd. 4 How. 21; In re Moore (D. C., Ky.), 6 Am. B. R. 590, 111 Fed. 145; In re Southern Steel Co. (D. C., Ala.), 25 Am. B. R. 358, 183 Fed. 498.

²⁴⁰. In re Alderson (D. C., W. Va.), 3 Am. B. R. 544, 98 Fed. 588, holding that a judgment obtained in a State court against a bankrupt for fines upon indictments is a dischargeable judgment. This does not seem to be good law.

²⁴¹. Matter of York Silk Mfg. Co. (D. C., Pa.), 26 Am. B. R. 650, 188 Fed. 735.

does not "owe" a fine; it is not a debt, but a punishment. Further, if provable, they are, under § 17, dischargeable. The courts will hardly impute to Congress an intention thus to grant amnesty to criminals whose punishment consists of a fine.²⁴² The opposite rule doubtless applies when the judgment is for a penalty or forfeiture.

c. **Alimony due or to accrue.**—Were *Audubon v. Schufeldt*²⁴³ national in its scope, alimony, whether in arrears or to accrue, would not be a provable debt. As it is, there may still be some doubt in those States where it, when decreed by a court, is a debt merely.²⁴⁴ That it is a duty measured up in dollars is the almost universal view, a reason alone sufficient to take it out of the meaning of § 63. Further, alimony to accrue is never a fixed liability, being always subject to change by the court that decrees it. Still further, it is not a judgment in the ordinary sense, the method of collection being far different. It is true that in this view, the amendment of 1903, exempting alimony from the effect of a discharge,²⁴⁵ is superfluous. Now, however, alimony, whether due at the time of bankruptcy or accrued or to accrue thereafter, is not a provable debt.²⁴⁶

d. **Rent to accrue.**—The law of 1867 contained a clause which limited the proof of "rent or any other debt falling due at fixed and stated periods" to the moment of bankruptcy.²⁴⁷ Under it, it was often held that rent to accrue was not provable.²⁴⁸ Though there is no such clause in the present law, the great weight of authority is that rent to accrue is not even a contingent claim,²⁴⁹ and is, therefore, not capable of proof.²⁵⁰ The reasons given are various, but that asserting that the adjudication amounts to a breach of the lease has already been challenged and may be doubted.²⁵¹ The only "fixed liability" under the lease is the rent due at the time of filing the petition.²⁵² Rent to accrue is not a fixed liability absolutely owing, but is a

242. See 1 N. B. 48, 57.

243. 181 U. S. 575, 5 Am. B. R. 829, 45 L. Ed. 1009, 21 Sup. Ct. 735.

244. For instance, in *Kentucky*, see *In re Houston* (D. C., Ky.), 2 Am. B. R. 107, 94 Fed. 119.

245. See Bankr. Act, § 17-a (2).

246. See under Section Seventeen of this work; *Wetmore v. Markoe*, 196 U. S. 68, 13 Am. B. R. 1, 49 L. Ed. 390, 25 Sup. Ct. 172.

247. Act of 1867, § 19, R. S., § 5071.

248. *In re May*, Fed. Cas. 9,325; *In re Hufnagel*, Fed. Cas. 6,837; *In re Cronney*, Fed. Cas. 3,411.

249. Compare *Ex parte Houghton*, Fed. Cas. 6,725. Text cited with approval in *Matter of Cress-McCormick Co.* (Ref., Miss.), 25 Am. B. R. 464.

250. *In re Jefferson* (D. C., Ky.), 2 Am. B. R. 206, 93 Fed. 948; *In re Arnstein* (D. C., N. Y.), 4 Am. E. R. 246, 101 Fed. 706; *In re Collignon* (Ref., N. Y.), 4 Am. B. R. 250; *In re Mahler* (D. C., Mich.), 5 Am. B. R. 453, 105 Fed. 428; *Atkins v. Wilcox* (C. C. A., 5th Cir.), 5 Am. B. R. 313, 105 Fed. 595; *In re Ellis* (D. C., Mass.), 3 Am. B. R. 564, 98 Fed. 967; *In re Hays, etc., Co.* (D. C., Ky.), 9 Am. B. R. 144, 117 Fed. 879; *In re Winfield Mfg. Co.* (D. C., Pa.), 15 Am. B. R. 24, 137 Fed. 984; *Watson v. Merrill* (C. C. A., 8th Cir.), 14 Am. B. R. 453,

136 Fed. 359; *In re Rubel* (D. C., Wis.), 21 Am. B. R. 566, 170 Fed. 1021; *In re Roth & Appel* (C. C. A., 2d Cir.), 24, Am. B. R. 588, 181 Fed. 667; *In re Sapinsky & Sons* (D. C., Ky.), 30 Am. B. R. 416, 206 Fed. 523; *Colman Co. v. Withoft* (C. C. A., 9th Cir.), 28 Am. B. R. 328, 195 Fed. 250. Apparently *contra*, *In re Goldstein* (Ref., Pa.), 2 Am. B. R. 603. Compare *Matter of Mullings Clothing Co.* (C. C. A., 2d Cir.), 38 Am. B. R. 189, 238 Fed. 58, following doctrine in *In re Roth & Appel* (C. C. A., 2d Cir.), 24 Am. B. R. 588, 181 Fed. 667, but holding that it was not applicable to a case when prior to bankruptcy a corporation was dissolved thus terminating a lease.

251. Compare *In re Jefferson* (D. C., Ky.), 2 Am. B. R. 206, 93 Fed. 948, with *In re Ellis* (D. C., Mass.), 3 Am. B. R. 564, 98 Fed. 967.

A lease is not terminated *ipso facto* by an adjudication of bankruptcy. *In re Pennewell* (C. C. A., 6th Cir.), 9 Am. B. R. 490, 119 Fed. 139; *Watson v. Merrill* (C. C. A., 8th Cir.), 14 Am. B. R. 453, 136 Fed. 359; *In re Adams* (D. C., Conn.), 14 Am. B. R. 23, 134 Fed. 142.

252. *Matter of Roth & Appel* (D. C. N. Y.), 22 Am. B. R. 504, 174 Fed. 64, *affd.* 24 Am. B. R. 588, 181 Fed. 667.

Rent accruing subsequent to bankruptcy and damages for breach.—In the case of

mere possible future demand contingent upon uncertain events,²⁵³ and there may be a change in the relation of the parties by consent or breach at any time.²⁵⁴ It does rest upon a contract,²⁵⁵ and, therefore, could be liquidated, were it not for the fact that "its very existence depends on a contingency,"²⁵⁶ no claim of which character can or ever has been capable of liquidation and proof.²⁵⁷ It has been held that notes given by a bankrupt for rent accruing subsequent to adjudication are without consideration, since the rent or debt for which they were given cannot possibly come into existence, and such notes cannot, therefore, be proved against the estate of the bankrupt lessee.²⁵⁸ And any other arrangement whereby the bankrupt became liable for future rent, although made between the bankrupt and a person other than the landlord to secure reimbursement of rent to be paid by such person, does not

Matter of Sterne & Levi (Ref., Tex.), 26 Am. B. R. 535, it was held that rents which a bankrupt has agreed to pay subsequent to the filing of a petition do not constitute the basis of a claim provable in bankruptcy, because not a "fixed liability—absolutely owing" at the time of the filing of the petition; and that damages for the breach of a bankrupt's contract to pay rent in the future may not be made the basis of a provable claim. (Citing text with approval.) And see Ellis v. Rafferty (C. C. A., 3d Cir.), 29 Am. B. R. 192, 199 Fed. 80.

253. Rent to accrue contingent upon uncertain events.—In the case of Matter of Roth & Appel (C. C. A., 2d Cir.), 24 Am. B. R. 588, 181 Fed. 667, the court said: "Rent is a sum stipulated to be paid for the use and enjoyment of land. The occupation of the land is the consideration for the rent. If the right to occupy terminate, the obligation to pay ceases. Consequently, a covenant to pay rent creates no debt until the time stipulated for the payment arrives. The lessee may be evicted by title paramount or by acts of the lessor. The destruction or disrepair of the premises may, according to certain statutory provisions, justify the lessee in abandoning them. The lessee may quit the premises with the lessor's consent. The lessee may assign his term with the approval of the lessor so as to relieve himself from further obligation upon the lease. In all these cases the lessee is discharged from his covenant to pay rent. The time for payment never arrives. The rent never becomes due. It is not a case of *debitum in praesenti solvendum in futuro*. On the contrary, the obligation upon the rent covenant is altogether contingent. Citing Watson v. Merrill (C. C. A., 8th Cir.), 14 Am. B. R. 453, 136 Fed. 362; Coke on Littleton, 292-b; Wood v. Partridge, 11 Mass. 492; Bordman v. Osborn, 23 Pick. (Mass.) 299. It follows from these principles that rent accruing after the filing of a petition in bankruptcy against the lessee is not provable against his bankrupt estate as a fixed liability . . . absolutely owing at the time of the filing of the petition, within the meaning of § 63-a (1) of the bankruptcy act of 1898. It is not a fixed liability, but is

contingent in its nature. It is not absolutely owing at the time of the bankruptcy, but is a mere possible future demand. Both its existence and amount are contingent upon uncertain events." Citing Atkins v. Wilcox (C. C. A., 5th Cir.), 5 Am. B. R. 313, 105 Fed. 595; also In re Rubel (D. C., Wis.), 21 Am. B. R. 566, 166 Fed. 131; In re Mahler (D. C., Mich.), 5 Am. B. R. 453, 105 Fed. 428; In re Hays, etc., Co. (D. C., Ky.), 9 Am. B. R. 144, 117 Fed. 879; In re Arnstein (D. C., N. Y.), 4 Am. B. R. 246, 101 Fed. 706; In re Jefferson (D. C., Ky.), 2 Am. B. R. 206, 93 Fed. 948; In re Inman & Co. (D. C., Ga.), 22 Am. B. R. 524, 171 Fed. 185.

A claim under a mining lease for royalties to become due in the future, which is contingent upon the continuance of the lease, and by the terms of the lease itself cease to be due in the event of strikes, car shortage, etc., is not provable against the estate in bankruptcy of the lessee. In re Gallagher Coal Co. (D. C., Ala.), 29 Am. B. R. 766, 205 Fed. 183.

Rent is contingent after an assignment for benefit of creditors under which the lessors have the right to enter upon the premises and terminate the lease, or at their election to demand damages. Cotting v. Hooper, Lewis & Co., 34 Am. B. R. 23, 107 N. E. 931.

254. Matter of Cress-McCormick Co. (Ref., Miss.), 25 Am. B. R. 464; In re Calons's Mfg. Co. (D. C., Pa.), 24 Am. B. R. 609, 179 Fed. 722.

255. Bankr. Act, § 63-a (4).

256. Deane v. Caldwell, 127 Mass. 242.

257. Compare In re Mahler (D. C., Mich.), 5 Am. B. R. 453, 105 Fed. 428.

258. In re Curtis (Sup. Ct., La.), 9 Am. B. R. 286, 33 So. 125. It was held upon rehearing in this case that the indorser on notes given for such rent was liable thereon upon the theory that although such notes were not provable against the bankrupt's estate, the consideration was not affected by the bankruptcy of the lessee, the non-provability of the notes being based upon the contingent nature of the claim.

modify the contingent character of the claim and make it provable.²⁵⁹ Where a receiver in bankruptcy continues in occupation of leased premises, from the filing of the petition until the tenant's adjudication as a bankrupt, it has been held that the landlord may prove for rent down to the time of the adjudication, as for a debt founded upon an express contract.²⁶⁰ It has been held that a covenant in a lease, making the rent for the entire period fall due upon a breach by the lease, creates a fixed liability within the meaning of § 63-a (1).²⁶¹ It has also been held that where a lease gives a lien for the rent upon property on the premises and such lien is recognized by a State statute, a claim for rent accruing after the bankruptcy of the tenant is provable against the particular property, but not against the general estate of the bankrupt.²⁶² But it has also been held that a provision in a lease, authorizing the landlord to re-enter upon the bankruptcy of the tenant, and permitting the landlord to recover the difference between the rent reserved and the rent collected by the landlord from other sources, does not enable the landlord to prove a claim for rent accruing subsequent to the bankruptcy of the tenant.²⁶³ If the trustee elects to assume the lease and sell the same and the landlord acquiesces, the trustee steps into the bankrupt's shoes, and the question here discussed will not arise.²⁶⁴ The trustee, however, usually retains possession

259. Claim for contribution by joint lessee.

—Bankrupt and claimant were jointly liable on a lease which had not expired at the time of bankrupt's adjudication. They assumed as between themselves a several liability for one-half the rental reserved in the lease, and, before bankruptcy intervened, entered into an agreement that claimant should procure, if possible, a rescission of the lease for which it might pay a sum not to exceed \$100 per month for each month of the unexpired term and the bankrupt would pay claimant one-half the sum so paid, or agreed to be paid, by it for such rescission. After bankrupt's adjudication upon a voluntary petition, claimant paid the next month's rent and thereafter paid the lessors a certain sum and secured a cancellation of the lease. *Held*, that a claim for one-half of the sums so paid by claimant was not provable, since bankrupt's liability therefor at the time when the petition was filed was not due and owing, but contingent. *Colman Co. v. Withoft* (C. C. A., 9th Cir.), 28 Am. B. R. 328, 195 Fed. 250.

260. *Matter of Hinckel Brewing Co.* (D. C., N. Y.), 10 Am. B. R. 484, 123 Fed. 942. But see, *contra*, *In re Adams* (D. C., Mass.), 12 Am. B. R. 368, 130 Fed. 381.

261. *Matter of Pittsburg Drug Co.* (D. C., Pa.), 20 Am. B. R. 227, 234, 164 Fed. 482. See *Martin v. Orgain* (C. C. A., 5th Cir.), 23 Am. B. R. 454, 174 Fed. 772.

262. *In re Scruggs* (D. C., Ala.), 31 Am. B. R. 94, 205 Fed. 673; citing *Martin v. Orgain* (C. C. A., 5th Cir.), 23 Am. B. R. 454, 174 Fed. 772.

263. *Matter of Roth & Appel* (D. C., N. Y.), 22 Am. B. R. 504, 174 Fed. 64, *affd.* 24 Am. B. R. 588, 181 Fed. 667; *In re Abrams* (D. C., Iowa), 29 Am. B. R. 590, 200 Fed. 1005.

Re-entry and recovery of damages in case of bankruptcy.

—Where a landlord's claim was founded upon a provision in his lease to bankrupt that if the tenant should petition to be or be declared bankrupt, the landlord might enter into and repossess the premises and terminate the lease, in which case the tenant agreed to pay to the landlord, as damages, a sum which at the time of such termination represented the difference between the rental value of the premises and the rent and other payments therein named for the residue of the term, the claim was not provable, since there was no "fixed liability . . . absolutely due and owing at the time of filing the petition" in bankruptcy, the lease being terminable by the entry of the landlord, which by the terms of the lease could not be made until after bankruptcy. *Slocum v. Soliday* (C. C. A., 1st Cir.), 25 Am. B. R. 460, 183 Fed. 410.

Claim against tenant for rent after surrender.

—Where before the filing of a petition in bankruptcy against a tenant, a levy was made upon his personal property, and subsequently the landlord accepted a surrender of the premises, he cannot claim against the bankrupt estate of the tenant for the whole of the unexpired term of the lease, although it provided that upon a levy against the tenant the whole rent for the unexpired portion of the term should become due. *Matter of Heilbron Brothers* (D. C., Pa.), 35 Am. B. R. 568, 226 Fed. 803.

264. *Matter of Sherwoods, Inc.* (C. C. A., 2d Cir.), 31 Am. B. R. 769, 210 Fed. 754; *In re Sapinsky & Sons* (D. C., Ky.), 30 Am. B. R. 416, 206 Fed. 523.

Where a bankrupt's trustee elects to give up the lease and the landlord's agent re-enters, but agrees to permit the occupancy

for a brief period, paying on a *quantum meruit* basis meanwhile.²⁶⁵ The principles applicable to rent due for the occupancy of real property do not apply to the same extent in the case of a lease of personal property, where, by the terms of the lease the whole amount becomes due in case of a default; in such a case the lessor may prove his claim for the whole amount due as a fixed liability.²⁶⁶

e. Debts outlawed by a statute of limitations.—Such debts are not provable. The limitation period depends upon the law of the State in which the action could be brought. There was some conflict on this question under the law of 1867, high authority holding that the provability of such a debt turned on whether the statute of limitations urged against it went merely to the remedy or actually destroyed the obligation.²⁶⁷ But the weight of authority under that law was the other way.²⁶⁸ The cases under the law of 1898 are to the same effect.²⁶⁹ The reason for this doctrine seems to be one of abstract equity. Strictly, an outlawed debt is within the terms of § 63-a (1) and, therefore, provable. But, since such a debt could not have been asserted before bankruptcy against the objection of the debtor, the law prevents its proof against the other creditors and the consequent reduction of their *pro rata* by an interloper whose remedy has been lost by his own *laches*.²⁷⁰ An insolvent person, intending to go through bankruptcy, may make an acknowledgment of an existing indebtedness, the right to recover which is barred by the statute of limitations, but against which the statute has not been pleaded, so as to

of the premises pending the determination of a controversy as to the ownership of certain personal property located on the premises, the lease is nevertheless terminated, and the estate is not liable for the rent. In *re Desmond & Co.* (D. C., Ala.), 28 Am. B. R. 456, 198 Fed. 581.

Effect of landlord's right to re-enter.—Where bankrupt held under a lease authorizing the landlord to re-enter upon default in the payment of rent, and providing that bankrupt should surrender the premises upon breach of the covenant to pay rent, and it appeared that bankrupt had defaulted in payment of rent before bankruptcy intervened, a claim for rent accruing after the filing of the bankruptcy petition is not a debt due and owing to the landlord when the petition was filed, and therefore is not provable in the bankruptcy proceedings of the lessee. In *re Abrams* (D. C., Iowa), 29 Am. B. R. 590, 200 Fed. 1005.

Re-entry by landlord; effect on claim.—Where, after a tenant's receiver in bankruptcy had sold personal property which was upon premises leased by a bankrupt for one year, allowing the purchaser a reasonable time within which to remove the goods, the landlord, acting under a provision in the lease, instituted ejectment proceedings against the purchaser, wherein he declared that the lease had absolutely ceased and determined, and he was put in possession of the premises under a writ issued in such ejectment proceedings, his claim for rent for the unexpired term of the lease will be disallowed. *South Side Trust Co. v. Watson*

(C. C. A., 3d Cir.), 29 Am. B. R. 446, 200 Fed. 50.

265. *Matter of Frazin & Oppenheim* (C. C. A., 2d Cir.), 24 Am. B. R. 903, 183 Fed. 28. See discussion under Section Seventy of this work, subtitle "Trustee vested with title of bankrupt."

266. *Matter of Caswell-Massey Co.* (D. C., N. Y.), 31 Am. B. R. 426, 208 Fed. 571; *Matter of Miller Bros. Grocery Co.* (D. C., Ohio), 31 Am. B. R. 430, 208 Fed. 573. In both cases contracts were under consideration whereby store apparatus for carrying parcels and cash was leased and in which it was provided that in case of default in a monthly payment the whole amount becomes due. It appeared that such apparatus when removed was substantially lessened in value. See also *In re Merwin & Willoughby Co.* (D. C., N. Y.), 30 Am. B. R. 485, 206 Fed. 116.

267. In *re Ray*, Fed. Cas. 11,589; In *re Shepard*, Fed. Cas. 12,753.

268. In *re Kingsley*, Fed. Cas. 7,819; In *re Hardin*, Fed. Cas. 6,048; In *re Cornwall*, Fed. Cas. 3,250; In *re Reed*, Fed. Cas. 11,635; In *re Noeson*, Fed. Cas. 10,288.

269. In *re Lipman* (D. C., N. Y.), 2 Am. B. R. 46, 94 Fed. 353; In *re Resler* (D. C., Minn.), 2 Am. B. R. 602, 95 Fed. 804; In *re Watkinson* (D. C., Pa.), 16 Am. B. R. 245, 143 Fed. 602; In *re Putman* (D. C., Cal.), 27 Am. B. R. 923, 193 Fed. 464.

270. In *re Currier* (D. C., N. Y.), 27 Am. B. R. 597, 192 Fed. 695, citing *Collier on Bankruptcy* (8th ed.), 722; *Pace's Trustees v. Pace*, (Ct. of App., Ky.), 33 Am. B. R. 834, 172 S. W. 925.

take the indebtedness out of the operation of the statute, and permit it to become the basis of a provable claim in bankruptcy.²⁷¹ It seems, too, that bankruptcy stops the running of the time and that a debt may be proven within the statutory year, provided the period of limitation expired after the bankruptcy.²⁷² However, under the present bankruptcy act an adjudication in bankruptcy does not suspend the running of the general statute of limitations as to provable claims for the reason that such adjudication does not put the creditor under a legal disability, but, on the contrary, permits him to proceed in the absence of a stay issued by the court.²⁷³ The statute of limitations of the State of the bankrupt's residence, and in which he was adjudged a bankrupt, governs the rights of the creditors in the administration of the bankrupt's estate.²⁷⁴ Any creditor of the bankrupt may interpose the statute of limitations as a defense against the allowance of a claim.²⁷⁵ It is the duty of a trustee to plead the statute wherever an outlawed claim is presented.²⁷⁶

f. Commissions of trustee.—A claim for commissions and expenses incurred by a trustee, named in a deed of trust executed by a bankrupt, in the sale of chattels thereunder prior to bankruptcy, is not provable under this section.²⁷⁷

g. Cross-references.—The liability of an estate in bankruptcy to pay a general assignee or receiver for his services and disbursements, or his attorney, or a sheriff proceeding on an execution or attachment, as well as the priorities sometimes claimed by them, is considered under section sixty-four.

271. *Matter of Blankenship* (D. C., Cal.), 33 Am. B. R. 756, 220 Fed. 395, wherein the court said: "The claim is made by the trustee, acting for the creditors, that the renewal or rehabilitation of a debt, under such circumstances, operates in fraud of the bankruptcy act, and constitutes such a preference as would suffice to render it void and of no effect. It is true it would seem, at first blush, as if the deliberate acknowledgment of an outlawed debt, under such circumstances, for the mere purpose of making it provable in bankruptcy, would be a fraud upon the rights of other creditors, whose claims had not been outlawed by the force of the statute, and in this regard in fraud of the general object of the bankruptcy act. This, however, would be because of the assumption that in the doing of the thing inveighed against, the bankrupt had thereby rendered a claim otherwise unenforceable, enforceable against him. Such, however, could result only in the event that the bankrupt had already pleaded the statute in bar of the indebtedness, or had determined so to do. If, as it must be assumed in the case herein, the bankrupt had always intended to pay the just claim against him and had determined upon suit brought not to interpose the special defence permitted by statute, then, in the making of the acknowledgment at the time

it was made, in so far as his own personal attitude was concerned, he was not changing his position either for the worse or otherwise. In this view of the case, it seems to me that his own conduct cannot be defined as in fraud of the bankruptcy act, and that, for that reason, the trustee of his estate should not be permitted thus to characterize it. The case is much different, in my judgment, from one in which, for instance, an insolvent person, after having defeated a claim, because of his plea of the statute, should thereafter, and in contemplation of bankruptcy, attempt to rehabilitate the claim, merely that the owner thereof might participate as against other lawful creditors."

272. *In re Eldridge*, Fed. Cas. 4,331. *Contra: Nichols v. Murray*, Fed. Cas. 10,223.

273. *Simpson v. Tootle, etc., Co.* (Sup. Ct., Okla.), 32 Am. B. R. 551, 141 Pac. 448.

274. *Hargadine, etc., Dry Goods Co. v. Hudson* (C. C. A., 8th Cir.), 10 Am. B. R. 225, 122 Fed. 232, affg. 6 Am. B. R. 657.

275. *In re Lafferty* (D. C., Pa.), 10 Am. B. R. 290, 122 Fed. 558; *In re Kingsley*, Fed. Cas. 7,819.

276. *In re Wooten* (D. C., N. Car.), 9 Am. B. R. 247, 118 Fed. 670.

277. *In re Standard Dairy and Ice Co.* (Sup. Ct., Dist. Columbia), 20 Am. B. R. 321.

SECTION SIXTY-FOUR.

DEBTS WHICH HAVE PRIORITY.

§ 64. **Debts which have Priority.**—*a* The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court.

b The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases, *and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery;** (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks, *traveling or city salesmen* † or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

c In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in

*Amendment of 1903 in italics.

†Amendment by Act of June 15, 1906.

addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication.

Analogous provisions: In U. S.: Act of 1867, § 28, R. S., § 5101; Act of 1841, § 5; Act of 1800, § 62.

In Eng.: Preferential Payments in Bankruptcy Act of 1888, § 1.

Cross-references: To the law: Composition, confirmation, and setting aside confirmation, §§ 12, 13.

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I. PRIORITIES IN GENERAL.

a. **Comparative legislation.**—The list of debts entitled to priority has increased with each successive bankruptcy law. That of England, in substance, gives priority of payment to (1) the costs of administration, (2) taxes, (3) wages to a limited amount within a limited time, and (4) rent where the landlord has distrained the bankrupt's goods.¹ Our law of 1800 merely saved debts due the United States; that of 1841 added debts for labor within six months to the amount of \$25.² The law of 1867 provided five classes of priority debts: (1) Costs of suits in the proceeding and for preserving the estate; (2) debts and taxes due the United States; (3) debts and taxes due the States; (4) wages to an operative, clerk or house-servant not to exceed

1. See § 1, *Preferential Payments*, English Bankruptcy Act of 1888.

2. See "Analogous Provisions," *ante*.

\$50 for labor performed within six months; (5) priorities given by the laws of the United States.³ The present act goes much further.

b. Construction of section.—The federal courts have construed the priority provisions of the bankrupt act with a fair degree of liberality,⁴ but subsection *a* must be strictly construed when it would inure to the benefit of a particular creditor, and not to a municipality.⁵

c. Priorities versus liens.—Many cases seem to hold the broad doctrine that these priorities are superior to valid liens.⁶ This may be doubted;⁷ even where property vested in the trustee is sold free and clear of incumbrances. Section 64-b has been construed as referring to the disbursement of the proceeds of unincumbered property, and not to the proceeds of property incumbered by valid liens.⁸ It has also been held that subdivisions (4) and (5) of § 64-b relate exclusively to the subject of the right to priority of payment arising among those whose claims would, in the absence of such subdivisions, stand on terms of equality before the law as general unsecured claims, and

3. Act of 1867, § 28, R. S., § 5101.

4. In re Jones (D. C., Mich.), 18 Am. B. R. 206, 151 Fed. 108.

Liberal construction as to priority of claim for taxes.—The cases of *City of Chattanooga v. Hill* (C. C. A., 6th Cir.), 15 Am. B. R. 195, 139 Fed. 600, 71 C. C. A. 584, and *State of New Jersey v. Anderson*, 203 U. S. 483, 17 Am. B. R. 63, 64, 51 L. Ed. 91, 27 Sup. Ct. 19, fairly illustrate this tendency. In the case first cited, the circuit court of appeals held that, under § 64-a, taxes assessed against land have priority, although the land on which the taxes were assessed never came into the hands of the bankrupt trustee. In the second case cited, the Supreme Court held that, under the same § 64-a, franchise fees owing by a corporation to the State of New Jersey, under whose laws it was created, have priority as taxes owing to a State, although the bankrupt corporation did no business in New Jersey, and although by such construction of the bankrupt act preference was given to the State of New Jersey over creditors who dealt with the corporation at its place of business.

5. In re Broom (D. C., N. Y.), 10 Am. B. R. 427, 123 Fed. 639. See also In re Parker, Fed. Cas. 10,719.

6. For instance: See In re Coffin (Ref., Tex.), 2 Am. B. R. 344; In re Byrne (D. C., N. Y.), 3 Am. B. R. 268, 97 Fed. 762; In re Tebo (D. C., W. Va.), 4 Am. B. R. 235, 101 Fed. 419, holding that costs of administration are a prior lien upon the assets of the bankrupt's estate, and take precedence of specific liens thereon; also, that wages due to workmen, clerks, etc., take precedence over other specific liens.

Priority of laborers' lien under Washington statute.—Under section 1162 of Rem. & Bal. Code of Washington, providing that "every person performing labor upon, or who shall assist in obtaining or securing saw-logs, spars, piles * * * shall have a lien upon the same for the work or labor done * * * whether * * * at the instance of the owner of the same or his agent," liens filed by laborers, employed by a purchaser of

timber under a contract that title thereto should remain in the grantor until full payment of the purchase price, are entitled to priority over the lien of the grantor. *Matter of Little Elk Logging Co.* (D. C., Wash.), 33 Am. B. R. 592, 218 Fed. 142.

7. Compare In re Frick (Ref., Ohio), 1 Am. B. R. 719, holding that, where the property of a bankrupt is mortgaged to the full extent of its value and there are no other funds to pay the debts of the bankrupt, the claim of an attorney for services rendered to the bankrupt and the wages earned by workmen within the three months' period do not have priority of payment over the lien of such mortgage; In re McConnell, Fed. Cas. 8,712; In re Hambright, Fed. Cas. 5,973; *Gardner v. Cook*, Fed. Cas. 5,226.

8. *Matter of Meis* (Ref., Ky.), 18 Am. B. R. 104. See Am. Bankr. Dig. § 860.

Priority subject to liens.—Section 64-b, providing for the order of distribution of bankrupt's funds has no reference to lien debts, but refers to the distribution of the funds not subject to lien among non-lien creditors. Where property is sold for an amount in excess of the lien debt, the balance of the proceeds may be distributed among non-lien creditors under this section. The bankruptcy act does not displace or invalidate *bona fide* liens upon the property of the bankrupt. It declares null and void liens that were given or accepted in fraud of the Act, but all liens given or accepted in good faith and not in contemplation of bankruptcy nor in fraud of the Act are entitled to recognition and payment in accordance with the law creating them. *Lott v. Salisbury* (C. C. A., 4th Cir.), 37 Am. B. R. 796.

The provisions of this section with relation to the payment of taxes, costs, filing fees, costs of administration, wages due to employees, and debts owing to any person entitled to priority, all pertain to the general assets of the estate, and have no relation to property which by reason of liens never became any part of the bankrupt estate. *Matter of Hosmer* (D. C., Ia.), 37 Am. B. R. 464, 233 Fed. 318.

that such subdivisions have no reference whatever to the subject of liens.⁹ But the costs of administration have been construed, upon equitable grounds, to be entitled to priority of payment, even out of the proceeds of property incumbered by valid liens.¹⁰ But only such costs as are necessarily incident to the preservation of the estate, its conversion into money and payment thereof to lienors are entitled to priority.¹¹ It is true that the whole estate is or may be marshaled and administered and liens paid through the trustee. But the rule that the bankrupt's assets come to his trustee charged with all *bona fide* liens,¹² even if within the four months' period, seems to negative the doctrine of the cases cited at the beginning of this paragraph. The question is often one of extreme difficulty. Equity may step in and charge against property affected by liens the "cost of preserving" it, or a proportionate share of the "attorney's fee"—this, however, only on a showing that his service was beneficial to the property of the lienor—but equity presumably will not declare the "filing fees" or "wages" or "State priorities" superior to valid liens. The lien creditor is prior in right, and should, therefore,

9. Effect of priorities on liens.—In the case of *In re Yoke Vitrified Brick Co.* (D. C., Kan.), 25 Am. B. R. 18, 180 Fed. 235, Judge Pollock said: "It was in contemplation of the lawmaking power that estates passing, as of the date of the adjudication, to the trustees in bankruptcy, would be covered and affected by fixed and valid liens resting thereon. Hence, for the protection of those holding such valid liens, and lest the rights of such lienholders should become confounded with the rights of those holding general unsecured demands against the estate which had been accorded priority in payment by the provisions of § 64-b of the act, it was provided in § 67-d, in effect, that nothing appearing elsewhere in the act itself, no matter how general and comprehensive the language employed might be, should affect the validity, extent, or operation of such liens. However, anything interfering in the general principles of equity or the law, such, for example, as the duty of the property to contribute its just proportion of the expense of government, or to pay its *pro rata* share of the expenses incurred in the preservation of the estate, and such like matters, remain still enforceable against the estate, although covered by fixed liens and against the consent of the holder of such liens, for such expenses are incurred for the protection of the lienholder and are enforceable for that reason and not because embodied in the act. This is the conclusion reached in *re Cramond* (D. C., N. Y.), 17 Am. B. R. 22, 145 Fed. 966, and, notwithstanding decisions apparently to the contrary, I am convinced is the true construction of the act."

10. Where a mortgagee invokes the jurisdiction of the bankruptcy court to enforce his lien, a reasonable fee for the attorney of the bankrupt, as part of the costs of administration, is entitled to priority of payment out of the proceeds of a sale of the

mortgaged property. *Matter of Meis* (Ref., Ky.), 18 Am. B. R. 104.

11. *Matter of Rauch* (D. C., Va.), 36 Am. B. R. 75, 226 Fed. 982.

12. *Yeatman v. Savings Inst.*, 95 U. S. 764, 24 L. Ed. 589. See also Am. B. R. Dig. § 337.

Liens first paid.—Judge Ray says in *Re Cramond* (D. C., N. Y.), 17 Am. B. R. 22, 38, 145 Fed. 966: "Liens on the property of the bankrupt, not void or voidable under some provision of the law, whether obtained and created by express contract or by virtue of compliance with the lien law of a state, since the amendment to the act, are first to be paid (excepting taxes) subject to abatement for commissions expressly allowed to referees and trustees on all sums disbursed to creditors in the one case and to any one in the other."

The trustee in bankruptcy is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued. *York Manufacturing Co. v. Cassell*, 201 U. S. 344, 15 Am. B. R. 633, 50 L. Ed. 782, 26 Sup. Ct. 481, revg. 14 Am. B. R. 52, 135 Fed. 52.

Wages of workmen, clerks, etc., of bankrupt, which, in addition to the priority given by § 64-b(4) of the bankruptcy act, are given priority by the laws of the State over every other debt or claim in receivership or assignment proceedings, are not entitled to priority of payment out of the proceeds derived from a sale of the property of the estate over those having valid, fixed liens on such property at the date of the adjudication, for the reason that § 67-d of the bankruptcy act provides that such liens shall not be affected by the provisions of the act. In *re Yoke Vitrified Brick Co.* (D. C., Kan.), 25 Am. B. R. 18, 180 Fed. 235. See also *In re Proudfoot* (D. C., W. Va.), 23 Am. B. R. 106, 173 Fed. 733.

unless directly benefited by the acts or disbursements for which priority is claimed, be prior in distribution.¹³

d. **Debts due the United States.**¹⁴—These are entitled to priority of payment. This follows from § 3466 of the Revised Statutes,¹⁵ though the words are somewhat general. It even seems that the United States need not prove its debt,¹⁶ and that the doctrine of *laches* does not apply, any more than to any other sovereign.¹⁷ Hence, § 3467, which makes the trustee personally liable, if, with notice, he fails to pay a debt due the United States.¹⁸ Being a debt, the order of payment is next after “wages due workmen, clerks or servants, which have been earned within three months before the date of the commencement of proceedings.”¹⁹

e. **Order of priority.**—(1) **IN GENERAL.**—The words “order of payment” clearly indicate that, after taxes, priority debts must be paid in the order indicated in subsection b. If there is not sufficient to pay all priority debts, the last class in order abates first. If priority debts of a given class, as those specified in subdivision (3), must abate in part; the order between each of them is fixed by general equity rules.²⁰ Taxes, costs, and expenses of administration have priority over dower.²¹

(2) **TRUST FUNDS.**²²—If property held by the bankrupt in trust passes to the trustee in bankruptcy it will be subject to the interest of the beneficiaries therein; but such beneficiaries will not be entitled to priority of payment unless they can trace the trust property, in its original or some substituted form, in the estate which comes into the hands of the trustee.²³ Money due

13. Compare, generally, discussion under Sections Sixty-seven and Seventy of this work.

14. See also Am. B. R. Dig. § 876.

15. U. S. v. Fisher, 2 Cranch 358; Lewis v. U. S., 92 U. S. 618, 23 L. Ed. 513; In re Rosey, Fed. Cas. 12,066; U. S. v. Griswold, 8 Fed. 496. See also Matter of Bologh (D. C., N. Y.), 25 Am. B. R. 726, 729, 185 Fed. 825.

16. U. S. v. Murphy, 15 Fed. 589; In re Huddell, 47 Fed. 206; Lewis v. U. S., 92 U. S. 618, 23 L. Ed. 513.

Proof of debt is not required where the debt is due the United States. Section 64-b (5) is *in pari materia* with U. S. Rev. Stats., §§ 3466 and 3467, and adds nothing to the rights given by those sections nor takes anything away. In re Stoever (D. C., Pa.), 11 Am. B. R. 345, 127 Fed. 394.

17. Cooke v. U. S., 91 U. S. 389, 23 L. Ed. 237; Hart v. U. S., 95 U. S. 316, 24 L. Ed. 479. It is a long and firmly established rule that the sovereign is not bound by a statute of limitations in which it is not named, and the provision of the bankrupt act requiring a claim to be proved within a year is a plain limitation on the creditor's remedy. In re Stoever (D. C., Pa.), 11 Am. B. R. 345, 349, 127 Fed. 394.

18. U. S. v. Barnes, 31 Fed. 705.

19. Guaranty Title & Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152, 27 Am. B. R. 873, 56 L. Ed. 706, 32 Sup. Ct. 457, revg. 23 Am. B. R. 340, 174 Fed. 385, which reversed 22 Am. B. R. 851.

20. In re Burke (Ref., Ohio), 6 Am. B. R. 502. For the order of priority and the

apportionment of an estate insufficient to pay preferred claims, see Matter of Grignard Lith. Co. (D. C., N. Y.), 19 Am. B. R. 743, 155 Fed. 699.

Where the assets of a bankrupt tenant consist of the proceeds of the sale of goods, and book-accounts, and claims for rent and for wages are sufficient to exhaust both funds, while the rent can only be paid out of the proceeds of the sale of goods the wages must first exhaust the book-accounts and take the balance only out of the other fund. Matter of Gerrow (D. C., Pa.), 37 Am. B. R. 14, 233 Fed. 841.

21. In re Forbes (Ref., Ohio), 7 Am. B. R. 42, holding that the wife of a bankrupt is entitled to her inchoate right of dower in his real estate, and if she consents to the sale of the same free from her dower, she is entitled to the value of such dower as fixed by the laws of the State of the bankrupt's residence.

22. See also Am. B. R. Dig. § 882.

23. Deere Plow Co. v. McDavid (C. C. A., 8th Cir.), 14 Am. B. R. 653, 137 Fed. 802; Matter of See (C. C. A., 2d Cir.), 31 Am. B. R. 360, 209 Fed. 172; Matter of McIntyre & Co. (C. C. A., 2d Cir.), 34 Am. B. R. 487, 221 Fed. 232; Macy v. Roedenbeck (C. C. A., 8th Cir.), 36 Am. B. R. 31, 227 Fed. 346.

Beneficiary of trust fund.—In the case of Spokane Co. v. First Nat. Bank, 16 C. C. A. 81, 68 Fed. 979, in disposing of a similar question, the court said: “We are unable to assent to the proposition that, because a trust fund has been used by the insolvent in the course of his business, the

from a bankrupt as trustee, and which cannot be distinguished from any other money in his possession or under his control, or which is due from him only because he has used trust funds for his own purposes, or has otherwise misapplied them, cannot be considered as property held by the bankrupt in trust.²⁴

f. Practice.—Priority should be specifically claimed.²⁵ This is usually done by a sentence to that effect and giving the grounds of the claim, inserted in the proof of debt. If not claimed, it will be deemed waived; though amendment setting up the claim will usually be allowed. It is not lost even if a claim is not made until after the first dividend;²⁶ nor although the claim of priority is not made until after the expiration of a year from the date of the adjudication, and the claimant voted at the election of trustee.²⁷ It has been held that the filing of an unsecured claim, without asserting any right of priority, does not estop the claimant from thereafter setting up his right, even after receiving a dividend on the claim, in the absence of proof that the trustee was misled or the estate injured by the delay in asserting the alleged priority.²⁸ It is not sufficient to state in the proof of claim, that the debt therein mentioned is "preferred" or is "a preferred claim."²⁹ The act does not contemplate that taxes assessed upon the bankrupt's real property, and which are matters of public record, shall be proved like an ordinary debt.³⁰

general creditors of the estate are by that amount benefited, and that, therefore, equitable considerations require that the owner of the trust fund be paid out of the estate to their postponement or exclusion. * * * Both the settled principles of equity and the weight of authority sustain the view that the plaintiff's right to establish his trust and recover his fund must depend upon his ability to prove that his property is in its original or a substituted form in the hands of the defendant."

24. *In re Dorr* (C. C. A., 9th Cir.), 28 Am. B. R. 505, 196 Fed. 292, citing *In re Richard* (D. C., Tenn.), 4 Am. B. R. 700, 104 Fed. 792; *In re Marsh* (D. C., Conn.), 8 Am. B. R. 576, 116 Fed. 396; *In re Mulligan* (D. C., Mass.), 9 Am. B. R. 8, 116 Fed. 715.

25. **Landlord's claim for rent in arrears.**—Where, in Pennsylvania, a landlord makes no objection to a sale in bulk of a bankrupt tenant's liquor license, stock, fixtures and lease and accepts the purchaser as tenant, and permits him to occupy the premises as the bankrupt's successor under the lease the landlord's claim for priority of payments, from the proceeds of sale for a balance of rent which had accrued before the filing of the petition in bankruptcy against the bankrupt will be disallowed. *In re McFadgen* (D. C., Pa.), 19 Am. B. R. 481, 156 Fed. 715; *Kayser v. Wessel* (C. C. A., 3d Cir.), 12 Am. B. R. 126, 128 Fed. 221.

26. *In re Scott* (D. C., Tex.), 2 Am. B. R. 324, 96 Fed. 607, holding that the fact that the claim for an attorney's fee was not presented until after the declaration of the first dividend does not destroy its right to priority of payment out of any funds on hand when the claim is properly proved and allowed.

27. **Time to claim priority under State laws.**—Creditors who establish claims giving them a preference in the distribution of assets by virtue of a statute giving priority to those who shall furnish materials or supplies to manufacturing corporations doing business in the State, are entitled to priority of payment, though they make no special claim therefor until after the expiration of the year from the date of the adjudication in bankruptcy, though inadvertently they voted at the election for trustee, without objection. *In re Ashland Steel Co.* (C. C. A., 6th Cir.), 21 Am. B. R. 834, 168 Fed. 679.

28. *Wuerpel v. Commercial, etc., Bank* (C. C. A., 5th Cir.), 38 Am. B. R. 223, 238 Fed. 269.

29. *In re Dunn* (D. C., N. Y.), 25 Am. B. R. 103, 181 Fed. 701, so holding in respect to a claim which merely stated that it is for "wages due deponent as clerk and manager and is a preferred claim;" the claim should have shown that such wages were earned in the employ of the bankrupt within three months before the commencement of bankruptcy proceedings.

30. *In re Cleanfast Hosiery Co.* (Ref., N. Y.), 4 Am. B. R. 702; *In re Prince & Walter* (D. C., Pa.), 12 Am. B. R. 675, 131 Fed. 546; *In re Harvey* (D. C., Pa.), 10 Am. B. R. 567, 122 Fed. 745, holding that the adjudication of an owner of real estate does not affect the lien of a municipality for unpaid taxes nor impose upon the city the duty of proving its claim as an ordinary creditor must do, but the amount of the taxes must be paid out of the fund realized at a trustee's sale of the property in advance of payment of dividends to creditors.

Allegations in a petition relating to an alleged priority are not to be taken as *prima facie* true, for the purpose of establishing such priority, in the absence of evidence for or against the fact,³¹ the burden being upon creditors claiming preference to bring themselves, by the evidence, within the statute creating the preference.³² A priority debt duly proved and allowed should not be ordered paid until it appears that there will be enough assets to pay in full all like debts of the same and higher classes.

II. PAYMENT OF TAXES.

a. **In general.**—Subsection *a* requires the court to order the trustee to pay all taxes “legally due and owing by the bankrupt to the United States, State, county, district or municipality in advance of the payment of dividends to creditors.” The present law is somewhat broader than its predecessor, which required payment in full only of taxes due the United States or the State. The subsection is explicit and needs little explanation. The words “taxes legally due and owing by the bankrupt” and “in advance of the payment of dividends to creditors” should be noted.³³ In spite of them, the tendency has been to construe subsection *a* as putting taxes in a different and really higher class than the debts enumerated in subsection *b*; this is probably the law.

b. **Construction and effect.**—Construed strictly, the words of this subsection lead to the result that taxes must be paid in any event. The right of priority exists even if the property on which taxes were assessed never came into the possession of the trustee,³⁴ and the fact that the whole amount received from the sale of a bankrupt's property will be taken up in the payment of taxes, while it may be unjust to general creditors, constitutes no legal reason for the disallowance of the amount due.³⁵ The court will not favor any evasion of this law by giving a too liberal construction to its words.³⁶ It has been

31. *In re Jones* (D. C., Mich.), 18 Am. B. R. 206, 151 Fed. 108.

32. *In re Crown Point Brush Co.* (D. C., N. Y.), 29 Am. B. R. 638, 200 Fed. 882.

33. **Rights of third person liable for taxes.**—The fact that a person other than the bankrupt may also be liable for the payment of taxes by contract or by statute is not sufficient to entitle such other person to priority of payment. *Matter of Harris Steam Engine Co.* (D. C., R. I.), 34 Am. B. R. 835, 225 Fed. 609.

Where a bankrupt assigns its interest in several contracts by which it had sold orchards and agreed to cultivate them and pay the taxes, and agrees in case of failure of any of the purchasers to complete their contracts to deed such tracts to whom the assignee may select, the title remains in the bankrupt and taxes are owing by him within the meaning of section 64-a, and are payable by his trustee, although the state law provides that taxes shall be assessed against the owner in possession. *Matter of Wenatchee Orchard Co.* (D. C., Wash.), 32 Am. B. R. 369, 212 Fed. 787.

34. *City of Waco v. Bryan* (C. C. A., 5th Cir.), 11 Am. B. R. 481, 127 Fed. 79.

All taxes to be paid.—In the case of *City of Chattanooga v. Hill* (C. C. A., 6th Cir.), 15 Am. B. R. 195, 139 Fed. 600, Judge Lur-

ton, in referring to § 64-a, said: “Congress evidently meant that the sovereign should neither be postponed nor delayed in the collection of taxes, and therefore provided that the trustee should pay all taxes due and owing by the bankrupt in advance of dividends. The law means that the trustee shall do what the bankrupt might have done and what good citizenship required him to do. The opinions of the courts are not agreed about this matter, and there are holdings which limit this direction to pay ‘all taxes due and owing by the bankrupt’ to such taxes as constitute a lien upon the bankrupt's estate in the hands of the trustee and remit the sovereign to the enforcement of any lien which it may have against property which the trustee relinquished to the lien creditors.”

35. *Matter of Bushnell* (D. C., Conn.), 33 Am. B. R. 47, 215 Fed. 651.

36. The manifest intent of the law is that, while the estate is in the hands of the trustee, his custody shall not constitute a barrier to prevent the collection of taxes which would be collectible under the law if the property had remained in the possession and control of the bankrupt himself. *In re Conhaim* (D. C., Wash.), 4 Am. B. R. 58, 107 Fed. 268.

held that State taxes are not given priority over "the actual and necessary cost of preserving the estate subsequent to the filing of the petition,"³⁷ but there is also authority for the opposite conclusion.³⁸ A claim for taxes due the United States is entitled to priority of payment, to the exclusion of all reasonable expenses of administration.³⁹

c. Federal courts to determine questions.—Subsection *a* provides expressly that "in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court." This authorizes the court to inquire as to whether the tax is a valid claim. The question as to whether or not a charge is a tax and entitled to preference under this subsection is one to be decided by the federal court in its administration of the bankrupt act,⁴⁰ although the decisions of the courts of the States where

37. Taxes not prior to cost of preserving estate.—In the case of *State of New Jersey v. Lovell* (C. C. A., 3d Cir.), 24 Am. B. R. 562, 179 Fed. 321, affg. 23 Am. B. R. 401, 175 Fed. 825, Judge Buffington said: "Now, while the relative order in which subdivisions 'a' and 'b' are placed is not happy, and indeed tends to mislead, yet the general intent of the section is clear. In subdivision 'b' we find the general scheme of awarding priority in advance of dividend creditors. That subdivision makes provision for paying such costs, fees, and liens as are therein provided, and if there are no outstanding taxes the fund is then paid to creditors. But before paying creditors, subdivision 'a' intervenes and makes provision for what, if omitted, has often proved a hardship, if not indeed an abuse in the settlement of decedent and insolvent estates, viz., delay in payment of taxes. Tax collectors whose power to distrain lapsed when the estate passed into the custody of the law, or who were left to come in as general creditors, were subjected to trying delays. Obviously subdivision 'a' meant that this delay should not occur, and therefore provided that, 'in advance of payment of dividends to creditors,' the court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality," and, to prevent delay from questions concerning such taxes, it provided, 'in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court.' And yet in case the court had to take testimony, or order a referee to determine the legality of such tax, the adjudged tax would, under the construction here contended for, absorb the whole fund and leave unpaid the agency by which its payment was effected. Now, whether the 'creditors' referred to in the phrase, 'in advance of the payment of dividends to creditors,' places the payment of taxes ahead of dividend creditors alone, or places it also ahead of those creditors who, under subdivisions 4 and 5 of clause 'b,' are paid in full, is a question not before us. It suffices to say that on the question that is

before us, namely, whether the taxes of a State are under clause 'a,' given priority over 'the actual and necessary cost of preserving the estate subsequent to the filing of the petition,' we are clear they are not."

38. In re Prince & Walter (D. C., Pa.), 12 Am. B. R. 675, 131 Fed. 546; In re Weissman (D. C., Conn.), 24 Am. B. R. 150, 178 Fed. 115.

39. In re Prince & Walter (D. C., Pa.), 12 Am. B. R. 675, 131 Fed. 546; In re Weiss (D. C., N. Y.), 20 Am. B. R. 247, 159 Fed. 295.

40. In re Lange Co. (D. C., Iowa), 29 Am. B. R. 478, 159 Fed. 586. In *New Jersey v. Anderson*, 203 U. S. 483, 17 Am. B. R. 64, 68, 51 L. Ed. 284, 27 Sup. Ct. 137, the court said: "The Bankruptcy Act is a Federal statute, the ultimate interpretation of which is in the Federal courts. It is doubtless true . . . that, if the highest court of the State should decide that a given statute imposed no tax within the meaning of the law as interpreted by it, a Federal court, in passing upon the Bankruptcy Act, would not compel the State to accept a preference from the bankrupt's estate upon a different view of the law. Conceding that the doctrine that the meaning of a statute is a State question, except where rights, the subject of adjudication in the Federal courts, have accrued before its construction by the State court, or the question of contract within the protection of the Federal Constitution is involved, still a State court, while entitled to great consideration, cannot conclusively decide that to be a tax within the meaning of a Federal law, providing for the payment of taxes, which is not so in fact. The section (64-a) itself declares that, in cases of disputes as to the amount or legality of any such tax, they shall be heard and determined by the court. The State court may construe a statute and define its meaning, but whether its construction creates a tax, within the meaning of a Federal statute giving a preference to taxes, is a Federal question, of ultimate decision in this court."

Determination of amount and legality of tax.—Under the provisions of § 64-a, any question as to the amount or legality of a tax shall be heard and determined by the

the tax is payable should be given well-nigh controlling force.⁴¹ The court is not bound by the action of the taxing authority, but may decide the question as to amount or legality itself;⁴² and the right is not limited by the act to such questions as the bankrupt might have raised against the tax at the date of the bankruptcy proceedings.⁴³ The priority accorded to any tax legally due and owing is qualified by leaving it open to the trustee to question or inquire into not only the legality of the tax, but also its amount, even if otherwise legal.⁴⁴ If the taxes are legal and binding they must be paid, although long overdue.⁴⁵

d. Taxes not debts and need not be proved.—Taxes are not, in a strict sense, debts,⁴⁶ although they are within the meaning of a definition of a debt as

bankruptcy court. In re Otto Freund Arnold Yeast Co. (D. C., N. Y.), 24 Am. B. R. 458, 178 Fed. 305. In this case it appeared that a personal property tax, assessed against a bankrupt corporation on the tax lists of a city, became a lien at a time when the corporation was hopelessly insolvent and shortly before the petition in bankruptcy was filed and its adjudication as a bankrupt. It was held that, although the statutory legality of the tax from the standpoint of regularity could not be raised, that under § 64-a a claim for the taxes against the estate of the bankrupt corporation should be disallowed on the grounds that the property supposed to be taxed did not actually exist.

41. First Nat. Bank v. Aultman (Ref., Ohio), 12 Am. B. R. 12, citing In re Ott (D. C., Iowa), 2 Am. B. R. 637, 647, 95 Fed. 274; In re Camp (D. C., Ga.), 1 Am. B. R. 165, 91 Fed. 745.

42. State of New Jersey v. Anderson, 203 U. S. 483, 17 Am. B. R. 64, 51 L. Ed. 284, 27 Sup. Ct. 137; Matter of Selwyn Importing Co. (Ref., N. Y.), 18 Am. B. R. 190; Matter of Heffron Co. (D. C., N. Y.), 33 Am. B. R. 443, 216 Fed. 642; Matter of Fisher Corporation (D. C., N. Y.), 36 Am. B. R. 509, 229 Fed. 316.

The case of New Jersey v. Anderson, 203 U. S. 483, 17 Am. B. R. 64, 51 L. ed. 284, 27 Sup. Ct. 137, determines the meaning of § 64-a, and approves of the disallowance of such part of a tax as may have been assessed on non-taxable or non-existing property, even if regularly assessed and beyond dispute under the State law. The Supreme court says:

"Coming to the specific objections to the claim for the year 1902, the claim was presented upon the basis of \$40,000,000 of outstanding capital stock, when in fact there was only \$10,000,000 of such stock; the assessment by the State board being upon the former sum and made upon the failure of the corporation to report. But we do not think the finding of the State board is conclusive. The tax is to be assessed upon capital actually outstanding. It may well be doubted whether the board had power to tax any other stock. But, be that as it may, § 64-a specifically provides that, in case any question arises as to the amount of legality of taxes, the same shall

be heard and determined by the court, with a view to ascertaining the amount really due. We do not think it was the intention of Congress to conclude the bankruptcy courts by the findings of boards of this character, and that the claim should have been upon the basis of the capital actually outstanding."

43. Matter of Fisher Corporation (D. C., Mass.), 36 Am. B. R. 509, 229 Fed. 316.

44. Matter of Selwyn Importing Co. (Ref., N. Y.), 18 Am. B. R. 190. In this case the referee said: "I do not think the trustee is confined to equitable remedies which may be provided by statutes of the State. He is clothed by § 64-a with independent equitable power to question the amount of the tax, irrespective of the State remedies."

Estoppel of bankrupt and trustee to deny validity of assessment.—Where there is no competent evidence from which it may be found that the assessed valuation of a bankrupt's property was unjust or illegal, both the bankrupt and his trustee are estopped by the former's own statements, as to the nature, title and value of his property. Matter of Bushnell (D. C., Conn.), 33 Am. B. R. 47, 215 Fed. 651.

45. In re Weissman (D. C., Conn.), 24 Am. B. R. 150, 178 Fed. 115, holding that taxes which were collectible from the bankrupt prior to adjudication are entitled to priority even though the tax collectors have been guilty of gross laches in allowing the taxes to remain unpaid for a period of twelve years and the payment of such taxes would take a large part, if not all, of the money which would otherwise be available for payment of dividends on the general claims.

46. **A tax is not strictly a debt.**—It lacks the nature of a debt in that, though for a sum certain, it is not founded upon any agreement or assent of the person or persons against whom it is assessed, but is a burden for the public purposes imposed *in invitum*. As an obligation or duty created by statute to pay money, however, it is quasi-contractual, although there may be difficulty as to the remedy for its enforcement in a given case. In re United Button Co. (D. C., Del.), 15 Am. B. R. 390, 400, 140 Fed. 495; Lane Co. v. Oregon, 7 Wall (U. S.), 71; State of New Jersey v. Ander-

contained in § 1 (9), (11).⁴⁷ But they are not, in any event, to be proved like other debts; this subsection makes it the duty of the trustee to pay them whether they are proved or not.⁴⁸

e. Payment out of proceeds of sale.—But it has been held that if the tax is by law made a lien or charge on the bankrupt's property, the same equitable principle which denies to the individual whose debt is fully secured the right to share in the general fund applies to the tax claimant,⁴⁹ and if the property subject to the tax is sold the tax should be paid out of the proceeds before any part thereof is distributed to general creditors.⁵⁰ This is especially true

son, 203 U. S. 483, 17 Am. B. R. 63, 69, 51 L. Ed. 284, 27 Sup. Ct. 137.

The annual license fee or franchise tax, required by the statute of New Jersey to be paid by corporations upon their outstanding capital stock, for the privilege of existence and the continued right to exercise their franchises is a "tax" within the meaning of § 64-a and not a debt. *State of New Jersey v. Anderson*, 203 U. S. 483, 17 Am. B. R. 63, 51 L. Ed. 284, 27 Sup. Ct. 137.

⁴⁷ *In re Fisher & Co.* (D. C., N. J.), 17 Am. B. R. 404, 411, 148 Fed. 907.

⁴⁸ *Stanard v. Dayton* (C. C. A., 8th Cir.), 33 Am. B. R. 682, 220 Fed. 441, affd. 241 U. S. 588, 37 Am. B. R. 259, 60 L. Ed. 1190, 36 Sup. Ct. 695; *In re Prince & Walter* (D. C., Pa.), 12 Am. B. R. 679, 131 Fed. 546; *In re Harvey* (D. C., Pa.), 10 Am. B. R. 567, 122 Fed. 745; *Hecox v. County of Teller* (C. C. A., 8th Cir.), 28 Am. B. R. 525, 198 Fed. 634; *In re Cleanfast Hosiery Co.* (Ref., N. Y.), 4 Am. B. R. 702.

Proof of debt for taxes not required.—*In re Fisher & Co.* (D. C., N. J.), 17 Am. B. R. 404, 412, 148 Fed. 907, the court said: "Of course, a tax is provable in bankruptcy. It thus appears that taxes legally due and owing by the bankrupt must be paid before distribution to creditors, and the injunction of § 64 is that the court 'shall order' the trustee to pay them. It seems to be the duty of the court to require such payment, even though no claim for the same shall have been presented in the manner or within the time prescribed by the bankruptcy act for the filing of claims. It is true that § 64 does not, in express words, refer to taxes assessed or becoming due after the institution of bankruptcy proceedings. But it is settled law that the bankrupt's estate is taxable while it is in the hands of the bankrupt's trustees."

In Swarts v. Hammer (C. C. A., 8th Cir.), 9 Am. B. R. 691, 120 Fed. 256, 56 C. C. A. 92, affd. 194 U. S. 441, 11 Am. B. R. 708, 48 L. Ed. 1060, 24 Sup. Ct. 695, it was held that a Federal court will always order and direct the payment of taxes duly assessed on property in the possession of its officers, and treat the same as a preferred claim against the estate or fund which is in process of administration.

The mandatory provision of section 64-a as to the payment of taxes recognizes a com-

ity that should not require the assertion by the State of its claim for taxes in all cases to warrant the order for their payment; but a suggestion that taxes are owing by one interested in the estate should be sufficient. *Matter of Wenatchee Orchard Co.* (D. C., Wash.), 32 Am. B. R. 369, 212 Fed. 787.

Redemption of lands sold for taxes.—Tax sales, made after adjudication of bankruptcy of property belonging to the bankrupt estate may be avoided, but purchasers will be entitled to reimbursement for the amount paid at such sales and subsequent taxes paid by them, together with interest thereon as provided by the laws of Colorado on redemption from tax sales of lands, out of the general fund, regardless of the amount which the property may bring at bankruptcy sale. *Stanard v. Dayton* (C. C. A., 8th Cir.), 33 Am. B. R. 682, 220 Fed. 441, affd. 241 U. S. 588, 37 Am. B. R. 259.

⁴⁹ See also Am. B. R. Dig. § 608.

But see *In re Stalker* (D. C., N. Y.), 10 Am. B. R. 709, 123 Fed. 961, holding that, where land of a bankrupt, of less value than both a mortgage and unpaid taxes, is sold to third parties upon a foreclosure of the mortgage, subject to the taxes, the municipality is not entitled to priority of payment of the taxes.

⁵⁰ *In re Harvey* (D. C., Pa.), 10 Am. B. R. 567, 122 Fed. 745; *In re Oxley* (D. C., Wash.), 30 Am. B. R. 406, 204 Fed. 826; *In re Clark Coal & Coke Co.* (D. C., Pa.), 22 Am. B. R. 843, 173 Fed. 658, holding that, where the real estate of a bankrupt is by order of the court, sold free and discharged of all liens, the amounts due for county taxes at the time of the sale are entitled to due priority of payment from the proceeds of sale.

Priority of taxes over mortgage debt.—Where a mortgagor, after neglecting to pay general and local taxes assessed against the mortgaged property and after the property had been sold under tax liens, was adjudged a bankrupt and his trustee in bankruptcy sold the property free and clear of all liens, including taxes, and held the fund instead of the property, which fund was insufficient to pay both the taxes and the mortgage debt, the payment of the taxes should be given priority under section 64 of the Bankruptcy Act. *Delahunt v. County of Oklahoma* (C. C. A., 8th Cir.), 35 Am. B. R. 157, 226 Fed. 31.

when the payment would inure solely to the benefit of a secured creditor.⁵¹ The weight of authority seems, however, to sustain the view that the taxes, whether a lien or not, are to be paid before any distribution is to be made to creditors.⁵² The taxes and assessments against lands are not merely charges upon the tracts sold, but also against the general estate as well.⁵³ If the greater part of the bankrupt's property upon which the tax was assessed is covered by a mortgage, the sale of which did not satisfy the lien of the mortgage, the tax must nevertheless be paid from the proceeds of the remaining estate of the bankrupt.⁵⁴ Where real property which is subject to a tax lien is sold divested of that lien, under an order of the court, the purchaser acquires a clear title and the claim for taxes has priority over the claims of general creditors against the other assets in the hands of the trustee.⁵⁵ The right to priority of payment out of the bankrupt's estate exists although the property is sold at a tax sale prior to the bankrupt's adjudication and bid in by the county treasurer because no other bid was received, owing to existing incumbrances against the property.⁵⁶ Where real property subject to an unpaid tax is in custody of the court of bankruptcy it may not be sold for such tax without leave of the court.⁵⁷

f. Taxes entitled to priority.—(1) **IN GENERAL.**⁵⁸—The word "tax" is not used in a restricted or narrow sense, but is intended to include all obligations imposed by the State and general governments under their restrictive taxation or police powers for governmental or public purposes. That a tax so imposed may not be a general property tax does not deprive it of the character of a tax. Many taxes are imposed under the name of license fees, franchise taxes or taxes for special purposes under some other name, and are, therefore,

51. *In re Veitch* (D. C., Conn.), 4 Am. B. R. 112, 101 Fed. 251.

52. *In re Hollenfeltz* (D. C., Iowa), 2 Am. B. R. 499, 94 Fed. 629; *In re Hillberg* (Ref., Pa.), 6 Am. B. R. 714.

Payment by trustee where property is sold.—When goods have been sold by the trustee and the vendees resist payment of the taxes thereon, under a State revenue law, on the ground that the taxes accrued before the sale to them, the trustee will not be ordered to pay such taxes upon their petition, but will be ordered to have the goods assessed at a fair valuation in his name as trustee and pay the amount which can be legally assessed thereon. *In re Conhaim* (D. C., Wash.), 4 Am. B. R. 58, 100 Fed. 268.

Taxes on exempt property.—The trustee must, at the request of the bankrupt, pay the taxes legally owing by such bankrupt even though assessed against property which is set off as exempt and though the said taxes are a lien upon and enforceable against the exempt property, and their payment would exhaust the fund otherwise going to the general creditors. *In re Tilden* (D. C., Iowa), 1 Am. B. R. 300, 91 Fed. 500; *In re Baker* (Ref., Tex.), 1 Am. B. R. 526.

53. *Dayton v. Stanard*, 241 U. S. 588, 37 Am. B. R. 259, 60 L. Ed. 1190, 36 Sup. Ct. 695.

54. *Chattanooga, City of, v. Hill* (C. C.

A., 6th Cir.), 15 Am. B. R. 195, 139 Fed. 600.

55. *In re Prince & Walter* (D. C., Pa.), 12 Am. B. R. 675, 131 Fed. 546. But see *In re Oxley* (D. C., Wash.), 30 Am. B. R. 406, 204 Fed. 826, holding that where after taxes had been lawfully assessed against the property of a bankrupt, eight-ninths of such property was taken under mortgage foreclosure, leaving only enough to pay the costs and expenses of administration, the payment of such taxes will not be decreed to the exclusion of the costs of administration, but an effort should be made to secure the payment of the taxes from the mortgaged property, the lien of the county not having been lost by the foreclosure.

The relinquishment of the property upon which the taxes were levied, to the holder of an incumbrance thereon, with the consent of the bankruptcy court in a proceeding to which the county was not a party, does not destroy the county's right to a preferential payment. *Hecox v. County of Teller* (C. C. A., 8th Cir.), 28 Am. B. R. 525, 198 Fed. 634.

56. *Hecox v. County of Teller* (C. C. A., 8th Cir.), 28 Am. B. R. 525, 198 Fed. 634.

57. *Dayton v. Stanard*, 241 U. S. 588, 37 Am. B. R. 259, 60 L. Ed. 1190, 36 Sup. Ct. 695.

58. See also Am. B. R. Dig. § 860.

special taxes, but they are nevertheless taxes imposed for a public purpose no matter what the name under which they are levied or imposed and are clearly within the meaning of the term "tax" as used in this section.⁵⁹ Generally speaking a tax is a pecuniary burden laid upon individuals or property for the purpose of supporting government.⁶⁰ And in this sense it includes duties imposed by federal law upon goods imported by the bankrupt.⁶¹ A tax imposed upon retail dealers in cigarettes in addition to the other taxes is within this section.⁶² A claim against a defaulting tax collector is not a debt for "taxes."⁶³ The liability of an employer of labor to pay assessments to a State under a Workmen's Compensation Act is not a tax within the meaning of this section,^{63a} nor is an award under such a statute against a bankrupt for personal injuries to an employee a "tax" entitled to priority.⁶⁴

(2) **LOCAL ASSESSMENT; WATER RENTS.**⁶⁵—An assessment levied for a local improvement is a tax entitled to priority of payment.⁶⁶ In some jurisdictions it has been held that the word "taxes" includes water rents due to a municipality,⁶⁷ and in other jurisdictions the courts have reached the opposite conclusion.⁶⁸

(3) **LICENSE FEES, FRANCHISE AND CORPORATION TAXES.**⁶⁹—An annual license fee or franchise tax, required to be paid by a corporation as a condition of its continued existence and based upon the amount of its capital stock issued and outstanding, is a tax within the meaning of this section,⁷⁰ and is

59. *In re Lange Co.* (D. C., Iowa), 20 Am. B. R. 478, 159 Fed. 586. See *In re Wyoming Valley Ice Co.* (D. C., Pa.), 21 Am. B. R. 1, 165 Fed. 789.

Character of tax.—The bankruptcy act does not make any distinction as to the character of the tax which is imposed. A license fee or franchise tax imposed by the State is recognized by the Federal courts as a tax. *First Nat. Bank v. Aultman* (Ref., Ohio), 12 Am. B. R. 12, 14.

60. *New Jersey v. Anderson*, 203 U. S. 483, 492, 17 Am. B. R. 63, 51 L. Ed. 284, 27 Sup. Ct. 137.

Tax defined.—The term "taxes," within the meaning of this section, includes only such taxes as are required to be paid into a common fund for the support of the government, national, state, or municipal, and such a fund as will relieve the general taxpayer from a payment of an unfair proportion of the expenses in the operation of the government, or a tax which would be by operation of law a lien upon the bankrupt estate. *Matter of Farrell* (D. C., Wash.), 32 Am. B. R. 212, 211 Fed. 212.

61. *Matter of Rosenthal Bros.* (D. C., N. Y.), 38 Am. B. R. 1, 235 Fed. 315. But see *contra*, *Matter of Pedlow & Co.* (Ref., N. Y.), 32 Am. B. R. 808, holding that duties due to the United States on importations are not entitled to priority as they are not taxes within the meaning of the bankruptcy act.

62. *In re Lange Co.* (D. C., Iowa), 20 Am. B. R. 478, 159 Fed. 586. See also Am. B. R. Dig. § 863.

63. *In re Waller* (D. C., Md.), 15 Am. B. R. 753, 142 Fed. 883. As to taxes payable by tax collector on his own property, see *In re Porterfield* (D. C., W. Va.), 15 Am. B. R. 11, 138 Fed. 192.

63a. *Matter of Farrell* (D. C., Wash.), 32 Am. B. R. 212, 211 Fed. 212.

64. *Matter of Rockaway Soda Water Manufacturing Co.* (D. C., N. Y.), 36 Am. B. R. 640.

65. See also Am. B. R. Dig. § 863.

66. *In re Stalker* (D. C., N. Y.), 10 Am. B. R. 709, 123 Fed. 961.

67. *In re Industrial Coal Storage & Ice Co.* (D. C., Pa.), 20 Am. B. R. 904, 163 Fed. 390. See also dictum in *Matter of Hills* (C. C. A., 2d Cir.), 34 Am. B. R. 43, 221 Fed. 260.

68. *Matter of Park Brew. Co.* (Ref., R. I.), 35 Am. B. R. 652.

Covenant of lessee.—The failure of a lessee to comply with a covenant in his lease to pay water rents or charges has been held not to give the lessor or the municipality a claim to priority of payment out of the funds of the estate of the bankrupt lessee. *In re Broom* (D. C., N. Y.), 10 Am. B. R. 427, 123 Fed. 639. See *In re Parker*, Fed. Cas. No. 10,719.

Meter charge.—Where the charge for water is for the amount used as indicated by meter, and not an assessment against the premises, it is not a tax but merely a debt to the municipality, and is not entitled to the priority given to taxes. *Matter of Hills* (C. C. A., 2d Cir.), 34 Am. B. R. 43, 221 Fed. 260.

69. See also Am. B. R. Dig. § 863.

70. *State of New Jersey v. Lovell* (C. C. A., 3d Cir.), 24 Am. B. R. 562, 179 Fed. 321; *New Jersey v. Anderson*, 203 U. S. 483, 17 Am. B. R. 64, 51 L. Ed. 284, 27 Sup. Ct. 137, revg. 14 Am. B. R. 604, 137 Fed. 858, and superseding *In re Danville Rolling Mill Co.* (D. C., Pa.), 10 Am. B. R. 327, 121 Fed. 432; *Matter of Mutual Mercantile Agency* (Ref., N. Y.), 8 Am. B. R. 435.

payable as of the date of the entry of the tax lien in the proper office, where such entry is required;⁷¹ but a sum exacted by a State for the privilege of increasing the capital stock of a corporation is not a debt entitled to priority upon the corporation subsequently becoming bankrupt, but is a provable debt entitled to a *pro rata* distribution with other general creditors.⁷² Taxes assessed against a partnership must be paid from the estate of an individual partner where he is individually liable under the State law.⁷³ The fact that a claim is called a tax does not make it so;⁷⁴ as where by a State statute a corporation is required to collect of its bondholders a State tax on a mortgage securing its bonds, the corporation is merely a collecting agency, and the tax is not that of the corporation entitled to priority of payment upon its being adjudicated a bankrupt.⁷⁵ So, when a State statute speaks of a license to sell liquors as a "tax," that does not make it a tax. It is merely a charge in the nature of a license and not entitled to priority.⁷⁶

g. Right to subrogation upon payment of taxes.—Where a purchaser of land upon which taxes were unpaid paid a judgment for such taxes, he is not subrogated to the rights of the municipality and cannot claim priority of payment upon the grantor of the lands being adjudged a bankrupt. Such judgment becomes in the hands of the person paying it an unsecured claim and is entitled to no priority.⁷⁷ The benefit of priority is available only to the municipality, State or United States and may not be extended to any other creditor.⁷⁸ So, where an owner of premises has leased them under a lease which requires the lessee to pay the taxes, he may not claim priority on account of city taxes paid by him after the bankrupt's failure to pay such taxes because of his bankruptcy.⁷⁹ A purchaser at a tax sale is not entitled to subrogation to a municipality's right to priority of payment of taxes from the assets of the bankrupt.⁸⁰

71. In re Clark Coal & Coke Co. (D. C., Pa.), 22 Am. B. R. 843, 173 Fed. 658.

72. Matter of York Silk Mfg. Co. (D. C., Pa.), 26 Am. B. R. 650, 188 Fed. 735, *affd.* 27 Am. B. R. 525, 192 Fed. 81.

73. In re Green (D. C., Ia.), 8 Am. B. R. 553, 116 Fed. 118. But a claim for personal taxes due the city of New York from a member of a firm cannot be enforced out of firm assets until all firm creditors have been paid in full. See Matter of Flatau (Ref., N. Y.), 21 Am. B. R. 352.

74. In re Cosmopolitan Power Co. (C. C. A., 7th Cir.), 14 Am. B. R. 604, 137 Fed. 858, *revd.* on other grounds, 203 U. S. 483, 17 Am. B. R. 63, 51 L. Ed. 284, 27 Sup. Ct. 137.

75. In re Wyoming Valley Ice Co. (D. C., Pa.), 16 Am. B. R. 594, 145 Fed. 267; Commonwealth of Pennsylvania v. York Silk Mfg. Co. (C. C. A., 3d Cir.), 27 Am. B. R. 525, 192 Fed. 81.

76. In re Ott (D. C., Ia.), 2 Am. B. R. 637, 95 Fed. 274.

77. Cooper Grocery Co. v. Bryan (C. C. A., 5th Cir.), 11 Am. B. R. 734, 127 Fed. 815, *citing* City of Waco v. Bryan (C. C. A., 5th Cir.), 11 Am. B. R. 481, 127 Fed. 9.

Payment of taxes by mortgagee.—In the case of In re Barr Pumping Engine Co. (Ref., Pa.), 11 Am. B. R. 312, the referee, after referring to several English cases, said: "If, as the English cases lay down, the un-

secured creditors of the bankrupt, standing in his shoes, have no equity to be protected, and if the question, therefore, practically arises between the bankrupt and a mortgagee, who, having been compelled to pay taxes, would have the right to claim a priority as against the bankrupt estate, the conclusion is irresistible that these taxes should be paid from the fund applicable to the payment of the general creditors."

78. Matter of Harris Steam Engine Co. (D. C., R. I.), 34 Am. B. R. 835, 225 Fed. 609; and see In re Broom (D. C., N. Y.), 10 Am. B. R. 427, 123 Fed. 639; In re Veitch (D. C., Conn.), 4 Am. B. R. 112, 101 Fed. 251; In re Hollenfeltz (D. C., Ia.), 2 Am. B. R. 499, 94 Fed. 629.

79. Matter of Harris Steam Engine Co. (D. C., R. I.), 34 Am. B. R. 835, 225 Fed. 609.

80. "Third parties, bidders at a tax sale, holding tax certificates for their security, are not entitled to relief out of the assets of the bankrupt. Much less is the purchaser at a foreclosure sale, having full knowledge of the tax liens, entitled to demand relief by the payment of taxes ostensibly to municipalities, but which in reality inures solely to his benefit, and when it may fairly be assumed that he bid in the incumbered property subject to existing liens for unpaid taxes and assessments." In re Brinker (D. C., N. Y.), 12 Am. B. R. 122, 128 Fed. 634.

h. Taxes accrued since proceedings were instituted.—Taxes upon property in the hands of the trustee, accrued since the proceedings were instituted, do not fall within the strict letter of the law, but the bankruptcy act does not withdraw the estates of bankrupts from the reach of the taxing power and they are subject, in consequence, to the payment of taxes imposed while in the hands of trustees.⁸¹ The tax assessed prior to adjudication is "legally due and owing" on the day of assessment, although not payable until after adjudication.⁸²

i. Interest on taxes and penalties.—It should be noted that this section does not provide for the payment of interest on taxes,⁸³ but it has been held that taxes which the trustee is required to pay carry interest until payment is actually made or tendered, and that the reasons why ordinary claims of creditors are not permitted to draw interest subsequent to adjudication have no application in the case of public taxes.⁸⁴ A penalty imposed for a failure to pay a State franchise tax has been held not to be a part of the original tax, and is not, therefore, entitled to priority,⁸⁵ but the courts are not in accord as to this proposition.⁸⁶

j. Illustrative cases.—Other cases in point on the payment of taxes under the present and the former law will be found in the foot-note.⁸⁷

C1. *In re Prince* (D. C., Pa.), 12 Am. B. R. 675, 131 Fed. 546; *Swarts v. Hammer* (C. C. A., 8th Cir.), 9 Am. B. R. 691, 120 Fed. 256, *affd.* 194 U. S. 411, 11 Am. B. R. 708, 48 L. Ed. 1060, 24 Sup. Ct. 695; *City of Waco v. Bryan* (C. C. A., 5th Cir.), 11 Am. B. R. 481, 127 Fed. 79; *In re Sims* (D. C., Ga.), 9 Am. B. R. 162, 118 Fed. 356; *In re Keller* (D. C., Iowa), 6 Am. B. R. 334, 357, 109 Fed. 131; *In re Conhaim* (D. C., Wash.), 4 Am. B. R. 59, 100 Fed. 268; *Stanard v. Dayton* (C. C. A., 8th Cir.), 33 Am. B. R. 682, 220 Fed. 441, *affd.* 241 U. S. 588, 37 Am. B. R. 259; *In re Fisher & Co.* (D. C., N. J.), 17 Am. B. R. 404, 412, 148 Fed. 907. See also Am. B. R. Dig. § 585.

The trustee should pay "all taxes owing by the bankrupt." This includes the original tax and all other sums accrued thereon under the revenue laws of the State up to the time the payment is actually made or tendered. *Matter of Kallak* (D. C., N. Dak.), 17 Am. B. R. 414, 147 Fed. 276. It is settled law that the bankrupt's estate is taxable while it is in the hands of the bankrupt's trustee. As to sale of property upon which taxes have been assessed since the bankruptcy, see *In re Crowell* (D. C., Mass.), 29 Am. B. R. 308, 199 Fed. 659.

^{82.} *In re Flynn* (D. C., Mass.), 13 Am. B. R. 720, 134 Fed. 145; *New Jersey v. Anderson*, 203 U. S. 483, 17 Am. B. R. 64, 51 L. Ed. 284, 27 Sup. Ct. 137, *revd.* 14 Am. B. R. 604, 137 Fed. 858, holding that a franchise tax assessed after adjudication upon a return made by the corporation before adjudication was "legally due and owing" and collectible. See *Matter of Sherwood, Inc.* (C. C. A., 2d Cir.), 31 Am. B. R. 769, 210 Fed. 754.

^{83.} *In re Fisher & Co.* (D. C., N. J.), 17 Am. B. R. 404, 413, 148 Fed. 907.

^{84.} *Matter of Kallak* (D. C., N. Dak.), 17

Am. B. R. 414, 147 Fed. 276; *Matter of Schuyler & Co.* (Ref., N. Y.), 21 Am. B. R. 428; *Stanard v. Dayton* (C. C. A., 8th Cir.), 33 Am. B. R. 682, 220 Fed. 441, *affd.* 241 U. S. 588, 37 Am. B. R. 259; *Matter of Ashland Emery & Corundum Co.* (D. C., Mass.), 36 Am. B. R. 194, 229 Fed. 829.

"There are two reasons why ordinary claims of creditors are not permitted to draw interest subsequent to the adjudication; first, it is important that the proportionate interest of the several creditors in the estate be ascertained and fixed. If interest were to accrue, however, after the adjudication, the amount of the several claims would vary from time to time, according to their respective rates of interest and the proportionate share of the several creditors would be subject to constant readjustment. The second reason is the convenience of administration.

... In the case of public taxes, neither of these reasons has any application because they do not share the estate with the claims of private creditors. On the contrary, § 64-a expressly provides that before anything shall be paid to the creditors by way of dividends, all taxes owing by the bankrupt shall be fully discharged." *Matter of Kallak* (D. C., N. Dak.), 17 Am. B. R. 414, 147 Fed. 276.

^{85.} *Matter of Ashland Co.* (D. C., Mass.), 36 Am. B. R. 194, 229 ed. 829.

^{86.} *Penalties entitled to priority.*—*Stanard v. Dayton* (C. C. A., 8th Cir.), 33 Am. B. R. 682, 220 Fed. 441; *Matter of Kallak* (D. C., N. Dak.), 17 Am. B. R. 414, 147 Fed. 276; *Matter of Schuyler* (Ref., N. Y.), 21 Am. B. R. 428; *Matter of Scheidt Bros.* (D. C., Ohio), 23 Am. B. R. 778, 177 Fed. 599.

^{87.} *In re Force* (Ref., Mass.), 4 Am. B. R. 114; *In re Cleanfast Hosiery Co.* (Ref., N. Y.), 4 Am. B. R. 702; *In re Keller* (D. C., Iowa), 6 Am. B. R. 351, 109 Fed. 131;

III. PRESERVING ESTATE; FILING FEES.

a. **Cost of preserving estate.**—(1) **IN GENERAL.**⁸⁸—Subdivision 1 of subsection *b* provides as the first statutory priority that there shall be paid "the actual and necessary cost of preserving the estate subsequent to filing the petition." The words of this subdivision are broad and have a corresponding elasticity of application. They give priority to the (1) actual and (2) necessary cost (3) of preserving the estate (4) subsequent to filing the petition. This has been thought to include the costs and disbursements of receivers in bankruptcy and other officers pending the adjudication and appointment of trustees.⁸⁹ But these are sufficiently within § 62. Hence, the reference here seems rather to the expenses of parties, not officers, in preserving the estate.⁹⁰ The impossibility of phrasing any rule whereby to determine when priority will be decreed is apparent. Nor, it seems, is it material what has been paid, as long as the court finds that the disbursement was not necessary.⁹¹ Where property is sold in admiralty to enforce maritime liens, with the consent of the bankruptcy court, the costs incurred in bankruptcy in the preservation of the property, together with the costs of administration, are entitled to priority of payment from the proceeds of the sale.⁹² But if the general fund of a bankrupt transportation company is sufficient to pay all expenses of administration, the cost of the operation of the vessels owned by the corporation should not be charged against the proceeds of the sale of a single vessel, sold to satisfy liens against it.⁹³ Claims for rent due for the occupation of the premises during the settlement of the bankrupt estate should be paid as part of the expense of maintaining the estate.⁹⁴ Likewise, claims of watchmen employed by express authority of the court to care for the bankrupt's stock are entitled to priority.⁹⁵ But costs in an attachment suit which was dissolved under § 67-f and was of no benefit to the bankrupt estate should not be allowed under this subdivision.⁹⁶

(2) **EXPENSES OF CREDITORS IN RECOVERING PROPERTY.**⁹⁷—The doctrine

Matter of Wenatchee Orchard Co. (D. C., Wash.), 32 Am. B. R. 369, 212 Fed. 787. *U. S. v. Herron*, 20 Wall. 251; *In re Moller*, Fed. Cas. 9,700; *In re Brand*, Fed. Cas. 1,809; *In re Ambler*, Fed. Cas. 271.

⁸⁸ See also Am. B. R. Dig. § 866.

⁸⁹ *Paine v. Archer* (C. C. A., 9th Cir.); 37 Am. B. R. 454, 233 Fed. 259.

Certificates issued by a receiver with the consent of the court to raise money necessary to care for and preserve the bankrupt estate are entitled to priority of payment from the proceeds of the sale of such property. *In re Alaska Fishing & Developing Co.* (D. C., Wash.), 21 Am. B. R. 685, 167 Fed. 875.

⁹⁰ *In re Burke* (Ref., Ohio), 6 Am. B. R. 502. Compare also, generally, cases cited sub-titles "*Cost of Administration*," "*Fees of General Assignees*," and "*Sheriff's Fees*," *post*, under this section.

⁹¹ *In re Allen* (D. C., Cal.), 3 Am. B. R. 38, 96 Fed. 51.

⁹² *In re Hughes* (D. C., N. J.), 22 Am. B. R. 303, 170 Fed. 809.

⁹³ *Matter of New England Transp. Co.* (D. C., Ct.), 34 Am. B. R. 323, 220 Fed. 203.

⁹⁴ *In re Youdelman-Walsh Foundry Co.* (D. C., N. Y.), 21 Am. B. R. 509, 166 Fed. 381; *In re Hersey* (D. C., Iowa), 22 Am. B. R. 860, 171 Fed. 1,001.

Premises used by receiver or trustee.—Where a receiver or trustee in bankruptcy actually occupies the leased premises, rent for such occupancy and use is payable by the receiver or trustee and will be considered a preferred claim in favor of the landlord, not because of any reservation of rent mentioned in the lease, but because the use of the premises was considered necessary to the preservation of the estate, and the amount paid by the receiver or trustee will be allowed as part of the cost of administration. *Matter of Mullings Clothing Co.* (D. C., Conn.), 37 Am. B. R. 166, 230 Fed. 681.

⁹⁵ *Matter of Mitchell* (C. C. A., 2d Cir.), 32 Am. B. R. 391, 212 Fed. 932, holding that such claims are entitled to priority over attorney's fees, and that a trustee is personally liable for their payment when he uses all the assets to pay subordinate claims.

⁹⁶ *Matter of Rood* (Ref., Minn.), 34 Am. B. R. 273.

⁹⁷ See also Am. B. R. Dig. § 867.

that the expense of preserving the estate is entitled to priority was, prior to the amendatory act of 1903, carried to the extent of decreeing costs out of the estate to creditors who before the bankruptcy had obtained a lien, by means of which all the creditors were equally benefited.⁹⁸ There was doubt, however, whether this was the law. The amendatory act of 1903 has removed the doubt by the words added to subdivision (2). This subdivision impliedly recognizes the right of a creditor to institute proceedings to recover, for the benefit of the estate of the bankrupt, property transferred by him, either before or after filing of the petition. It will be observed that the act makes no distinction as to the character of the transfer, whether it be one involving actual fraud, an intent to hinder, delay, or defraud the creditors of the bankrupt, which the law declares to be null and void, or a constructive fraud. So, then, it makes no difference whether the transfer be one of actual or of constructive and technical fraud, so far as the interest and rights of creditors are concerned.⁹⁹ Now, to entitle a creditor to an allowance for expenses and priority of payment, the applicant must show that he has (1) at his expense (2) recovered for the benefit of the bankruptcy estate (3) property which the (4) bankrupt had transferred or concealed.¹⁰⁰ If the creditor shows this, he is entitled to his "reasonable expenses" in so doing: It is immaterial whether the transfer or concealment was before or after the petition. Nor is it thought that the word "recovered" will be construed strictly; it should be enough if any active agency, which was either the moving cause or without which recovery would have been unlikely or impossible, is shown.¹⁰¹

b. Filing fees in involuntary cases.—Subdivision 2 of subsection *b* requires the payment of filing fees paid by creditors in involuntary cases. This subdivision should be read in connection with § 3-e and General Order XXXIV. The three together fix the rights of the respective parties to costs and disbursements on creditors' petitions for involuntary bankruptcy. Such a creditor is entitled, not only to a return of his filing fee, but also his other disbursements, as for service of process;¹⁰² the latter, however, as cost of administration, rather than under this subdivision. A priority of this kind may be claimed by a verified account filed with the trustee; but the same should not be paid until allowed by the referee. This priority is akin to, but not the

98. *In re Lesser* (C. C. A., 2d Cir.), 5 Am. B. R. 320, 100 Fed. 433, revd. on another point in *Metcalf v. Barker*, 187 U. S. 165, 9 Am. B. R. 36, 47 L. Ed. 122, 23 Sup. Ct. 67. Compare also *In re Little River Lumber Co.* (D. C., Ark.), 3 Am. B. R. 682, 101 Fed. 558; *In re Groves*, 2 N. B. N. Rep. 466.

99. *Frost v. Latham & Co.* (C. C., Ala.), 25 Am. B. R. 313, 181 Fed. 866.

100. For definitions of these words see *Bankr. Act*, § 1.

An allowance by a state court to a receiver for services rendered in the preservation of the estate during the four months preceding bankruptcy is entitled to priority in payment after the property has been transferred to the trustee in bankruptcy. *Paine v. Archer* (C. C. A., 9th Cir.), 37 Am. B. R. 454, 233 Fed. 259.

101. Where attorneys for unsecured creditors of a bankrupt performed valuable

services prior to the appointment of a trustee by conducting an examination of the officers of the bankrupt which inured to the benefit of all the general creditors and tended to recover property which had been fraudulently transferred, they are entitled to compensation from the estate under section 64-b(2) of the bankruptcy act, as amended in 1903; by which it is provided that where property of the bankrupt has been recovered for the benefit of the estate, the reasonable expenses for such recovery shall be entitled to priority of payment, but after the employment of counsel by the trustee, no allowance can be made out of the estate for services performed by such attorneys in aid of such counsel. *In re Medina Quarry Co.* (D. C., N. Y.), 25 Am. B. R. 405, 182 Fed. 508, revd. on other grounds, 27 Am. B. R. 466, 191 Fed. 815.

102. *In re Silverman* (D. C., N. Y.), 3 Am. B. R. 227, 97 Fed. 325.

same as, that for indemnity deposits required by General Order X.¹⁰³ On the analogy of these provisions, money advanced by the attorney or friend of a voluntary bankrupt to pay the filing fee is often ordered paid in full out of the estate when collected in;¹⁰⁴ but such an advancement is strictly a "cost of administration."

IV. COST OF ADMINISTRATION.

a. In general.¹⁰⁵—Subdivision 3 makes next in order of priority the payment of the "cost of administration." This phrase includes the priorities mentioned in the preceding subdivision. A similar idea is expressed in "the actual and necessary expenses incurred by officers in the administration of estates" in § 62. It may include the referees' fees for allowing claims, fixed by § 40, as amended by the act of 1903, and disbursements of the bankrupt in notifying creditors of an application for his discharge.¹⁰⁶ The expenses of a referee, including a reasonable allowance for clerk hire, fall within this subdivision.¹⁰⁷ And so also does the reasonable value of the use by a trustee of leased premises formerly occupied by the bankrupt.¹⁰⁸ It may also include a great variety of disbursements made necessary in the administration of the estate, but not costs awarded in proceedings not a part of the bankruptcy proceeding.¹⁰⁹ It is impossible to phrase any fixed rule. Compensation for services of accountants, acting without authority of the court, will not be allowed.¹¹⁰

b. Witness fees and mileage.—These are expressly given priority. They would have it were the law silent. Their amount is fixed by the Revised Statutes.¹¹¹

c. Attorney's fees.¹¹²—Costs of administration under subdivision (3) include "one reasonable attorney's fee." This subject is considered in detail under § 62. The allowance must be (1) in one item, (2) reasonable, and (3) for professional services actually rendered. It seems that the basis of compensation is not payment for all services which the bankrupt may request of his attorney, but for the services to the bankrupt in involuntary cases, while performing the duties devolved upon the bankrupt by the bankruptcy law.¹¹³ The services rendered must be such as aid in the settlement of the estate, and will not include services rendered in securing an exemption for the bank-

^{103.} Compare *In re Matthews* (D. C., Iowa), 3 Am. B. R. 265, 97 Fed. 772; also *In re Burke* (Ref., Ohio), 6 Am. B. R. 502.

^{104.} See *Whiston v. Smith*, Fed. Cas. 17,523.

^{105.} See also Am. B. R. Dig. § 869.

^{106.} *In re Hatcher* (D. C., Tex.), 14 Am. B. R. 722, 145 Fed. 658. See General Order X.

^{107.} *In re Tebo* (D. C., W. Va.), 4 Am. B. R. 235, 101 Fed. 419.

^{108.} *In re Abrams* (D. C., Iowa), 29 Am. B. R. 590, 200 Fed. 1005.

^{109.} For exceptions to this rule, see *In re Lesser* (C. C. A., 2d Cir.), 5 Am. B. R. 320, 100 Fed. 433, revd. on other grounds in 187 U. S. 165, 9 Am. B. R. 36, 47 L. Ed. 122, 23 Sup. Ct. 67; *In re Neely* (D. C., N. Y.), 5 Am. B. R. 836, 108 Fed. 371.

^{110.} *Matter of Marks* (Ref., Ga.), 22 Am. B. R. 54, holding that items of expense incurred by accountants for "entertainment"

and unusual hotel bills and Pullman fares are not properly chargeable against the estate of a bankrupt, and will be disallowed.

^{111.} U. S. R. S., § 848. See also under Section Twenty-one of this work, *ante*.

^{112.} See also Am. B. R. Dig. § 870 and cross-references thereunder.

^{113.} The "one reasonable attorney's fee" must be allowed for services actually rendered to the bankrupt in performing the duties required by the act. *In re Payne* (D. C., N. Y.), 18 Am. B. R. 192, 153 Fed. 1,018; *In re Lewin* (D. C., Vt.), 4 Am. B. R. 632, 103 Fed. 850; *In re Anderson* (D. C., S. Car.), 4 Am. B. R. 640, 103 Fed. 854; *In re Terrill* (D. C., Vt.), 4 Am. B. R. 625, 103 Fed. 781.

The "duties" referred to in the last sentence of the above text are those imposed by section 7 of the Bankruptcy Act. *Whitla & Nelson v. Boyd* (C. C. A., 9th Cir.), 32 Am. B. R. 469, 213 Fed. 587.

rupt,¹¹⁴ nor services rendered in State and city courts at the instance of the bankrupt,¹¹⁵ nor services rendered in resisting the claim of a receiver appointed by the State court prior to adjudication.¹¹⁶ And the bankruptcy act does not contemplate that estates shall be burdened with the expense of furnishing an attorney for the bankrupt every time he appears before the referee.¹¹⁷ Where partnership bankrupts have different attorneys but one allowance can be made.¹¹⁸ An attorney who uselessly files a second involuntary petition, and subsequently demurs to the petition previously filed by another attorney, and such petition is amended, and an adjudication had thereon, is not entitled to an allowance of a fee for services.¹¹⁹ The attorney's fee should be kept down to what it was intended by the act to represent, and that is simply the necessary professional assistance required by the bankrupt to meet the demands of the act upon him. Thus, clerical work performed by an attorney in posting the bankrupt's books and in making extra copies of schedules cannot be charged for as professional services.¹²⁰ It should affirmatively appear that the services were reasonably necessary and rendered in good faith,¹²¹ although the prevailing opinion seems to be that the attorney for petitioning creditors in an involuntary proceeding is entitled as a matter of right to a reasonable fee, the amount to be determined upon evidence of the services performed and their value.¹²² An application to confirm a composition made by an involuntary bankrupt is no part of the administration of the estate, and the fees and disbursements of the bankrupt's attorney cannot be allowed as costs of administration.¹²³ Compensation may be allowed to the bankrupts' attorneys for

114. *In re O'Hara* (D. C., Pa.), 21 Am. R. R. 508, 166 Fed. 384; *Matter of Bohrman* (D. C., Ga.), 34 Am. B. R. 801, 224 Fed. 287.

115. *Musica v. Prentice* (C. C. A., 5th Cir.), 31 Am. B. R. 687, 211 Fed. 326, affg. 30 Am. B. R. 555, 205 Fed. 413.

116. *Whitla & Nelson v. Boyd* (C. C. A., 9th Cir.), 32 Am. B. R. 469, 213 Fed. 587.

117. *Whitla & Nelson v. Boyd* (C. C. A., 9th Cir.), 32 Am. B. R. 469, 213 Fed. 587.

118. See *In re Eschwege* (Ref., N. Y.), 8 Am. B. R. 282.

119. *Frank v. Dickey* (C. C. A., 8th Cir.), 15 Am. B. R. 155, 139 Fed. 744.

120. *In re Connell & Sons* (D. C., Pa.), 9 Am. B. R. 474, 120 Fed. 846.

121. *In re Carr* (D. C., N. Car.), 9 Am. B. R. 58, 117 Fed. 572, holding that, the allowance to an attorney under section 64-b being discretionary, the attorney must disclose his dealings with his client that the court may act intelligently.

Test is whether services are necessarily rendered.—*In re Rosenthal & Lehman* (D. C., Mo.), 9 Am. B. R. 626, 628, 120 Fed. 848, the court said: "It goes without saying that, if the services of counsel are secured, or, when secured, are employed for the purpose of securing the bankrupt from the consequences of his own wrongful conduct, or for the purpose of suppressing the truth, or otherwise thwarting the operation of the act, no compensation can reasonably be allowed by the court to be paid out of the assets of the estate. The test, in my opinion, is whether the employment is

necessarily made, and the services necessarily rendered in good faith for the real purpose of so administering the act in a given case as to accomplish the purpose of its enactment."

Services to secure preferential payments.—Where an attorney for the petitioning creditors, who were in sympathy with the bankrupt and assisted in the wrongful transfer of its property, subsequently represented creditors who had received preferential payments and who sought to establish invalid claims against the estate, he is not entitled to an allowance for fees out of the estate. *In re Medina Quarry Co.* (D. C., N. Y.), 25 Am. B. R. 405, 182 Fed. 508, *reyd.* on other grounds 27 Am. B. R. 466, 191 Fed. 815.

122. *Smith v. Cooper* (C. C. A., 5th Cir.), 9 Am. B. R. 755, 120 Fed. 230; *In re Curtis* (C. C. A., 7th Cir.), 4 Am. B. R. 17, 100 Fed. 784; *In re Goldville Mfg. Co.* (D. C., S. Car.), 10 Am. B. R. 552, 118 Fed. 892; *In re Lang* (D. C., Tex.), 11 Am. B. R. 794, 127 Fed. 755.

123. Compensation of attorney for bankrupt in contest over confirmation of composition.—*In re Fogarty* (C. C. A., 8th Cir.), 26 Am. B. R. 568, 187 Fed. 773, the court said: "If, because the professional services in this case were rendered in the bankruptcy court—in the administration of the bankruptcy law—the attorney's fees are therefore costs of administration within the meaning of section 64, nevertheless such fees are not payable from the estate unless the services were rendered to the bankrupt while he was in the performance of some

services rendered at a trial in which, although adjudication finally resulted, a successful resistance was made to important and serious charges alleged in the petition of the petitioning creditors.¹²⁴ No attorney's fee will be allowed, under this section, except upon notice to parties interested, and upon petition by, or recommendation of, parties mentioned in the statute.¹²⁵ Where the attorney for a bankrupt advanced the filing fee for a voluntary petition and made other disbursements for printing notices to creditors, etc., on behalf of the bankrupt, the same should be allowed out of the estate as a "cost of administration."¹²⁶ Claims of attorneys for the receiver of a corporation appointed by a State court are not entitled to priority, where the corporation subsequently becomes bankrupt.¹²⁷ Though but three kinds of legal services in bankruptcy cases are enumerated in this subsection, services not coming within the words must still be paid for and are entitled to priority, if within the meaning of "cost of administration." But an attorney's priority is not superior to that of a *bona fide* lienor.¹²⁸ Claims of attorneys for services

duty prescribed by the act. No duty was laid upon him to try to settle the case and get back his property. That was a privilege, not a duty. If it be said that an application for a discharge is likewise merely a privilege, that the bankrupt's costs in connection with the hearing upon his application for a discharge are payable from the estate, that the confirmation of a composition is equivalent to a discharge, and that therefore his costs in connection with the prosecution of his composition offer should also be payable from the estate, we think the following considerations are a sufficient answer. Attendance in the one case is made by the letter of the statute the bankrupt's duty; in the other, not. Though a confirmed composition has the effect of a discharge, and though confirmation may be opposed on grounds that would prevent a discharge, the first question for the judge is whether the composition is for the best interests of the creditors, and this question has nothing to do with the right to a discharge. This question might be clearly determinable without the attendance of the bankrupt. Upon the judge is laid the duty of becoming 'satisfied' that the composition offer is fair. If questions should arise which the judge thought might not be rightly solved without the attendance of the bankrupt and his attorney to aid in determining what was for the best interests of the creditors, it is possible that under section 7-a(2) he might make a 'lawful order' requiring the attendance of the bankrupt and his attorney at the expense of the estate. But the issue here is whether the bankrupt can recover from the estate the fees and disbursements of his attorney in endeavoring to force a dismissal of the case and a restoration of the seized property, when neither the letter of the statute nor an order of the court imposed upon the bankrupt the obligation to make such a contest. Our interpretation of the sections herein referred to, in connection with the

spirit of the act as an entirety, is against the bankrupt's contention."

124. Successful defense to charges.—In the case of *Matter of Perlhefter* (Ref., N. Y.), 25 Am. B. R. 586, the referee said: "It seems to me essentially equitable that a bankrupt should be allowed to defend himself against charges made under section 3 of the Bankruptcy Act, defining acts in bankruptcy, and that the expense of successful defense be allowed out of his estate under section 64-b(3) of the Act, especially if such charges, if established, could be pleaded as objections to his discharge within section 14-b of the Bankruptcy Act (I refer particularly to subdivision 4), or should be germane to any such objections, although at the same time the trial should result in an adjudication on *other* charges established at the trial."

125. *In re Young* (D. C., N. Car.), 16 Am. B. R. 106, 142 Fed. 891.

126. *Matter of Carpenter* (Ref., N. Y.), 25 Am. B. R. 161, citing *Collier on Bankruptcy* (8th ed.), p. 736.

127. Compensation of attorneys for receiver of corporation appointed by State court.—Where a fee has been allowed attorneys by a State court for services rendered the receiver of a corporation in that court and ordered to be paid by such receiver out of any funds available for that purpose, and prior to the making of such order, the corporation has become bankrupt and its assets have passed under the jurisdiction of the bankruptcy court, such fee is not a priority claim constituting a lien on the assets of the bankrupt corporation. Such claim is allowable only upon equitable considerations for services from which the estate in bankruptcy has derived benefit, and to the extent only that they were beneficial in fact. *In re Standard Fuller's Earth Co.* (D. C., Ala.), 26 Am. B. R. 562, 186 Fed. 578.

128. *In re Frick* (Ref., Ohio), 1 Am. B. R. 719; *Liddon v. Smith* (C. C. A., 5th Cir.),

essential to the proper administration of the bankrupt's estate rank second only to labor claims.¹²⁹

V. PAYMENT OF WAGES.¹³⁰

a. In general.—Subdivision 4 specifies the wages which are to have priority in payment. The amendment of 1906 added "traveling or city salesmen" to workmen, clerks and servants, who alone were preferred under the original act. Under this subdivision the rule as to a conflict between the bankruptcy law and a State statute concerning wage priorities should be noted.¹³¹ An analogous but different priority to the wage-earner is probably given by every State law. Still, such statutes apply in certain circumstances, as where they give priority for labor over even an existing mortgage,¹³² or where, in case of insolvency, a lien is given.¹³³ But such claims are not usually prior to valid vested liens.¹³⁴ Since the claim of a clerk for his wages earned within three months of his bankruptcy with his employer is a priority fixed by the bankruptcy act and not a lien under the laws of the State,¹³⁵ it is immaterial whether under the laws of the State the claim is or is not superior to a homestead right.¹³⁶ A laborer may be entitled to priority of payment hereunder although he has not perfected his lien under a State statute.¹³⁷ Proof of claim for wages must state facts which show the claim to be entitled to preference or priority of payment. It is not sufficient to say in the claim that the debt therein mentioned is "preferred" or a "preferred claim."¹³⁸

b. Construction and effect.—The term "wages" should be construed in a broad and general sense, as meaning compensation for services rendered. Any

14 Am. B. R. 204, 135 Fed. 43. *Contra*: In re Duncan (Ref., Tex.), 2 Am. B. R. 321. Compare also In re Tebo (D. C., W. Va.), 4 Am. B. R. 235, 101 Fed. 419.

129. In re Erie Lumber Co. (D. C., Ga.), 17 Am. B. R. 689, 700, 150 Fed. 817.

130. See also Am. B. R. Dig. §§ 871-873.

131. See under this section, *post*, subtitle "Conflicting and Overlapping State Priorities."

132. In re Matthews (D. C., Ark.) 6 Am. B. R. 96, 109 Fed. 603.

In Kentucky wage-earners have no lien upon and are not entitled to priority of payment out of the proceeds of mortgaged property sold by the trustee in bankruptcy of the mortgagor. In re Mulhauser (C. C. A., Ky.), 10 Am. B. R. 231, 121 Fed. 629, followed in Matter of Meis (Ref., Ky.), 18 Am. B. R. 104.

133. In Ohio it has been held to be the purpose of the statute in regard to labor claims, when the property of the employer shall be placed by assignment or receivership beyond the reach of those who may have assisted in its creation by their labor to the extent of claims which have accrued three months prior thereto, to fasten upon it a charge which shall yield in priority of payment only to taxes and costs of administering the trust, and that this charge is tantamount to a specific lien in favor of this class of creditors. The mere fact that a petition in bankruptcy has been filed within four months of the appointment of a

receiver of the insolvent debtor does not affect such a lien, which is not in any proper sense a lien created by a suit or proceeding at law or in equity. In re Coe, Powers & Co. (C. C. A., 6th Cir.), 6 Am. B. R. 1, 109 Fed. 550.

134. In re Cramond (D. C., N. Y.), 17 Am. B. R. 22, 145 Fed. 966; In re Proudfoot (D. C., W. Va.), 23 Am. B. R. 106, 173 Fed. 733; In re Tebo (D. C., W. Va.), 4 Am. B. R. 235, 101 Fed. 419, is thus not a reliable authority. See discussion under this section, *ante*, subtitle "Priorities versus Liens."

135. In re Erie Lumber Co. (D. C., Ga.), 17 Am. B. R. 689, 699, 150 Fed. 817, quoting Collier on Bankruptcy (5th Ed.), p. 504.

136. Matter of Strickland (Ref., Ga.), 20 Am. B. R. 923.

137. In re Cramond (D. C., N. Y.), 17 Am. B. R. 22, 145 Fed. 966; In re Burton Mfg. Co. (D. C., Ia.), 14 Am. B. R. 218, 134 Fed. 157.

138. Sufficiency of proof of claim entitled to priority as a wage claim.—Where a proof of claim states merely that it is for "wages due deponent as clerk and manager and is a preferred claim," and it does not appear in such claim or by proof of any kind that such wages were earned in the employ of bankrupt within three months before the commencement of bankruptcy proceedings, it is not sufficient. In re Dunn (D. C., N. Y.), 25 Am. B. R. 103, 181 Fed. 701.

other construction would lead to glaring inconsistencies and manifest injustice.¹³⁹ The services referred to are those rendered by one occupying the relation of servant to his employer as master; including only persons who work, labor or serve in a more or less subordinate position.¹⁴⁰ The statute indicates that such a construction should be made, for it specifies "wages due to workmen, clerks or servants," excluding the notion that one who renders professional services as an attorney or physician is entitled to priority under such provision.¹⁴¹ Under such construction a person who renders services as an incident of a contract providing for payment in some other way than on a time basis would not be entitled to the privilege of priority.¹⁴² Commissions on sales of traveling salesmen constitute wages within the meaning of this provision,¹⁴³ but a partnership, composed of several members, selling the product of a corporation on a commission, is not a workman or laborer, and its commissions may not be considered as "wages."¹⁴⁴ The fact that a claimant's compensation was more than \$1,500 per year does not of itself disentitle him to priority.¹⁴⁵ The intent and purpose of the clause is to protect laborers to the fullest possible extent, giving them priority over all other creditors.¹⁴⁶ The priority given to claims for wages is not lost by the entry of judgment on the claim before the institution of bankruptcy proceedings.¹⁴⁷

c. Assignee of claim for wages.¹⁴⁸—An assignee of a claim for wages is entitled to priority of payment although the assignment was made prior to the commencement of the bankruptcy proceedings.¹⁴⁹ But such priority is lost by the assignee's acceptance of the debtor's note and due bill, the transaction

139. *In re New England Thread Co.* (C. C. A., 1st Cir.), 20 Am. B. R. 47, 158 Fed. 788.

140. *Matter of Gay & Sturgis* (D. C., Mass.), 36 Am. B. R. 350.

141. *Matter of Gay & Sturgis* (D. C., Mass.), 36 Am. B. R. 350.

142. *Matter of Footville Condensed Milk Co.* (D. C., Wis.), 38 Am. B. R. 472, 237 Fed. 136.

143. *In re New England Thread Co.* (C. C. A., 1st Cir.), 20 Am. B. R. 47, 158 Fed. 788; *In re Fink* (D. C., Pa.), 20 Am. B. R. 897, 163 Fed. 135.

144. *Matter of Crawford Woolen Co.* (D. C., W. Va.), 34 Am. B. R. 223, 218 Fed. 951.

145. *Matter of Schultz & Guthrie* (D. C., Mass.), 37 Am. B. R. 604, 235 Fed. 907; *Matter of American Finance & Securities Co.* (Ref., N. J.), 38 Am. B. R. 479. *Contra*: *In re Becker* (Ref., N. Y.), 31 Am. B. R. 596.

146. Judgment founded upon claims for labor are entitled to priority over the claims of all other creditors and to payment in full. *In re Blackstaff Engineering Co.* (D. C., Ga.), 29 Am. B. R. 663, 200 Fed. 1,019, citing *In re Erie Lumber Co.* (D. C., Ga.), 17 Am. B. R. 689, 150 Fed. 817, and *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 224 U. S. 152, 27 Am. B. R. 873, 56 L. Ed. 706, 32 Sup. Ct. 457.

Purpose of section.—Priority of payment of wages under section 64b(4) of the Bankruptcy Act was intended for the benefit only of those who are dependent upon their wages,

and who, having lost their employment by the bankruptcy, would be in need of such protection. *Blessing v. Blanchard* (C. C. A., 9th Cir.), 35 Am. B. R. 135, 213 Fed. 35.

147. *Matter of Haskell* (D. C., N. Y.), 36 Am. B. R. 428, 228 Fed. 819.

148. See also Am. B. R. Dig. § 885.

149. *Matter of Dutcher* (D. C., Wash.), 32 Am. B. R. 545, 213 Fed. 908.

Priority of assignee.—*Shropshire v. Bush*, 204 U. S. 186, 17 Am. B. R. 77, 51 L. Ed. 436, 27 Sup. Ct. 178, holding that "The priority is attached to the debt and not to the person of the creditor; to the claim and not to the claimant;" *In re Fuller & Bennett* (D. C., W. Va.), 18 Am. B. R. 443, 152 Fed. 538. The act of 1898, providing for priority in payment of wages earned within three months of the filing of the petition by workmen, clerks, or servants, not to exceed \$300 to each claimant, causes such priority to attach to the character of claim earned by the designated class and within the period fixed, and not to the character of the claimant who offers to prove such claim, and such priority claims do not lose their status as such, by assignment before the filing of the petition to another than the workman, clerk, or servant who earned them. *Matter of Harmon* (D. C., W. Va.), 11 Am. B. R. 64, 128 Fed. 170.

Borrowing money to pay wages.—In the case of *United Surety Co. v. Iowa Mfg. Co.* (C. C. A., 8th Cir.), 24 Am. B. R. 726, 179 Fed. 55, the court said: "In this case there was no assignment of the claims and none

operating as a novation.¹⁵⁰ Orders drawn upon a company by a bankrupt, and given to his employees, payable in trade, do not, upon payment, constitute an assignment of wages so as to entitle the drawee to priority.¹⁵¹ Where checks are given to laborers for wages earned prior to the employer's bankruptcy, the person who cashes such checks becomes an assignee of the claims represented by such checks and is entitled to priority.¹⁵² If the claim be assigned after being proved, the assignee is subrogated to the priority of the assignor.¹⁵³ A surety may be entitled, through the doctrine of subrogation, to preference in payment of claims which it has discharged.¹⁵⁴ But the mere fact that one pays off a debt at the instance of the debtor or lends money to

was intended by the parties. The transaction consisted simply in the Abadie Company [insolvent] borrowing money from the surety company to pay a debt which, as between the borrower and the lender, was alone owned by the former, and instead of buying the claims from the laborers, and thereby securing some equitable right as against the principal debtor, the surety company took what it conceived to be ample security for the loan, turned over the money to the borrower, and with it the latter paid and extinguished its own debt to the laborers. Their claims, therefore, were not at the time bankruptcy proceedings were instituted against the borrower 'wages due the workmen' within the meaning of the section 64-b(4) of the Bankruptcy Act. Neither were they assigned claims of that kind entitling the assignee to stand in the shoes of the laborers."

Priority personal under prior decisions.—This priority has been held to be personal and where an assignment of the wages took place prior to the filing of the petition no priority was allowed. In *re Westlund* (D. C., Minn.), 3 Am. B. R. 646, 99 Fed. 399. Thus, where, prior to the bankruptcy of a corporation, its employees assign their claims for wages to secure one who advanced the money for their wages, the assignee is not entitled to priority of payment. In *re St. Louis Ice, etc., Co.* (D. C., Mo.), 17 Am. B. R. 194, 147 Fed. 752. But where the assignment took place after the bankruptcy proceedings were commenced it was held that the claims for wages are entitled to priority in the hands of the assignee. In *re Campbell* (D. C., Wis.), 4 Am. B. R. 535, 102 Fed. 686.

150. In *re Fuller & Bennett* (D. C., W. Va.), 18 Am. B. R. 443, 152 Fed. 538.

151. *Stewart & Co. v. McLeod* (C. C. A., 5th Cir.), 34 Am. B. R. 414, 222 Fed. 253.

Goods purchased by orders of bankrupt.—Where a merchant supplied goods to workmen in the employ of the bankrupt, upon orders; of the bankrupt, received as a portion of their wages, and for the amount of such orders remaining unpaid, filed a claim in their own name and asserted a laborers' lien upon the bankrupt's property under a Tennessee statute, and where there had been no assignment of the labor claims to the merchant *pro tanto* by consent or

knowledge of the laborers themselves, but simply a supposition between the bankrupt and claimant that claimant should stand precisely in the shoes of the laborers, in the absence of evidence that the laborers intended to sell and agreed that the lien should be kept alive for the benefit of the purchaser, payment and not an assignment will be presumed. *Browder & Co. v. Hill* (C. C. A., 6th Cir.), 14 Am. B. R. 619, 136 Fed. 821. See also *Bell v. Arledge* (C. C. A., 5th Cir.), 27 Am. B. R. 773, 192 Fed. 837.

152. *Matter of Stultz Brothers* (D. C., N. Y.), 34 Am. B. R. 783, 226 Fed. 989.

Time checks.—Where bankrupts were loggers and failed to pay their men and the owners of the logs paid off the liens to prevent threatened foreclosure, and sale, and the time checks representing each man's claim being turned over to the owners of the logs upon such payment, the transaction amounted to an assignment in fact of such claim and not to a payment and extinguishment, and such claims were entitled to the same right to priority of payment in the hands of such owners as in the hands of the workmen. *Matter of Langley & Alderson* (Ref., Wis.), 24 Am. B. R. 69. Where a bankrupt corporation issued daily time checks to its laborers which were neither dated nor negotiable and a mercantile firm gave merchandise for the checks under an agreement by the bankrupt to pay the same, less 10 per cent., and the checks were not assigned to the mercantile firm and the laborers had no agreement with it, such firm is not entitled to priority in payment of such checks under section 64-b (4) of the Bankruptcy Act, especially where the evidence is insufficient to establish that the checks were for labor performed within three months prior to bankruptcy. *Matter of McGowin Lumber Co.* (D. C., Ala.), 35 Am. B. R. 57, 223 Fed. 553, quoting text with approval.

153. **Subrogation.**—In *re North Carolina Car Co.* (D. C., N. Car.), 11 Am. B. R. 488, 127 Fed. 178; *Matter of Langley & Alderson* (Ref., Wis.), 24 Am. B. R. 69.

154. **Right to be subrogated to priority claims.**—A surety on the bond of a municipal contractor, one of the conditions of which was that the wages of workmen should be paid, who, after the bankruptcy obtains an assignment of claims for wages and pays them, is entitled to subrogation to the rights

pay off such debt does not entitle him to subrogation to the liens of the creditors so paid off.¹⁵⁵

d. **When services performed.**—The labor must have been performed within three months of the filing of the petition, although a different and longer period be prescribed by a State statute.¹⁵⁶ The claim of an infant for wages, earned more than three months before the commencement of bankruptcy proceedings, is not entitled to priority.¹⁵⁷ The holding that, if performed thereafter without actual notice of the bankruptcy, the right to priority exists, seems erroneous;¹⁵⁸ though perhaps such a disbursement could be allowed as an expense of administration. If a labor claim is reduced to judgment within the four months' period, priority may still be asserted if the claimant waives his judgment, but all such rights are lost where the judgment was without the four months' period.¹⁵⁹ The claim must be for wages actually earned within the prescribed time, and a judgment for a breach of a contract of employment based upon an unlawful discharge of the employee is not entitled to priority.¹⁶⁰ The claim of a teamster should be limited to his personal services.¹⁶¹ The words "wages due" include wages owing at the date of bank-

of its assignor and to their right of priority in payment. *Matter of Dutcher* (D. C., Wash.), 32 Am. B. R. 545, 213 Fed. 908.

155. *Brower & Co. v. Hill* (C. C. A., 6th Cir.), 14 Am. B. R. 619, 136 Fed. 821.

156. **Priority confined to wages earned within three months of bankruptcy.**—In *re Rouse* (C. C. A., 7th Cir.), 1 Am. B. R. 234, 91 Fed. 96, revg. s. c., 1 Am. B. R. 231, 91 Fed. 514, and holding that, where a company suspended business on August 31, 1898, owing wages to many workmen, and said company was involuntarily adjudged bankrupt on November 1, 1898, that the workmen, etc., were limited as to their priorities, to the wages earned within three months prior to the filing of the petition in bankruptcy, and they could not under section 67-b(5), which allows the same priorities in bankruptcy as are allowed by State laws, be allowed, as prior claims, wages earned more than three months prior to the filing of the bankruptcy petition, notwithstanding there were two statutes of the State of their residence, one allowing priority in the payment of wages for three months prior to the suspension of business by the employer, and another allowing priority in the payment of any sum earned as wages, no matter at what period.

Where a State statute provides that in all distributions of assets under general assignments for the benefit of creditors, the wages or salaries actually owing to the employees of the assignor for services rendered within one year prior to the execution of the assignment shall be preferred before any other debts, and such an assignment is made within four months prior to the filing of the petition in bankruptcy against the assignor, the priority of a wage claim against the bankrupt estate is confined to wages earned within three months before the commencement of the bankruptcy proceedings. *Matter of Slomka*

(C. C. A., 2d Cir.), 9 Am. B. R. 635, 122 Fed. 630, revg. 9 Am. B. R. 124.

157. In *re Hunteberg* (D. C., N. Y.), 18 Am. B. R. 697, 153 Fed. 768.

158. In *re Gerson* (Ref., Pa.), 1 Am. B. R. 251.

159. In *re Anson* (D. C., Cal.), 4 Am. B. R. 231, 101 Fed. 698; *Matter of Pedlow & Co.* (Ref., N. Y.), 32 Am. B. R. 808.

160. **Damages for breach of contract.**—*Matter of Lewis County* (Ref., R. I.), 12 Am. B. R. 279, holding that, where a salesman employed under a yearly contract is wrongfully discharged after seven weeks of work, sues at once and recovers judgment for breach of such contract, the amount recovered is not wages; hence upon the bankruptcy of the employer within a year, the salesman is not entitled to payment in full for the proportionate part of his judgment, which three months bears to the unexpired period of his term of service.

Where a contract of employment at a fixed salary for a definite time expressly provides that in case the employer, a corporation, should be dissolved before the expiration of the contract, it might at the option of the corporation be declared null and void, and before the expiration of the contract the employer makes a written admission of its inability to pay its debts and its willingness to be adjudged bankrupt upon that ground, the employee is not entitled to prove a claim for damages for an alleged breach of the contract of employment. In *re Sweetser* (C. C. A., 2d Cir.), 15 Am. B. R. 650, 142 Fed. 131.

161. If the claim is for services of teamster with wagon and team, he may have priority only for his personal services. *Matter of Winton Lumber & Mfg. Co.* (Ref., Ky.), 17 Am. B. R. 117.

In Pennsylvania, the earnings of horses and teams, not being preferred under the

ruptcy, even though, by contract between the wage-earner and the bankrupt, payment is to be deferred to a date later than the date of bankruptcy.¹⁶² Payments on account of wages due, made by a bankrupt to certain of his employees within three months of the filing of a petition in bankruptcy, will not be held to reduce the amount of wages earned by them during that period, where the bankrupt was indebted to such employees for services rendered prior thereto to a greater extent than the payments made, and in making such payments gave no direction for their application.¹⁶³

e. Persons entitled to priority.¹⁶⁴—(1) **WORKMEN, CLERKS OR SERVANTS.**—The question as to who is entitled to priority for wages is not, it seems, controlled by the statutory definition of "wage-earner."¹⁶⁵ The words are used in their popular sense, and should be construed to mean just what they are popularly understood to mean;¹⁶⁶ that is, only those who work, labor or serve in a more or less subordinate capacity.¹⁶⁷ Dictionaries should be consulted, as well as cases. The phrase "operative, clerk, or house-servant," in the law of 1867, is thought to be practically equivalent. Cases construing these words will be found in the foot-note.¹⁶⁸ Priority, being given to persons performing services of a certain character, depends upon the character of the services rather than upon the particular mode of employment.¹⁶⁹ A bookkeeper, employed by a bankrupt at a regular salary payable monthly, is a clerk within the meaning of this subdivision.¹⁷⁰ Under the present law, the following have been held not entitled to priority under this subsection: a contractor,¹⁷¹ a

State law, are not preferred under section 64-b(5) of the bankruptcy act, and it being impossible to individuate claimant's earnings and the earnings of his team, no portion of the claim will be allowed. *Spruks v. Lackawanna Dairy Co.* (D. C., Pa.), 26 Am. B. R. 554, 189 Fed. 287.

162. Wages due; deferred payment.—In re Gladding (D. C., R. I.), 9 Am. B. R. 700, 120 Fed. 709, holding that, where a clerk of the bankrupt took two weeks' vacation in accordance with a notice posted in the store and which provided that "it is understood and agreed that employees taking vacations agree that if for any reason employment is severed voluntarily or otherwise before January 1, 1903, the vacation pay will be forfeited," and the employer becomes a bankrupt in October, 1902, such provision must not be converted into an agreement which would deprive the clerk of his ordinary legal status as a creditor.

163. In re Van Wert Machine Co. (D. C., Mass.), 26 Am. B. R. 597, 186 Fed. 607.

164. See also Am. B. R. Dig. §§ 872, 873.

165. Wages, definition.—In re Scanlon (D. C., Ky.), 3 Am. B. R. 202, 97 Fed. 26; In re Gurewitz (C. C. A., 2d Cir.), 10 Am. B. R. 350, 121 Fed. 982; *Blessing v. Blanchard* (C. C. A., 9th Cir.), 35 Am. B. R. 135, 213 Fed. 35. The term "wages," as used in this section, has received a very liberal construction. It includes commissions or other methods of payment. In re Roebuck Weather Strip & Wire Screen Co. (D. C., N. Y.), 24 Am. B. R. 532, 180 Fed. 497.

The term "wage-earner," as defined in § 1 (27) of the act does not appear in this sub-

section, and the definition does not in any way tend to assist in construing the language here used. *American Finance & Securities Co.* (Ref., N. J.), 38 Am. B. R. 479.

166. In re Rose (Ref., Ohio), 1 Am. B. R. 68.

167. Matter of Gay and Sturgis (D. C., Mass.), 36 Am. B. R. 350.

The word "servant," as used in section 64b(4) of the bankruptcy act, giving priority to wages due, should be held to mean a restricted class of subordinate helpers who work for wages, but who are not salesmen, workmen, or clerks. It does not include the manager of a business, although he may also have rendered services as a salesman. *Blessing v. Blanchard* (C. C. A., 9th Cir.), 35 Am. B. R. 135, 213 Fed. 35.

168. In re Pevear, Fed. Cas. 11,053; In re Erie Rolling Mill Co., 1 Fed. 585; In re Waites & Co., 39 Fed. 264.

169. In re New England Thread Co. (D. C., R. I.), 18 Am. B. R. 840, 154 Fed. 742; Matter of Snow Wire Works (Ref., N. Y.), 34 Am. B. R. 152.

170. Bookkeeper.—In re Baumblatt (D. C., Pa.), 19 Am. B. R. 500, 153 Fed. 485; *Bell v. Arledge* (C. C. A., 5th Cir.), 27 Am. B. R. 773, 192 Fed. 837.

Under the act of 1867, Judge Lowell decided that the word included "a person employed for temporary service in adjusting the books and accounts of a bankrupt." *Ex parte Rockett*, Fed. Cas. 11,977.

171. Contractor distinguished from workman.—Where one rendered services to another under an express contract, and the relation established between the parties was

general buyer from jobbers,¹⁷² a manager of a branch broker's office,¹⁷³ an actress,¹⁷⁴ a teamster,¹⁷⁵ a blacksmith shoeing horses and repairing tools in his own shop,¹⁷⁶ a firm, selling the product of a corporation on a commission,¹⁷⁷ a person engaged merely in an incidental agency,¹⁷⁸ and a corporation manager¹⁷⁹ or officer.¹⁸⁰ But if an officer of a corporation performs services which are not connected with his office, he is entitled to priority of payment for such services.¹⁸¹ It has been held that the superintendent of a factory, employed

one of contract involving the employment of capital of the alleged laborer, and the use of his machinery, factory, and the services of his own employees, it was held that the party furnishing such capital, factory, and services of his employees was not a workman, clerk, or servant, within the meaning of subdivision 4, even though he also, in connection with the performance of his contract, rendered some manual service. In re Rose (Ref., Ohio), 1 Am. B. R. 68.

172. A general buyer from jobbers, receiving his pay wholly from the persons for whom he purchases, is not a "workman, clerk or servant" within the meaning of subdivision 4. Matter of Smith (Ref., R. I.), 11 Am. B. R. 646.

173. A manager of a branch broker's office is neither a workman, servant, or clerk. In re Brown (D. C., N. Y.), 22 Am. B. R. 496, 171 Fed. 281. Nor is a manager of a branch store who incidentally sells goods and performs clerical work. In re Greenberger (D. C., N. Y.), 30 Am. B. R. 117, 203 Fed. 583; Blessing v. Blanchard (C. C. A., 9th Cir.), 35 Am. B. R. 135, 213 Fed. 35.

174. An actress, under contract to receive \$5,000 for a four weeks' engagement, is not a "workman" or "servant" within the meaning of this section. Matter of All Star Feature Corporation (D. C., N. Y.), 36 Am. B. R. 655, 231 Fed. 251.

175. A teamster is neither a workman, clerk, or servant, within the meaning of subdivision 4 of the act. Spruks v. Lackawanna Dairy Co. (D. C., Pa.), 26 Am. B. R. 554, 189 Fed. 287; Spruks v. Lackawanna Dairy Co. (D. C., Pa.), 26 Am. B. R. 554, 189 Fed. 287.

One employed to deliver milk at bankrupt's premises with his team, at a fixed price per month, is neither a workman, clerk, or servant within the meaning of subdivision 4 so as to give his claim priority. Spruks v. Lackawanna Dairy Co. (D. C., Pa.), 26 Am. B. R. 554, 189 Fed. 287.

176. The claim of a blacksmith, proprietor of a shop, for the services of himself and men in shoeing horses belonging to a bankrupt corporation and in doing other work, is not entitled to priority. Weaver v. Hugill Shoe & Supply Co. (Ref., Ohio), 16 Am. B. R. 516.

177. Matter of Crawford Woolen Co. (D. C., W. Va.), 34 Am. B. R. 223, 218 Fed. 951.

178. An incidental agency, with no obligation to serve, does not create a claim entitled to priority under subdivision 4. In re Mayer (D. C., Wis.), 4 Am. B. R. 119, 101 Fed. 227.

179. General manager.—A general manager of a bankrupt corporation, having authority to hire and discharge men, and to superintend the salesmen, who himself worked as a salesman, is not entitled to priority under section 64-b(4) nor under a statute of California, giving priority to "miners, mechanics, salesmen, clerks, servants, laborers or other persons for work done or services rendered." Blessing v. Blanchard (C. C. A., 9th Cir.), 35 Am. B. R. 135, 213 Fed. 35.

A general manager and president of a corporation, who, with his wife, owned all but one share of the stock, and who managed the corporation, hired and discharged all employees, and attended to all financial arrangements, and whose salary was fixed by the board of directors, consisting of himself, his wife and his attorney, is not a servant of the corporation entitled to priority under this section. Keyes v. Davis (C. C. A., 9th Cir.), 36 Am. B. R. 884, 231 Fed. 688.

A claimant, who entered the employ of the bankrupt as an accountant, but after a short time actually acted as manager, is not a workman, clerk or servant. Matter of Snow Wire Works (Ref., N. Y.), 34 Am. B. R. 152.

A shop foreman, who was also the treasurer and a director of his employer, and spent an appreciable part of his time in the latter position, is not entitled to priority therefor. Matter of Boston French Range Co. (D. C., Mass.), 37 Am. B. R. 508, 235 Fed. 916.

180. In re Grubbs-Wiley Co. (D. C., Mo.), 2 Am. B. R. 442, 96 Fed. 183; In re Carolina Cooperage Co. (D. C., N. Car.), 3 Am. B. R. 154, 96 Fed. 950; Matter of Metropolitan Jewelry Co. (D. C., N. Y.), 31 Am. B. R. 752, 216 Fed. 385; Arnold v. Knapp (W. Va., Sup. Ct.), 34 Am. B. R. 432, 84 S. E. 895.

Director.—A shop foreman, who was also the treasurer and a director of his employer, and who spent an appreciable part of his time in the latter position, is not entitled to priority therefor. Matter of Boston French Range Co. (D. C., Mass.), 37 Am. B. R. 508, 235 Fed. 916.

181. In re Swain Co. (D. C., Cal.), 28 Am. B. R. 66, 194 Fed. 749, in which it was held that the claim made by one who acted as director and secretary of the bankrupt restaurant corporation for wages for services rendered as steward of bankrupt's restaurant, and in no other capacity, is entitled to priority of payment; Matter of Capital Paint Co. (D. C., Cal.), 38 Am. B. R. 188; In re Crown Point Brush Co. (D. C., N. Y.), 29 Am. B. R. 638, 200 Fed. 882; Blessing v.

to have charge of the factory and superintend the making of paints, is not a workman or servant, although he performs more or less manual labor.¹⁸² On the other hand, it has been held that the superintendent of an automobile shop, who does the same kind of work as the men under him and is subject to the control and direction of the general manager, is a workman, even though he has authority to hire and discharge the men in his department.¹⁸³ The earnings of a professional man, employed primarily because of his ability to advise helpfully, do not constitute "wages" and the man himself is not a "workman, clerk or servant."¹⁸⁴ But a clerk selling goods in a store¹⁸⁵ is entitled to priority, and so is a laborer "working by the piece."¹⁸⁶ So also as to musicians employed by the bankrupt to play in a roof garden;¹⁸⁷ and it has been held that a manager of a store may apply a payment of wages made to him within the three months' period upon wages due before such period, and that he is entitled to priority in the payment of the balance of his claim.¹⁸⁸

Blanchard (C. C. A., 9th Cir.), 35 Am. B. R. 135, 213 Fed. 35; Keyes v. Davie (C. C. A., 9th Cir.), 36 Am. B. R. 884, 231 Fed. 688; Matter of American Finance & Securities Co. (Ref., N. J.), 38 Am. B. R. 479; Matter of Capital Paint Co. (D. C., Cal.), 38 Am. B. R. 188.

182. Matter of Continental Paint Co. (D. C., N. Y.), 34 Am. B. R. 282, 220 Fed. 189.

183. Blessing v. Blanchard (C. C. A., 9th Cir.), 35 Am. B. R. 135, 213 Fed. 35.

184. Mining engineer.—A claim by a mining engineer, employed by the bankrupt at a salary of \$4,000 per annum, payable monthly, to advise and assist the superintendent, is not entitled to priority. Matter of Gay and Sturgis (D. C., Mass.), 36 Am. B. R. 350.

185. A person selling goods in a store is a clerk within the meaning of subdivision 4 and is entitled to priority, but where a person so entitled to priority allows his debtor to retain a portion of his wages under an arrangement to create a fund with which to pay the expenses of a college education, his lien as a wage-earner does not extend to the balance of his wages thus retained. In re Flick (D. C., Ohio), 5 Am. B. R. 465, 105 Fed. 503. See also In re King Co. (D. C., Mass.), 7 Am. B. R. 619, 113 Fed. 120.

186. "Piece worker."—In the case of In re Guarewitz (C. C. A., 2d Cir.), 10 Am. B. R. 350, 121 Fed. 982, the court holding that the claim of a "piece worker" is entitled to priority, said: "It surely could not have been the purpose of Congress to make the method of computation a criterion of priority.

In order to secure priority under this subdivision [subd. 4], the creditor must establish the following facts: First, that he was a workman, clerk, or servant of the bankrupt. Second, that he earned wages within three months prior to the commencement of the proceedings. There is nothing ambiguous about the use of the word 'wages' in this connection. It means the agreed compensation for services rendered by the workmen, clerks or servants of the bankrupt, those who have served him in a subordinate or

menial capacity and who are supposed to be dependent upon their earnings for their present support. Whether their employer has agreed to pay them by the hour, the day, the week, the month, or by the 'job' or piece, is wholly immaterial."

In Pennsylvania a workman has been held to be one who works for others at manual labor, skilled or unskilled, and the reward of his labor is wages, and it is none the less such because it is paid for by the piece. But it is not wages where payment is by the job nor where it is profits on the labor of others, even though the person himself takes part in the work. In re Deutschle & Co. (D. C., Pa.), 25 Am. B. R. 343, 182 Fed. 430. In this case the establishment of the bankrupts was a sash, door and blind factory, and the claimants, under contract with the bankrupts, had charge of two of the factory departments. The men under them were their own, hired and discharged by them, and claimants were paid for the work which their men turned out at so much a piece, and were answerable for it. This work was done at the factory of the bankrupts with the aid of materials and machinery which the bankrupts furnished, the claimants furnishing the required labor. The hours of the men were regulated by the shop whistle and, for the sake of convenience, their wages were taken care of by the bankrupts for the claimants on pay day. It was held that claimants were not "workmen," nor were their earnings "wages" within the meaning of section 64-b (4) of the bankruptcy act.

187. Musicians hired at regular wages by a bankrupt to play on his roof garden are "servants" within the meaning of subdivision 4. In re Calwell (D. C., Ark.), 21 Am. B. R. 236, 164 Fed. 515.

188. In re Andrews (Ref., N. Car.), 19 Am. B. R. 441; Matter of McIntyre Bros. (Ref., Miss.), 21 Am. B. R. 588. But in the absence of specific application to other debts, such payments are to be applied to wages earned during the three months' period. In re Flick (D. C., Ohio), 5 Am. B. R. 465, 105 Fed. 503.

The priority does not exist in favor of an officer of a corporation, who occupies the position of a manager or assistant manager of the corporation's business, although incidentally he keeps the books and performs other services ordinarily performed by a clerk or laborer.¹⁸⁹ Every laborer who actually labors under the authority of the court for the preservation or enhancement of the fund or property in *custodia legis* is entitled to an equitable lien equivalent in effect to that of a *bona fide* purchaser without notice.¹⁹⁰

(2) TRAVELING OR CITY SALESMAN.—The amendment of 1906 has included within the preference the wages earned by a traveling or city salesman, thus nullifying contrary authorities under the former law.¹⁹¹ This amendment is not retroactive, and a claim for such wages filed in a bankruptcy proceeding instituted before said amendment is not entitled to priority.¹⁹² A traveling salesman, as commonly understood, may be defined as a man who travels about the country soliciting orders for goods, which orders are sent to his employer for approval. This is the primary service for which he is employed, and it measures the full extent of his responsibility.¹⁹³ The fact that a claimant, in addition to procuring orders for the bankrupt's goods, supervised their being placed in position, does not take him from the classification of a salesman, his principal business being to procure orders.¹⁹⁴ Likewise, the fact that a

189. *In re Crown Point Brush Co.* (D. C., N. Y.), 29 Am. B. R. 638, 200 Fed. 882.

190. Labor under authority of court.—“Thus, to express it otherwise, a laborer, who by order of the court is employed on property in the hands of the court, as to the existent values in hand, will be paid by the court for the value of his services rendered to that property to which the liens of the creditors attach, and for the benefit of which his services were rendered.” *In re Erie Lumber Co.* (D. C., Ga.), 17 Am. B. R. 689, 700, 150 Fed. 817.

191. *In re Scanlon* (D. C., Ky.), 3 Am. B. R. 202, 97 Fed. 26; *In re Greenwald* (D. C., Pa.), 3 Am. B. R. 696, 90 Fed. 705.

192. *In re Photo Engraving Co.* (D. C., N. Y.), 19 Am. B. R. 94, 155 Fed. 684.

193. Traveling salesman, definition.—*In re New England Thread Co.* (C. C. A., 1st Cir.), 20 Am. B. R. 47, 158 Fed. 788. In this case the court said: “He is not employed or authorized to fix prices. He cannot pass upon the credit or standing of customers. He does not collect accounts. He is not responsible for the quality, condition, or delivery of the goods. He makes no personal contracts, and he has no other interest in the sales than his compensation for those which are approved his employer. But, hile the field of service and responsibility of traveling salesmen is limited, the agreements which they make with their employers vary greatly in such details as the form of compensation, the extent of territory, and in many other particulars. A traveling salesman may be paid a fixed sum per day, week or month, or a yearly salary, or a commission on the amount of goods sold, or both a fixed sum in the form of wages or salary, and, in addition thereto, a commission on the amount of goods sold when the sales exceed a certain

amount. The territory assigned to him may be confined to a single city or State, or it may cover many cities or States. Commonly, the employer pays the salesman's expenses, but sometimes, especially if he works for a commission, he pays his own expenses. Sometimes the employer has a list of customers, and the salesman receives a commission upon all orders sent in by those customers. Sometimes he is allotted a certain territory, and he receives a commission upon all sales which are sent in from that territory. In some cases the employer may direct the routes he is to travel, and in other cases the salesman chooses his own routes. Sometimes the salesman sends the orders directly to his employer, and sometimes the customers themselves send in the orders to the employer. We do not think any of these details takes a man out of the category of traveling salesman.” See also *In re Fink* (D. C., Pa.), 20 Am. B. R. 897, 163 Fed. 135.

194. *In re Roebuck Weather Strip & Wire Screen Co.* (D. C., N. Y.), 24 Am. B. R. 532, 180 Fed. 497. In this case a claim was filed against the estate of a bankrupt under a contract between the bankrupt and the claimant by which it was agreed that the claimant should solicit orders for weather strips, superintend the placing of the same by workmen whom the claimant should select, subject to the approval of the bankrupt, and that bankrupt should pay the wages of the workmen, furnish the material, and out of the price should retain the cost of labor and material and an additional amount of 15 per cent. of the price, turning the balance over to the claimant as his compensation. Claimant claimed priority for compensation due pursuant to said contract under subdivision 4. It was held that the claimant was a wage-earner and not a principal with

traveling salesman had charge of a local office, does not deprive him of priority, where his office management was merely incidental to his work as salesman.¹⁹⁵ A corporation, engaged in selling merchandise for manufacturers, is not a traveling or city salesman within the meaning of this section.¹⁹⁶

VI. DEBTS ENTITLED TO PRIORITY UNDER STATE LAWS.¹⁹⁷

a. **In general.**—Subdivision 5 requires the payment of "debts owing to any person who by the laws of the States or the United States is entitled to priority." Here the practitioner should again bear in mind the rule as to liens, previously stated.¹⁹⁸

b. **Liens under State laws and bankrupt act.**—Where a priority is sought under a State statute it must be determined under the laws of that State.¹⁹⁹ If the State law gives a lien and it continues after bankruptcy, the priority exists in effect though not in name; the property becomes charged with the lien, and § 64, strictly speaking, does not apply. In this connection, too, § 67 on liens avoided by the adjudication should be consulted. It must be remembered, too, that this subdivision has no application where the State statute gives priority to a class already given priority by the bankruptcy law; the bankrupt act not only controls the State law in case of absolute conflict, but by its express regulation of these priorities excludes the State law altogether.²⁰⁰ Subject to these exceptions, if the State law gives the priority, the same must be recognized in the bankruptcy proceedings.²⁰¹ A state statute which gives a lien to employees and materialmen of manufacturing establishments is not unconstitutional as discriminating against those furnishing money or machinery to the same establishments, but is a reasonable classification.²⁰² The bankruptcy act expressly recognizes the existence of State

the bankrupt in its business and that the claim should be allowed priority to the extent of \$300.

Salesman for another concern selling on commissions.—Where a traveling man for another concern, having an agreement with a bankrupt company whereby he was to receive 15 per cent. on monuments sold by him to be paid him when the monument was set up and paid for, makes an agreement for the sale of a monument about ten months before the bankruptcy proceeding, but the monument is not delivered and paid for until the month prior to the bankruptcy proceedings, he is a traveling salesman. *In re National Marble & Granite Co.* (D. C., Ga.), 31 Am. B. R. 80, 206 Fed. 185.

195. *Matter of Gay* (D. C., Mass.), 33 Am. B. R. 898, 188 Fed. 392.

196. *Matter of Herzenstein Bros.* (Ref., N. Y.), 35 Am. B. R. 656.

197. See also Am. B. R. Dig. §§ 874-881.

198. See discussion under this section, ante, subtitle "Priorities versus Liens."

199. *In re Byrne* (D. C., Iowa), 3 Am. B. R. 268, 97 Fed. 762. Text cited in *In re United States Lumber Co.* (D. C., Wash.), 30 Am. B. R. 682, 206 Fed. 236.

200. *In re Lewis* (D. C., Mass.), 4 Am. B. R. 51, 99 Fed. 935; *Matter of Slomka* (C. C. A., 2d Cir.), 9 Am. B. R. 635, 122 Fed. 630; *In re Crown Point Brush Co.* (D. C., N. Y.), 29 Am. B. R. 638, 200 Fed. 882, quoting text.

A state statute cannot override the act of Congress, even if a lien exists under the former at the time when the proceedings in bankruptcy are begun. *In re Consumers' Coffee Co.* (D. C., Pa.), 18 Am. B. R. 500, 151 Fed. 933.

201. Compare *In re Fall City, etc., Co.* (D. C. Ky.), 3 Am. B. R. 437, 98 Fed. 592; *In re Worcester Co.* (C. C. A., 1st Cir.), 4 Am. B. R. 497, 102 Fed. 808; *In re Crow* (D. C., Ky.), 7 Am. B. R. 545, 116 Fed. 110; *In re Potter* (D. C., Ky.), 16 Am. B. R. 26, 143 Fed. 407; *Moore v. Greene* (C. C. A., 4th Cir.), 16 Am. B. R. 648, 145 Fed. 480; *Matter of Spies-Alper Co.* (D. C., N. J.), 36 Am. B. R. 470, 231 Fed. 535. If the State statute gives no lien to a county on the property of a tax collector for moneys collected by him, the county is not entitled to priority of payment out of his bankrupt estate. *In re Waller* (D. C., Md.), 15 Am. B. R. 753, 142 Fed. 883; *In re Iroquois Machine Co.* (D. C., R. I.), 22 Am. B. R. 183, 166 Fed. 629, holding that where an attachment upon a debtor's property is dissolved by his adjudication as a bankrupt, the attaching creditor's claim for costs of the attachment is a debt entitled to priority. As to lien of garnishment, see *Matter of Culnepper* (Ref., Tex.), 31 Am. B. R. 762.

202. *Central Trust Co. v. Lueders & Co.* (C. C. A., 6th Cir.), 34 Am. B. R. 61, 921 Fed. 829. See Kentucky Statutes, § 2487.

statutes, and makes them the basis for allowing priority of payment to certain classes of claims.²⁰³ The priority should be clearly evidenced by some statutory provision, or by a judicial rule so definitely established as to have the force of a statute.²⁰⁴ It seems that a creditor will be allowed the same priority under the bankruptcy act which he would have had, had not the latter act superseded the State laws governing the distribution of estates of insolvent

203. In re Crow (D. C., Ky.), 7 Am. B. R. 545, 116 Fed. 110, 112, approved in In re Bennett (C. C. A., 6th Cir.), 18 Am. B. R. 320, 153 Fed. 673.

204. In re Potter (D. C., Ky.), 16 Am. B. R. 226, 143 Fed. 407. See also Vidal, Petitioner (C. C. A., 1st Cir.), 36 Am. B. R. 783; Gandia & Slubbe v. Cadierno (C. C. A., 1st Cir.), 36 Am. B. R. 789.

Money due from a guardian to his ward, on a settlement of his accounts in a probate court of Kentucky, is entitled to priority from the estate of the guardian in bankruptcy, the statutes of Kentucky providing that in a distribution of insolvent estates, whether on a voluntary or involuntary assignment, or the death of the insolvent, debts due as a guardian shall be paid in full before any payment shall be made to general creditors. (Ky. St., 1903, § 74.) In re Crow (D. C., Ky.), 7 Am. B. R. 545, 116 Fed. 110. But see under the Michigan statute, In re Jones (D. C., Mich.), 18 Am. B. R. 206, 151 Fed. 108.

Costs incurred in an action against the bankrupt prior to bankruptcy, which would constitute a preferred claim under the insolvency laws of Rhode Island, are entitled to priority against the estate in bankruptcy. In re Daniels (D. C., R. I.), 6 Am. B. R. 699, 110 Fed. 745.

A claim for materials supplied to a corporation, being entitled to priority under the laws of Kentucky, has been held to be entitled to priority under the bankruptcy act, although a technical lien had not ripened at the date of the corporation's adjudication in bankruptcy. In re Bennett, Trustee, etc. (C. C. A., 6th Cir.), 18 Am. B. R. 320, 153 Fed. 673, affg. 18 Am. B. R. 847. Such lien does not exist for manufactured goods sold to a manufacturer and jobber, engaged in manufacturing the same goods, and also in selling such goods manufactured by others. In re Starks-Ullman Saddlery Co. (C. C. A., 6th Cir.), 22 Am. B. R. 596, 171 Fed. 834. See also In re Floyd & Behr Co. (D. C., Ky.), 29 Am. B. R. 149, 200 Fed. 1,016.

Priority of unrecorded mortgage.—In Kentucky under a statute providing that no mortgage shall be valid as against creditors until acknowledged or proved according to law and lodged for record, a mortgage acknowledged in 1905, but not recorded until within four months of the mortgagor's adjudication in 1906, is not a valid lien as against creditors whose claims were created while the mortgage was withheld from record, and the mortgagee is not

entitled to priority of payment over such creditors, but in the distribution of the assets should share pro rata with the general creditors. Matter of Doran (D. C., Ky.), 17 Am. B. R. 799, 148 Fed. 327. See also In re Clark Coal & Coke Co. (D. C., Pa.), 23 Am. B. R. 273, 173 Fed. 658. The recording act of Kentucky is ineffective unless an attachment has been sued out by a creditor claiming its benefits; hence an unrecorded mortgage on real estate has priority over the general creditors of a bankrupt where no creditor has attached the land prior to bankruptcy. Matter of Brown (D. C., Ky.), 35 Am. B. R. 826, 228 Fed. 533.

Community property.—In New Mexico, a husband has only a community interest in property acquired by himself or wife during the marriage, and upon the bankruptcy of the husband, community creditors are entitled to priority of payment as to community property. In re Chavez (C. C. A., 8th Cir.), 17 Am. B. R. 641, 149 Fed. 73.

Priority of debts owing by foreign corporation to residents of State out of property in the State, sustained and applied. See In re Standard Oak Veneer Co. (D. C., Tenn.), 22 Am. B. R. 883, 173 Fed. 103.

Priority of mortgage executed prior to four months' period.—Where a real estate mortgage was executed by a bankrupt more than four months prior to the filing of a petition against him for adjudication, it constitutes a valid mortgage against all creditors except such as may have acquired a lien prior to its proper record and is entitled to priority under subdivision 5, unless void under the State law as made with intent to hinder, delay and defraud creditors. Bean v. Orr (C. C. A. 5th Cir.), 25 Am. B. R. 400, 182 Fed. 599, revg. In re Tysor-Cheatham Mercantile Co. (D. C., Ga.), 24 Am. B. R. 434, 178 Fed. 733; Rouse v. Ottenwess & Huxtell (C. C. A., 6th Cir.), 31 Am. B. R. 115, 208 Fed. 881.

Claim by wife for wages.—Under the statutes and law of Alabama, a wife on the bankruptcy of her husband is entitled to a prior claim for wages due under a contract for services in her husband's store. Matter of Davidson (D. C., Ala.), 37 Am. B. R. 480, 233 Fed. 462.

Wages or salary under Washington statute.—The secretary, general manager, and superintendent of a lumber company, whose duties include employing workers, directing sales, overseeing the work, and repairing and adjusting machinery, is not a laborer, within the meaning of Remington & Ballinger's Code of Washington, §§ 1149, 1150,

debtors.²⁰⁵ Thus, a landlord's claim for rent in arrears, being entitled to priority under the State law, is within this subsection.²⁰⁶ And a mechanic's

and 1153, and his claim for salary is not entitled to priority. (See Am. B. R. Digest, § 881.) *Wintermote v. MacLafferty* (C. C. A., 9th Cir.), 37 Am. B. R. 425, 233 Fed. 95.

Priority of labor claims under Ohio code.—Claims for services rendered the bankrupt allowed as preferred claims under section 8339 of the Ohio General Code and section 64-b(5) of the bankruptcy act. *Emerson v. Castor* (C. C. A., 6th Cir.), 37 Am. B. R. 719.

Fraudulent mortgage.—A mortgage, withheld from record until shortly before the date of bankruptcy of the mortgagor for the purpose of bolstering the credit of the mortgagor, and defrauding his creditors, should not be allowed priority. *Fourth Nat'l Bank v. Willingham* (C. C. A., 5th Cir.), 32 Am. B. R. 159, 213 Fed. 219.

Caption of mortgage wrong.—A mortgage executed by a bankrupt in good faith, attested in compliance with the law of Georgia, and, through a mistake, bearing a caption for the wrong county, but recorded in the proper county, is valid and entitles the mortgagee to priority of payment. *Matter of Williams* (D. C., Ga.), 35 Am. B. R. 459, 224 Fed. 984.

Customers of bankrupt stockbrokers who have traced their stock specifically and hold the same free and clear, are in a preferred class, and if the equity of a loan to the bankrupt for which the stock had been pledged is insufficient, the deficiency must be borne by the other customers provided they held their stocks on a margin. *Matter of Pierson, Jr. & Co.* (D. C., N. Y.), 35 Am. B. R. 213, 225 Fed. 889.

205. In re *Jones* (D. C., Mich.), 18 Am. B. R. 206, 151 Fed. 108; In re *Chandron & Peyton* (D. C., Md.), 24 Am. B. R. 811, 815, 180 Fed. 841, citing *Collier on Bankruptcy* (7th Ed.), p. 742.

206. Lien for rent.—*Matter of Pittsburg Drug Co.* (D. C., Pa.), 20 Am. B. R. 227, 164 Fed. 482; In re *Sapinsky & Sons* (D. C., Ky.), 30 Am. B. R. 416, 206 Fed. 523; *Matter of Mt. Winans Lumber Co.* (D. C., Md.), 36 Am. B. R. 263, 228 Fed. 831.

Upon the adjudication of a tenant in a jurisdiction where the landlord has by statute a preferred lien upon the tenant's chattels on the leased premises, the landlord's claim for the rent due at the adjudication is entitled to priority of payment from the proceeds of a sale of said chattels. In re *Bishop* (D. C., S. Car.), 18 Am. B. R. 635, 153 Fed. 304.

A claim for future accruing rent will not be given effect under sections 67-d and 64-b of the bankruptcy act, by virtue of article 3251 of the Revised Statutes of Texas which provides that the lessor should have a lien for rent due or to become due on the property of the tenant in the building for the

period of the current contract year, "it being intended by the term 'current contract year' to embrace a period of twelve months, reckoning from the beginning of the lease or rental contract," the "current contract year" mentioned in the statute having expired on the date the petition was filed. *Matter of Sterne & Levi* (Ref., Tex.), 26 Am. B. R. 535.

Under the Iowa statute (Code, § 2992), enacting that a landlord shall have a lien for his rent upon any personal property of the tenant used or kept on the leased premises, for one year after a year's rent, or the rent for a shorter period, falls due the lien of a landlord, as between him and a tenant, is given priority in all cases. In re *Hersey* (D. C., Ia.), 22 Am. B. R. 860, 171 Fed. 998.

Under the Pennsylvania statute, a landlord is entitled to priority of payment not exceeding the rent for one year, and this preference will be recognized by a court of bankruptcy. In re *West Side Paper Co.* (D. C., Pa.), 20 Am. B. R. 289, 293, 159 Fed. 241; *Ludlow v. Pugh* (C. C. A., 3d Cir.), 32 Am. B. R. 435, 213 Fed. 450, affg. *Matter of Keith-Gara Co.* (D. C., Pa.), 29 Am. B. R. 466, 203 Fed. 585. But where a landlord makes no objection to a sale in bulk of a bankrupt tenant's stock and lease, and accepts the purchaser as a tenant, the landlord's claim for priority of payment, from the proceeds of the sale, for a balance of rent which had accrued before the filing of the petition in bankruptcy is properly disallowed. *Vollmer v. McFadgen* (C. C. A., 3d Cir.), 20 Am. B. R. 540, 161 Fed. 914, affg. 19 Am. B. R. 481; *Matter of Quality Shoe Shop*, (D. C., Pa.), 34 Am. B. R. 196, 212 Fed. 321.

The landlord's lien is prior to the claim of execution creditors to the proceeds of the sale of goods of the tenant, although they were under levy by the sheriff at the time of the filing of the petition in bankruptcy. *Matter of Gerrow* (D. C., Pa.), 37 Am. B. R. 14, 233 Fed. 841.

Georgia code.—The general lien of a landlord under the Georgia Code is not created by the levy of a distress warrant but arises out of the relation of landlord and tenant, and hence, his claim for rent is entitled to priority upon the bankruptcy of the tenant over the levy of a distress warrant. *Matter of City Drug Store* (D. C., Ga.), 35 Am. B. R. 335, 224 Fed. 132. Under the Georgia Code mortgage lien holders with duly recorded mortgages are entitled to priority over a landlord's general lien for rent, with long-after-issued distress warrant. *Precetorius v. Anderson* (C. C. A., 5th Cir.), 38 Am. B. R. 93.

Priority over wage earners.—Where, just prior to adjudication of bankruptcy, the landlord distrained for rent in arrears, priority will be given over wage earners, where the

lien is valid as against the trustee although notice of the lien was filed after the adjudication in bankruptcy; the State statute must be recognized which gives the creditor a specified time after the materials were furnished within which the lien may be perfected.²⁰⁷ The repeal of a statute giving a lien for materials furnished does not affect the right of priority as to materials furnished before the repeal, even though the statute was repealed before adjudication.²⁰⁸ A collusive assignment of mechanics' liens for the benefit of the bankrupt will not be allowed.²⁰⁹ While the priority of a landlord's lien, given under the State statute, is undoubtedly preserved by clause *b* (5) of § 64, this priority is not over all other claims whatever, but only over those that are not specified in the section as being even higher in right.²¹⁰ Where a conditional vendor has no priority over judgment creditors without notice, the order of payment provided for in subdivision 5 is not interfered with by not allowing such conditional vendor priority of payment.²¹¹ If a State

funds are insufficient to pay both classes of creditors. *Matter of Mock* (D. C., Miss.), 35 Am. B. R. 9, 228 Fed. 94.

New Jersey Landlord and Tenant Act.—Under this section and the New Jersey Landlord and Tenant Act, which provides that no chattels lying upon leased premises shall be liable to be taken by any process unless before the renewal the accrued rent shall be paid, and giving the landlord the right to distrain the goods of the tenant on the demised premises for rent, a landlord, although he has not distrained for rent, has a prior claim for rent subject to the costs against the bankrupt tenant. *Matter of Braus* (D. C., N. Y.), 37 Am. B. R. 594, 233 Fed. 835.

The landlord is merely entitled to a preference in payment out of the tenant's goods and chattels on the demised premises over other creditors, including those holding executions who are not lien holders. *Matter of Spies-Alper Co.* (D. C., N. J.), 36 Am. B. R. 470, 231 Fed. 535.

207. *Hildreth Granite Co. v. Watervliet* (N. Y. App. Div.), 31 Am. B. R. 703, 161 N. Y. App. Div. 420, 146 N. Y. Supp. 449.

208. *Louisville Woolen Mills v. Johnson* (C. C. A., 6th Cir.), 37 Am. B. R. 67, 228 Fed. 606.

209. **Collusive assignment of mechanics' liens to sons of bankrupt for benefit of bankrupt.**—Two sons of a bankrupt father, who clerked for him, and knew of his financial extremity, a day or two before he executed an assignment for the benefit of creditors bought up mechanics' liens against the bankrupt's store building to the amount of \$2,000, all but one of which were subject to set-offs on book accounts for material sold by the bankrupt out of the store to the original claimants, amounting to nearly \$1,800, and with the money the original claimants paid the bankrupt the book accounts. It was not pretended that the liens were bought up by the sons to relieve their father from financial pressure, nor to protect their individual interests. They did not buy at a discount, so as to make it an in-

ducement, nor did they satisfactorily show that they purchased with their own money, the property of one son being heavily mortgaged and the other son being only a few years out of college. It was held that instead of the account being used by set-off to reduce the claims to about \$200, leaving that much more derivable from the real estate by the creditors, the real estate was allowed to continue burdened with liens amounting to \$2,000; that it was a collusive scheme between the father and sons to enable the father to realize on the book accounts, which were thus withdrawn from the reach of creditors; and that the liens were not valid in the hands of the sons as against the creditors except the one claim against which there was no book account to set-off. *In re Kyte* (D. C., Pa.), 25 Am. B. R. 337, 182 Fed. 166.

210. *In re Consumers' Coffee Co.* (D. C., Pa.), 18 Am. B. R. 500, 151 Fed. 933.

Cost of administration.—Since the words "of estates" and "bankruptcy estates" as used in sections 62 and 64-b respectively relating to the payment of costs of administration, refer to the unincumbered assets generally as distinguished from property upon which there is a specific lien, only such costs as are necessarily incident to the preservation of the particular estate, its conversion into money, and payment thereof to the lienor, are entitled to payment in preference to the landlord's lien for rent. *Matter of Rauch* (D. C., Va.), 36 Am. B. R. 75, 226 Fed. 982.

211. **Priority of conditional vendor.**—Where under the State law a conditional vendor has no priority over judgment creditors without notice, and since section 47-a (2), as amended in 1910, places the trustee in bankruptcy in this class, the conditional vendor has no priority and the order of payment provided by section 64 is not interfered with by not allowing the conditional vendor priority of payment. *In re Bazemore* (D. C., Ala.), 26 Am. B. R. 494, 189 Fed. 236; *In re Calhoun Supply Co.* (C. C., Ala.), 26 Am. B. R. 528, 189 Fed. 537. Before the amendment to the bankruptcy act, the trustee's title

statute gives a lien for wages or services, and the persons entitled to the lien fall within the clause as to priority of claims therefor, the extent of the lien is limited by the provisions of the bankruptcy act.²¹²

c. Priority of debts due the State.—A State is a “person” within the meaning of this clause, and a debt due to a State which is entitled to priority under its insolvency laws is entitled to priority against the debtor’s estate in bankruptcy.²¹³ But in the case of a debt due the State, the priority must be created by a State law of the same general character as the bankruptcy act.²¹⁴ A debt due the State on a judgment for a fine is not entitled to priority.²¹⁵

d. Conflicting or overlapping State priorities.—An interesting question which thus far has received little attention is, the effect of § 64-b (5) where the State statute gives priority to a class or for a purpose specified in the other subdivisions of § 64-b. On principle, it would seem that where the Federal statute prescribes a class as entitled to priority, as “workmen, clerks or servants,” no overlapping State statute having the same purpose but defining the class in different words should apply.²¹⁶ Thus, it has been well said by Judge Lowell: “Where both a State law and the bankrupt act give priority to the same class of debts, the bankrupt act not only controls the State law in case of absolute conflict between the two, but, by its express regulation of these

as against a claim under an unrecorded conditional sale, though the State law required record, did not prevail. *Crucible Steel Co. v. Holt* (C. C. A., 6th Cir.), 23 Am. B. R. 302, 174 Fed. 127. It was to obviate this, among other things, that section 47, clause 2, subdivision a, of the act was amended by inserting the words “And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon.”

Under the law of Kentucky, the sale of a computing scale to a bankrupt upon a contract, which was never recorded, providing that title should remain in the vendor until the agreed price was fully paid, constitutes a sale and mortgage back to the vendor to secure the price, and the vendor has a preferred claim as against the scale or its proceeds under subdivision 5 of this section of the bankruptcy act. *In re Lausman* (D. C., Ky.), 25 Am. B. R. 186, 183 Fed. 647.

212. *Matter of Crawford Woolen Co.* (D. C., W. Va.), 34 Am. B. R. 223, 218 Fed. 951.

213. *In re Western Implement Co.* (D. C., Minn.), 22 Am. B. R. 167, 166 Fed. 576, *affd.* 171 Fed. 81, 96 C. C. A. 185.

214. State statutes requiring debts of insolvents to be paid to State.—In the case of *In re Devlin* (D. C., Kan.), 24 Am. B. R. 863, 180 Fed. 170, the judge said: “It is not thought that provision of the statutes of the State which requires all debts due the State to be paid as a claim of the third class out of the estate of a deceased person is a law of such general nature or so related to the sub-

ject in hand that it can be given weight here in determining the right of the State to priority of payment of its demands arising under the provisions of clause 5, § 64-b, of the Bankruptcy Act.” This question was expressly ruled upon by the circuit court of appeals for the first circuit in *Derby v. Worcester County* (C. C. A., 1st Cir.), 4 Am. B. R. 496, 102 Fed. 808, 42 C. C. A. 637, where Judge Putnam, delivering the opinion of the court, said: “We are unable to conceive of any priority to which any one may be entitled by the laws of a State, under section 64 of the Bankruptcy Act, unless it be a priority created by insolvent laws of that character. It is true that priorities are often created by State statutes relating to the administration of estates of deceased persons, and also to proceedings for winding up corporations; but such laws are not of that general character which can be supposed to be within the purview of the provision of the Bankruptcy Act which is concerned here. Of course statutes touching assignments for the benefit of creditors must be classed with insolvency laws, strictly so called. It is settled that State insolvency laws are not annulled by the enactment of a Bankruptcy Act, and that the only effect of such enactment is to suspend their operation, so that they become operative again, without re-enactment when the Bankruptcy Act is repealed.” *Butler v. Gorely*, 146 U. S. 303, 36 L. Ed. 981, 13 Sup. Ct. 84.

215. *In re Alderson* (D. C., W. Va.), 3 Am. B. R. 544, 98 Fed. 588.

216. Thus, see *In re Rouse* (D. C., Ill.), 1 Am. B. R. 231, 91 Fed. 514; *In re Union Planing Mill*, 2 N. B. N. Rep. 384; *In re Shaw* (D. C., Pa.), 6 Am. B. R. 501, 109 Fed. 782.

priorities, excludes the State law altogether."²¹⁷ This distinction seems sometimes to have been overlooked.²¹⁸

e. **Liens.**—As previously stated, mere liens are not priorities. They stand or fall as liens, as where under a statute a distress for rent creates a lien upon the property distrained, the lessor has no lien upon the property if the proceeding was instituted after the lessee was adjudicated a bankrupt, but is entitled to his rent as a preferred claim out of the proceeds of the sale of property.²¹⁹ Other cases illustrating this distinction will be found in the foot-note.²²⁰

f. **Attorney's liens.**—Liens of attorneys on the proceeds of litigations instituted prior to bankruptcy, have been recognized, as where an attorney foreclosed a mechanic's lien for a debtor prior to his bankruptcy, and the amount recovered was turned over to his trustee, it was held that the attorney was entitled to reasonable compensation out of the proceeds of the recovery.²²¹

²¹⁷. In re Lewis (D. C., Mass.), 4 Am. B. R. 51, 99 Fed. 935.

²¹⁸. See in re Byrne (D. C., Iowa), 3 Am. B. R. 268, 97 Fed. 762; In re Lawler (D. C., Wash.), 6 Am. B. R. 184, 110 Fed. 135.

²¹⁹. In re Cramond (D. C., N. Y.), 17 Am. B. R. 22, 145 Fed. 966; Mott v. Wissler Mining Co. (C. C. A., 4th Cir.), 14 Am. B. R. 321, 135 Fed. 697; In re Austin (D. C., Hawaii), 13 Am. B. R. 136, 2 U. S. (D. C., Hawaii), 210; In re Thackara Mfg. Co. (D. C., Pa.), 15 Am. B. R. 258, 140 Fed. 126; Matter of Federal Biscuit Co. (C. C. A., 2d Cir.), 33 Am. B. R. 273, 218 Fed. 753.

Where property was converted by a bankrupt prior to adjudication and mingled with the other assets, the trustee takes such assets subject to the claim of the owner of the property converted, and such owner is entitled to priority of payment from the proceeds of the sale thereof. Erie Railroad Co. v. Dial (C. C. A., 6th Cir.), 15 Am. B. R. 559, 140 Fed. 689.

Equitable assignment.—A legatee assigned his interests in the estates of his father and grandfather as security for the payment of certain notes and thereafter certain other creditors having attached his interest in said estates, the assignee wrote a letter approved by such legatee, to the attorney for the attaching creditors agreeing that after payment of his debts, costs and expenses, the assignee would pay the claims of such attaching creditors "from the money coming into (their) hands on account of" said assignor; whereupon the attachment was withdrawn. Subsequently such legatee went into bankruptcy. It was held that said assignment was a mortgage only, and that the promise of the assignee was merely to pay over any excess which might come into its hands, and did not operate as an equitable assignment of the fund, nor give said attaching creditors any preference in payment out of such fund in the hands of the trustee in bankruptcy. In re Ballantine (C. C. A., 3d Cir.), 26 Am. B. R. 275, 186 Fed. 91.

Lien on distrainable assets.—In re Duble (D. C., Pa.), 9 Am. B. R. 121, 117 Fed. 794; In re Bourlier Cornice & Roofing Co. (D. C., Ky.), 13 Am. B. R. 585, 133 Fed. 958.

In Pennsylvania when the intention to so consider them is made clear in the contract between lessor and lessee, sums by way of taxes, etc., will be considered as rent and may be distrained for by the landlord and are entitled to preference over liens by execution or otherwise. In such a case the lessor upon filing a claim against the bankrupt lessee is entitled to priority over general creditors for the whole amount of rent due, including taxes. McCann v. Evans (C. C. A., 3d Cir.), 26 Am. B. R. 47, 185 Fed. 93.

In determining whether a landlord is entitled to priority of payment for rent in arrears, the sole question is whether, under the State law of the State in which the property is situated, the rent is under such circumstances a preferred claim. Thus, where, at the time of adjudication, the bankrupt owed rent which was then due and in arrears, and there were at the time of such adjudication distrainable goods on the premises, the landlord, not having distrained for rent before the filing of the bankruptcy petition, was not entitled to a landlord's lien under the Maryland law, and so could not have a preferred claim in bankruptcy out of the proceeds of sale of the goods by the trustee, by filing a petition with the bankruptcy court asking for preferential payment or in the alternative for permission to distrain on the said goods. In re Chandron & Peyton (D. C., Md.), 24 Am. B. R. 811, 180 Fed. 841.

²²⁰. In re Kerby-Dennis Co., 95 U. S. 116, 2 Am. B. R. 402; In re Lowensohn (D. C., N. Y.), 4 Am. B. R. 79, 101 Fed. 776; In re Emalie (C. C. A., 2d Cir.), 4 Am. B. R. 126, 102 Fed. 291; In re Mitchell (D. C., Del.), 8 Am. B. R. 324, 116 Fed. 87.

²²¹. Matter of Coney Island Lumber Co. (D. C., N. Y.), 34 Am. B. R. 563, 199 Fed. 803.

g. Fees and expenses of general assignees and receivers and their attorneys.—

A general assignment for the benefit of creditors is not in itself a fraudulent act although it is an act of bankruptcy, and if such an assignment be honestly made for the purpose of applying all the assignor's property to the payment of his debts, the assignee who accepts the trust in good faith and executes it intelligently, successfully and honestly, is entitled to be paid a fair and reasonable compensation for his services and those of his attorneys, out of the assets turned over by him to the trustee in bankruptcy of his assignor.²²² But it must appear that the services rendered were an actual benefit to the estate,²²³ and that the assignment was not made for the purpose of avoiding inevitable bankruptcy.²²⁴ If the assignment be actually fraudulent, and the assignee be a party to the fraud, he has no right to priority in bankruptcy proceedings,²²⁵ nor, indeed, to prove a claim as a general creditor. There are rulings to the effect that if an assignee has been permitted by the court to retain possession of the property assigned from the filing of the petition in bankruptcy until the adjudication, he is entitled to compensation as a *quasi* receiver.²²⁶ The United States Supreme Court has disapproved the doctrine, that a general assignment for creditors, valid under a State statute, is constructively fraudulent, and has held that a claim for services rendered by or for an assignee, which were beneficial to the estate, is entitled to priority of payment, and that a charge for preparing the necessary papers for the assignment is a provable debt, but that a charge for services in resisting an adjudication in bankruptcy against the assignor is not provable.²²⁷ There is, perhaps, a distinction between a corporation which cannot file a voluntary petition and one which can; but the distinction may be overcome by recalcitrancy, evidencing an intent to deprive creditors of rights given them by the Federal laws.²²⁸ The same test would doubtless determine the right of a receiver of an insolvent corporation²²⁹—he being technically named by the State court—to the fees allowed by the State law; though since such a receivership is now an act of bankruptcy,²³⁰ the strict rule applicable to

^{222.} *Summers v. Abbott* (C. C. A., 8th Cir.), 10 Am. B. R. 254, 122 Fed. 36; *In re Pattee* (D. C., Conn.), 16 Am. B. R. 480, 143 Fed. 994; *In re Hersey* (D. C., Iowa), 22 Am. B. R. 856, 171 Fed. 998.

Costs in an attachment, which was dissolved under § 67-f and was of no benefit to the bankrupt estate should not be allowed as a preferred claim under § 64-b, subd. 1 or subd. 5. *Matter of Rood* (Ref., Minn.), 34 Am. B. R. 273.

^{223.} *In re Zier & Co.* (D. C., Ind.), 11 Am. B. R. 527, 127 Fed. 399; *In re Allison Lumber Co.* (D. C., Ga.), 14 Am. B. R. 78, 137 Fed. 643.

^{224.} *Matter of Congdon* (D. C., Minn.), 11 Am. B. R. 219, 129 Fed. 478, affd. 15 Am. B. R. 46, 142 Fed. 102, citing *Collier on Bankruptcy* (4th ed.), p. 464.

^{225.} *In re McCauley*, 2 N. B. N. Rep. 1089; *Stearnes v. Flick* (D. C., Ohio), 4 Am. B. R. 723, 103 Fed. 919; *Wilbur v. Watson* (D. C., R. I.), 7 Am. B. R. 54, 111 Fed. 493; *In re Chase* (C. C. A., 1st Cir.), 10 Am. B. R. 677, 124 Fed. 753; *Matter of Harson* (Ref., R. I.), 11 Am. B. R. 513. For case of doubtful authority where fees

paid were not disturbed, see *In re Scholtz* (D. C., Iowa), 5 Am. B. R. 782, 106 Fed. 834.

^{226.} *Matter of Harson* (Ref., R. I.), 11 Am. B. R. 514; *Matter of Gladding Co.* (Ref., R. I.), 9 Am. B. R. 171.

^{227.} *Randolph v. Scruggs*, 190 U. S. 533, 10 Am. B. R. 1, 47 L. Ed. 1165, 23 Sup. Ct. 710; *Summers v. Abbott* (C. C. A., 8th Cir.), 10 Am. B. R. 254, 122 Fed. 36.

^{228.} See *In re Lock-Stub Check Co.* (Ref., N. Y.), 5 Am. B. R. 106-n; *In re Peter Paul Book Co.* (D. C., N. Y.), 5 Am. B. R. 105, 104 Fed. 786.

^{229.} Compare *Mauran v. Crown, etc., Co.* (Sup. Ct., R. I.), 6 Am. B. R. 734, 50 Atl. 331, 23 R. I. 324.

Claim for debts incurred by receiver of private corporation.—Debts incurred by the receiver of a private corporation, not in preserving its property but in operating and adding to it, will not be allowed priority over the claims of bondholders of the corporation having liens on its property. *In re Benwood Brewing Co.* (D. C., W. Va.), 29 Am. B. R. 759, 202 Fed. 326.

^{230.} See Bankr. Act, § 3-a (4), as amended in 1903.

general assignees may apply instead. But if the fees have been actually paid to the assignee, before notice of bankruptcy or in pursuance of an order of a court, the trustee in bankruptcy cannot proceed to collect summarily; he must collect by suit.²³¹ So, the right of a trustee to retain a part of the assets of an estate as compensation for services rendered and expenses incurred prior to the bankruptcy in attempting to effect a composition with the creditors, may not be determined by a summary order, but the trustee must bring a plenary suit to determine the rights of the parties.²³² What goes before does not, of course, apply where the assignment or receivership is more than four months before the bankruptcy; in such a case, the administration continues in the State court.

h. Sheriff's fees.—One of the most difficult questions which has arisen under the present law is whether a sheriff has priority for his fees and disbursements after the property seized by him vests, clear of the lien of the execution or attachment, in the bankrupt's trustee. As a rule, a sheriff must proceed under an execution or warrant of attachment delivered to him; in case he seizes, he must insure and safely keep the property; he may be liable in damages if he fails so to do. Yet, if the lien of his attachment or execution is avoided by a bankruptcy within four months, he is obliged to surrender to the trustee, and, it has been claimed, without right even to reclaim his disbursements.²³³ On the other hand, the creditor represented by the sheriff was probably seeking to obtain an advantage,²³⁴ and the general creditors should not be compelled to pay his bill. Thus, if the lien creditor or his attorney is not financially responsible, the sheriff may fall between two stools. The equities—of the sheriff on the one hand and of the general creditors on the other—are equally strong, though the rules discussed in the two previous paragraphs do not apply, the sheriff not being a willing party to a fraud on the law as are usually a general assignee and his attorney. The question is not yet authoritatively settled. Cases under the former law quite uniformly went against the sheriff.²³⁵ Those under the present law quite evenly balance.²³⁶ It is impossible, however, to distinguish them; it is only possible to suggest therefrom the following tests which, when applied to a given case, may aid in determining the sheriff's right to payment in full: (1) has the sheriff a lien for his fees at the time the petition is filed; (2) if so, is it a lien that survives the bankruptcy? In either event, the property comes to the trustee charged with such lien and the sheriff's fees, must be

²³¹ *Comingor v. Louisville Trust Co.*, 184 U. S. 18, 7 Am. B. R. 421, 46 L. Ed. 413, 22 Sup. Ct. 293. Compare *In re Klein & Co.* (D. C., N. Y.), 8 Am. B. R. 559, 116 Fed. 523.

²³² *In re Hersey* (D. C., Iowa), 22 Am. B. R. 856, 171 Fed. 998.

²³³ *In re Young* (D. C., N. Y.), 2 Am. B. R. 673, 96 Fed. 606.

Fees of a sheriff, accruing on a writ of attachment founded on a provable debt and issued before the commencement of proceedings in bankruptcy, are entitled to priority of payment, where such priority is given under the Massachusetts insolvency laws. *In re Lewis* (D. C., Mass.), 4 Am. B. R. 51, 99 Fed. 935.

²³⁴ See, generally, under Sections Sixty and Sixty-seven of this work.

²³⁵ *In re Davis*, Fed. Cas. 3,616; *Zeiber*

v. Hill, Fed. Cas. 18,206; *In re Fortune*, Fed. Cas. 4,955; *In re Preston*, Fed. Cas. 11,394; *In re Jenks*, Fed. Cas. 7,276; *In re Ward*, Fed. Cas. 17,145; *In re Hatje*, Fed. Cas. 6,215. Apparently *contra*: *In re Housberger*, Fed. Cas. 6,734; *Platt v. Stewart*, Fed. Cas. 11, 220; *In re Foster*, Fed. Cas. 4,960.

²³⁶ *In re Lewis* (D. C., Mass.), 4 Am. B. R. 51, 99 Fed. 935; *In re Beaver Coal Co.* (C. C. A., 9th Cir.), 7 Am. B. R. 542, 113 Fed. 889, affg. s. c., 6 Am. B. R. 404, 107 Fed. 98; *In re Young* (D. C., N. Y.), 2 Am. B. R. 673, 96 Fed. 606; *In re Allen* (D. C., Cal.), 3 Am. B. R. 38, 96 Fed. 512; *Matter of Moncrief Mfg. Co.* (Ref., R. I.), 31 Am. B. R. 674. For a review of the cases, see *In re Jennings* (Ref., N. Y.), 8 Am. B. R. 358.

paid. Or, if the sheriff has no lien or it is avoided by the bankruptcy, (3) is there any State statute that gives the sheriff a priority? If not, his claim to priority for his fees will be disallowed. It is important to note that a sheriff's lien or priority may exist and yet the creditor's fail. In the ultimate analysis, the question turns solely on what the State law is.

i. **Sheriff's disbursements.**—These may sometimes be paid when his fees are not. This, however, is also on the theory that he is a custodian or that his service has been beneficial to the estate, *i. e.*, under § 64-b (1).²³⁷ The cases under the law of 1867 are quite numerous and are still authorities.²³⁸

j. **Other illustrative cases.**—As will be noticed from the cases cited there is some confusion in the cases and they cannot always be reconciled.²³⁹ Special deposits in banks and trust funds in the hands of bankrupts are, under some circumstances, entitled to priority of payment; but a treasurer of a municipal corporation who, under authority of law, deposits public moneys in a bank which becomes bankrupt, is not a special depositor entitled to be first paid out of the funds of the estate.²⁴⁰ State statutes frequently accord to creditors maintaining actions, in behalf of all creditors, to set aside trust deeds and transfers of insolvent debtor's property, preferences by lien or otherwise upon the property affected; in such cases the liens or priorities are to be preserved, and the creditors are entitled to priority of payment.²⁴¹ An award by a State industrial commission against a bankrupt, for personal injuries to an employee, is not entitled to priority under this subdivision, taken in connection with a State law providing that the right of compensation given shall have the same preference or lien against the assets of the employer as allowed by law for a claim for unpaid wages.²⁴²

²³⁷ Compare *In re Lengert Wagon Co.* (D. C., N. Y.), 6 Am. B. R. 535, 110 Fed. 927; *In re Francis-Valentine Co.* (C. C. A. 9th Cir.), 2 Am. B. R. 522, 94 Fed. 793.

²³⁸ *In re Fortune*, Fed. Cas. 4,955; *In re Ward*, Fed. Cas. 17,145; *In re Jenks*, Fed. Cas. 7,276; *Zeiber v. Hill*, Fed. Cas. 18,206; *In re Holmes*, Fed. Cas. 6,631.

²³⁹ *In re Wright* (D. C., Mass.), 2 Am. B. R. 592, 95 Fed. 807; *In re Goldstein* (Ref., Pa.), 2 Am. B. R. 603; *In re Daniels* (D. C., R. I.), 6 Am. B. R. 699, 110 Fed. 745; *In re Matthews* (D. C., Ark.), 6 Am. B. R. 96, 109 Fed. 603; *In re Meyers* (D. C., Pa.), 4 Am. B. R. 536, 102 Fed. 869; *Central Trust Co. v. Lueders & Co.* (C. C. A., 6th Cir.), 34 Am. B. R. 61, 221 Fed. 829.

²⁴⁰ **Priority of bank deposits.**—*In re Smart* (D. C., Ohio), 14 Am. B. R. 672, 136 Fed. 974. See also *Deere Plow Co. v. McDavid* (C. C. A., 8th Cir.), 14 Am. B. R. 653, 137 Fed. 802; *In re Brunsing, Tolle & Postal* (D. C., Cal.), 22 Am. B. R. 129, 169 Fed. 668, holding that the special deposit or trust property must be traced into the hands of the trustee as part of the bankrupt's estate.

²⁴¹ *In re Goldberg* (D. C., Me.), 16 Am. B. R. 521, 144 Fed. 566; *Moore v. Green* (C. C. A., 4th Cir.), 16 Am. B. R. 648, 145 Fed. 480.

²⁴² *Matter of Rockaway Soda Water Manufacturing Co.* (D. C., N. Y.), 36 Am. B. R. 640.

SECTION SIXTY-FIVE.

DECLARATION AND PAYMENT OF DIVIDENDS.

§ 65. **Declaration and Payment of Dividends.**—*a* Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.

b The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed, equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order: *Provided, That the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed: And provided further, That the final dividend shall not be declared within three months after the first dividend shall be declared.**

c The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends.

d Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such court shall be paid any amounts.

e A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this act.

* Amendments of 1903 in italics.

Analogous provisions: In U. S.: As to first and subsequent dividends, Act of 1867, §§ 27, 28, R. S., §§ 5092, 5093; Act of 1841, § 10; Act of 1800, §§ 29, 30; As to filing accounts preparatory to final dividend, Act of 1867, § 27, R. S., § 5096; As to rights of creditors whose claims are allowed after first dividend, Act of 1867, § 28, R. S., § 5097; Act of 1841, § 10.

In Eng.: Act of 1883, §§ 58-63; General Rules 232-234, 273 (11) (12).

Cross-references: To the law: Referees to declare dividends and to prepare and deliver dividend sheets to trustees, § 39-a(1).

Payment of dividends by trustees by check or draft, § 47-a(4); payment within ten days after declaration, § 47-a(9).

Final meeting of creditors when estate is closed, § 55.

Proof and allowance of claims, § 57.

Notice to creditors of declaration and time of payment of dividends, § 58-a (5).

Unclaimed dividends to be paid into court, § 66.

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See also Supplementary Forms; Hagar and Alexander's Bankruptcy Forms.

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I. DIVIDENDS GENERALLY.

a. **Comparative legislation.**—The English law is and our law of 1867 was far more elaborate in their provisions on this subject. Some useful suggestions will be found in them.¹ The present section differs from those of the former law chiefly in being more elastic. Dividends may now be declared at irregular intervals. The amount on hand, not the time elapsed since the bankruptcy, is the real test; though this rule has been somewhat modified by the proviso clauses added by the amendatory act of 1903.

1. See "Analogous Provisions," *ante*.

b. Cross-references.—Some of the subjects treated in this connection in the law of 1867 are found elsewhere in the present law. Thus, of the method of declaring dividends,² and of paying of dividends,³ also of the notice to creditors of the declaration and payment of dividends.⁴ The meaning of "dividend" is also discussed in section one of this work; the disposition of unclaimed dividends is fixed by § 66.

c. Declaration of dividends.—Subsection *a* provides for the declaration and payment of dividends on all allowed claims, except such as have priority or are secured. The meaning of this clause has been much discussed. It has been held a definition of "dividends."⁵ It is rather the declaration, found in all bankruptcy laws, that each creditor of the same class shall receive his *pro rata* of the bankrupt's assets.⁶ The subsection was of considerable importance prior to the amendatory act of 1903; the cases, which are by no means uniform, are collected in the foot-note.⁷ The status of creditors entitled to priority and the order of payment has already been considered;⁸ so also of secured creditors.⁹ The former are never entitled to "dividends" in the restricted sense here employed; the latter only after they have realized on their securities or had their value otherwise determined.¹⁰ Both classes are "creditors" as defined in § 1 (9), and for the purpose of computing commissions under §§ 40 and 48, as amended.

II. FIRST AND SUBSEQUENT DIVIDENDS.

a. Time and amount.—Subsection *b* provides for the time of declaring the first dividend, and the amount thereof, and regulates all subsequent dividends. The statute seems full and clear and is thought to be mandatory. The first dividend must be declared within thirty days after the adjudication, if a dividend of five per cent. can (after deducting sufficient to pay priorities) be paid on all claims whether allowed or not. In doing so, claims scheduled but not yet allowed must be included.¹¹ The second dividend must, subject to the proviso clauses of the amendatory act of 1903, be declared as soon as there is enough to pay 10 per cent. more; and so on until the funds of the estate are entirely distributed. This accords with the policy of

2. Bankr. Act, § 39-a(1).

3. Bankr. Act, § 47-a(4) (9).

4. Bankr. Act, § 58-a(5).

5. See *In re Sabine* (Ref., N. Y.), 1 Am. B. R. 322.

Definition.—A dividend in bankruptcy has been defined as a parcel of funds arising from the assets of the estate rightfully allotted to the creditor entitled to share in the fund, whether in the same proportion with the other creditors or in a different proportion. *In re Barber* (D. C., Minn.), 3 Am. B. R. 306, 97 Fed. 547.

6. *In re Gerson* (Ref., Pa.), 2 Am. B. R. 352; *In re Barber* (D. C., Minn.), 3 Am. B. R. 307, 97 Fed. 547.

7. *In re Sabine* (Ref., N. Y.), 1 Am. B. R. 322; *In re Ft. Wayne Elec. Corp.* (D. C., Ind.), 1 Am. B. R. 706, 94 Fed. 109; *In re Coffin* (Ref., Tex.), 2 Am. B. R. 344; *In re Gerson* (Ref., Pa.), 2 Am. B. R. 352; *In re Fielding* (D. C., Mo.), 3 Am. B. R. 135, 96 Fed. 800; *In re Utt* (C. C. A., 7th Cir.), 5 Am. B. R. 383, 105 Fed. 754, holding that

sums to be paid upon secured claims or other claims entitled to priority are not "dividends" upon which the trustee or referee may receive a commission, disapproving *In re Barber* (D. C., Minn.), 3 Am. B. R. 306, 97 Fed. 547.

8. See discussion under Section Sixty-four of this work.

9. See discussion under Section Fifty-seven of this work.

10. Compare *In re Little* (D. C., Ia.), 6 Am. B. R. 681, 110 Fed. 621.

11. *In re Scott* (D. C., Tex.), 2 Am. B. R. 324, 96 Fed. 607, holding that in declaring the first dividend the referee should withhold from distribution sufficient funds to cover all expenses of administration and priorities. He is required to hold back only sufficient funds to cover claims that will probably be allowed. This includes only those claims as to which he has information such as justifies him in the conclusion that they will be allowed when presented.

the law in hastening distribution. This policy is further emphasized by the provision that the judge, but not the referee, may declare dividends oftener and in smaller proportions. In all other cases, the referee declares the dividend¹² and orders it paid. The assignee (trustee) formerly did this; in England, the trustee does yet. But dividends can be declared only at meetings of creditors.

b. Amendment of 1903.—Since the amendatory act, the practice of declaring first and final dividend in small estates at one time is no longer possible.¹³ Since this amendment, if any dividends are declared, there must be two, the second at least three months after the first. The first proviso, added by the amendatory act, is a further limitation. Not more than 50 per cent. of the cash on hand, in excess of money to be reserved or paid on priority debts and that held out for claimants who have not yet proven, can be disbursed in a first dividend. The meaning is not exactly clear. The purpose, however, is patent enough: to give creditors a longer time to prove and additional notice of their right to dividends.¹⁴ The change is a mild reversal of the policy of the original law toward rapidity in administration.

c. Creditors entitled only to what the bankruptcy law gives them.—Subsection *e* is the corollary of subsection *a*. It prevents a creditor from collecting from the bankrupt estate any greater amount than accrues under the provisions of the bankruptcy law. General creditors are entitled each to his *pro rata*, but no more; secured creditors to their security and a *pro rata* of the balance, but no more. An apparent exception is that interest is sometimes paid on allowed claims; but this is only in case such claims have been paid in full, and there are assets still undistributed.¹⁵ If anything then remains it is returned to the bankrupt. The estate of a debtor of a bankrupt is not precluded, by reason of the debtor's fraudulent conduct in taking and concealing conveyances of real estate from the bankrupt, which were subsequently set aside as fraudulent in a suit by bankrupt's trustee, from participating in the distribution of the proceeds arising from the sale of such real estate, as to a debt in no way involved in the fraudulent conveyances, incurred before they were made, and admitted to be just and unpaid.¹⁶ Where bankrupt stockbrokers dispose of securities belonging to several of their customers, deposit the proceeds in one of their general bank accounts, draw out such moneys and convert the same to their own use, and subsequently make other deposits, such deposits must be considered as a general restoration in which all the defrauded customers should share ratably.¹⁷ Where a State law provides for the deposit of bonds with a State officer for the protection of creditors from whom moneys are received by the depositor of such bonds, they may be held by the trustee of the bankrupt for the benefit of those creditors who live within the State.¹⁸

d. Garnishment of dividends in hands of trustee.—Although dividends in the hands of a trustee in bankruptcy are not, as a matter of right, subject to

12. Bankr. Act, § 39-a (1).

13. See *In re Smith* (Ref., N. Y.), 2 Am. B. R. 648.

14. It perhaps minimizes certain evils, which grew out of a liberal construction of Bankr. Act, § 57-n.

15. *In re Hagan*, Fed. Cas. 5,898; *In re Town*, Fed. Cas. 14,112; *In re Bank*, etc., Fed. Cas. 895. As to arrangement for distribution of dividends between two creditors

having special relations to each other, see *In re Paris Modes Co.* (C. C. A., 2d Cir.), 28 Am. B. R. 470, 196 Fed. 357.

16. *In re Hurst* (D. C., W. Va.), 26 Am. B. R. 781, 188 Fed. 707.

17. *In re McIntyre & Co.* (C. C. A., 2d Cir.), 25 Am. B. R. 93, 181 Fed. 960. See s. c., 24 Am. B. R. 1, 4, 626.

18. *In re Rosset* (D. C., N. Y.), 29 Am. B. R. 341, 203 Fed. 67.

attachment or garnishment,¹⁹ it seems, that the bankruptcy court may, out of respect to the State court, direct the trustee to pay a judgment obtained in a garnishment proceedings against a creditor of the bankrupt.²⁰ The rule of a State court permitting the garnishment of dividends after they have been declared by an officer of a State court, such as a receiver, administrator, or a trustee, cannot affect the administration by a Federal court of an estate in bankruptcy. The right to garnishee funds in *custodia legis* must depend upon express statutory authority. No such authority is to be found in the bankruptcy law. The distribution of the assets of the bankrupt, therefore, cannot be stayed or prevented by the process of a State court, the object of which is to withhold a dividend from a creditor entitled thereto for the security of a plaintiff pending litigation.²¹ If a State court could garnishee a trustee in bankruptcy, to catch funds in his hands which had been ordered paid by the court to which he was directly amenable, but which he had not actually paid out, and could compel him to withhold the payment, regardless of the order of the court of bankruptcy, it will be readily perceived that confusion and conflict of jurisdiction would at once arise, and that a State

19. Garnishment of dividends in hands of trustee.—Although the State law permits an attachment to be laid in the hands of a trustee appointed by a court of chancery to bind the funds in his hands, after the amount to be paid out by him has been definitely ascertained by the court, and nothing remains for him to do but to pay the sum over to the person whose credits are attached, the dividends in the hands of a trustee in bankruptcy are not subject to attachment. Where petitioner, who had obtained a judgment against a person entitled to a dividend out of a bankrupt's estate, had no claim of title to nor specific lien upon the fund in the hands of the trustee and had not procured the appointment of a receiver who had succeeded to the title of the creditor entitled to such dividend, the bankruptcy court is without power to order the trustee to pay over the dividend to the petitioner. In re Hollander (D. C., Md.), 25 Am. B. R. 48, 181 Fed. 1019.

In Gilbert v. Quimby, 1 Fed. 111, the court said: "That the dividend was not attachable on process from the State courts would seem to be quite clear. While in the hands of the assignee, it would be part of the estate of the bankrupt in the custody of the court. It would not be held the property of the debtor, but would only be property that would become his when he should get it. He could not maintain any suit against the assignee for it, nor obtain it by any legal process other than by application to the District Court having control of the fund as a party to the proceedings in that court. Money in the hands of a disbursing officer of the United States, due to a private person, cannot be attached on process against such person out of a State court, because the money will not be his, but will remain the property of the United States until it is paid to him. Buchanan v. Alexander, 4 How. 20,

11 L. Ed. 857." In re Cunningham, Fed. Cas. 3,478, it was said: "The reason of this doctrine seems to be that the court having the money or property in its custody under the law holds it for some purpose, of which that court is exclusive judge. To permit property or money thus held to be seized on execution, attached, or garnished, would therefore defeat the very purpose for which it is held, and in many cases enable some other court to dispose of property or money, and wholly divert it from the end or purpose for which possession has been taken. A conflict of jurisdiction and decision would in many cases thus ensue." There is nothing in the present bankruptcy law to change the rule thus established under the provisions of the act of 1867. In re Argonaut Shoe Co. (C. C. A., 9th Cir.), 26 Am. B. R. 584, 187 Fed. 784; In re Thompson-Breese Co. (Ref., Ohio), 30 Am. B. R. 105.

20. Trustee to pay judgment.—In the case of In re Kranich (D. C., Pa.), 25 Am. B. R. 50, 182 Fed. 849, the judge said: "The following situation is therefore presented: A creditor has obtained judgment against the garnishee in an execution attachment. The garnishee is an officer of this court and has more than enough money in his hands to satisfy the judgment; and while the State tribunal could not compel him to pay over the money, he himself has made no objection either to the judgment or to the order that is not asked for by the creditor. Under such circumstances, I see no reason why this court should not pay due respect to a tribunal of the State, and recognize a claim that has thus been conclusively proved — although I repeat that the allowance must be accepted as purely *ex gratia*."

21. In re Argonaut Shoe Co. (C. C. A., 9th Cir.), 26 Am. B. R. 584, 187 Fed. 784; Clark v. Shaw, 28 Fed. 356.

court, by means of a garnishment, could indefinitely delay the final winding up of the matter in bankruptcy and the final discharge of the trustee.²²

e. Practice.—The practice usually involves an order, reciting the giving of the statutory notice, the action of the creditors at the meeting, if any, and declaring a dividend at a specified per cent. on all claims allowed as shown on a dividend sheet annexed; it also should direct the trustee to pay the same.²³ It is the practice in some districts to require exceptions to a proposed distribution to be filed before the final decree of confirmation is entered.²⁴ If a dividend has been declared, the court has power in a proper case to restrain the payment of it by the trustee in order to give to parties in interest an opportunity to move to have the order of dividend vacated.²⁵ But a dividend so declared cannot be distributed except for some error or other cause. It cannot be opened for the purpose of paying an expense which would have been allowed, had it been brought to the attention of the court before the declaration of the dividend.²⁶ Whether a dividend order, which was right when made should be revoked and the case reopened so that a claim may be proved, is a matter within the discretion of the referee, to the exercise of which no appeal lies except so far as it may have proceeded on erroneous principles of law.²⁷ A State court cannot in any way interfere with the bankruptcy court in its distribution of the assets of the bankrupt.²⁸

f. Illustrative cases.—There are but few cases even under the former law. Some of them will be found in the foot-note.²⁹

III. RIGHTS OF CREDITORS WHOSE CLAIMS ARE ALLOWED SUBSEQUENT TO PAYMENT OF DIVIDENDS.

a. In general.—There was a corresponding clause in the former law. Claims cannot be allowed after one year after the adjudication;³⁰ thus, the list of creditors entitled to share is fixed at that time. Prior to the amendments of 1903, it was held that if a dividend had been paid within the year, such dividend and payment should not be distributed or a creditor compelled to return what he has received, even that an expense of administration which was overlooked may be paid.³¹ Such a contingency can rarely arise. As the law now is, a like dividend on such subsequent claims and such expenses must be paid before a further dividend is declared.

b. Final dividends.—As the prior provisions of the act have made it necessary to declare a first dividend within thirty days after adjudication, if there are funds sufficient to do so, and as the statute has provided that

22. *Cowart v. Caldwell Co.* (Sup. Ct., Ga.), 24 Am. B. R. 546, 551, 134 Ga. 544, holding that "garnishment will not lie from a state court to a trustee or assignee in bankruptcy to catch dividends which have been declared in favor of certain creditors or the amount which will be going to them under a composition."

23. See discussion under Section Forty-seven of this work.

24. *In re Heebner* (D. C., Pa.), 13 Am. B. R. 256, 132 Fed. 1003, holding that, in this district, exceptions with a petition for review filed after a decree of confirmation, and distribution of the final dividend, will be dismissed with costs.

25. *In re N. Y. Mail S. S. Co.*, Fed. Cas. 10,272, 3 N. B. R. 280.

26. *In re B. K. Smith*, Fed. Cas. 12,989, 15 N. B. R. 97.

27. *Matter of Siegel Co.* (D. C., Mass.), 32 Am. B. R. 645, 216 Fed. 943.

28. *In re Bridgman*, Fed. Cas. 1,867, 2 N. B. R. 252.

29. *In re Walker* (D. C., N. Dak.), 3 Am. B. R. 35, 96 Fed. 550; *In re James*, Fed. Cas. 7,175; *Bristol v. Sanford*, Fed. Cas. 1,893; *Atkinson v. Kellogg*, Fed. Cas. 613; *In re Sheehan*, Fed. Cas. 12,737; *In re Haynes*, Fed. Cas. 6,269.

30. Bankr. Act, § 57-n.

31. *Claffin v. Eason* (Ref., Tex.), 2 Am. B. R. 263; *In re Hegerty*, 2 N. B. N. Rep. 1083; *In re Smith*, Fed. Cas. 12,989; *In re N. Y. Mail, etc., Co.*, Fed. Cas. 10,212.

creditors who are not diligent are permitted only to share in the estate that remains, and not to interfere with the funds already divided, it would appear that the court has the power to make a final dividend and to approve of a final report at any time after four months have elapsed subsequent to adjudication, if the other conditions are present showing the estate to be apparently ready for the final accounting.³² It is improper to delay the payment of a final dividend merely because certain creditors have not filed their claims.³³ It has been held that a final dividend may be declared on the expiration of three months from the time of the first dividend, notwithstanding the failure of creditors to prove their claims.³⁴ An application for such a dividend should be made upon an order to show cause, or other sufficient notice to all persons scheduled or appearing in any way in the proceedings as creditors, giving them an opportunity not only to know if the dividend, but notifying them that their claims should be proven, or their rights lost.³⁵

IV. PREFERENCE TO RESIDENTS OF THE UNITED STATES.

Subsection *d* applies only to cases where the bankrupt has been so adjudged not only in the United States but in a foreign country. It is intended to accomplish equality of payment to resident creditors, wherever the law of such a country does not permit such residents to prove thereon. The subsection is rarely available and requires no discussion.

32. *Matter of Eldred* (D. C., N. Y.), 19 Am. B. R. 52, 155 Fed. 686.

33. *In re Stein* (D. C., Ind.), 1 Am. B. R. 662, 94 Fed. 124.

34. *Matter of Bell Piano Co.* (D. C., N. Y.), 18 Am. B. R. 183, 155 Fed. 272. In this case the court said: "To say that the final dividend shall not be declared within three months after the first dividend is declared does, in my judgment, say by implication that a final dividend may be declared on the expiration of three months from the time of the first dividend." See *In re Coulter* (D. C., Pa.), 30 Am. B. R. 75, 206 Fed. 906. in which it was held that the provisions of section 65-b of the Bankruptcy Act, providing

for the declaration of dividends, by necessary implication authorize the final closing of the estate and the declaration of the final dividend any time after four months from adjudication; and under section 65-c, providing that the rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends, creditors have a vested right in dividends as soon as declared, which cannot be affected.

35. *Matter of Eldred* (D. C., N. Y.), 19 Am. B. R. 52, 155 Fed. 686.

SECTION SIXTY-SIX.

UNCLAIMED DIVIDENDS.

§ 66. **Unclaimed Dividends.**— *a* Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court.

b Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: *Provided*, That in case unclaimed dividends belong to minors such minors may have one year after arriving at majority to claim such dividends.

Analogous provisions. In U. S.: None.

In Eng.: Act of 1883, § 162; General Rules 345, 346A.

Cross-references: To the law: Declaration and payment of dividends, § 65, and cross-references thereunder.

SYNOPSIS OF SECTION.

I. Unclaimed Dividends, 1029.

- a. Comparative legislation, 1029.*
- b. In general, 1029.*
- c. Payment of balance to bankrupt, 1030.*
- d. Illustrative cases, 1030.*

I. UNCLAIMED DIVIDENDS.

a. Comparative legislation.— This section is new. There was nothing like it in our previous laws. The English statute requires the payment of unclaimed dividends into the Bank of England, where they remain subject to the demands of the creditors entitled thereto and the orders of the Board of Trade.¹ There seems to be no provision in that act for a distribution among creditors who have already claimed and had their dividends.

b. In general.— The practice here is simple. If for any reason a creditor entitled to a dividend does not accept it, the trustee must wait until six months after the declaration of the final dividend and then pay the money into court. If such dividends are not claimed for one year after the final dividend is declared, the same must be distributed to creditors whose claims

1. Act of 1883, § 162.

have been allowed but not paid in full, or, after they are paid, to the bankrupt. The purpose clearly is to distribute every dollar declared by way of dividends, that there may be no bankruptcy funds "in chancery," as under our law of 1867² and the present English law. The saving clause as to dividends due minors should be noted. While the consideration deposited for the purpose of carrying out a composition³ is not strictly dividends, good practice would seem to require the deposit of the unclaimed funds in such a proceeding in a special account and its ultimate distribution as suggested by subsection *b*.⁴ Dividends in the hands of the trustee are not property but a right to secure property,⁵ and are not subject to attachment by a creditor of the dividend creditor.⁶

c. Payment of balance to bankrupt.—Subsection *b* provides that after the claims of creditors have been paid in full the balance shall be paid to the bankrupt. The balance meant is not a surplus, but the remainder of unclaimed dividends—the remainder of sums allotted to creditors who have failed to claim them; the remainder, after satisfying in full the claims of other creditors who have not failed to claim their dividends.⁷

d. Illustrative cases.—There are but few cases. Some of them will be found in the foot-note.⁸

2. See remarks of Philips, J., in *In re Fielding* (D. C., Mo.), 3 Am. B. R. 135, 96 Fed. 800.

3. Bankr. Act, § 12-b-e.

4. For practice on "Payments of Moneys Deposited," see General Order XXIX.

5. *Gilbert v. Lynch*, 17 Blatchf. 402.

6. *Jackson v. Miller*, 9 N. B. R. 143.

7. **Disposition of balance after payment of claims.**—In the case of *Johnson v. Norris* (C. C. A., 5th Cir.), 27 Am. B. R. 107, 190 Fed. 459, it was held that the surplus, remaining after the payment of all claims, proved against the bankrupt estate, and interest thereon to the date of the filing of a voluntary petition by a partnership, should be applied to the payment of interest accruing on the claims subsequent to the filing of the petition, and the balance then remaining should be returned to bankrupt. The court said, in speaking of this provision of the subsection: "This section relates to unclaimed dividends only. It shows that the Legislature intended (exempt property and costs, and debts having priority, being excepted) that the entire estate should be divided *pro rata* among the creditors by the declaration of dividends. When a dividend is unclaimed, it provides for its disposition—it is to go to the satisfaction of other claims till they are paid in full. It is only after

the claims are paid in full that 'the balance shall be paid to the bankrupt.' The balance meant is not a surplus, but the remainder of unclaimed dividends—the remainder of sums allotted to creditors who have failed to claim them; the remainder, after satisfying in full the claims of other creditors who have not failed to claim their dividends. This section gives no authority to pay a surplus to the bankrupt which has never been embraced in a declaration of dividends, and it shows that the Act neither contemplates the existence nor provides for the disposition of any surplus which shall not be embraced in the declaration of dividends. But, unquestionably, a surplus after paying in full all debts, including all interest due on the debts accruing before and subsequent to the filing of the petition, would equitably belong to the bankrupt, and no statute would be needed to authorize the court to direct its payment to the bankrupt."

8. In *re Fielding* (D. C., Mo.), 3 Am. B. R. 135, 96 Fed. 800. As to the method of distribution now fixed by subs. *b*, see In *re Haynes*, Fed. Cas. 6,269; In *re James*, Fed. Cas. 7,175. Somewhat *contra*: In *re Hoyt*, Fed. Cas. 6,806. Compare also In *re Blight*, Fed. Cas. 1,540. And see In *re Bridgman*, Fed. Cas. 1,867.

SECTION SIXTY-SEVEN.

LIENS.

§ 67. **Liens.**—*a* Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

b Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.

c A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened.

d Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, *to the extent of such present consideration only*,* not be affected by this act.

e That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person

*Amendments of 1910 in italics.

adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.**

f That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry.

* Amendment of 1903 in italics.

Analogous provisions: In U. S.: As to fraudulent transfers, Act of 1867, § 35, R. S., § 5129; As to liens which are unaffected, Act of 1867, § 20, R. S., § 5075; Act of 1841, § 2; Act of 1800, § 63; As to dissolution of attachment liens, Act of 1867, § 14, R. S., § 5044.

In Eng.: None.

Cross-references: To the law: Definition of transfer, § 1(25).

Insolvency; what includes; when person deemed insolvent, § 1(15).

Jurisdiction of bankruptcy court to cause estates to be collected and reduced to money, § 2(7).

Fraudulent transfer as act of bankruptcy, § 3-a(1); preferential transfer, § 3-a(2); permitting preference through legal proceedings, § 3-a(3).

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See also Supplementary Forms; Hagar and Alexander's Bankruptcy Forms (2d ed.).

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- j. *Saving clause*, 1089.

I. LIENS IN GENERAL.

a. **Comparative legislation.**—The act of 1898 is much more explicit in respect to liens than any previous bankruptcy law. In England, while a fraudulent transfer is an act of bankruptcy,¹ there is no statutory provision that such a transfer is void. Nor is that statute any more explicit as to liens, save those available as acts of bankruptcy. The only lien through legal proceedings in terms dissolved by bankruptcy under our law of 1867, was that of an attachment on *mesne* process. Fraudulent transfers, on the other hand, were interdicted,² but were made up of elements more numerous and difficult of proof than those specified in the present law. Much of the section under discussion is new. Indeed, the law of 1898 is, in this particular, far more favorable to the creditor than was that of 1867.

b. **Scope of section.**—Starting with the well-recognized doctrine that a trustee in bankruptcy merely steps into the bankrupt's shoes and, therefore, takes his property subject to all valid liens,³ the statute proceeds to declare what liens are not to be considered valid, as, in substance, (1) those which are invalid under the laws of a State,⁴ and, provided they are less than four months old, (2) those which were not recorded or are invalid "for other reasons,"⁵ (3) those which were given with intent to hinder, delay, or defraud creditors,⁶ and (4) those which were obtained through legal proceedings;⁷ with the further proviso that even liens so declared invalid shall not be so as to *bona fide* purchasers without notice. While somewhat out of

1. English Act of 1883, § 4(1) (b).

2. Act of 1867, § 35, R. S., § 5129.

3. Compare discussion under this section, *post*, subtitle "*Valid Liens*." See *Continental Bank v. Katz* (Super. Ct., Ill.), 1 Am. B. R. 19; *In re Moore* (D. C., Vt.), 6 Am. B. R. 175, 107 Fed. 234; *Ex parte Christy*, 3 How. 292; *Yeatman v. Savings Inst.*, 95 U. S. 764; *Stewart v. Platt*, 101 U. S. 731; *In re Stuyvesant Bank*, 49 How. Pr. 133.

4. *In re Davis*, Fed. Cas. 3,618; *Peck v. Jenness*, 7 How. 612; *Downer v. Brackett*, 21 Vt. 599.

5. See discussion under this section, *post*, subtitle "*Claims Void for Want of Record, or other Reasons*."

6. See discussion under this section, *post*, subtitle "*Fraudulent Transfers and Liens*."

7. See discussion under this section, *post*, subtitle "*Liens through Legal Proceedings*."

place in this section, the allied subject of fraudulent transfers is here interdicted in much the same way; they are null and void as to creditors, if made by an insolvent with intent to hinder, delay, or defraud and within four months of the bankruptcy. The section also phrases the doctrine of subrogation with regard to liens which, because declared void, a mere creditor cannot enforce. Read together, its various paragraphs and salient features make the section consistent and far-reaching in the extreme.

c. **Construction and general effect.**—The following general suggestions may be made: Liens more than four months before the bankruptcy are, unless fraudulent, not affected;⁸ no more are liens acquired after the bankruptcy.⁹ On the other hand, while subdivision *e* is in itself a statute of limitations on fraudulent transfers, if the transfer is also interdicted by the law of the State, it may, under § 70-e, be attacked within the much longer period fixed by the State statute.¹⁰ Further, while liens through legal proceedings within the four months' period are dissolved by bankruptcy, other liens are not, unless the lienor was insolvent at the time and there was "intent to hinder, delay, or defraud."¹¹ It follows also that a trustee, not being a purchaser for value,¹² not only stands in the shoes of the bankrupt as to his property, but, as the representative of creditors, may sue to avoid the effect of the bankrupt's acts.¹³ But the trustee does not represent creditors who are secured by valid liens; and, therefore, he has no interest in the respective rights of priority of such creditors.¹⁴ Liens here referred to are liens within the meaning of the common law; the term does not occur in the civil law.¹⁵ It has also been held that, where a valid lien is incident to a debt and the debt is discharged, the lien nevertheless remains.¹⁶ Subsections *a* and *b* of this section apply only to liens created by the debtor.¹⁷

d. **Cross-references.**—This section is closely connected with both § 60-a-b, on voidable preferences, and § 70-e, on fraudulent transfers voidable under the State law; somewhat less closely with § 3-a (1), § 3-a (2), and § 3-a (3), where similar transactions are declared acts of bankruptcy; while by § 14-b (4) a fraudulent transfer, as defined in words almost identical with those in subsection *e*, is made an objection to discharge. What is said in the appropriate paragraphs under the corresponding sections of this work should be consulted here.

II. CLAIMS VOID FOR WANT OF RECORD OR OTHER REASONS.

a. **In general.**—Subsection *a* precludes claims attaching as liens, which would not have been valid liens as against the claims of the creditors of the

8. In re Dunavant (D. C., N. Car.), 3 Am. B. R. 41, 96 Fed. 542; Doe v. Childress, 21 Wall. 642.

9. Kinmouth v. Braeutigam (Sup. Ct. N. J.), 4 Am. B. R. 344, 46 Atl. 769; In re Engle (D. C., Pa.), 5 Am. B. R. 372, 105 Fed. 893.

10. In re Adams (Ref., N. Y.), 1 Am. B. R. 94; In re Dunavant (D. C., N. Car.), 3 Am. B. R. 41, 96 Fed. 542. See cases cited under Section Seventy of this work.

11. See discussion under this section, *post*, subtitle "*Fraudulent Transfers and Liens*."

12. Chattanooga Bank v. Rome Iron Co. (C. C., Ga.), 4 Am. B. R. 441, 102 Fed. 755. *Contra*: In re Booth (D. C., Or.), 3 Am. B. R. 574, 98 Fed. 975.

13. In re Legg, 96 Fed. 326; In re Leigh (Ref., Colo.), 2 Am. B. R. 606, *affd.* 96 Fed. 806. *Contra*: In re Ohio Co-operative Shear Co. (Ref., Ohio), 2 Am. B. R. 775.

14. Goldman v. Smith (Ref., Ky.), 2 Am. B. R. 104; Jerome v. McCarter, 94 U. S. 734, 24 L. Ed. 136.

15. Matter of Pilar Hermanos (D. C., Porto Rico), 37 Am. B. R. 405.

16. Bank of Commerce v. Elliot (Sup. Ct., Wis.), 6 Am. B. R. 409, 109 Wis. 678. Compare Bracken v. Johnston, Fed. Cas. 1,761.

17. Mishawaka Woolen Mfg. Co. v. Smith (D. C., Wis.), 20 Am. B. R. 317, 158 Fed. 885; *revd.* on other grounds, *sub nom.* In re Bement (C. C. A., 7th Cir.), 22 Am. B. R. 616, 172 Fed. 98.

bankrupt, "for want of record or for other reasons." It will be noticed that the subsection applies to claims which are ineffectual as liens against the creditors of the bankrupt for any reason; not alone "for want of record."¹⁸ This subsection should be read in connection with the next to the last sentence in subsection e.

b. State law controls.—Clearly the reference is to the State law. If not yet a lien, properly so called, under that law, as, for want of record or "for other reasons," it cannot be recognized in bankruptcy; it is the statute or judicially established rule of the State which must control in every case.¹⁹ If once it is apparent that the State court finds its decision as to the effect of a lien, upon a State statute, even though a Federal court has decided precisely the same question directly the contrary, the determination of the State court is controlling.²⁰ This rule is subject to certain exceptions, as where the decision of a State court was rendered after rights had accrued or liabilities have been incurred, which are the subject of determination by a court of the United States; in such a case the latter court is not bound by the decision of the State court, but exercises its independent judgment, although it will lean toward an agreement with the State court.²¹ Whether and to what extent a lien is valid is a local question, to be determined by the decisions of State courts, at least in the absence of Federal statute.²² It is the law of the State

18. Application to other liens.—The provision of this section that "claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate," does not mean that no lien may be maintained against an estate unless or until it has been recorded. *Matter of Lane Lumber Co.* (C. C. A., 9th Cir.), 33 Am. B. R. 491, 217 Fed. 550.

19. *Humphrey v. Tatman*, 198 U. S. 91, 14 Am. B. R. 74, 49 L. Ed. 956, 25 Sup. Ct. 567; *Thompson v. Fairbanks*, 196 U. S. 516, 13 Am. B. R. 437, 49 L. Ed. 577, 25 Sup. Ct. 306; *In re First Nat. Bank of Canton* (C. C. A., 6th Cir.), 14 Am. B. R. 180, 135 Fed. 62; *Bryant v. Swafford Bros. Co.*, 214 U. S. 279, 22 Am. B. R. 115, 53 L. Ed. 997, 29 Sup. Ct. 614; *Reardon v. Rock Island Plow Co.* (C. C. A., 7th Cir.), 22 Am. B. R. 26, 168 Fed. 654; *In re Burke* (D. C., Ga.), 22 Am. B. R. 69, 168 Fed. 994; *Mattley v. Wolfe* (D. C., Nebr.), 23 Am. B. R. 673, 175 Fed. 619; *In re Hurley* (D. C., Mass.), 26 Am. B. R. 434, 185 Fed. 851; *Matter of Harrington* (D. C., Mass.), 32 Am. B. R. 828, 212 Fed. 542; *Scandinavian-American Bank v. Sabin*, (C. C. A., 9th Cir.), 36 Am. B. R. 151, 227 Fed. 579; *Matter of Kligerman* (D. C., Pa.), 33 Am. B. R. 608, 219 Fed. 758; *Grimes v. Clark* (C. C. A., 4th Cir.), 37 Am. B. R. 142; *Matter of Davidson* (D. C., Ala.), 37 Am. B. R. 480, 233 Fed. 462; *Pretorius v. Anderson* (C. C. A., 5th Cir.), 38 Am. B. R. 93; *Babbitt v. Read* (C. C. A., 2d Cir.), 38 Am. B. R. 303, 236 Fed. 42; *Davis v. Billings* (Pa. Sup. Ct.), 38 Am. B. R. 957, 99 Atl. 163, holding that unless the bankruptcy law otherwise provides the validity of an assignment or lien is to be

determined in accordance with the principles of the local law.

The validity of a pledge made, executed and to be performed in New York, and the rights of the parties thereunder are governed by the State law. *Hiscock v. Varick Bank*, 206 U. S. 28, 18 Am. B. R. 1, 6, 51 L. Ed. 945, 27 Sup. Ct. 681, affg. 15 Am. B. R. 362, 142 Fed. 445.

20. *Babbitt v. Read* (C. C. A., 2d Cir.), 38 Am. B. R. 303, 236 Fed. 42.

21. *State of Missouri v. Angle* (C. C. A., 8th Cir.), 38 Am. B. R. 394, 236 Fed. 644, affg. 35 Am. B. R. 436, 224 Fed. 525.

22. *Matter of Virgin* (D. C., Ga.), 35 Am. B. R. 494, 224 Fed. 128; *Matter of Heffron Co.* (D. C., N. Y.), 33 Am. B. R. 443, 216 Fed. 642; *Matter of Kligerman* (D. C., Pa.), 33 Am. B. R. 608, 219 Fed. 758; *Frey v. McGaw* (Md. Ct. of App.), 35 Am. B. R. 822. *See Am. Bankr. Dig. § 428.

State law to control.—In the case of *In re Wade* (D. C., Mo.), 26 Am. B. R. 169, 173, 185 Fed. 664, the court said: "Whether, and to what extent, a mortgage of this kind is valid is a local question, and the decisions of the State court will be followed by this court in such case. *Dooley v. Pease*, 180 U. S. 126, 21 Sup. Ct. 308, 45 L. Ed. 457; *Thompson v. Fairbanks*, 196 U. S. 516, 15 Am. B. R. 633, 25 Sup. Ct. 306, 49 L. Ed. 577. In short, it seems to be the settled rule that the trustee in bankruptcy takes the property of the bankrupt, subject to all the rights, claims, and equities that have been impressed upon it in the hands of the bankrupt, and that the validity of such rights, claims, and equities is to be determined, in the absence of federal statute, by the local law as evidenced by the decisions of the

where the property is located which governs.²³ Where goods are sold under a conditional bill of sale in a State where registration of such sale is not required, but, by the contract, are to be delivered in another State where such registration is required, the law of the latter State prevails.²⁴ This is the corollary of the proposition that the property of the bankrupt comes to the trustee charged with all valid liens. The subsection is merely declaratory of the law.

c. **Want of record.**—(1) **IN GENERAL.**—The laws of many of the States require chattel mortgages, contracts of conditional sale and other similar instruments to be recorded or filed in order that the lien thereby created shall be valid as against other creditors having judgments, or other judicial process. The absence of recording does not necessarily affect the validity of the lien as between the immediate parties; usually it affects such validity merely as to creditors of a certain class,²⁵ nor does it affect the provability of the claim.²⁶ The effect of this subsection is to preserve liens on the bankrupt's property, as against the other creditors, where such liens have been duly recorded or filed, as required by a State statute. The construction and effect of such a statute will largely depend upon State decisions. Reference should be had to such decisions for a determination of the effect of a failure to record or file. Where a contract of conditional sale is made in one State, under the terms of which the goods are to be delivered in another State, the validity of the transaction, and the rights of the parties in respect thereto, will be governed by the laws of the latter State.²⁷ It will not be possible for us to more than suggest the principles involved in such a determination. The cases are numerous which involve the question of the validity of unfiled or unrecorded chattel

State courts." Citing *Thomas v. Taggart*, 209 U. S. 385, 19 Am. B. R. 710, 28 Sup. Ct. 519, 52 L. Ed. 845; *Bryan, Trustee v. Swofford Bros. Dry Goods Company*, 214 U. S. 279, 22 Am. B. R. 111, 29 Sup. Ct. 614, 53 L. Ed. 997; *Humphrey v. Tatman*, 198 U. S. 91, 14 Am. B. R. 74, 25 Sup. Ct. 567, 49 L. Ed. 956; *In re Dunlop* (C. C. A., 8th Cir.), 19 Am. B. R. 361, 156 Fed. 945, 86 C. C. A. 435; *In re Great Western Manufacturing Company* (C. C. A., 8th Cir.), 18 Am. B. R. 259, 152 Fed. 123, 81 C. C. A. 341; *Title Guaranty & Surety Co. v. Witmire* (C. C. A., 6th Cir.), 28 Am. B. R. 235, 195 Fed. 41.

23. So held in respect to a mortgage executed in New York upon property in Connecticut. *In re Greene* (D. C., Conn.), 13 Am. B. R. 504, 134 Fed. 137. See also *In re Gray* (D. C., Okla.), 21 Am. B. R. 375, 170 Fed. 638; *Matter of McAusland* (D. C., N. J.), 37 Am. B. R. 519, 235 Fed. 173.

24. **Lex loci controls.**—The case of *In re Yukon Woolen Co.* (D. C., Conn.), 2 Am. B. R. 805, 96 Fed. 326, follows the general principle of law recognized by the Federal courts that where a contract contemplates or provides that property is to be delivered or used in another State the *lex loci solutionis* governs. See also *Matter of Southern Textile Co.* (C. C. A., 2d Cir.), 23 Am. B. R. 172, 174 Fed. 523. The construction placed by the State courts upon a State statute relating to conditional sales will be adopted by the bankruptcy court. *Matter of Pacific*

Electric & Automobile Co. (D. C., Wash.), 35 Am. B. R. 222, 224 Fed. 220.

25. *First Nat'l Bank v. Connett* (C. C. A., 8th Cir.), 15 Am. B. R. 662, 142 Fed. 33; *Loeser v. Savings Bank & Dep. Co.* (C. C. A., 6th Cir.), 17 Am. B. R. 628, 148 Fed. 975; *In re McGhee* (D. C., Ga.), 21 Am. B. R. 656, 166 Fed. 928.

26. *In re Burlage Bros.* (D. C., Ia.), 22 Am. B. R. 410, 169 Fed. 1006.

27. *In re Wall* (D. C., Okla.), 29 Am. B. R. 901, 207 Fed. 994, holding that in determining the validity of a contract of conditional sale, where the laws of the State in which the contract was made are not pleaded, the court will presume that they are similar to the laws of the State where the goods were delivered and where they were when bankruptcy intervened; *Matter of Anson Mercantile Co.* (D. C., Tex.), 38 Am. B. R. 952, 203 Fed. 871.

When law of situs governs application of recording statute.—Where an excavating machine, purchased under a conditional sale, was shipped by the vendors to another State to be there used quasi permanently, the recording statute of the State to which it was shipped applies. And upon failure to record the contract as required by the laws of that State, the title of a trustee in bankruptcy is good as against an attempted reclamation by the vendor. *Potter Mfg. Co. v. Arthur* (C. C. A., 6th Cir.), 34 Am. B. R. 75, 220 Fed. 843.

mortgages or contracts of conditional sale as against general judgment creditors of the bankrupt. The determination of the question must necessarily depend upon the statutes and decisions of the several States,²⁸ and they do not, therefore, admit of ready classification. A number of these cases are cited in the note.²⁹

(2) WHAT CONSTITUTES WANT OF RECORD AFFECTING VALIDITY.—A mortgage given and received in fraud of creditors, or to hinder, delay, or defraud creditors is invalid as to creditors. But a mortgage not so given, that is, not given and received for such a purpose, if there be a good present consideration and it is given more than four months prior to the filing of the petition in bankruptcy in New York, is good and valid as to creditors and the trustee in bankruptcy, whether recorded or not. A mortgage is not "required" to be recorded as to general creditors and a trustee in bankruptcy, when it is not required to be recorded except as to subsequent purchasers in good faith and subsequent mortgagees. If good as to general creditors without being recorded, then as to general creditors and the trustee in bankruptcy representing them and their interests it is not "required" to be recorded within the meaning of the bankruptcy act.³⁰

(3) CHATTEL MORTGAGES AND CONTRACTS FOR CONDITIONAL SALE.—(I) *In general*.—The object of recording acts is to prevent the obtaining of credit by reason of the ostensible ownership of property which in reality is covered by a secret lien by giving notice to those intending to purchase such property and to creditors who give credit on the faith thereof.³¹ A trustee in bankruptcy is, generally speaking, in the shoes of the bankrupt; he acquires no better title than that of the bankrupt, and, except for the provisions of

28. *In re Beede* (D. C., N. Y.), 11 Am. B. R. 387, 126 Fed. 853; *In re Andrae Co.* (D. C., Wis.), 9 Am. B. R. 135, 117 Fed. 561; *In re Antigio Screen Door Co.* (C. C. A., 7th Cir.), 10 Am. B. R. 359, 123 Fed. 249; *Matter of McDonald* (D. C., Mass.), 23 Am. B. R. 51, 173 Fed. 99; *In re Nuckols* (D. C., Tenn.), 29 Am. B. R. 867, 201 Fed. 437.

The rights of creditors to avoid unrecorded liens, which the bankruptcy act confers on trustees in bankruptcy, are to be determined by the laws of the State requiring the record. *In re Dancy Hardware & Furniture Co.* (D. C.; Ala.), 28 Am. B. R. 444, 198 Fed. 336.

29. *In re Harrison* (N. Y.), 2 N. B. N. Rep. 541; *In re Booth* (D. C., Or.), 3 Am. B. R. 574, 98 Fed. 975; *In re Tatem et al.* (D. C., N. Car.), 6 Am. B. R. 426, 110 Fed. 519; *In re N. Y. Econ. Printing Co.* (C. C. A.; 2d Cir.), 6 Am. B. R. 615, 110 Fed. 514; *In re Sewell* (D. C., Ky.), 7 Am. B. R. 133, 111 Fed. 791; *In re Wilkes* (D. C., Ark.), 7 Am. B. R. 574, 112 Fed. 975; *In re Pekin Plow Co.* (C. C. A., 8th Cir.), 7 Am. B. R. 369, 112 Fed. 308; *In re Hull* (D. C., Vt.), 8 Am. B. R. 302, 115 Fed. 858; *Dunplain Silk Co. v. Spencer* (C. C. A., 3d Cir.), 8 Am. B. R. 367, 115 Fed. 689; *In re Josephson* (D. C., Ga.), 8 Am. B. R. 423, 116 Fed. 404; *In re Gosch* (C. C. A., 5th Cir.), 12 Am. B. R. 149, 126 Fed. 627; *revg.* 9 Am. B. R. 610, 121 Fed. 602; *In re Raubenau* (D.

C., Mo.), 9 Am. B. R. 180, 118 Fed. 471. Equitable claim on proceeds of sale. *Hanson v. Blake & Co.* (D. C., Me.), 19 Am. B. R. 325, 155 Fed. 342; *Pontiac Buggy Co. v. Skinner* (D. C., N. Y.), 20 Am. B. R. 206, 158 Fed. 858; *Deupree v. Watson* (C. C. A., 6th Cir.), 32 Am. B. R. 407, 216 Fed. 483; *Grimes v. Clark* (C. C. A., 4th Cir.), 37 Am. B. R. 142. See discussion and cases cited under this section, *post*, subtitles "*Mechanics' Liens*," "*Chattel Mortgages*," "*By Judgment and Execution*," "*By Creditors' Bill*," etc.

Laws of place where property is situated. — Where mortgaged property, at the time of the execution of the mortgage, is situated in a State other than that in which the mortgagor is domiciled and the mortgage executed, the question of the preservation of the lien acquired by such mortgage, under the laws in reference to registration and the priority of such lien over the rights and interests subsequently acquired by third persons, should be determined by the law of the place where the property is situated at the time the mortgage is executed. *In re Nuckols* (D. C., Tenn.), 29 Am. B. R. 867, 201 Fed. 437.

30. *Matter of Mosher* (D. C., N. Y.), 35 Am. B. R. 284, 224 Fed. 739.

31. Object of recording acts.—*In re Cannon* (D. C., S. Car.), 10 Am. B. R. 64, 121 Fed. 582; *In re Claussen* (D. C., N. Car.), 21 Am. B. R. 34, 164 Fed. 300; *Matter of Southern Textile Co.* (C. C. A., 2d Cir.), 23

§ 47-a (2), as amended by the act of 1910, is not in any sense a subsequent purchaser in good faith within the meaning of recording acts.³² One purpose of the amendment of 1910 to § 47-a (2) was to reach that class of cases in which no creditors had acquired a lien by legal or equitable proceedings, so as to vest in the trustee for the benefit of all the creditors the potential rights of a creditor having such a lien.³³ A mortgagee, taking possession before the commencement of bankruptcy proceedings against the mortgagor of after-acquired property covered by the mortgage, is entitled under the laws of Massachusetts to hold it against the trustee.³⁴ If actual notice of the chattel mortgage or conditional sale is shown, the failure to record or file is immaterial.³⁵

(II) *Effect of failure to file or record; New York rule.*—Under the law in New York an unfiled chattel mortgage is void only as against judgment creditors of the mortgagor, and it has been held that a general creditor upon obtaining judgment and issuing execution may impeach the validity of the mortgage for non-filing, although in the meantime it may have been filed.³⁶ The Court of Appeals of New York has held that the trustee of a bankrupt mortgagor could attack a mortgage for failure to file to the extent of the claims of those creditors whose claims accrued prior to the time when the

Am. B. R. 172, 174 Fed. 523. See *Bayley v. Greenleaf*, 7 Wheat. (U. S.), 46, 5 L. Ed. 393, where Chief Justice Marshall says: "There is not perhaps a State in the Union, the laws of which do not make all conveyances not recorded and all secret trusts void as to creditors, as well as subsequent purchasers without notice. To support the secret lien of a vendor against a creditor who is a mortgagee would be to counteract the spirit of these laws."

32. In re *Wade* (D. C., Mo.), 26 Am. B. R. 169, 185 Fed. 664; *Hewit v. Berlin Machine Works*, 194 U. S. 296, 11 Am. B. R. 709, 48 L. Ed. 986, 24 Sup. Ct. 690; *Thompson v. Fairbanks*, 196 U. S. 516, 13 Am. B. R. 437, 49 L. Ed. 577, 25 Sup. Ct. 306; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 15 Am. B. R. 633, 50 L. Ed. 782, 26 Sup. Ct. 481.

33. In re *Calhoun Supply Co.* (D. C., Ala.), 26 Am. B. R. 528, 189 Fed. 537; In re *Hartdagen* (D. C., Pa.), 26 Am. B. R. 532, 189 Fed. 546.

Conditional sale; failure to record; rights of trustee under section 47-a (2) as amended in 1910.—Where a vendor under a conditional sale contract, failed to record such contract in a State whose laws required record and avoided contracts unrecorded, as against purchasers for a valuable consideration, mortgages and judgment creditors without notice, said vendor could not reclaim the chattel covered by the contract from the trustee in bankruptcy of the vendee, since the purpose of the amendment to section 47-a (2) of the bankruptcy act, enacted June 25, 1910, providing "and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon" was

to obviate the previous rule that the title of the vendor, in an unrecorded conditional sale contract, would prevail over that of the trustee in bankruptcy of the vendee. The operation of the amendment of 1910 to section 47-a (2) of the bankruptcy act was not intended to be restricted to cases in which a creditor had in fact acquired a lien by legal or equitable proceedings, as it would then add nothing to section 67 of the original act permitting the subrogation of the trustee to such a lien, if created within four months; but the class of cases, unprovided for by the original act, and intended to be reached by the 1910 amendment, was that in which no creditors had acquired liens by legal or equitable proceedings and to vest in the trustee for the interest of all creditors the potential rights of creditors potential with such liens. In re *Bazemore* (D. C., Ala.), 26 Am. B. R. 494, 189 Fed. 236. See In re *Dancy Hardware & Furniture Co.* (D. C., Ala.), 28 Am. B. R. 444, 198 Fed. 336.

Conditional sale contract; failure to record.—Where a State statute renders a contract of conditional sale invalid as to lien creditors or *bona fide* purchasers where it is not registered, a seller of property by conditional sale who has failed to register his contract has no remedy as against the trustee in bankruptcy to enforce his lien, and he cannot recover the property from a purchaser at the trustee's sale, but he is a mere general creditor with a right to share in the assets of the estate. *Hinton v. Williams* (N. C. Sup. Ct.), 35 Am. B. R. 878, 86 S. E. 994.

34. In re *Hurley* (D. C., Mass.), 26 Am. B. R. 434, 185 Fed. 851.

35. In re *Bazemore* (D. C., Ala.), 26 Am. B. R. 494, 189 Fed. 236.

36. In re *Beede* (D. C., N. Y.), 11 Am. B. R. 387, 120 Fed. 853; In re *Beede*, (D. C.,

mortgage was filed, although if any one of such creditors sought relief against such mortgage it would be necessary for him to put his claim into a judgment.³⁷ This ruling of the Court of Appeals of New York would seem conclusive upon this question, in view of the determination of the Supreme Court of the United States,³⁸ already referred to, to the effect that Federal courts are required in all such cases to follow the rules laid down by State courts.³⁹ The rule in force in New York depends upon a construction of the New York statute; it does not necessarily apply in other jurisdictions. As, for instance, under the Ohio statute relative to the filing of chattel mortgages and contracts of conditional sale, it has been held that an unfiled contract is void only as to creditors who, before the filing thereof, had "fastened upon" the bankrupt's property by some specific liens, and that the trustee has no rights as against such unfiled contract, in favor of the general creditors.⁴⁰ Under such

N. Y.), 14 Am. B. R. 697, 138 Fed. 441, in which cases Judge Ray considered at length and in full all the New York authorities applicable to the validity of unfiled chattel mortgages.

37. *Skilton v. Codington*, 15 Am. B. R. 810, 185 N. Y. 80, 77 N. E. 790, disapproving *In re New York Economical Printing Co.* (C. C. A., 2d Cir.), 6 Am. B. R. 615, 110 Fed. 514. See also *Gove v. Morton Trust Co.*, 12 Am. B. R. 297, 96 N. Y. App. Div. 177, 89 N. Y. Supp. 247; *Matter of Metropolitan Store, etc., Co.* (Ref., N. Y.), 15 Am. B. R. 119; *In re Beede* (D. C., N. Y.), 11 Am. B. R. 387, 126 Fed. 853; *Matter of Thompson* (D. C., N. Y.), 10 Am. B. R. 242, 122 Fed. 174; *In re Ducker* (C. C. A., 6th Cir.), 13 Am. B. R. 760, 133 Fed. 771; *In re Schiebler* (D. C., N. Y.), 21 Am. B. R. 309, 165 Fed. 363; *In re Thomas* (D. C., N. Y.), 29 Am. B. R. 945, 199 Fed. 214; *Matter of Palmer* (D. C., N. Y.), 33 Am. B. R. 689, 218 Fed. 74. As to effect of failure to record assignment of mortgage upon subsequent assignee, see *In re Buchner* (D. C., Ill.), 29 Am. B. R. 179, 202 Fed. 979.

Failure to file within reasonable time.—In New York, a chattel mortgage must be filed within a reasonable time after the execution, and a failure to file it for nearly three months after its execution renders it invalid as against all the creditors of the bankrupt even though the mortgagee was unable to speak the English language and was apparently entirely unacquainted with business, and such failure was through the omission of her attorney either to do so or to tell her to do so. *Matter of Schmidt* (C. C. A., 2d Cir.), 24 Am. B. R. 687, 181 Fed. 73.

Failure to refile chattel mortgage; New York statute.—Where, as in New York, the statute provides that a chattel mortgage shall be invalid as against creditors of the mortgagor and against subsequent purchasers or mortgagees in good faith after the expiration of one year from its original filing, unless refiled within thirty days next preceding the expiration of such time, a failure to refile a mortgage given by bankrupt until some five

months after the expiration of one year from the date of its original filing, renders such mortgage invalid as against the bankrupt's creditors and may be attacked by the trustee. *Matter of Watts-Woodward Press, Inc.* (C. C. A., 2d Cir.), 24 Am. B. R. 684, 181 Fed. 71.

38. *Humphrey v. Tatman*, 198 U. S. 91, 14 Am. B. R. 74, 49 L. Ed. 956, 25 Sup. Ct. 567.

39. Compare *In re Burnham* (D. C., N. Y.), 15 Am. B. R. 548, 140 Fed. 926.

40. *York Mfg. Co. v. Cassell*, 201 U. S. 344, 15 Am. B. R. 633, 50 L. Ed. 782, 26 Sup. Ct. 481; *Crosby v. Miller* (Ct. App., D. C.), 16 Am. B. R. 805, 25 R. I. 172; *In re Doran* (D. C., Ky.), 17 Am. B. R. 799, 148 Fed. 327; *In re Thomas* (D. C., N. Y.), 29 Am. B. R. 945, 199 Fed. 214.

Under 3103 of the Code of West Virginia, providing that a deed of trust shall be void as to creditors "until and except from the time it is duly admitted to record," an unrecorded deed of trust is not void as to general creditors; and the holders of bonds secured by an unrecorded deed of trust merely lose their right to priority as against creditors who have obtained judgments or other liens on the property. *In re Charles Town Light & Power Co.* (D. C., W. Va.), 29 Am. B. R. 721, 199 Fed. 846.

In Kentucky, an unrecorded contract of conditional sale, with reservation of title in the vendor, is good as against the trustee of the vendee, though some of the creditors did not sustain that relation at the time the contract was entered into. The word "creditors" as used in the statute includes only such as have acquired a lien. *Crucible Steel Co. of America v. Holt* (C. C. A., 6th Cir.), 23 Am. B. R. 302, 174 Fed. 127; *In re Ducker* (D. C., Ky.), 13 Am. B. R. 760, 133 Fed. 771.

In Missouri it has been held that the instituting of bankruptcy proceedings amounts to an effectual sequestration of the bankrupt's property in favor of all the creditors, and that therefore an unrecorded chattel mortgage is invalid as against the trustee representing all the creditors. *Bradley v. McAfee* (D. C., Mo.), 17 Am. B. R.

a statute the mortgagee and conditional vendor take legal title to the property, good as against all creditors who have not, prior to bankruptcy proceedings, acquired a lien by legal proceedings.⁴¹ Under the Michigan statute it is held that a right to such lien is thereby given, but it is only effective if some appropriate proceeding is taken to fasten the lien upon the property, prior to bankruptcy.⁴²

(III) *Bankrupt remaining in possession.*—If a bankrupt gave a lien on certain chattels to secure an antecedent indebtedness, the bankrupt remaining in possession, with the power of disposition, and no notice by filing or otherwise being given, the lien is not effectual against the bankrupt's creditors, such lien being regarded as fraudulent against creditors.⁴³ It has been held

499, 149 Fed. 254; *In re Pekin Plow Co.* (C. C. A., 8th Cir.), 7 Am. B. R. 369, 112 Fed. 308; *In re Martin* (C. C. A., 8th Cir.), 23 Am. B. R. 151, 173 Fed. 597; *In re Wade* (D. C., Mo.), 26 Am. B. R. 169, 185 Fed. 664.

In Kansas, where the title of an assignee for the benefit of creditors is good as against an unfiled contract of conditional sale, the rights of creditors of the assignor under such contract may be enforced by his trustee. *In re Fish Bros. Wagon Co.* (C. C. A., 8th Cir.), 21 Am. B. R. 149, 164 Fed. 553.

Under the law of Maryland, although subsequent creditors of the mortgagee without notice are not affected by an unrecorded chattel mortgage, a creditor whose debt has been contracted prior to the making of such mortgage is, so far as the mortgaged property is concerned, postponed to the mortgagee's claim, notwithstanding that he has reduced his claim to judgment and levied execution upon the mortgaged property. Hence, in determining the question of priority of the distribution of the proceeds of the property so mortgaged, the mortgagee's rights are not affected by the amendment of 1910 to section 47-a (2) of the bankruptcy act, vesting in the trustee, who represents the general creditors, all the rights and priorities which by State law are accorded a creditor holding a lien by legal or equitable proceedings on the property, but he is entitled to share in the proceeds with the subsequent creditors. *In re Riehl* (D. C., Md.), 29 Am. B. R. 613, 200 Fed. 455.

Under the law of Arkansas, a contract of conditional sale, although unrecorded, is valid as against the vendee's trustee in bankruptcy, and vests no title in the vendee, even as against *bona fide* purchasers without notice, until performance of the conditions. *In re Lutz* (D. C., Ark.), 28 Am. B. R. 649, 197 Fed. 492.

The Washington statute is similar to the New York act, and it has been held thereunder that the courts will not restrict the word "creditors" but will declare a chattel mortgage not filed within ten days from the time of its execution to be of no force or effect as to any creditor, whether prior or subsequent, at least until it is actually filed. *In re Mission Fixture & Mantel Co.* (D. C., Wash.), 24 Am. B. R. 873, 180 Fed. 263; *Pacific State Bank v. Coats* (C. C. A., 9th

Cir.), 30 Am. B. R. 655, 205 Fed. 618; *In re United States Lumber Co.* (D. C., Wash.), 30 Am. B. R. 682, 206 Fed. 236.

Under the Washington statute a chattel mortgage, not filed within ten days, but filed before bankruptcy proceedings were commenced and before the bankrupt had any creditors, is valid as against the trustee in bankruptcy of the mortgagor. *Matter of Bolstad* (D. C., Wash.), 35 Am. B. R. 355, 224 Fed. 233.

Under the law of North Carolina, which declares every mortgage or deed of trust to be invalid as against creditors until its registration, a trustee in bankruptcy may avoid and set aside a chattel mortgage which, although given before and for a consideration passing at the time of its execution, was not recorded until within four months prior to the beginning of bankruptcy proceedings; and which operated at the date of its registration to give the mortgagee a preference over other creditors. *Brigman v. Covington* (C. C. A., 4th Cir.), 33 Am. B. R. 644, 219 Fed. 500.

41. *Foerstner v. Citizen's Savings & Trust Co.* (C. C. A., 6th Cir.), 26 Am. B. R. 377, 186 Fed. 1; *Davis v. Hanover Savings Fund Society* (C. C. A., 4th Cir.), 31 Am. B. R. 368, 210 Fed. 768, as to effect of failure to record against general creditors under West Virginia statute.

Under the law of Minnesota, a chattel mortgage vests the legal title to the mortgaged property in the mortgagee, and, although unrecorded, is good as against general creditors of the mortgagor who have not seized the mortgaged property by legal process or acquired some lien upon it. *Title Guaranty & Surety Co. v. Witnire* (C. C. A., 6th Cir.), 28 Am. B. R. 235, 195 Fed. 41.

42. *In re Ottenwess v. Huxall* (C. C. A., 6th Cir.), 27 Am. B. R. 579, 193 Fed. 851; *Detroit Trust Co. v. Pontiac Sav. Bank* (C. C. A., 6th Cir.), 27 Am. B. R. 821, 196 Fed. 29, *affd.* 237 U. S. 186, 34 Am. B. R. 759, 59 L. Ed. 907, 35 Sup. Ct. 509.

43. *In re Bellevue Pipe & Foundry Co.* (Ref., Ohio), 22 Am. B. R. 97, citing Ohio cases. See also *In re Braselton* (D. C., Ga.), 22 Am. B. R. 419, 169 Fed. 960; *Williamson v. Richardson* (C. C. A., 9th Cir.), 30 Am. B. R. 559, 205 Fed. 245; *Covington v. Brigman* (D. C., N. Car.), 32 Am. B. R. 35, 210 Fed. 499. See Am. Bankr. Dig. § 442.

under a statute requiring a contract for the sale of personal property, where the title is to remain in the seller, and the possession in the purchaser, to be filed, that an unfiled contract for the sale of goods intended for resale, with reservation of title in the vendor until payment of the purchase price, is invalid as against general creditors of the vendee; in such a case the trustee in bankruptcy of the vendee may contest the validity of such contract in behalf of such creditors.⁴⁴ Where there has been no actual change of possession but circumstances, as where the property was marked as belonging to the purchaser, indicate that title has been passed under a bill of sale, the trustee does not take title, although the bill of sale was not recorded.⁴⁵ Possession of the property by the mortgagee, taken after the filing of the petition in bankruptcy, cannot avail the mortgagee as against the trustee in bankruptcy.⁴⁶ But the holder of an unrecorded chattel mortgage may take possession of the property, subject to possession by an officer of a State court under an attachment, so as to render the mortgage valid under a State law providing that an unrecorded mortgage is invalid against third parties unless the property is in the possession of the mortgagee.⁴⁷

(IV) *Withholding from record or filing.*—Where chattel mortgages are withheld from record contrary to the provisions of a statute for the purpose of enabling the mortgagor to preserve his credit, such mortgages are not entitled to priority of payment in bankruptcy over claims arising subsequent to the execution of the mortgages and before they were recorded.⁴⁸ An agreement to withhold from record, for the purpose and with the effect of securing credit not justified by the debtor's financial status, is evidence of fraud which is of itself sufficient to vitiate the transfer.⁴⁹ But the failure to promptly

44. *In re Bement* (C. C. A., 7th Cir.), 22 Am. B. R. 616, 172 Fed. 98; *In re Burke* (D. C., Ga.), 22 Am. B. R. 69, 168 Fed. 994; *In re Dancy Hardware & Furniture Co.* (D. C., Ala.), 28 Am. B. R. 444, 198 Fed. 336.

45. *Stellwagen v. Clum* (C. C. A., 6th Cir.), 38 Am. B. R. 904, 218 Fed. 730.

46. *State Bank v. Cox* (C. C. A., 7th Cir.), 16 Am. B. R. 32, 143 Fed. 91; *Cruchet v. Red Rover Co.* (C. C., Mass.), 18 Am. B. R. 814, 155 Fed. 486; *Clay v. Waters* (C. C. A., 8th Cir.), 24 Am. B. R. 293, 178 Fed. 388; *Schaupp v. Miller* (D. C., Ore.), 30 Am. B. R. 699, 206 Fed. 575.

47. *Duffy v. Charak*, 236 U. S. 97, 34 Am. B. R. 5, 59 L. Ed. 483, 35 Sup. Ct. 264.

48. *Clayton v. Exchange Bank of Macon* (C. C. A., 5th Cir.), 10 Am. B. R. 173, 121 Fed. 630; *Guras v. Porter* (D. C., Cal.), 9 Am. B. R. 271, 118 Fed. 668; *In re Andrae Co.* (D. C., Wis.), 9 Am. B. R. 135, 117 Fed. 561; *Orr v. Park* (C. C. A., 5th Cir.), 25 Am. B. R. 544, 183 Fed. 683; *In re Jacobson & Perrill* (D. C., Ga.), 29 Am. B. R. 603, 200 Fed. 812.

Withholding from record.—A trust deed or mortgage, executed by a corporation as security against indorsements of notes, withheld from record for the purpose of avoiding publicity and injury to the credit of the corporation, and not mentioned in a bill of sale to the bankrupt, was not a valid incumbrance on the property purchased as against the bankrupt, and did not constitute a valid

consideration for the delivery of bonds by the bankrupt to the indorser, who was a director of the bankrupt. *Butterfield v. Woodman* (C. C. A., 1st Cir.), 34 Am. B. R. 510, 223 Fed. 956, modifying 33 Am. B. R. 154, 216 Fed. 208.

Agreement to withhold.—Mortgages withheld from record by agreement for the purpose of enabling the mortgagor to preserve his credit, are fraudulent as against subsequent creditors. *Hawkins v. Dannenberg Co.* (D. C., Ga.), 37 Am. B. R. 262, 234 Fed. 752.

49. *In re Duggan* (D. C., Ga.), 25 Am. B. R. 105, 182 Fed. 252, *affd.* 25 Am. B. R. 479, 183 Fed. 405; *Orr v. Park* (C. C. A., 5th Cir.), 25 Am. B. R. 544, 183 Fed. 683; *McAtee v. Shade* (C. C. A., 8th Cir.), 26 Am. B. R. 151, 163, 185 Fed. 442; *In re Bothe* (C. C. A., 8th Cir.), 23 Am. B. R. 151, 173 Fed. 597; *Fourth Nat'l Bank v. Willingham* (C. C. A., 5th Cir.), 32 Am. B. R. 159, 213 Fed. 219; *Covington v. Brigman* (D. C., N. Car.), 32 Am. B. R. 35, 210 Fed. 499; *Matter of National Boat & Engine Co.* (D. C., Maine), 33 Am. B. R. 154, 216 Fed. 208.

Secret agreement to withhold chattel mortgage from record; void as to both prior and subsequent creditors.—Where a bankrupt gave a chattel mortgage to a creditor with a secret agreement that the same should be withheld from the record, and which was so withheld for a period of many months, during which time other creditors, unaware of this undisclosed mortgage, sold him goods,

record or file a mortgage is not in itself fraudulent as to other creditors, where there is no proof of fraudulent intent.⁵⁰ In some jurisdictions and under some statutes it must affirmatively appear in order to invalidate the mortgage that it was withheld from record by agreement, or that some prejudice resulted to creditors on account of its not having been filed for record.⁵¹

(V) *Recording or filing within four months' period.*—In Massachusetts a chattel mortgage made prior to the four months' period and recorded within that period is good as against the mortgagor's trustee in bankruptcy.⁵² The same rule apparently exists in Maine under a similar statute.⁵³ The contrary rule, however, is maintained in North Carolina.⁵⁴ A failure to record a real property mortgage until after the adjudication of the bankrupt mortgagor

which they had refused to do while a prior mortgage to the same mortgagee was on record, and which, for that reason, was canceled of record and the mortgage in question given, the mortgage was fraudulent and void, not only as to subsequent creditors, but as to prior creditors as well. In *re Duggan* (C. C. A., 5th Cir.), 25 Am. B. R. 479, 183 Fed. 405, affg. 25 Am. B. R. 105, 182 Fed. 252.

50. *Bean v. Orr* (C. C. A., 5th Cir.), 25 Am. B. R. 400, 182 Fed. 599, revg. In *re Tysor-Cheatham Mercantile Co.*, 24 Am. B. R. 434, 178 Fed. 733, and distinguishing *Clayton v. Exchange Bank* (C. C. A., 5th Cir.), 10 Am. B. R. 173, 121 Fed. 630, 57 C. C. A. 656. Compare In *re Sturtevant* (C. C. A., 7th Cir.), 26 Am. B. R. 574, 188 Fed. 196.

51. *Deland v. Miller & Cheney Bank*, 11 Am. B. R. 744, 119 Iowa, 368; In *re Williams* (D. C., Ga.), 9 Am. B. R. 731, 120 Fed. 542.

Intervention of bankruptcy before time for recording contract of conditional sale has expired.—Under the requirement of § 3394 of Civil Code of Alabama of 1907 that where personal property is delivered from without the State to a purchaser under a contract of conditional sale whereby the vendor retains title until payment of the purchase price the contract must, within three months of the time the property subject to the condition comes into the State, be recorded, the failure to record such a contract within the stated period avoids the condition in favor of the purchaser's trustee in bankruptcy, though at the time bankruptcy intervened the property had not been within the State for the full period of three months allowed by the statute for the purpose of recording. In *re Dancy Hardware & Furniture Co.* (D. C., Ala.), 28 Am. B. R. 444, 198 Fed. 336.

Rights of creditors subsequent to unrecorded instrument; withholding from record.—Under the law of Iowa a creditor, subsequent to an unrecorded instrument, has no equity and no right to assert a claim superior to the rights accruing under the unrecorded instrument, unless *before record*, he acquires a lien by attachment, execution or otherwise;

but, *he has the right to allege that the unrecorded instrument was withheld from record as part of a fraudulent scheme to procure credit.* Where conditional contracts were filed for record before the filing of a petition in bankruptcy, the trustee in bankruptcy acquired no rights greater than those which would be acquired by creditors who on the day that the petition in bankruptcy was filed secured a lien by attachment or otherwise. A mortgage, executed more than four months before the bankruptcy petition is filed, is valid as against the trustee; even though the same is not recorded until three days previous to the filing of the petition in bankruptcy, where there is no claim of preference. *Emerson-Brantingham Implement Co. v. Lawson* (D. C., Iowa), 38 Am. B. R. 344, 237 Fed. 877.

52. *Humphrey v. Tatman*, 198 U. S. 91, 14 Am. B. R. 74, 49 L. Ed. 956, 25 Sup. Ct. 567. The rule in Ohio seems to be the same. In *re First Nat. Bank of Canton* (C. C. A., 6th Cir.), 14 Am. B. R. 180, 135 Fed. 62.

Recording mortgage within four months' period.—A mortgage executed and delivered by an insolvent debtor more than four months prior to the filing of his voluntary petition, but not recorded within the statutory four months, has been held a valid and subsisting lien as against the trustee. In *re Wright* (D. C., Ga.), 2 Am. B. R. 364, 96 Fed. 187; *Matter of Virgin* (D. C., Ga.), 35 Am. B. R. 494, 224 Fed. 128.

53. In the case of *Matter of Marriner* (D. C., Me.), 34 Am. B. R. 444, 226 Fed. 542, it was held that since, under the Maine statute, a chattel mortgage, made in good faith, is valid against all parties who, previous to the date of its record, have not acquired a lien by attachment, levy, or some such proceeding, it is valid as to creditors who extend credit to the mortgagor prior to its record, where it appears that it was not withheld from record for the purpose of giving the mortgagor a fictitious credit, and that the subsequent record was not made in contemplation of bankruptcy, or with any corrupt purpose.

54. *Brigman v. Covington* (C. C. A., 4th Cir.), 33 Am. B. R. 644, 219 Fed. 500.

and the appointment of his trustee has been held, under the Pennsylvania rule, to deprive the mortgagee of his lien as against the trustee.⁵⁵

(VI) *Place of filing or recording.*—It has been held in Massachusetts under a statute (Rev. Laws, Mass., ch. 198, § 1) requiring a chattel mortgage to be recorded in the office of the clerk of the municipality where the mortgagor has his principal place of business and also in the clerk's office of the municipality where he lives, that a failure to file in the latter place defeats the lien of the mortgage as against the trustee in bankruptcy of the mortgagor, and such trustee is not estopped by the fact, that the mortgagor stated in the mortgage that he lived in the municipality where the mortgage was filed.⁵⁶ A corporation is deemed a resident of the State wherein it is incorporated and its principal place of business is situated, within the meaning of an act relating to recording instruments, and the county of its residence must be taken to be the county in which such place of business is located.⁵⁷ The trustee in bankruptcy of the corporation representing the creditors for whose protection the recording act was passed may assail the validity of a chattel mortgage which was not recorded in the proper county.⁵⁸

(VII) *Unrecorded contracts for conditional sale.*—Where a State statute provides that an unrecorded contract for the conditional sale of chattels, with reservation of title, is good as between the parties, such contract is not void as to creditors who have not acquired a specific lien, and under such statute the trustee of the bankrupt vendee has not acquired such a lien by the adjudication of the vendee, and may not avoid the contract.⁵⁹ Where a conditional sale consists of two separate written instruments and one only was recorded,

55. *In re Lukens* (D. C., Pa.), 14 Am. B. R. 683, 133 Fed. 188. Compare as to mortgage executed in good faith but not recorded, *Rogers v. Page* (C. C. A., 6th Cir.), 15 Am. B. R. 502, 140 Fed. 596, 72 C. C. A. 164.

56. *Matter of McDonald* (D. C., Mass.), 23 Am. B. R. 51, 173 Fed. 99.

57. *Fairbanks Steam Shovel Co. v. Wills*, 240 U. S. 642, 36 Am. B. R. 754, 60 L. Ed. 841, 36 Sup. Ct. 466, affg. 32 Am. B. R. 381, 212 Fed. 688.

58. *Fairbanks Steam Shovel Co. v. Wills*, 240 U. S. 642, 36 Am. B. R. 754, 60 L. Ed. 841, 36 Sup. Ct. 466, affg. 32 Am. B. R. 381, 212 Fed. 688.

59. *York Mfg. Co. v. Cassell*, 201 U. S. 344, 15 Am. B. R. 632, 50 L. Ed. 782, 26 Sup. Ct. 481; *Matter of Superior Drop Forge & Mfg. Co.* (D. C., Ohio), 31 Am. B. R. 455, 208 Fed. 813. The statute under consideration in this case was similar to that under consideration in the following cases, where a different rule was applied: *In re Press Post Printing Co.* (D. C., Ohio), 13 Am. B. R. 797, 134 Fed. 998; *In re Dunn Hardware & Furniture Co.* (D. C. N. Car.), 13 Am. B. R. 147, 132 Fed. 719. As to property sold on condition with possession in purchaser, see discussion under § 70, *post*, heading, "*Property sold to bankrupt on condition.*"

Conditional sale, what constitutes.—Where a contract in writing, under which goods were delivered to bankrupts in Arkansas, to be resold in the usual course of business,

provided that the title to and right of possession thereof, and all proceeds of resales thereof, should be vested and remain in the seller until payment of the purchase price, and that except for the right to resell the goods in the ordinary course of business, the bankrupts should not remove them from the city in which they were doing business, an obligation arose upon the part of the bankrupts to account for and pay over what was collected of the proceeds of resales, and the transaction constituted a conditional sale. The trustee is bound by the terms of such contract. *Bryant v. Swafford Bros. Dry Goods Co.*, 214 U. S. 279, 22 Am. B. R. 111, 53 L. Ed. 997, 29 Sup. Ct. 614. See also *In re McGehee* (D. C., Ga.), 21 Am. B. R. 656, 166 Fed. 928.

Sale dependent upon condition subsequent.—Since a conditional sale may be made to depend upon a condition subsequent as well as a condition precedent, a bill of sale, in the form of a deed of indenture which, after conveying personal property with covenants of warranty, provides that in default in payment by the vendee when due the vendors may declare the sale forfeited and retake the property, makes the sale conditional, and, the condition having been broken by default in payment, the vendors have the right to retake the property. *In re Lutz* (D. C., Ark.), 28 Am. B. R. 649, 197 Fed. 492.

Effect of unfiled contract.—A vendor, under a contract of conditional sale which provides that he shall be entitled to possession of the

and the unrecorded one materially altered the legal effect of the other, the provisions of the statute requiring record have not been complied with.⁶⁰

(VIII) *Effect of amendment of § 47-a (2).*—Under § 47-a (2), as amended by the act of 1910, trustees have the rights and remedies of lien creditors or judgment creditors as against unrecorded transfers or incumbrances.⁶¹ So that equities or rights in favor of such creditors as against a chattel mortgage or other instrument which for want of record or other reason is invalid as to them, may be asserted with the same force and effect by the trustee of the bankrupt debtor.⁶² Prior to the amendment of 1910 to § 47-a (2) it was held under the New York statute that an unfiled conditional sale contract accompanied by delivery of the goods, being void only as against "subsequent purchasers, pledgees and mortgagees in good faith," was valid as against a trustee in bankruptcy.⁶³

d. Invalid for other reasons.—Where for a reason contained in a State statute a lien is invalid as against a person's creditors, it is also invalid as against such creditors in bankruptcy. As where it is provided that a chattel mortgage, containing a provision for the sale of the goods mortgaged, and the use of the proceeds thereof other than in payment of the debt, is void as to creditors; in such a case the mortgage is not valid as against the creditors

property whenever he may feel insecure or when the vendee may become insolvent or bankrupt, is entitled to the possession of property sold thereunder, as against the trustee in bankruptcy of the vendee and other creditors, although the contract was not filed until a few days before the bankruptcy of the vendee, when it appears that no creditors were misled thereby. *Deere Plow Co. v. Edgar Farmer Store Co.* (Wis. Sup. Ct.), 31 Am. B. R. 156, 143 N. W. 194. Under New Jersey statute, see *Matter of Vandewater Co., Ltd.* (D. C., N. J.), 33 Am. B. R. 671, 219 Fed. 627.

Conditional sale under Michigan statute.—Any contract whatever its particular terms, providing for the sale of goods which are, or are to be, delivered to the buyer for the purposes of resale and without any limitation as to the buyer's rights to sell the same, unless such sale is made by the buyer for the seller, is a contract of sale with a reservation retaining a lien as security, and is invalid as against creditors unless recorded pursuant to the provisions of the Michigan statute. *In re King Motor Car Co.* (Ref., Mich.), 1 Am. B. R. 172.

Under the recording law of Kansas a conditional sale contract is valid between the parties, whether filed for record or not, but is void as against a creditor who fastens a lien upon the property by execution, attachment, or like legal proceedings before the contract is recorded. *Bailey v. Baker Ice Machine Co.* (U. S. Sup. Ct.), 239 U. S. 268, 35 Am. B. R. 814, 60 L. Ed. 275, 36 Sup. Ct. 50.

Washington statute.—Under section 47a (2) of the bankruptcy act, as amended in 1910, creating a lien in favor of the trustee upon all property in the custody, or coming into the custody of the bankruptcy court, the

lien of a trustee supersedes any rights existing in favor of a conditional sale, a memorandum of which was not recorded pursuant to section 3670 of the Washington Code. *Matter of Pacific Electric & Automobile Co.* (D. C., Wash.), 35 Am. B. R. 222, 224 Fed. 220.

Effect of permission to sell.—Where a written contract between a manufacturer and a dealer, under which automobile parts were delivered to the latter, contained a formal reservation of title, but the understanding when the contract was made and their subsequent course of dealing contradicted the written instrument, the written contract was held to be merely colorable and not enforceable against the dealer's trustee in bankruptcy. *Matter of Harrington* (D. C., Mass.), 32 Am. B. R. 828, 212 Fed. 542.

^{60.} *In re Bazemore* (D. C., Ala.), 26 Am. B. R. 494, 189 Fed. 236.

^{61.} See discussion under § 47a (2) and cases cited, *ante*.

^{62.} *Fairbanks Steam Shovel Co. v. Wills*, 240 U. S. 642, 36 Am. B. R. 754, 60 L. Ed. 841, 36 Sup. Ct. 466.

Under the amendment of 1910 to section 47-a (2) of the Bankruptcy Act, which clothed the trustee with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, the trustee's lien cannot antedate the institution of bankruptcy proceedings, so as to affect the validity of a chattel mortgage executed more than four months prior to bankruptcy, but recorded within the four months' period. *Matter of Virgin* (D. C., Ga.), 35 Am. B. R. 494, 224 Fed. 128.

^{63.} *Holt v. Henley*, 232 U. S. 637, 32 Am. B. R. 161, 58 L. Ed. 767, 34 Sup. Ct. 459; *Matter of White's Express Co.* (C. C. A., 2d Cir.), 33 Am. B. R. 74, 215 Fed. 894.

of the bankrupt mortgagor.⁶⁴ The trustee may attack the validity of such a mortgage, as conclusively as though fraudulent intent were shown to exist.⁶⁵ A collusive arrangement between the holders of liens and a bankrupt to keep such liens alive for the individual benefit of the bankrupt and against the interests of his creditors, will nullify the liens.⁶⁶ A contract for the conditional sale of a chattel is subject to the same rule.⁶⁷ Any defect in the execution of a chattel mortgage or other instrument, resulting in its invalidity, as where there was a failure to obtain the necessary consent of stockholders in case of a corporation, may be taken advantage of by the trustee, in behalf of the creditors.⁶⁸

III. SUBROGATION OF TRUSTEE TO RIGHTS OF CREDITORS.

a. **In general.**—Subsection *b* in effect provides that when a creditor is prevented by bankruptcy from enforcing his rights against a lien created, or attempted to be created, by his debtor, the trustee in bankruptcy is subrogated to the rights of such creditors for the benefit of the estate. This provision preserves for the benefit of the estate a right which some particular creditor had been prevented from enforcing by the intervention of the debtor's bankruptcy.⁶⁹ The subsection is doubtless declaratory of the rule at law.⁷⁰ This

64. *In re National Bank of Canton* (C. C. A., 6th Cir.), 14 Am. B. R. 180, 135 Fed. 62; *In re Marine Construction & Dry Dock Co.* (D. C., N. Y.), 14 Am. B. R. 466, 135 Fed. 921; *Skillen v. Endelman*, 11 Am. B. R. 766, 39 Misc. 261, 79 N. Y. Supp. 413; *Dodge v. Nodin* (C. C. A., 8th Cir.), 13 Am. B. R. 176, 133 Fed. 363 (under Colorado statute); *In re Hull* (D. C., Vt.), 8 Am. B. R. 302, 115 Fed. 858; *In re Volence* (D. C., N. Y.), 27 Am. B. R. 914, 197 Fed. 232; *Matter of Purtell* (D. C., N. Y.), 32 Am. B. R. 824, 215 Fed. 191.

Right of mortgagor to sell for own benefit; validity.—In New York, a chattel mortgage is not *per se* void because of a provision contained in it permitting the mortgagor to sell the mortgaged property provided the mortgage also requires the mortgagor on making sales to pay over the proceeds thereof and apply them to the payment of the mortgage debt; but a chattel mortgage given and filed is fraudulent and void as to creditors when accompanied by an agreement between the parties, whether found in the mortgage or not, which authorizes and permits the mortgagor to treat and deal with the mortgaged property as his own and to sell the same and use the proceeds or any part thereof for his own benefit. *In re Hartman* (D. C., N. Y.), 26 Am. B. R. 6, 189 Fed. 196.

Mortgagor permitted to sell and use proceeds; Wisconsin statute.—Where, under Wisconsin statute, a chattel mortgage is not valid as against creditors unless accompanied by an actual and continued possession of the property by the mortgagee, or the mortgage be filed, or, if the mortgagor remains in possession of a stock of goods, the mortgage shall cease to be a lien except as between the parties, unless the mortgagor shall file a statement every sixty days showing the

amount of sales therefrom, amount applied on mortgage and amount of new stock bought, a chattel mortgage, providing that the mortgagor may remain in possession of the stock of goods, applying the proceeds of sale thereof to its own use, providing for a sinking fund and stipulating that the mortgagee may consent to waive the requirements as to any payments into the sinking fund in his discretion, is fraudulent and void as to creditors, even in the absence of intentional bad faith, no statement of the amount of sales, amount of new stock bought and amount applied on the mortgage having been filed, as required by the Wisconsin statute. *In re Standard Telephone & Electric Co.*, 216 U. S. 545, 24 Am. B. R. 761, 54 L. Ed. 610, 30 Sup. Ct. 412.

65. *In re Standard Telephone & Electric Co.*, 216 U. S. 545, 24 Am. B. R. 761, 54 L. Ed. 610, 30 Sup. Ct. 412.

66. *In re Kyte* (D. C., Pa.), 25 Am. B. R. 337, 182 Fed. 166.

67. *In re Garcewich* (C. C. A., 2d Cir.), 8 Am. B. R. 149, 115 Fed. 87.

68. The provision of the New York Stock Corporation Law (sec. 6), requiring, except in certain cases, the consent of two-thirds of the stockholders of a corporation to the execution of a mortgage by the corporation may be taken advantage of by the trustee in bankruptcy of a corporation in contesting the validity of a chattel mortgage executed by its officers. *Matter of Progressive Wall Paper Corporation* (D. C., N. Y.), 37 Am. B. R. 207, 230 Fed. 171.

69. *In re New York Economical Printing Co.* (C. C. A., 2d Cir.), 6 Am. B. R. 615, 110 Fed. 518; *Matter of Schweitzer* (D. C., Pa.), 33 Am. B. R. 212, 217 Fed. 495.

70. Compare *In re Yukon Woolen Co.* (D. C., Conn.), 2 Am. B. R. 805, 96 Fed. 326.

provision of the statute does not transfer to the trustee the right of a judgment creditor to enforce an equitable lien acquired by the filing of a creditor's bill before bankruptcy proceedings were begun, or abate such creditor's right to prosecute suit.⁷¹ The word "prevented," as used in this subsection, means prevented by the bankruptcy proceedings.⁷² The trustee under subdivisions *a* and *b* of this section stands in the position of creditors.⁷³ He is in the precise situation of a junior judgment creditor with an execution lien, and has the right to invalidate a prior lien, either for *laches*, fraud or dormancy, as of the date of the filing of the petition in bankruptcy.⁷⁴ The trustee is not only invested with the title to the bankrupt's property, but since, after the filing of the petition, the creditors are powerless to pursue and enforce their rights, the trustee is vested with their rights of action with respect to all property of the bankrupt transferred or incumbered by him in fraud of his creditors.⁷⁵ A trustee is not, however, an innocent purchaser or a lien creditor, but, generally speaking, he takes the bankrupt's property subject to such claims and with such rights as the bankrupt himself had,⁷⁶ subject, of course, to the powers now conferred upon trustees by the amendment of § 47-a (2) by the act of 1910. Where because of the failure to record a mortgage certain equities exist in the property covered by such mortgage in favor of creditors, such equities follow the property into the hands of the trustee.⁷⁷ Where a bankrupt borrowed money upon collaterals in excess of the debt, the trustee may pay the debt out of the funds of the estate and become subrogated to the rights of the creditor, and upon a sale of the collaterals divide the surplus among the general creditors.⁷⁸ Other cases in point are referred to in the foot-note.⁷⁹

b. Is the trustee a "judgment creditor?"—(1) RULE UNDER FORMER ACT.—The majority of cases under the law of 1867 held that, since the bankruptcy arrests proceedings in the State courts, the assignee (trustee), as the representative of the whole body of creditors, could bring any of that class of equitable actions where the existence of a judgment and execution returned

71. *Taylor v. Taylor*, 59 N. J. Eq. 86, 45 Atl. 440.

72. *In re Doran* (C. C. A., 6th Cir.), 18 Am. B. R. 760, 154 Fed. 467, modifying 17 Am. B. R. 799, 148 Fed. 327; *Matter of Schweitzer* (D. C., Pa.), 33 Am. B. R. 212, 217 Fed. 495.

73. *Matter of Gerstman & Bandman* (Spec. M., N. Y.), 17 Am. B. R. 882.

74. *Matter of Zeis* (D. C., N. Y.), 36 Am. B. R. 581, 229 Fed. 472.

75. *In re Rodgers* (C. C. A., 7th Cir.), 11 Am. B. R. 79, 93, 125 Fed. 169, *revd.* on other grounds, 198 U. S. 280, 14 Am. B. R. 102, 49 L. Ed. 1051, 25 Sup. Ct. 693; *Bush v. Export Storage Co.* (C. C., Tenn.), 14 Am. B. R. 138, 136 Fed. 918; *Mitchell v. Mitchell* (D. C., N. C.), 17 Am. B. R. 382, 389, 147 Fed. 280; *In re Bement* (C. C. A., 7th Cir.), 22 Am. B. R. 616, 172 Fed. 98; *In re Burke* (D. C., Ga.), 22 Am. B. R. 69, 168 Fed. 994; *Reardon v. Rock Island Plow Co.* (C. C. A., 7th Cir.), 22 Am. B. R. 66, 168 Fed. 654.

This subject is further discussed under Section Seventy of this work.

76. *York Mfg. Co. v. Cassell*, 201 U. S. 344, 15 Am. B. R. 633, 50 L. Ed. 782, 26 Sup. Ct. 481; *In re Fish Bros. Wagon Co.* (C. C. A., 8th Cir.), 21 Am. B. R. 149, 151, 164 Fed. 553; *Foerstner v. Citizens' Savings & Trust Co.* (C. C. A., 6th Cir.), 26 Am. B. R. 377, 186 Fed. 1; *In re Charles Town Light & Power Co.* (D. C., W. Va.), 29 Am. B. R. 721, 199 Fed. 846.

77. *In re Wade* (D. C., Mo.), 26 Am. B. R. 169, 185 Fed. 664.

78. *Matter of Kessler* (C. C. A., 2d Cir.), 37 Am. B. R. 325, 186 Fed. 127.

79. *In re Kenney* (D. C., N. Y.), 3 Am. B. R. 353, 97 Fed. 554; *In re Boston* (D. C., Neb.), 3 Am. B. R. 388, 98 Fed. 587; *In re Howland* (D. C., N. Y.), 6 Am. B. R. 495, 109 Fed. 869; *Barnes Mfg. Co. v. Norden* (Sup. Ct., N. J.), 7 Am. B. R. 553, 67 N. J. Law 493; *Patten v. Carley*, 8 Am. B. R. 482, 69 N. Y. App. Div. 423, 74 N. Y. Supp. 993; *In re Beede* (D. C., N. Y.), 14 Am. B. R. 697, 138 Fed. 441; *Receivers of Virginia Iron, etc., Co. v. Staake* (C. C. A., 4th Cir.), 13 Am. B. R. 281, 133 Fed. 717.

unsatisfied are necessary elements; *i. e.*, that he was in effect, if not in name, a judgment creditor.⁸⁰

(2) RULE UNDER PRESENT ACT.—The rule formerly existing has been applied under the present act.⁸¹ This seems justified in view of the words “may enforce such rights of such creditor for the benefit of the estate.” The phrasing of § 70-e, limiting actions to avoid transfers to such suits as a creditor could have brought, again opened the question. Thus, it has been held in a well-considered case,⁸² that only a judgment creditor can share in property of the bankrupt, affected by a chattel mortgage not duly refiled as provided in the New York statute, *i. e.*, that the trustee is a judgment creditor only so far as he represents judgment creditors, the New York law denying to creditors whose debts are not reduced to judgment the remedy of a suit to set it aside. There never has been a doubt about the trustee's power to sue to set aside a transaction which amounts to a fraud in fact, whether on the law or on the creditors; and that, too, irrespective of whether any of the creditors had obtained judgments. Where, however, the wrong on creditors is purely constructive, and the remedy is denied until certain statutory preliminaries are observed, the case was different. The creditor whose debt was not in judgment could, of course, complain that the bankruptcy prevented him from observing those preliminaries, but, in a vast majority of cases, the judgment creditors might have rejoined that the complaining creditor might have had a judgment had he been vigilant and was, therefore, not in a position to ask equity. Such a distinction harmonized with the doctrine that the trustee took the assets in the “plight and condition” they were in on the day of bankruptcy.⁸³

(3) EFFECT OF AMENDMENT OF § 47-A (2) BY AMENDMENT OF 1910.—Section 47-a (2), as amended by the act of 1910, has substantially modified the rules declared as to the power of a trustee to take advantage of the privileges accorded a judgment creditor, as against a lien which is invalid for want of record. The provisions of this subsection, as so amended, should be construed with subsection *b* of this section. It is there provided that the trustee “as to all property not in the custody of the bankruptcy court shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied.” The purpose and effect of this amendment has already been considered.⁸⁴ This amendment effectually disposes of any doubt which may have existed as to the right of

80. *Barker v. Barker's Assignee*, Fed. Cas. 986; *Beecher v. Clark*, Fed. Cas. 1,223; *In re Duncan*, Fed. Cas. 4,131; *In re Metzger*, Fed. Cas. 9,510. See under the present act, *Skilton v. Codrington*, 15 Am. B. R. 810, 185 N. Y. 80, 77 N. E. 790. *Contra*: *In re Collins*, Fed. Cas. 3,007; *Cook v. Whipple*, 55 N. Y. 150. But see *post* in this paragraph. Compare *Platt v. Stewart*, Fed. Cas. 11,277, as *revd.* as *Stewart v. Platt*, 101 U. S. 731, 25 L. Ed. 954.

81. Compare *In re McNamara*, 2 N. B. N. Rep. 341; *In re Harrison*, 2 N. B. N. Rep. 541.

82. *In re New York Economical Printing Co.* (C. C. A., 2d Cir.), 6 Am. B. R. 615,

110 Fed. 514. Compare *In re Schmitt* (D. C., Ohio), 6 Am. B. R. 150, 109 Fed. 267, *affd.* as *In re Shirley* (C. C. A., 6th Cir.), 7 Am. B. R. 299, 112 Fed. 301; *In re Hasie* (D. C., Tex.), 30 Am. B. R. 83, 206 Fed. 789.

83. This rule has been held not to apply to liens, which, although valid as to the bankrupt, are invalid as to creditors. *First Nat. Bank v. Staake*, 202 U. S. 141, 15 Am. B. R. 639, 50 L. Ed. 967, 26 Sup. Ct. 580. See *Corey v. Blackwell Lumber Co.* (Idaho Sup. Ct.), 31 Am. B. R. 135, 135 Pac. 742.

84. See discussion under Section Forty-seven of this work.

a trustee to proceed as a judgment creditor against conveyances invalid for failure to record or file, or because of fraud as against creditors.⁸⁵

IV. VALID LIENS.

a. In general.—Subsection *d* is also declaratory of the law. It is intended to preserve liens created in good faith, “and not in contemplation of a fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice.” It is the converse of subsections *c*, *e* and *f*, and is emphasized by subsection *b*, the saving clause in the body of subsection *e* and the proviso clause at the end of subsection *f*. It is much broader than the corresponding clauses of the act of 1867, which protected liens by mortgage only.⁸⁶

b. Good faith of transaction.—“Good faith,”⁸⁷ and “not in contemplation of or in fraud upon the bankruptcy act,” are of the essence of this subsection without which the liens therein mentioned cannot be upheld even though there be a present consideration for them.⁸⁸ For instance, where an assignment of accounts due a corporation is made by the corporation to its president to secure moneys previously advanced by him to the corporation, he knowing at the time that the corporation was in a precarious condition, there is an absence of good faith which will render the assignment ineffectual as a lien.⁸⁹ Want of present consideration or failure to record where record is necessary to impart notice are important. These are often elements of proof on the

⁸⁵. In re Bazemore (D. C., Ala.), 26 Am. B. R. 494, 189 Fed. 236; In re Calhoun Supply Co. (D. C., Ala.), 26 Am. B. R. 528, 189 Fed. 537; In re Buchner (D. C., Ill.), 29 Am. B. R. 179, 202 Fed. 979; In re Geiver (D. C., So. Dak.), 28 Am. B. R. 413, 193 Fed. 128; Matter of Fitzhugh Hall Amusement Co. (D. C., N. Y.), 36 Am. B. R. 239, 228 Fed. 169, affd. 36 Am. B. R. 493, 230 Fed. 811; Matter of Zeis (D. C., N. Y.), 36 Am. B. R. 581, 229 Fed. 472.

⁸⁶. Act of 1867, § 14, R. S., § 5052.

⁸⁷. In re Soudans Mfg. Co. (C. C. A., 7th Cir.), 8 Am. B. R. 45, 113 Fed. 804; Matter of Baar (C. C. A., 2d Cir.), 32 Am. B. R. 465, 213 Fed. 628.

Protection of liens.—It is the intention of the bankruptcy act to protect all liens, whether arising by contract or by statute, except only such as are expressly declared annulled or invalidated. It is not intended to avoid a lien secured by the act of labor and preserved and enforced by legal proceedings, especially where such lien attached more than eight months before proceedings in bankruptcy were commenced, and the action to foreclose the lien was commenced long prior thereto. Tube City Mining & Milling Co. v. Otterson (Ariz. Sup. Ct.), 35 Am. B. R. 500, 146 Pac. 203.

⁸⁸. Powell v. Gate City Bank (C. C. A., 8th Cir.), 24 Am. B. R. 316, 178 Fed. 609; Hardcastle v. National Clothing Co. (Tenn. Sup. Ct.), 38 Am. B. R. 719, 191 S. W. 524; Matter of Stone (Ref., Mass.), 37 Am. B. R. 138; Lott v. Salisbury (C. C. A., 4th Cir.), 37 Am. B. R. 796; Matter of Baar

(C. C. A., 2d Cir.), 32 Am. B. R. 465, 213 Fed. 628.

Mortgage within four months' period to secure existing debt; present consideration.—A corporation, subsequently bankrupt, borrowed money from a bank in which its officers held office. The amount of the indebtedness was found to be largely in excess of that which, by the statutes of the State, the bank might loan to one corporation. Individual notes were accepted by the bank in place of the corporation's obligations. These being criticised by the bank examiner, the bank's cashier thereafter individually indorsed such notes, and thus became their guarantor, the consideration being founded on the abandonment of complaints on the part of the examiner. Thereafter these notes were taken up by the cashier who assumed the indebtedness of the corporation to the bank and took the note of the corporation to himself, secured by a mortgage which he did not place on record until shortly before the bankruptcy. The officers of the corporation and the cashier knew that it was insolvent. It became a bankrupt within four months from the giving of the mortgage. Held, that the cashier by indorsing said notes became the creditor of the corporation, and that the unrecorded mortgage was not given by the corporation nor accepted by him in good faith for a present consideration, under § 67-d of the bankruptcy act, but was a voidable preference under § 60-b thereof. McAttee v. Shade (C. C. A., 8th Cir.), 26 Am. B. R. 151, 185 Fed. 442.

⁸⁹. In re Richards (Ref., D. C., Sup. Ct.), 28 Am. B. R. 636.

question of good faith.⁹⁰ The amendment of 1910 inserted the words "to the extent of such present consideration only," thus preserving the security which a creditor has obtained only so far as the same is based upon the original consideration.⁹¹ A mortgage given to secure indorsers upon the bankrupt's notes is for a present consideration under this clause, since such indorsers became creditors contingently at the time of their indorsement.⁹² As will soon be seen, *bona fides* is not material where the lien is through legal proceedings. The universal recognition of the rule of law here-phrased into the statute results in cases construing it being rare, perhaps unnecessary.

c. Jurisdiction of bankruptcy court to determine validity of lien.—One who, prior to the filing of a petition in bankruptcy, has acquired by other means than the legal proceedings specified in § 67, *c* and *f*, a lien upon the property of a party subsequently adjudged bankrupt, is an adverse claimant, and is entitled to the rights and privileges of such claimant, to the same extent as one who has acquired a claim of title to property from such a party.⁹³ A bankruptcy court has no authority or jurisdiction in the absence of lawful possession of the property by its officers to draw to itself and determine in a summary proceeding the adverse claim of one claiming for his own benefit a lien upon or title to property of the bankrupt which was created, or is claimed to have been created, otherwise than by the legal proceeding specified in subsections *c* and *f* of this section prior to the filing of the petition in bankruptcy.⁹⁴ A lienholder may establish his lien in any court having jurisdic-

90. Compare subs. 2; *In re Soudans Mfg. Co.* (C. C. A., 7th Cir.), 8 Am. B. R. 45, 113 Fed. 804; *In re Durham* (D. C., Md.), 8 Am. B. R. 115, 114 Fed. 750.

91. *In re Foster* (D. C., Vt.), 25 Am. B. R. 96, 181 Fed. 703.

92. *In re Farmers' Supply Co.* (D. C., Ohio), 22 Am. B. R. 460, 170 Fed. 502.

93. *American Trust & Savings Bank v. Ruppe* (C. C. A., 8th Cir.), 38 Am. B. R. 621, 237 Fed. 581; *In re Rathman* (C. C. A., 8th Cir.), 25 Am. B. R. 246, 183 Fed. 913; *Stone-Ordean-Wells Co. v. Mark* (C. C. A., 8th Cir.), 35 Am. B. R. 663, 227 Fed. 975; *In re Shea* (D. C., Ky.), 31 Am. B. R. 697, 211 Fed. 365, 369; *Jaquith v. Rowley*, 188 U. S. 620, 621, 625, 626, 47 L. Ed. 620, 23 Sup. Ct. 369; *Harris v. First National Bank*, 216 U. S. 382, 23 Am. B. R. 632, 54 L. Ed. 528, 30 Sup. Ct. 296; *In re McMahon* (C. C. A., 6th Cir.), 17 Am. B. R. 530, 147 Fed. 684; *Frank v. Vollkommer*, 205 U. S. 521, 17 Am. B. R. 806, 51 L. Ed. 911, 27 Sup. Ct. 596; *Carling v. Seymour Lbr. Co.* (C. C. A., 5th Cir.), 8 Am. B. R. 29, 113 Fed. 483; *In re Silberhorn* (D. C., Ill.), 5 Am. B. R. 568, 105 Fed. 899. See also *Am. Bankr. Dig.* § 469.

94. *In re Rathman* (C. C. A., 8th Cir.), 25 Am. B. R. 246, 183 Fed. 913, 925-927, 106 C. C. A. 253, 265-267; *First National Bank v. Title & Trust Co.*, 198 U. S. 280, 281, 282, 14 Am. B. R. 102, 49 L. Ed. 1051, 25 Sup. Ct. 693; *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 25, 7 Am. B. R. 421, 46 L. Ed. 413, 22 Sup. Ct. 293; *Murphy v. John Hoffman Co.*, 211 U. S. 562, 569, 570, 21 Am. B. R. 487, 53 L. Ed. 327, 29 Sup. Ct. 154;

Tripp v. Mitschrich (C. C. A., 8th Cir.), 31 Am. B. R. 662, 211 Fed. 424, 426, 128 C. C. A. 96, 98. In the case of *American Trust & Savings Bank v. Ruppe* (C. C. A., 8th Cir.), 38 Am. B. R. 621, 237 Fed. 581, it appeared that at the time of the filing of the petition in bankruptcy a bank had a lien upon the mortgaged property which had been created prior to that time without suits or legal proceedings and had the possession of the mortgaged property. The action in replevin did not create the lien of the bank. That lien was created in May, 1914, by the act of the parties to the mortgage and the laws of the State of New Mexico, the petition in bankruptcy being filed in October, 1914. The bank was adverse claimant in possession when the petition for the adjudication in bankruptcy was filed. Neither the bankruptcy court nor any of its officers ever acquired any possession of the mortgaged property or of its proceeds. It was held that the bank had the right to the trial of its claim in a plenary action according to the course of the common law, or in a suit in equity according to the rules and principles of equity jurisprudence, and the bankruptcy court was without authority or jurisdiction in the absence of the consent of the bank to adjudge in a summary proceeding either the validity or the extent of its claim.

Jurisdiction of Bankruptcy Court.—Although under section 67-d of the bankruptcy act, valid liens are protected and preserved in bankruptcy, the holder of a mortgage or a security deed takes his security subject to the chance that proceedings in bankruptcy may be instituted and that the property held

tion;⁹⁵ although if the property is in possession of the court the bankruptcy court has jurisdiction,⁹⁶ and under certain conditions may proceed summarily as to such property.⁹⁷

d. Miscellaneous valid liens.—The rule seems to be that where the lien does not contravene the bankruptcy law, and is recognized by the State law, it will be preserved.⁹⁸ Likewise, a vendor's lien on land will be valid against a trustee in bankruptcy and courts of bankruptcy will recognize and give effect to such a lien provided for by the statutes of a State, in the absence of some act of the vendor or claimant inconsistent with the purpose of claiming a lien or with its continued existence.⁹⁹ And liens for the wages of employees under a State law are not to be affected by the act, and such liens are to be given full force and effect, although such wages are entitled to priority of payment under § 64-b (5); where such liens exist they must be recognized and satisfied in full out of the proceeds of the property to which they attach, without regard to the priority of other claims which precede them under the terms of such § 64-b.¹⁰⁰ A lien created by a verbal agreement, made

by him as security may be subject to become administered by the bankruptcy court. *Cohen v. Nixon & Wright* (D. C., Ga.), 37 Am. B. R. 646.

95. *Matter of Hosmer* (D. C., Ia.), 37 Am. B. R. 464, 233 Fed. 318.

96. *Brown Bros. Co. v. Smith Bros. Co.* (D. C., La.), 37 Am. B. R. 30, 231 Fed. 475, holding that the proper and most convenient method of claiming a lien on property in the possession of the bankruptcy court is by ancillary bill filed in the bankruptcy proceedings, and not by a separate plenary suit.

97. See discussion under § 23-b, *ante*, heading "Summary jurisdiction."

98. *Davis v. Billings* (Pa. Sup. Ct.), 38 Am. B. R. 957, 99 Atl. 163; *Kemp Lumber Co. v. Howard* (C. C. A., 8th Cir.), 38 Am. B. R. 608, 237 Fed. 574; *Matter of Mossler Co.* (C. C. A., 7th Cir.), 38 Am. B. R. 604; *Pretorius v. Anderson* (C. C. A., 5th Cir.), 38 Am. B. R. 93; *Matter of Cutler & John* (D. C., No. Car.), 36 Am. B. R. 420, 228 Fed. 771; *Cullen v. Armstrong* (D. C., Md.), 33 Am. B. R. 735, 209 Fed. 704; *In re Lowensohn* (D. C., N. Y.), 4 Am. B. R. 79, 100 Fed. 776; *In re Alverson Bros.* (Ref., So. Car.), 5 Am. B. R. 855; *In re Byrne* (D. C., Iowa), 3 Am. B. R. 268, 97 Fed. 762; *In re Gerry* (D. C., Pa.), 7 Am. B. R. 459, 461, 112 Fed. 957, 959; *In re West Norfolk Lumber Co.* (D. C., Va.), 7 Am. B. R. 648, 112 Fed. 759; *McNair v. McIntyre* (C. C. A., 4th Cir.), 7 Am. B. R. 638, 113 Fed. 113; *Evans v. Rounsaville* (Sup. Ct., Ga.), 8 Am. B. R. 236, 115 Ga. 684; *In re Hersey* (D. C., Iowa), 22 Am. B. R. 863, 171 Fed. 998; *Harvey v. Smith* (Sup. Ct., Mass.), 7 Am. B. R. 497; *In re Standard Laundry Co.* (C. C. A., 9th Cir.), 8 Am. B. R. 538, 116 Fed. 476; *In re Klapholz* (D. C., Pa.), 7 Am. B. R. 703, 113 Fed. 1,002; *Clark v. Iselin*, 21 Wall. 360; *In re Hutto*, Fed. Cas. 6,960; *In re N. Y. Mail, etc., Co.*, Fed. Cas. 10,209; *In re Dunkerson*, Fed. Cas. 4,156; *Gardner v. Cook*, Fed. Cas. 5,226.

Under the Mississippi statute, giving vendors of personal property a lien for the purchase money, the assignee of a note given for the balance of the purchase price of personal property has a lien which is not affected by the bankruptcy act, within the meaning of section 67-d, although acquired within four months of the filing of a petition against the assignor. *Norris v. Trenholm* (C. C. A., 5th Cir.), 31 Am. B. R. 353, 209 Fed. 827.

99. Vendor's lien.—Under the Idaho Revised Codes, sections 3441 and 3443, and the bankruptcy act, a vendor of land to a bankrupt has a lien thereon, as against the trustee in bankruptcy, and he is not guilty of laches in waiting until after the filing of a petition in bankruptcy against the vendee before asserting his vendor's lien. *Matter of Lane Lumber Co.* (C. C. A., 9th Cir.), 33 Am. B. R. 491, 217 Fed. 550.

100. *In re McDavid Lumber Co.* (D. C., Fla.), 27 Am. B. R. 39, 190 Fed. 97.

Liens of employees under State Law.—In the case of *In re Yoke Vitrefied Brick Co.* (D. C., Kan.), 25 Am. B. R. 18, 180 Fed. 235, the court said: "When viewed in this light, it readily appears if the only prior right of payment provided for in section 64-b of the Bankruptcy Act had been debts owing to any person who by the laws of the State are entitled to priority of payment, and the State statute should receive the construction above conceded, such provision in the act would not have affected the rights of a lienholder who received his lien after the State statute had become a law of the State. But such are not the terms of the Bankruptcy Act. Instead of claimants here demanding priority of payment of their claims under the State law in question, receiving their demands, as commanded by the terms of the statute, 'from the money thereof which shall first come into the hands of such receiver or assignee' (in this case, trustee), the provisions of the Bankruptcy Act are such that four classes of claimants must be first paid in

in good faith and with the knowledge of the bankrupt's creditors, is valid.¹⁰¹

e. Mechanics' liens.—Here there was some question under the former law.¹⁰² There is none under the present.¹⁰³ Such a lien is not one through legal proceedings,¹⁰⁴ and, unless so, cannot be attacked, save for intention to hinder, delay, or defraud, an element not likely to appear in liens of this class.¹⁰⁵ It seems even that such a lien may be perfected after bankruptcy.¹⁰⁶ A mechanic's lien is not lost by the adjudication of bankruptcy, even though the lien did not attach until notice, and the notice was filed within four months preceding the bankruptcy adjudication.¹⁰⁷ Being liens created by statute, without the necessity of legal proceedings or judicial process, they are not ordinarily dissolved by an adjudication in bankruptcy within four months after they are acquired.¹⁰⁸ A materialman's lien may be asserted whether the owner of the property against which it is claimed was solvent or insolvent at the time it was filed.¹⁰⁹ A laborer's or materialman's lien for labor performed for, or materials furnished to, a subcontractor is not affected by the bankruptcy of the subcontractor.¹¹⁰ In determining the validity of such liens

full before one claiming priority of payment of his demand under the State law may be paid anything, and of the four classes of demands entitled to be so paid in preference to one claiming priority of payment under the State law are such demands as filing fees, and certain costs of administration not going to the preservation of the estate, and which do not protect or further the interest of the lienholder, and which for this reason, as against his rights, cannot be ordered paid out of the estate on which his lien holds against his consent. It therefore follows, of necessity, if such demands must be paid before one demanding priority of payment under the laws of the State can be paid, and as such prior demands, which by the very terms of the act itself must be first paid, cannot be enforced against the rights of a valid lienholder, to enforce the rights of petitioners in accordance with the statute of the State, as it is contended by them should be done, would operate to affect the fixed liens thereon, and thus contravene the express provision of section 67-d of the Bankruptcy Act."

101. *Goodnough Mercantile & Stock Co. v. Galloway* (D. C., Oregon), 19 Am. B. R. 244, 136 Fed. 504, holding that a lien on certain logs and lumber, created anterior to the four months' period to receive money advanced for labor and supplies, is valid.

102. *In re Dey*, Fed. Cas. 3,871; *In re Coulter*, Fed. Cas. 3,276; *Sabin v. Connor*, Fed. Cas. 12,197; *In re Cook*, Fed. Cas. 3,151.

103. *In re Kerby-Dennis* (C. C. A., 7th Cir.), 2 Am. B. R. 402, 95 Fed. 166, affg. s. c., 2 Am. B. R. 218, 94 Fed. 818; *In re Emslie* (C. C. A., 2d Cir.), 4 Am. B. R. 126, 102 Fed. 291, revg. s. c., 3 Am. B. R. 282, 97 Fed. 929; *In re Coe-Powers Co.* (C. C. A., 6th Cir.), 6 Am. B. R. 1, 109 Fed. 550; *In re Beck Prov. Co.*, 2 N. B. N. Rep. 532. See cases digested in *Am. Bankr. Dig.* § 445.

104. *Howard v. Cunliff* (Ct. App., Mo.), 10 Am. B. R. 71, 69 S. W. 737; *In re Emslie* (C. C. A., 2d Cir.), 4 Am. B. R. 126, 102 Fed.

292; *Fairlamb v. Smedley Const. Co.*, 22 Am. B. R. 824, 36 Pa. Super. Ct. 17; *Tube City Mining & Milling Co. v. Otterson* (Ariz. Sup. Ct.), 35 Am. B. R. 500, 146 Pac. 203, holding that a lien, under a State statute for labor performed and material furnished is not a "lien obtained through legal proceedings" even though it was necessary to file a claim, and initiate the prosecution of a suit to preserve and enforce it; *Kemp Lumber Co. v. Howard* (C. C. A., 8th Cir.), 38 Am. B. R. 608, 237 Fed. 574.

105. *In re Kyte* (D. C., Pa.), 25 Am. B. R. 337, 182 Fed. 166.

106. *In re Houston* (Ref., N. Y.), 7 Am. B. R. 92; *Moreau Lumber Co. v. Johnson* (Sup. Ct., N. Dak.), 33 Am. B. R. 717, 150 N. W. 563.

107. *In re Emslie* (C. C. A., 2d Cir.), 4 Am. B. R. 126, 102 Fed. 292; *Hildreth Granite Co. v. Watervelt* (N. Y., App. Div.), 31 Am. B. R. 703, 161 N. Y. App. Div. 420, 146 N. Y. Supp. 449.

108. *Kemp Lumber Co. v. Howard* (C. C. A., 8th Cir.), 38 Am. B. R. 608, 237 Fed. 574.

109. *Lloyd v. Sickler* (Wash. Sup. Ct.), 38 Am. B. R. 785, 162 Pac. 979.

110. *Crane Co. v. Smythe*, 11 Am. B. R. 747, 94 N. Y. App. Div. 53, 87 N. Y. Supp. 917; *Kane Co. v. Kinney*, 9 Am. B. R. 778, note, 174 N. Y. 69, 66 N. E. 619; *In re Cramond* (D. C., N. Y.), 17 Am. B. R. 22, 145 Fed. 966; *Matter of Grissler* (C. C. A., 2d Cir.), 13 Am. B. R. 508, 136 Fed. 754, holding that where a mechanic's lien has been perfected as provided by a State statute, an action to enforce it will not be stayed by the bankruptcy court; *Fehling v. Goings*, 13 Am. B. R. 154, 67 N. J. Eq. 375.

Money due under building contract.—In the case of *Matter of Roeber* (C. C. A., 2d Cir.), 9 Am. B. R. 303, 121 Fed. 449, revg. 9 Am. B. R. 778, 121 Fed. 444, it was held that a trustee in bankruptcy takes title to the money due to a bankrupt under a building contract, free from the liens of

the law of the State will control.¹¹¹ A mechanic's lien, defective upon its face, is not entitled to priority of payment in the distribution of the funds.¹¹² A failure to file a notice of lien as required by the statute, or otherwise to comply with the statute, affects the validity of the lien and it is not enforceable as such.¹¹³ Akin to mechanics' liens are all liens which exist by, or whose priority rests on, special statutes.¹¹⁴

f. Landlords' liens.—At common law, before distraint, the landlord has no lien on any particular portion of the goods of his tenant, and is only an ordinary creditor, except that he has the right of distress by reason of which he may place himself in a better position.¹¹⁵ In some States a landlord is given a statutory lien, either after or before distraint for rent. Such statutory liens must be treated as having been given in good faith and independently of the bankruptcy act, and are not affected by such act.¹¹⁶ A landlord's statutory lien for rent is entitled to priority of payment over the claims of general creditors,¹¹⁷ and will attach to such portion of the bankrupt tenant's property and will accrue as to such portion of the unpaid rent, as may be prescribed by the statute creating the lien.¹¹⁸ The requirements of the State statute must be strictly observed or the lien will not be recognized.¹¹⁹ If dis-

subcontractors for labor and materials furnished for the building, although the notices of liens were filed pursuant to the statute, but after the contractor had filed his petition in bankruptcy.

111. *Morgan v. First Nat. Bank* (C. C. A., 4th Cir.), 16 Am. B. R. 639, 145 Fed. 466.

Validity under Washington code.—Petitioner contracted with the bankrupt to furnish labor and materials for putting in certain chain and railing for the bankrupt. While this work was in progress the bankrupt contracted with another to furnish labor and materials for the construction of tables. The latter contractor not having the materials, the bankrupt agreed with the petitioner that, if he would furnish the materials he would pay him direct therefor. Petitioner so furnished the materials and subsequently filed a lien under sections 1154 and 1155 of Rem. & Bal. Code of Washington, upon the several articles as constructed under one contract. Held, that the lien cannot be sustained, as the labor and material was furnished under two distinct contracts. *Matter of Shute and Wife* (D. C., Wash.), 37 Am. B. R. 554, 233 Fed. 544.

112. *In re Miner's Brewing Co.* (D. C., Pa.), 20 Am. B. R. 717, 162 Fed. 327.

113. *In re Cramond* (D. C., N. Y.), 17 Am. B. R. 22, 145 Fed. 966.

Failure to perfect.—Before a creditor can claim a lien given by a State statute he must comply with the statute and perfect his lien. It is only after so perfected that the lien is protected by a court of bankruptcy or any other court. *In re Franklin* (D. C., N. Car.), 18 Am. B. R. 218, 220, 151 Fed. 642.

Verbal notice of lien.—Where the statute of a State requires that a person claiming a lien on property shall "notify" the owner of his claim, a verbal notice to the owner is a sufficient notice upon which to predicate

a lien and base a claim of priority over subsequent lienholders on real estate which was formerly owned by a bankrupt and sold by his trustee. *In re Boner* (D. C., Ohio), 26 Am. B. R. 321, 189 Fed. 93.

114. For instance, in cases like *In re Matthews* (D. C., Ark.), 6 Am. B. R. 96, 109 Fed. 603; *In re Gosch* (D. C., Ga.), 9 Am. B. R. 613, 121 Fed. 604. But see *In re Fall City Shirt Co.* (D. C., Ky.), 3 Am. B. R. 437, 98 Fed. 592.

115. *Henderson v. Mayer*, 225 U. S. 631, 28 Am. B. R. 387, 56 L. Ed. 1233, 32 Sup. Ct. 699.

116. *Courtney v. Fidelity Trust Co.* (C. C. A., 6th Cir.), 33 Am. B. R. 400, 219 Fed. 57.

117. *In re V. D. L. Co.* (D. C., Ga.), 23 Am. B. R. 643, 175 Fed. 635; *In re Burns* (D. C., Ga.), 23 Am. B. R. 640, 175 Fed. 633; *Matter of Southern Hardware & Supply Co.* (D. C., Ala.), 32 Am. B. R. 92, 210 Fed. 381, citing *Collier's on Bankruptcy* (9th Ed.), 945. See cases digested in Am. Bankr. Dig. § 449.

118. Under the statute of Louisiana, giving a landlord a lien for rent and providing that in case of the failure or death of a lessee of a building used wholly or in part for mercantile purposes, the right so given "shall not extend * * * in such a way as to receive rent for a term of more than one year after such failure or death," a lease, having more than a year to run at the date of the bankruptcy of the lessee, mercantile company, gave the landlord a lien for the accrued rent and for the rent for one year after the bankruptcy, and said lien is saved by section 67-d of the Bankruptcy Act, from being affected by the act. *Fudickar P. Glenn* (C. C. A., 5th Cir.), 38 Am. B. R. 237, 237 Fed. 808.

119. *Marshall v. Knox*, 16 Wall. 551; *In re McIntire* (D. C., W. Va.), 16 Am. B. R.

traint is necessary and has not been resorted to, there is no lien.¹²⁰ But it has been held that the lien was valid though it did not attach by the levy of a distress warrant until two days before the filing of a petition in bankruptcy against the tenant.¹²¹ Where a lien is given for the "current contract year," the landlord may enforce such lien against the trustee for rent due after the adjudication of the tenant, and for the remainder of such year.¹²² Where a landlord's lien is not recognized by statute, a lien under a distress warrant is avoided by subsection f.¹²³ But where a statute gives a general lien to a landlord on the property of his tenant, which dates from and is enforceable by a levy of a distress warrant, such lien is not one created by a judgment nor "obtained through legal proceedings," so as to be void under subsection f.¹²⁴ Under such a statute the landlord's lien takes effect as of the date of the levy of the distress warrant, and all liens antedating the levy, including that of the trustee based on the adjudication in bankruptcy of the tenant in favor of general creditors, are superior to that of the landlord.¹²⁵ Even where such

80, 142 Fed. 593; *Preetorius v. Anderson* (C. C. A., 5th Cir.), 38 Am. B. R. 93.

Lien under unrecorded lease of real estate.

—A lease of real estate in the State of Rhode Island, containing a reservation of personal property on the premises as security for rent to become due, need not be recorded in order to render the lien valid. Hence, the trustee in bankruptcy of the lessee is not entitled under section 47a (2) of the Bankruptcy Act, as amended in 1910, to the personal property in question, although the lease was not recorded until within four months of bankruptcy. *Dellinger v. Waite Thresher Co.* (C. C. A., 1st Cir.), 35 Am. B. R. 802, 228 Fed. 506.

120. *In re Ruppel* (D. C., Pa.), 3 Am. B. R. 233, 97 Fed. 778; *In re Bayley* (Ref., Pa.), 22 Am. B. R. 249; *In re German* (Ref., Pa.), 2 Am. B. R. 170; *Matter of Printograph Sales Co.* (D. C., Pa.), 31 Am. B. R. 539, 210 Fed. 567.

Under the Maryland statute a landlord who fails to exercise his right to distrain before insolvency proceedings are begun has no right to preferential payment. *In re Chaudron & Peyton* (D. C., Md.), 24 Am. B. R. 811, 820, 180 Fed. 841.

121. *In re Robinson & Smith* (C. C. A., 7th Cir.), 18 Am. B. R. 503, 154 Fed. 343.

122. *Martin v. Orgain* (C. C. A., 5th Cir.), 23 Am. B. R. 454, 174 Fed. 772, arising under Texas Stats., Art. 3,251; *In re Meyer & Bleuler* (D. C., La.), 28 Am. B. R. 17, 195 Fed. 653, arising under Louisiana Civil Code, Art. 2,705; *Matter of Southern Hardware, etc., Co.* (D. C., Ala.), 32 Am. B. R. 92, 210 Fed. 381, citing *Collier on Bankruptcy* (9th Ed.), 946.

123. *In re Dougherty* (D. C., Ga.), 6 Am. B. R. 457, 109 Fed. 480.

Landlord's lien under Illinois statute.—The lien of a landlord upon the property of a tenant for unpaid rent, acquired under the Illinois statute by the levy of a distress warrant within four months of the bankruptcy of the tenant, is null and void under section

67-f of the Bankruptcy Act, except as to "crops grown or growing" upon the premises. *Matter of United Motor Co.* (C. C. A., 7th Cir.), 33 Am. B. R. 694, 220 Fed. 772.

124. *Matter of Mossler Co.* (C. C. A., 7th Cir.), 38 Am. B. R. 604; *In re West Side Paper Co.* (C. C. A., 3d Cir.), 20 Am. B. R. 660, 159 Fed. 241.

Under section 2795 of the Georgia Code, providing that landlords shall have a general lien on the property of the tenant liable to levy and sale which dates from the levy of the distress warrant to enforce the same, the landlord has a right to a statutory lien from the beginning of the tenancy; and the lien is not created by a judgment nor "obtained through legal proceedings," so as to be void under section 67f of the Bankruptcy Act, even though it was enforced and attached by the levy of a distress warrant within four months of the lessee's bankruptcy. *Henderson v. Mayer*, 225 U. S. 631, 28 Am. B. R. 387, 56 L. Ed. 1233, 32 Sup. Ct. 699.

125. *Preetorius v. Anderson* (C. C. A., 5th Cir.), 38 Am. B. R. 93.

Landlord's lien invalid as against trustee.—In the case of *Southern Railway Co. v. Wilder* (C. C. A., 5th Cir.), 36 Am. B. R. 747, 231 Fed. 933, the court had occasion to consider the lien of the landlord as opposed to the trustee's lien in favor of general creditors given under the bankruptcy law, and stated as follows: "Under Civ. Code Ga. 1895, § 2787, establishing liens in favor of landlords, section 3124, empowering them to distrain for rent as soon as the same is due, and section 2795, giving them a general lien on the property of the tenant liable to levy and sale, which dates from the levy of the distress warrant to enforce the same, the lien of the landlord for rent prior to distress is inchoate, and covers no specific property, and gives no priority over the lien given to the trustee in bankruptcy by § 47a (2) of the Bankruptcy Act, as amended by the Act of 1910."

a lien is given, it is waived by the landlord taking a chattel mortgage for the rent.¹²⁶ The lien attaches to the proceeds of the sale of the goods upon which it exists, even though the sale was had pursuant to a court order, and such order made no provision therefor.¹²⁷ But where a landlord consents to the sale of property to which his lien has attached in bulk with other property not affected thereby he loses his lien, since under such circumstances it would be impossible to determine how much of the proceeds of sale was the product of the property covered by his lien.¹²⁸ A materialman's lien, which exists at the time of the delivery of the goods and which under the statutes of Kentucky has priority over other liens thereafter created, takes precedence over a landlord's lien under a lease subsequently executed.¹²⁹ It seems that this subsection does not include a landlord's lien under the Pennsylvania statute.¹³⁰ Cases under the law of 1867 will be found in the foot-note.¹³¹

g. Mortgages to secure further advances and on after-acquired property.—

Mortgages given in good faith by way of continuing collateral are valid to the amount advanced before the petition is filed.¹³² So also, it is thought, of mortgages purporting to cover property to be acquired.¹³³ A chattel mortgage, covering after-acquired property in the possession of the mortgagor, valid under the laws of the State where given, is effectual as against the mortgagor's trustee in bankruptcy, and the taking possession of the property by the mortgagee after a condition broken within the period of four months prior to filing the petition against the mortgagor is not a preference.¹³⁴

^{126.} *In re Wolf* (D. C., Iowa), 3 Am. B. R. 558, 98 Fed. 84.

^{127.} **Equitable lien on proceeds of sale of stock of goods.**—Where a sale of a bankrupt tenant's entire stock of goods is made without notice or objection by the landlord, under an order of the court authorizing the receiver to continue the business of the bankrupt, thereby divesting the landlord of his lien on the goods sold which he had by the law of the State for further accruing rent, the landlord is equitably entitled to a lien on the proceeds of such sale, even though the decree of sale made no such provision. *In re Varley & Bauman Clothing Co.* (D. C., Ala.), 26 Am. B. R. 104, 188 Fed. 761; *Matter of Southern Hardware, etc., Co.* (D. C., Ala.), 32 Am. B. R. 92, 210 Fed. 381.

^{128.} *Keyser v. Wessel* (C. C. A., 3d Cir.), 12 Am. B. R. 126, 128 Fed. 281, affg. 10 Am. B. R. 586, 123 Fed. 188, and distinguishing *Carroll v. Young* (C. C. A., 3d Cir.), 9 Am. B. R. 643, 119 Fed. 577. See also *In re Bayley* (Ref., Pa.), 22 Am. B. R. 249.

^{129.} *Louisville Woolen Mills v. Tapp* (C. C. A., 6th Cir.), 38 Am. B. R. 529, and see *Courtney v. Fidelity Co.* (C. C. A., 6th Cir.), 33 Am. B. R. 400, 219 Fed. 57 and *Louisville Woolen Mills v. Johnson* (C. C. A., 6th Cir.), 37 Am. B. R. 67, 228 Fed. 606.

^{130.} *In re Consumers' Coffee Co.* (D. C., Pa.), 18 Am. B. R. 500, 151 Fed. 933. In Pennsylvania, a landlord's right of distraint upon the goods and chattels on leased premises is not considered a superior lien to that of an execution against the owner of said goods. *In re De Lancey Stables Co.* (D. C., Pa.), 22 Am. B. R. 406, 170 Fed. 860.

^{131.} *In re Bowne*, Fed. Cas. 1,741; *Trim v. Wagner*, Fed. Cas. 14,174; *Bailey v. Loeb*, Fed. Cas. 739.

^{132.} *Marvin v. Chambers*, Fed. Cas. 9,179. See *Davis v. Turner* (C. C. A., 4th Cir.), 9 Am. B. R. 704, 120 Fed. 605; *In re Williams* (D. C., Ga.), 9 Am. B. R. 731, 120 Fed. 542; *Stedman v. Bank of Monroe* (C. C. A., 8th Cir.), 9 Am. B. R. 4, 117 Fed. 237; *Matter of United States Food Co.* (Ref., Mich.), 15 Am. B. R. 329; *In re Hawks* (D. C., Kan.), 30 Am. B. R. 365, 204 Fed. 309. See Am. Bankr. Dig. § 443.

As to distinction between mortgage and deed conveying property described therein to secure a debt, under Georgia statute, see *In re Caldwell* (D. C., Ga.), 24 Am. B. R. 495, 178 Fed. 377.

^{133.} *Barnard v. Norwich, etc., Co.*, Fed. Cas. 1,007; *In re Sentenne & Green Co.* (D. C., N. Y.), 9 Am. B. R. 648, 120 Fed. 436. Compare *Brett v. Carter*, Fed. Cas. 1,844.

^{134.} *Thompson v. Fairbanks*, 196 U. S. 516, 13 Am. B. R. 437, 49 L. Ed. 577, 25 Sup. Ct. 306; *In re Rogers* (D. C., Vt.), 13 Am. B. R. 75, 132 Fed. 560; *In re Hersey* (D. C., Iowa), 22 Am. B. R. 863, 171 Fed. 998.

The validity of a mortgage on after-acquired property as against a trustee in bankruptcy depends upon the laws of the State wherein the property is situated; such a mortgage held invalid in New York. *In re Marine Const. & Dry Dock Co.* (C. C. A., 2d Cir.), 16 Am. B. R. 325, 144 Fed. 649; *In re Adamant Plaster Co.* (D. C., N. Y.), 14 Am. B. R. 815, 137 Fed. 251; *Zartman v. National Bank*, 16 Am. B. R. 152, 109 N.

h. Mortgagor in possession.—A chattel mortgage is not void for indefiniteness of description which purports to be upon all property "now being and remaining in the possession" of the mortgagor.¹³⁵ Nor does an agreement therein permitting the mortgagor to sell the mortgaged goods and use the proceeds thereof invalidate the mortgage, where no fraudulent intention is found; the only effect of such agreement is to withdraw the goods sold from the operation of the mortgage.¹³⁶ The lien of a chattel mortgage may be retained so far as valid.¹³⁷ Where the mortgage was given for a present consideration upon property remaining in the possession of the mortgagor, it is valid, in the absence of proof of actual fraud; the knowledge of the mortgagee that the mortgagor was unable to pay his debts does not invalidate the mortgage if a present valid consideration exists at the time of the execution of the mortgage.¹³⁸

i. Liens on special funds; mingling with other funds.—It is a familiar rule that where a wrongdoer knowingly mingles the property of another with his own in such a manner that it becomes indistinguishable, the true owner may claim the whole mass, or if it has been disposed of, may follow it or its proceeds as long as he can trace them, for the purpose of fastening an equitable lien for the property of which he has been dispossessed.¹³⁹ This principle has been applied in bankruptcy cases to preserve liens for funds and property of others in the possession of bankrupts who have commingled them with their

Y. App. Div. 406, 96 N. Y. Supp. 633. Compare *In re Burnham* (D. C., N. Y.), 15 Am. B. R. 548, 140 Fed. 926.

Under the decisions of Minnesota which do not limit the operation of a chattel mortgage on subsequently acquired property to such as is merely incidental to an existing body of property, the assignment of property to be thereafter acquired by bankrupts became effective as soon as such property was purchased, and title thereto vested in the surety company at that time, with a right on its part to take possession whenever a default occurred. *Title Guaranty & Surety Co. v. Witmire* (C. C. A., 6th Cir.), 28 Am. B. R. 235, 195 Fed. 41.

A chattel mortgage purporting to cover after acquired property is void under the law of Maryland as to such property, and the mortgagee has no rights in such property as against subsequent creditors without security. *Grimes v. Clark* (C. C. A., 4th Cir.), 37 Am. B. R. 142.

Personal property used in bankrupt's business and consisting of machinery, tools and office fittings which were purchased with the proceeds of the sale of mortgage bonds, intermingled with other funds, does not pass under an after-acquired property clause in the mortgage given to secure the payment of such bonds, so that such property can be held by the mortgagee as against the trustee in bankruptcy who represents the general creditors. *In re Niagara Lead & Battery Co.* (D. C., N. Y.), 29 Am. B. R. 788, 202 Fed. 298.

135. *In re Beede* (D. C., N. Y.), 11 Am. B. R. 387, 126 Fed. 853; *Davis v. Turner* (C. C.

A., 4th Cir.), 9 Am. B. R. 704, 120 Fed. 605. See *Jones Chatt. Mortg.*, § 65.

136. *In re Ball* (D. C., Vt.), 10 Am. B. R. 564, 123 Fed. 164. As to effect of mortgagor remaining in possession under Ohio law, see *In re First Nat. Bank of Canton* (C. C. A., 6th Cir.), 14 Am. B. R. 180, 135 Fed. 62; *In re National Valve Co.* (D. C., Ohio), 15 Am. B. R. 524, 140 Fed. 679; under New York law, see *Skilton v. Codrington*, 15 Am. B. R. 810, 185 N. Y. 80, 77 N. E. 790; *In re Mahland* (D. C., N. Y.), 26 Am. B. R. 81, 184 Fed. 743.

Power of mortgagor to sell for own benefit.—A chattel mortgage, executed by a bankrupt upon all his property at his designated place of business, made in good faith and for a present consideration, is not rendered void *in toto*, as against the bankrupt's trustee, because the bankrupt is permitted to continue a portion of the business without accounting to the mortgagee, but is void only to the extent of such portion. *Peterson v. Sabin* (C. C. A., 9th Cir.), 32 Am. B. R. 599, 214 Fed. 234.

137. *Matter of Davis* (D. C., N. Y.), 19 Am. B. R. 98, 155 Fed. 671; *Peterson v. Sabin* (C. C. A., 9th Cir.), 32 Am. B. R. 599, 214 Fed. 234.

138. *In re Mahland* (D. C., N. Y.), 26 Am. B. R. 81, 184 Fed. 743; *In re Hawks* (D. C., Kan.), 30 Am. B. R. 365, 204 Fed. 30c; *Matter of Baar* (C. C. A., 2d Cir.), 32 Am. B. R. 465, 213 Fed. 628.

139. *National Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693; *Holder v. Western German Bank*, 136 Fed. 90; *Erie R. Co. v. Dial*, 140 Fed. 689; *Knatchbull v. Hallett*, 13 Ch. Div. (Eng.) 696.

own funds or property; as where a trustee of a fund uses the same in his own business and subsequently becomes bankrupt, the trustee, standing in the shoes of the bankrupt, and possessed only of his rights in respect to such fund, must recognize the lien of his bankrupt's beneficiary, and satisfy such lien out of the proceeds of the sale of the property purchased in whole or in part by the trust fund.¹⁴⁰ And the same principle will require the trustee of a bank which has become bankrupt to satisfy, out of the assets of the bank, a lien of a depositor whose deposit was received while the bank was insolvent and wrongfully mingled with its own funds.¹⁴¹ A deposit of town funds with a bank without agreement that such funds shall be kept separate from other funds used by the banker in his business, does not create a lien upon the funds of the banker in the hands of his trustee in bankruptcy, to the extent of the deposit, unless the town funds can be identified.¹⁴² If a trust fund which has been mingled and used in the bankrupt's general business for a considerable time, may have been used in the payment of losses, debts and expenses, and is not shown to have materially increased the assets which came into the trustee's possession, a lien does not exist against the general body of the assets received by the bankrupt's trustee.¹⁴³

j. Lien of pledgee.—The lien of a pledgee is not only recognized, but is unimpaired, and he has the right to retain the property until it is released by a payment of his claim.¹⁴⁴ The validity of a contract of pledge must be decided by the law of the State where made.¹⁴⁵ Generally speaking, and under the laws of most of the States, there must be a delivery of the possession of

^{140.} *Smith v. Township of Au Gres* (C. C. A., 6th Cir.), 17 Am. B. R. 745, 150 Fed. 257; *In re Taft*, 13 Am. B. R. 417, 133 Fed. 511.

^{141.} *Smith v. Mottley* (C. C. A., 6th Cir.), 17 Am. B. R. 863, 150 Fed. 268; *Clark v. Iselin*, 21 Wall. 360.

Mingling property of another with own; misappropriation of deposits by bank.—A bank received cash on deposit and certain securities for collection which it proceeded to collect, the proceeds from which, together with the cash deposit, it mingled with its own funds, and had failed to remit to the depositor, at the time of the bank's failure, in accordance with instructions. *Held*, that where the bank had made investment loans after receiving this trust fund cash, the presumption would be that the loans were made out of its own funds and not out of trust funds, which presumption could only be met by proof that, at the close of the bank on the day of the investment, the bank did not have remaining in its vaults money equal to and out of which it could repay the trust fund; and that in the absence of such proof, a lien should not be allowed against such investments, but only upon the cash on hand when the bank closed. *In re City Bank of Dowagiac* [appeal of Spaulding] (D. C., Mich.), 25 Am. B. R. 276, 186 Fed. 413. See also *In re City Bank of Dowagiac* [claim of Nelson] (D. C., Mich.), 25 Am. B. R. 236, 186 Fed. 250.

^{142.} *In re Nichols* (D. C., N. Y.), 22 Am. B. R. 216, 166 Fed. 603.

^{143.} *In re Lindsley & Co.* (D. C., Mich.), 25 Am. B. R. 239, 185 Fed. 684.

^{144.} *Jerome v. McCarter*, 15 N. B. R. 546; *Yeatman v. Savings Inst.*, 9 U. S. 764; *Clark v. Iselin*, 21 Wall. 360; *Matter of Harvey* (D. C., Ala.), 32 Am. B. R. 337, 212 Fed. 340.

Lien of pledgee.—In the case of *Matter of Mayer, Leslie and Baylis* (C. C. A., 2d Cir.), 19 Am. B. R. 356, 157 Fed. 836, it was held that a bankruptcy court is without power to restrain a sale by the pledgee of property held by him under a valid agreement of pledge by the bankrupt, and pursuant to its terms.

Verbal pledge of insurance policies.—The manual delivery of insurance policies, or other choses in action, to a pledgee with full power of control over them and with the intention of passing the equitable right to them is efficacious to that end, even if the legal title remains in the pledgor, and, constituting an equitable and enforceable pledge good between the parties, is good as against the trustee in bankruptcy of one of them. *Jones v. Coates* (C. C. A., 8th Cir.), 28 Am. B. R. 249, 196 Fed. 860.

^{145.} *Security Warehousing Co. v. Hand*, 206 U. S. 415, 19 Am. B. R. 291, 51 L. Ed. 1117, 27 Sup. Ct. 720; *Hartford Ins. Co. v. Railway*, 175 U. S. 91, 44 L. Ed. 84, 20 Sup. Ct. 33; *In re Industrial Iron Work* (D. C., Pa.), 25 Am. B. R. 221, 179 Fed. 151. *Matter of Harvey* (D. C., Ala.), 32 Am. B. R. 337, 212 Fed. 340; citing *Collier on Bankruptcy* (9th Ed.), 948; *Taney v. Penn National Bank*, 232 U. S. 174, 33 Am. B. R. 168.

the property pledged to the pledgee, to give rise to the lien in his favor;¹⁴⁶ for instance, under the laws of Wisconsin there can be no pledge of goods in a warehouse by the mere transfer of warehouse receipts.¹⁴⁷ But under circumstances showing that the transaction is in good faith, and that the requirement of delivery would be such a hardship as to defeat the purpose of the contract, the lien may be sustained as an equitable lien rather than a pledge.¹⁴⁸

k. Other valid liens.—(1) **VENDOR'S LIEN.**—A contract of conditional sale may give rise to a valid lien,¹⁴⁹ which will not be affected by a discharge.¹⁵⁰ A purchase-money lien continues in full force notwithstanding the vendee has

146. *In re Shulman* (D. C., Pa.), 30 Am. B. R. 238, 206 Fed. 129; *Matter of Harvey* (D. C., Ala.), 32 Am. B. R. 337, 212 Fed. 340.

Possession of pledgor.—When a vendee, or a pledgee, takes title to personal property, without taking possession of it, he takes the risk of the integrity and solvency of his vendor, or pledgor, when the rights of subsequent *bona fide* purchasers, or of levying creditors, arise. *Bank of North America v. Penn Motor Car Co.* (Pa. Sup. Ct.), 31 Am. B. R. 395, 83 Atl. 622.

Symbolical delivery.—Delivery of possession is indispensable to a valid pledge of personal property, but such delivery may be made symbolically, and the question of possession may largely depend upon the intention of the parties dealing in good faith and upon the nature and location of the property itself. *Ward v. First Nat'l Bank of Ironton, Ohio* (C. C. A., 6th Cir.), 29 Am. B. R. 312, 202 Fed. 609 (as to delivery of lumber in possession of pledgor, which was tagged and marked with initials of pledgee).

Return of pledged securities to trustee of pledgor.—Where a pledgee of securities, after he had returned them to the trustee in bankruptcy of the pledgor, discovered that he was exposed to liability in connection with the sale of certain other pledged securities, and that he would be entitled to reimbursement from the securities returned in case this liability should be adjudged against him, and the owners of the returned securities set up a decree of the District Court, affirmed by the Circuit Court of Appeals, adjudging them to be the owners, and asserted these decrees to be conclusive, the referee properly directed the trustee to retain custody of the securities, until the court should determine whether the pledgee by returning them had lost the right to claim a lien thereon. *Matter of Jamison Bros. & Co.* (C. C. A., 3d Cir.), 35 Am. B. R. 725, 227 Fed. 30.

147. *Security Warehousing Co. v. Hand*, 206 U. S. 415, 19 Am. B. R. 291, 51 L. Ed. 1117, 27 Sup. Ct. 720.

Warehouse receipts.—As to validity of pledge of warehouse receipts to secure loans made to owner by trust company, see *Union Trust Co. v. Wilson*, 198 U. S. 530, 14 Am. B. R. 109, 49 L. Ed. 1154, 25 Sup. Ct. 766; *Love v. Export Storage Co.* (C. C. A., 6th Cir.), 16 Am. B. R. 171, 143 Fed. 1; *Security Warehousing Co. v. Hand* (C. C. A., 7th Cir.), 16 Am. B. R. 49, 143 Fed. 32.

148. *Matter of Harvey* (D. C., Ala.), 32 Am. B. R. 337, 212 Fed. 340; citing *Collier on Bankruptcy* (9th Ed.), 948, 950.

Retention of possession by pledgor for purposes of manufacture; equitable lien.—In the case of *In re Industrial Iron Works* (D. C., Pa.), 25 Am. B. R. 221, 179 Fed. 151, it appeared that the bankrupt, having contracted to supply a customer with a derrick car and equipment, bought the car itself from another company, upon a contract of conditional sale, title to remain in vendor until paid for. While engaged in the manufacture and erection of the equipment of the car, and more than four months before the filing of the petition in bankruptcy, the bankrupt assigned the car and its equipment and the money to be paid therefor by the bankrupt's customer, to a bank, in return for the discount of bankrupt's note for the amount of the purchase price. The purchaser was requested to pay the contract price to the bank, which it agreed to do; but when the car was delivered it was refused because not satisfactory under the contract. While in the custody of the carrier, after refusal, and after bankruptcy, the bank seized the car, with its equipment, in an action of replevin, as pledgee. It was held, that the conditional vendor of the car was entitled to the car or its value and that upon the payment of its value the bank might retain the car and its equipment; that under the law of Pennsylvania, the pledge to the bank was not invalid as against the trustee on the ground of retention of possession by the pledgor, because possession was necessarily so retained for the purpose of manufacture, the pledgor acting as a bailee for that purpose, and neither the bankrupt nor his trustee having had possession after refusal by the purchaser; and that the bank's claim could be sustained as an equitable lien upon the property, which, having been acquired more than four months before the filing of the petition, was not affected by the bankruptcy proceeding.

149. *National Bank of Commerce v. Williams* (C. C. A., 5th Cir.), 20 Am. B. R. 79, 159 Fed. 615; *Matter of Johnson* (D. C., Conn.), 33 Am. B. R. 104, 215 Fed. 666. See under heading "c. Want of record. (2) Chattel mortgages and contracts for conditional sale," *ante*.

150. *Smith v. Turner* (Sup. Ct., Ga.), 32 Am. B. R. 864, 80 S. E. 993.

been adjudicated a bankrupt.¹⁵¹ The lien will exist and may be asserted against the bankrupt's trustee, although no claim thereto has been filed.¹⁵²

(2) **EQUITABLE LIENS.**—Equitable liens, established in good faith in respect to any particular property, are cognizable in courts of bankruptcy and will be sustained against a holder who is not a purchaser for value and without notice and against trustees in bankruptcy.¹⁵³ An equitable lien as security for advances made to the bankrupt, created prior to the four months' period, may be enforced against the lienor's trustee in bankruptcy and will attend the fund arising from the sale of the property to which the lien attaches.¹⁵⁴ The lien of a partner upon the partnership property for the surplus which may be due to him after the partnership debts have been paid, will be recognized by the bankruptcy court; and if prior to the proceedings in bankruptcy a receiver has been appointed in an action to dissolve the partnership and procure an accounting and has taken possession of the property, the possession of the State court through its officers will not be disturbed.¹⁵⁵

(3) **ATTORNEY'S LIEN.**—An attorney's lien on the papers of his client,¹⁵⁶ or on a judgment,¹⁵⁷ or on a chattel mortgage which came into his possession before the filing of the petition,¹⁵⁸ or on other property coming into his hands,¹⁵⁹ may be enforced notwithstanding bankruptcy.

(4) **BANKER'S LIEN; LIENS FOR SERVICES.**—A bank's lien on the dividends to its stockholders who are debtors,¹⁶⁰ and the special lien given by a State statute to the manufacturer of machinery supplied to a factory,¹⁶¹ or to laborers

151. *Sheridan State Bank v. Rowell* (D. C., Oregon), 32 Am. B. R. 747, 212 Fed. 529.

152. *Whalen v. Wolford* (Kan. Sup. Ct.), 35 Am. B. R. 117, 150 Pac. 608, in which case it appeared that a father contracted to convey to his son a tract of land for \$5,000, crediting \$1,000 thereof as a gift, the remainder to be paid in five equal annual payments, with 6 per cent. per annum. Afterwards, before paying any part of the \$4,000 the son on his own petition was adjudged a bankrupt. It was held in an action by his trustee to quiet his title to the land as against the father, that the latter was entitled to a lien for the \$4,000 and interest, and was not precluded therefrom by reason of having filed no claim with the trustee.

153. *Root Manufacturing Co. v. Johnson* (C. C. A., 7th Cir.), 34 Am. B. R. 247, 219 Fed. 397, citing *Walker v. Brown*, 165 U. S. 654, 41 L. Ed. 865, 17 Sup. Ct. 453; *Sexton v. Kessler*, 225 U. S. 90, 28 Am. B. R. 85, 56 L. Ed. 995, 32 Sup. Ct. 657; *Van Iderstine v. Nat. Discount Co.*, 227 U. S. 575, 29 Am. B. R. 478, 57 L. Ed. 652, 33 Sup. Ct. 343; *Greedy v. Dockendorff*, 231 U. S. 513, 31 Am. B. R. 407, 58 L. Ed. 339, 34 Sup. Ct. 166; *McDonald v. Daskam*, 8 Am. B. R. 543, 116 Fed. 276. See cases digested Am. Bankr. Dig. § 455.

154. *Goodnough Mercantile & Stock Co. v. Galloway* (D. C., Oreg.), 22 Am. B. R. 803, 171 Fed. 940; *Gage Lumber Co. v. McEldowney* (C. C. A., 6th Cir.), 30 Am. B. R. 251, 207 Fed. 255.

155. *Clark v. Bining*, 38 How. Pr. 341, 3 N. B. R. 518.

156. *Rogers v. Winsor*, Fed. Cas. 12,023; *In re N. Y. Mail, etc., Co.*, Fed. Cas. 10,200;

Matter of Brown & Fleming Co. (Ref., N. Y.), 21 Am. B. R. 662. See cases digested Am. Bankr. Dig. § 446.

157. *Matter of Pennell* (D. C., N. J.), 18 Am. B. R. 909, 159 Fed. 500.

Attorney's lien.—A creditor's attorney, who has successfully prosecuted a claim, has a lien for his services which may be enforced in the bankruptcy court. *In re Rude* (D. C., Ky.), 4 Am. B. R. 319, 101 Fed. 805.

158. *Matter of Enrich's Fort Hamilton Brewery* (D. C., N. Y.), 19 Am. B. R. 798, 158 Fed. 644, holding that where an attorney, who had represented an alleged bankrupt in certain transactions, claims a lien for services upon certain chattel mortgages which came into his hands prior to the filing of the petition, the court may order that the mortgages and the assignments thereof be turned over to the receiver, subject to the lien of the attorney, who may have its amount determined either in the bankruptcy court or any other court of competent jurisdiction.

159. *Hartman v. Swiger* (D. C., W. Va.), 33 Am. B. R. 369, 215 Fed. 986.

160. *In re Dunkerson*, Fed. Cas. 4,156; *Matter of Gesas* (C. C. A., 9th Cir.), 16 Am. B. R. 872, 146 Fed. 734. See also interesting case of *Hutchinson v. Otis* (C. C. A., 1st Cir.), 8 Am. B. R. 382, 115 Fed. 937.

161. *In re Matthews* (D. C., Ark.), 6 Am. B. R. 96, 109 Fed. 603; *In re Georgia Handle Co.* (C. C. A., 5th Cir.), 6 Am. B. R. 472, 109 Fed. 632; *In re Oconee Milling Co.* (C. C. A., 5th Cir.), 6 Am. B. R. 475, 109 Fed. 866; *Mott v. Wissler Mining Co.*, (C. C. A., 4th Cir.), 14 Am. B. R. 321, 135 Fed. 697, 68 C. C. A. 335.

for wages,¹⁶² are valid, if perfected as required by such statute.¹⁶³ A livery stable keeper's statutory lien does not depend for its existence upon the institution of judicial or other proceedings, but is a perfect lien under the statute, and as such is cognizable and enforceable in bankruptcy.¹⁶⁴ An artisan has a lien for repairs and improvements made to a bankrupt's automobile after petition filed and before adjudication.¹⁶⁵

(5) **MARITIME LIENS.**—Maritime liens for repairs and supplies furnished to vessels will be enforced in a court of bankruptcy.¹⁶⁶ Where a libel in admiralty was filed against a vessel before the filing of an involuntary petition in bankruptcy against the owner of the vessel, but the arrest of the vessel was not made until after the adjudication, it was held that the admiralty court would retain jurisdiction for the purpose of determining all questions of maritime liens.¹⁶⁷ On the other hand, where a bankruptcy court has taken possession, through its receiver, of a vessel belonging to the bankrupt, its jurisdiction is exclusive and will not be ousted to permit the enforcement of a maritime lien in a court of admiralty.¹⁶⁸

(6) **FACTOR'S LIEN.**—A factor's lien, if valid and effectual under a State law, must be recognized and may be enforced; but it is absolutely essential to the validity of such a lien for advances, that the property consigned shall be delivered by the consignor to the consignee.¹⁶⁹ Where a bankrupt consigned its entire stock in trade to a factor under an agreement whereby he was to conduct the business and receive certain commissions and the factor took immediate possession of the business, and duly advertised the fact, a lien exists in favor of the factor, valid as against the bankrupt's trustee.¹⁷⁰

(7) **TRUST AND OTHER TRANSFERS.**—Deeds of trusts and other transfers made in good faith to secure present loans, protected under a State statute, are within the protection of clause *d* of this section and valid liens.¹⁷¹ But

162. *Browder & Co. v. Hill* (C. C. A., 6th Cir.), 1 Am. B. R. 619, 136 Fed. 821, where orders by a bankrupt corporation upon a merchant to supply goods to laborers as part payment of wages were held not to be assignments of wages so as to subrogate the merchant to the rights of the laborers under a statute creating a lien in favor of such laborers.

163. *In re Lillington Lumber Co.* (D. C., N. Car.), 13 Am. B. R. 153, 132 Fed. 886.

164. *In re Mero* (D. C., Conn.), 12 Am. B. R. 171; 128 Fed. 630; *In re Pratesi* (D. C., Del.), 11 Am. B. R. 319, 126 Fed. 588.

165. *In re Rich* (Ref., Ohio), 17 Am. B. R. 893.

166. *The Ironsides*, Fed. Cas. 7,069, 4 Biss. 518; *In re Kirkland*, Fed. Cas. 7,842, 12 Am. Law Reg. 300. See cases digested Am. Bankr. Dig. § 451.

Maritime liens may be enforced in a court of bankruptcy, although they are founded upon a State statute and are not strictly maritime liens. *In re Scott*, Fed. Cas. 12,517, 1 Abb. N. S. 336.

167. *The Philomena* (D. C., Mass.), 37 Am. B. R. 220, 200 Fed. 859; *The Bethulia* (D. C., Mass.), 37 Am. B. R. 223, 200 Fed. 862; *The Geisha* (D. C., Mass.), 37 Am. B. R. 226, 200 Fed. 864. Where a maritime lien exists, either a court of bankruptcy, or of equity will

enforce such a lien with the same effect as would a court of admiralty. *Matter of New England Transp. Co.* (D. C., Ct.), 34 Am. B. R. 323, 220 Fed. 203.

168. *The Casco* (D. C., Mass.), 37 Am. B. R. 215, 230 Fed. 929.

Administration expenses; priority.—The proceeds of the sale in admiralty of a steamer belonging to bankrupt and subject to maritime liens are properly chargeable with expenses of administration in bankruptcy in so far as the expenses were incurred by the trustee in intervening to contest the lien claims where he could not determine with reasonable certainty the validity of such liens, although on the hearing it developed that no interest of value over and above the liens passed to the trustee; but charges not so incurred or due, though incurred in the administration of the estate as a whole should be borne by the unsecured creditors. *The Bethulia* (D. C., Mass.), 37 Am. B. R. 227, 200 Fed. 862.

169. *Ommen v. Talcott* (C. C. A., 2d Cir.), 26 Am. B. R. 689, 188 Fed. 401.

170. *Boise v. Talcott* (D. C., N. Y.), 38 Am. B. R. 838, 212 Fed. 268.

171. *Crim v. Woodford* (C. C. A., 4th Cir.); 14 Am. B. R. 302, 136 Fed. 34; *Matter of Alden* (Ref., Ohio), 16 Am. B. R. 362; *In re Noel* (D. C., Md.), 14 Am. B. R. 715, 137

a deed of trust made by a corporation to secure *ultra vires* notes has been held fraudulent and invalid.¹⁷² A mortgage executed by the officers of a corporation, the proceeds being applied for the benefit of the corporation, but technically defective because not authorized by the directors, is valid as against the trustee of the bankrupt corporation.¹⁷³ When money is advanced to a debtor in pursuance of an express agreement that it is to be used to retire existing liens or incumbrances on his property, and that the creditor who loans the money is to have a first lien upon the property to secure its repayment, such creditor may be subrogated to the rights of the incumbrancer or lienor whose debt has been paid, and may assert his lien against the borrower's trustee in bankruptcy.¹⁷⁴ An assignment of future wages constitutes a valid lien which is not affected by the discharge in bankruptcy of the mortgagor.¹⁷⁵

1. **Effect of valid liens on distribution.**—If valid, the lienor becomes a secured creditor, and must be treated as such.¹⁷⁶

V. FRAUDULENT TRANSFERS AND LIENS.

a. **In general.**—Subsection *e* nullifies (1) all "conveyances, transfers, assignments or incumbrances, or any part thereof," on the bankrupt's property, (2) made or created "within four months prior to the filing of the petition," (3) "with the intent to hinder, delay or defraud his creditors;" (4) "except as to purchasers in good faith and for a present consideration." All such property so disposed of remains as a part of the estate of the bankrupt and passes to his trustee, whose duty it is to recover the same for the benefit of the creditors.¹⁷⁷ The subsection then nullifies all conveyances, trans-

Fed. 694; *Wilder v. Watts* (D. C., S. Car.), 15 Am. B. R. 57, 138 Fed. 426; *In re Clifford* (D. C., Iowa), 14 Am. B. R. 281, 136 Fed. 475; *In re Randolph* (D. C., W. Va.), 26 Am. B. R. 623, 187 Fed. 186.

172. *American Wood Working Machinery Co. v. Norment* (C. C. A., 4th Cir.), 19 Am. B. R. 679, 157 Fed. 801, holding that where a corporation gives its notes, without consideration, to its principal stockholder and manager, who, as intended by the parties, pledges them as collateral security for his personal indebtedness to the knowledge of the pledgees, a deed of trust securing the notes given by the corporation while insolvent, and within four months of its bankruptcy, is fraudulent and void as to the creditors of the corporation.

173. A mortgage of a Minnesota corporation, executed by the president and secretary, with the seal of the corporation, to secure an indebtedness justly due from the corporation the proceeds of which it received and used in the conduct of its business, but which had not been authorized by the directors, is a valid lien against the trustee in bankruptcy of the corporation. *Galbraith v. First Nat. Bank of Alexandria* (C. C. A., 8th Cir.), 34 Am. B. R. 213, 221 Fed. 387.

174. *Union Central Life Ins. Co. & Burgoyne v. Drake* (C. C. A., 8th Cir.), 32 Am. B. R. 252, 214 Fed. 536; *In re Lee* (C. C. A., 8th Cir.), 25 Am. B. R. 436, 182 Fed. 579, citing *Association v. Thompson*, 32 N. J. Eq. 133; *Tyrrell v. Ward*, 102 Ill. 29; *Bank v. Bierstadt*, 168 Ill. 618, 48 N. E. 161, 61 Am. St. Rep. 146; *Draper v. Ashley*, 104, Mich.

527, 62 N. W. 707; *Wilson v. Mayberry*, 75 Wis. 191, 43 N. W. 901, 6 L. R. A. 61, 17 Am. St. Rep. 193; *Levy v. Martin*, 48 Wis. 198, 4 N. W. 35; *Trust Co. v. Peters*, 72 Miss. 1058, 18 South. 497; *Dillon v. Kauffman*, 58 Tex. 696.

Contract to secure advances; objection made after securing possession of collateral.—Where after bankrupt's trustee, under sanction of the court, and with the assent of a debtor who had agreed to hold its stock as security for its debt which was evidenced by notes, had virtually exercised the power to take legal possession of such stock, it was too late for certain banks, which held some of those notes as collateral for loans made to bankrupt, to raise the question, as the result of an agreement thereafter made with such debtor, whether the original agreement as to the stock between bankrupt and the debtor was ineffective to operate as a lien as to creditors because of the want of delivery. *Merchants' Nat. Bank v. Sexton*, 228 U. S. 634, 39 Am. B. R. 278, 57 L. Ed. 998, 33 Sup. Ct. 725.

175. *Citizens' Loan Ass'n v. Boston & Maine R. R.* (Sup. Ct., Mass.), 19 Am. B. R. 650.

176. See under Section Fifty-seven of this work.

177. Closely related to this clause is § 70-a (4), vesting title in the trustee of property transferred by the bankrupt in fraud of creditors; and also § 70-e, authorizing the trustee to avoid any transfer which any creditor of the bankrupt might have avoided.

fers and incumbrances made by the bankrupt within four months prior to the filing of the petition, "which are held null and void against the creditor of such debtor" under State laws, and provides that such property shall pass to, and be recovered by, the trustee for the benefit of the creditors. The amendment of 1903 conferred concurrent jurisdiction upon courts of bankruptcy and State courts to recover property under the subsection.

b. Scope of subsection.—This subsection is somewhat out of place here. Its counterpart in the law of 1867 is both different in the minor matters of phrasing and the time limit, and in effect more favorable to the debtor than the present subsection. The important elements of proof in that law—the creditor's reasonable cause to believe the debtor insolvent and that the transaction was in fraud of the act—have given place to the single element of intent to hinder, delay or defraud.¹⁷⁸ The former law here interdicted transfers¹⁷⁹ only. The present subsection has to do with incumbrances, too, at least so far as such liens result from the voluntary act of the debtor.¹⁸⁰

c. Insolvency not essential.—Unlike fraudulent preferences, fraudulent transfers may, it seems, be made at a time when the transferor is solvent.¹⁸¹ but, intent to hinder, delay, or defraud being necessary, insolvency will usually be an element of proof.

d. "Within four months prior to filing the petition."—The meaning of these words is discussed elsewhere.¹⁸² The practitioner should also note that, if the period has elapsed, there may still be a remedy under the State law, as pointed out by § 70-e.¹⁸³ But the words quoted above do not apply where the fraudulent transaction amounted to a voluntary gift,¹⁸⁴ nor where the transfer was made more than four months before the petition in bankruptcy was filed.¹⁸⁵ There is a clear distinction between the creation of a lien within the

178. In re McLam (D. C., Vt.), 3 Am. B. R. 245, 97 Fed. 922.

179. See Bankr. Act, § 1 (25) for elastic meaning now given the word.

180. That is mortgages, pledges and the like, as distinguished from judgments, attachments, and other liens through legal proceedings.

181. Pollock v. Jones (C. C. A., 4th Cir.), 10 Am. B. R. 616, 124 Fed. 163. Compare In re McLam (D. C., Vt.), 3 Am. B. R. 245, 97 Fed. 922; also In re Soudans Mfg. Co. (C. C. A., 7th Cir.), 8 Am. B. R. 45, 113 Fed. 804; Spencer v. Nekemoto (D. C., Hawaii), 24 Am. B. R. 517.

182. See discussion under Section Sixty of this work, subtitle, "*Within four months*;" and also under Section Three, subtitle, "*Time within which petition must be filed*."

183. Compare In re Adams (Ref., N. Y.), 1 Am. B. R. 94; In re Grahs (Ref., Ohio), 1 Am. B. R. 465; In re Taylor, 95 Fed. 956.

184. In re Schenck (D. C., Wash.), 8 Am. B. R. 727, 116 Fed. 554.

Gift of engagement ring within four months' period while insolvent.—Where bankrupt, within four months of his bankruptcy and while insolvent, gave to defendant a diamond ring, the occasion being the announcement of his engagement to marry defendant, such ring or its value was recoverable by bankrupt's trustee, it being immaterial that in making the gift bankrupt had no actual

intent to hinder, delay or defraud his creditors, since he was in fact insolvent at the time. Pollock v. Simon (D. C., Pa.), 30 Am. B. R. 390, 205 Fed. 1005.

185. Little v. Holly Brooks Hardware Co. (C. C. A., 5th Cir.), 13 Am. B. R. 422, 133 Fed. 874; Manning v. Evans (D. C., N. J.), 19 Am. B. R. 217, 222, 156 Fed. 106.

A partnership assignment, made more than four months before the petition in bankruptcy was filed, cannot be recovered by the trustee under this provision. In re J. M. Ceballos & Co. (D. C., N. J.), 20 Am. B. R. 459, 466, 161 Fed. 445.

A general assignment for the benefit of creditors more than four months prior to the filing of a petition in voluntary bankruptcy by the assignor is irrevocable so far as the inhibition of § 67-e is concerned. In re Shinn (D. C., N. J.), 25 Am. B. R. 833, 185 Fed. 990.

Written agreement evidencing prior parol assignment.—Where petitioner sold merchandise to bankrupt anterior to the four months' period and subsequently, within such prohibitive period, received a written agreement and assignment of bankrupt's book accounts, as security for the payment of the purchase price of the goods, evidence examined and held, insufficient to sustain the findings of the referee that prior to the sale there was a parol assignment of the accounts operating *in praesenti*. In re Stiger (D. C., N. J.), 29 Am. B. R. 253, 202 Fed. 791.

four months' period and the enforcement of one previously acquired;¹⁸⁶ so that where a mortgage was given prior to such period, the mortgagee may, if authorized by the terms of the mortgage, take possession of the property, or do any other act with a view of enforcing the mortgage, at any time prior to the adjudication.¹⁸⁷ A complaint does not state a cause of action under this subdivision unless it is alleged that the transfers sought to be attacked were made within four months of the time the petition in bankruptcy was filed.¹⁸⁸

e. Intent to hinder, delay or defraud.—(1) **IN GENERAL.**—The words "with intent to hinder, delay or defraud," as used in subsection *e*, have their immemorial meaning.¹⁸⁹ They have already been considered under sections three and fourteen. The cases under the former law, found in the footnote,¹⁹⁰ are thought still applicable, though in that statute used in defining an act of bankruptcy. Knowledge of, or participation in, the fraud by the creditor to whom the transfer was made is not material.¹⁹¹ Transfers by this subsection are only those fraudulent and therefore voidable at common law, or, what is the same thing, such as constitute acts of bankruptcy under § 3 of the act.¹⁹² A creditor's passive receipt of payment is not of itself sufficient to make it fraudulent.¹⁹³ An intent to defraud is the test; if the transaction was in good faith, there is no fraud.¹⁹⁴ It is not necessary in order to avoid a transfer as a transfer made to hinder and delay creditors that the transferor at the time of the transfer was insolvent, but if the circumstances are such that the jury can find that the transfer was made with intent to hinder and delay creditors it is voidable.¹⁹⁵

^{186.} *Thompson v. Fairbanks*, 196 U. S. 516, 13 Am. B. R. 437, 49 L. Ed. 577, 25 Sup. Ct. 306.

^{187.} *Woods v. Klein*, 22 Am. B. R. 722, 223 Pa. St. 257, 72 Atl. 523, citing *Metcalf v. Barker*, 187 U. S. 165, 9 Am. B. R. 36, 47 L. Ed. 122, 23 Sup. Ct. 67; *Davis v. Billings* (Pa. Sup. Ct.), 38 Am. B. R. 957, 99 Atl. 163.

^{188.} *Thomas v. Roddy*, 19 Am. B. R. 873, 122 N. Y. App. Div. 861, 107 N. Y. Supp. 473.

^{189.} See *Githens v. Shiffer Bros.* (D. C., Pa.), 7 Am. B. R. 453, 112 Fed. 505.

^{190.} *Sedgwick v. Place*, Fed. Cas. 12,620; *In re Cowles*, Fed. Cas. 3,297; *In re McKibben*, Fed. Cas. 8,859; *In re Williams*, Fed. Cas. 17,703; *Curran v. Munger*, Fed. Cas. 3,487.

^{191.} *Sherman v. Luckhardt* (Sup. Ct., Kan.), 11 Am. B. R. 26, 67 Kan. 682. Compare *Stitch v. Berman*, 15 Am. B. R. 466, 49 N. Y. Misc. 104, 96 N. Y. Supp. 743; *In re Leader* (D. C., Ark.), 26 Am. B. R. 668, 190 Fed. 624.

^{192.} *Wright v. Sampter* (D. C., N. Y.), 18 Am. B. R. 355, 152 Fed. 196; *Underleak v. Scott* (Sup. Ct., Minn.), 28 Am. B. R. 926, 134 S. W. 731.

It is not a fraud at common law for a debtor who is in straitened circumstances to prefer one or more creditors, though such payment may render it impossible to pay anything to his other creditors. Nor does it make any difference that both the creditor and debtor know that the effect of such appropriation will be to deprive other creditors of the power of reaching the debtors' property by legal process in satisfaction of their claims. If there is no secret trust agreed

upon or understood between the debtor and creditor, but the sole object of the transfer of property is to pay or secure the payment of a debt, the transaction is valid at common law. *Lyon v. Wallace* (Mass. Sup. Ct.), 35 Am. B. R. 688, 108 N. E. 1075.

^{193.} *Wright v. Sampter* (D. C., N. Y.), 18 Am. B. R. 355, 152 Fed. 196.

^{194.} *In re Bloch* (C. C. A., 2d Cir.), 15 Am. B. R. 748, 142 Fed. 674, holding that where a member of a firm pledges his life insurance policies to secure certain creditors with the understanding that they were not firm assets, fraudulent intent is not shown. *In re Benjamin* (D. C., Pa.), 15 Am. B. R. 351, 140 Fed. 320; *In re Longbottom* (D. C., Pa.), 15 Am. B. R. 437, 142 Fed. 291; *In re Hill* (D. C., Cal.), 15 Am. B. R. 499, 140 Fed. 984; *Coder v. Arts* (C. C. A., 8th Cir.), 18 Am. B. R. 513, 152 Fed. 943, modifying 16 Am. B. R. 583, affd. 213 U. S. 223, 22 Am. B. R. 1, 53 L. Ed. 772, 29 Sup. Ct. 436; *Vollmer v. Plage*, (D. C., N. Y.), 26 Am. B. R. 590, 186 Fed. 598.

Successive assignment of accounts receivable by way of security, in pursuance of a contract under which advances were made to enable the assignor, subsequently adjudged a bankrupt, to get goods on the faith of the undertaking that the accounts should be assigned, are not fraudulent in law because the contract embraced all accounts, where neither party contemplated any fraud or knew that the assignor was insolvent. *Greey v. Dockendorff*, 231 U. S. 513, 31 Am. B. R. 407, 58 L. Ed. 339, 34 Sup. Ct. 166.

^{195.} *Holbrook v. International Trust Co.* (Sup. Jud. Ct., Mass.), 33 Am. B. R. 808, 107 N. E. 665.

(2) **REVIVAL OF OUTLAWED DEBT.**—A bankrupt with knowledge of his insolvency, cannot on the eve of bankruptcy revive an outlawed claim by a written acknowledgment or by part payment,¹⁹⁶ although if the creditor or the bankrupt was ignorant of the fact of insolvency such revival may be effectual.¹⁹⁷

(3) **EVIDENCE OF INTENT.**—(I) *In general.*—Whether a conveyance was made with intent to hinder, delay and defraud creditors is a question of fact.¹⁹⁸ It is only an intent to hinder, delay and defraud creditors unlawfully, and not every intent to hinder or delay them in collecting, or to prevent them from collecting their claims that avails to avoid a transfer.¹⁹⁹ A transfer alleged to be void under subsection e, so far as the purchase is concerned must be impugned, if at all, by actual fraud as distinguished from constructive fraud.²⁰⁰ Actual fraud, as distinguished from constructive fraud based upon the failure to file or record, must appear.²⁰¹ There must be some evidence of actual fraud in order to invalidate a conveyance; mere suspicion of wrongdoing is insufficient.²⁰² In determining whether the result of a number of transactions was the consummation of a preconceived purpose to hinder, delay or defraud creditors, the court will not separately and independently regard each step which, of itself, might be innocent, but will consider the transactions in connection with what else appears, especially when they are in close consecutive association.²⁰³ The rule that persons who do not meet their obligations as they mature in the ordinary course of business are “insolvent,” within the meaning of bankruptcy and insolvency acts does not apply to all persons but does apply to traders. Hence where the bankrupt was a trader the fact that he was unable to pay his debts as they matured and became due and payable in the ordinary course of business as persons carrying on trade usually do is a fact to be given its full weight by the jury in determining whether the payments made by him were made with intent to hinder and delay his creditors.²⁰⁴

(II) *Payments without fraudulent intent.*—An insolvent debtor has the *jus disponendi* of his property until the commencement of proceedings in

196. *Matter of Salmon* (D. C., N. Y.), 38 Am. B. R. 692.

197. *Matter of Banks* (D. C., N. Y.), 31 Am. B. R. 270, 207 Fed. 662; *Matter of Blankenship* (D. C., Cal.), 33 Am. B. R. 756, 220 Fed. 395.

198. *Matter of McKane* (D. C., N. Y.), 19 Am. B. R. 103, 155 Fed. 674; *Clingman v. Miller* (C. C. A., 8th Cir.), 20 Am. B. R. 360, 160 Fed. 326; *Maires v. Metal & Machinery Co.* (D. C., N. Y.), 33 Am. B. R. 422, 220 Fed. 115.

199. *Coder v. Arts* (C. C. A., 8th Cir.), 18 Am. B. R. 513, 518, 152 Fed. 943, modifying 16 Am. B. R. 583, 145 Fed. 202, affd. 213 U. S. 223, 22 Am. B. R. 1, 53 L. Ed. 772, 29 Sup. Ct. 436; *Sargent v. Blake* (C. C. A., 8th Cir.), 20 Am. B. R. 115, 160 Fed. 57.

Actual fraud in securing present loan to prefer creditor.—This section applies only to actual fraud as distinguished from a mere preference, and the fact that a lender knew at the time of making a loan and taking security that the borrowed money would be used to prefer a creditor does not make the transaction fraudulent. But actual fraud exists where there is also an actual participation by the lender as agent of the borrower

and for his benefit in carrying out the plan of preference which it was obvious would result in closing the business of the debtor. *Dean v. Davis* (C. C. A., 4th Cir.), 31 Am. B. R. 808, 212 Fed. 88, affd. 242 U. S. —, 38 Am. B. R. 664, 37 Sup. Ct. 30.

200. *Chambers v. Continental Trust Co.* (D. C., Ga.), 38 Am. B. R. 78, 235 Fed. 441, holding that a transfer by a director of an insolvent bank to secure the payment of his note to another bank which had loaned money for the payment of the creditors of the insolvent bank, made for a present and fair consideration, and taken in good faith by the purchaser, is not invalid under section 67-e of the bankruptcy act, although the director knew of his own insolvency when he made the conveyance.

201. *McAttee v. Shade* (C. C. A., 8th Cir.), 26 Am. B. R. 151, 185 Fed. 442.

202. *Johnson v. Barrett* (D. C., Ga.), 38 Am. B. R. 464, 237 Fed. 112.

203. *Amundson v. Folsom* (C. C. A., 8th Cir.), 33 Am. B. R. 318, 219 Fed. 122.

204. *Holbrook v. International Trust Co.* (Sup. Jud. Ct., Mass.), 33 Am. B. R. 808, 107 N. E. 665.

bankruptcy against him. So a preference of one creditor over others by a payment or by security, which is free from actual or constructive fraud, and from any purpose to affect other creditors injuriously beyond the necessary effect of the security or preference, is valid and lawful, and the fact that a creditor is so preferred is not in itself sufficient to show evidence of an intent to hinder, delay or defraud creditors so as to make the transaction void or voidable under this subsection.²⁰⁵ As stated by the Supreme Court:²⁰⁶ "Making a mortgage to secure an advance with which the insolvent debtor intends to pay a pre-existing debt does not necessarily imply an intent to hinder, delay or defraud creditors. The mortgage may be made in the expectation that thereby the debtor will extricate himself from a particular difficulty and be enabled to promote the interest of all other creditors by continuing his business. The lender who makes an advance for that purpose with full knowledge of the facts may be acting in perfect 'good faith.' But where the advance is made to enable the debtor to make a preferential payment with bankruptcy in contemplation, the transaction presents an element upon which fraud may be predicated. The fact that the money advance is actually used to pay a debt does not necessarily establish good faith. It is a question of fact in each case what the intent was with which the loan was sought and made."²⁰⁷ A mortgage taken to secure a loan with knowledge by the mortgagee

205. *Sargent v. Blake* (C. C. A., 8th Cir.), 20 Am. B. R. 115, 121, 160 Fed. 57; *Coder v. Arts*, 213 U. S. 223, 22 Am. B. R. 1, 53 L. Ed. 772, 29 Sup. Ct. 436; *Johnstone v. Babb* (C. C. A., 4th Cir.), 38 Am. B. R. 715, holding that making a mortgage to secure an advance with which an insolvent debtor intends to pay a pre-existing debt does not necessarily imply an intent to hinder, delay or defraud creditors; the lender who makes an advance for that purpose with full knowledge of the facts may be acting in perfect good faith.

When fraudulent intent presumed.—Under the laws of Minnesota a creditor may avoid a transfer made with intent to hinder, delay, or defraud creditors. Such intent of the debtor is essential to the fraudulent character of the transfer. A voluntary conveyance is presumptively fraudulent as to existing creditors, but not conclusively so. Where the debtor is solvent, and retains sufficient property to amply satisfy the claims of existing creditors, in the absence of an actual intent to hinder, delay, or defraud creditors, such a transfer is valid. *Underleak v. Scott* (Minn. Sup. Ct.), 28 Am. B. R. 926, 134 S. W. 731.

206. *Dean v. Davis*, 242 U. S. —, 38 Am. B. R. 664, 667, 37 Sup. Ct. 30.

207. **Mortgages taken as security for loans.**—The following cases were classified in the margin to the case of *Davis v. Dean*, 242 U. S. —, 38 Am. B. R. 664, 668, 37 Sup. Ct. 30. Cases holding that a mortgage is a fraudulent conveyance where taken as security for a loan which the lender knows is to be used to prefer favored creditors, in fraud of the act: *Parker v. Sherman* (C. C. A., 2d Cir.), 32 Am. B. R. 393, 129 C. C. A. 437, 212 Fed. 917; *Re Soforenko* (D. C.,

Mass.), 32 Am. B. R. 32, 210 Fed. 562; *Johnson v. Dismukes* (C. C. A., 5th Cir.), 29 Am. B. R. 686, 122 C. C. A. 552, 204 Fed. 382; *Lumpkin v. Foley* (C. C. A., 5th Cir.), 29 Am. B. R. 673, 122 C. C. A. 542, 204 Fed. 372; *Re Lynden Mercantile Co.* (D. C., Wash.), 19 Am. B. R. 444, 156 Fed. 713; *Roberts v. Johnson* (C. C. A., 4th Cir.), 18 Am. B. R. 132, 81 C. C. A. 47, 151 Fed. 567; *Re Pease* (D. C., Mich.), 12 Am. B. R. 66, 129 Fed. 446. See also *Walters v. Zimmerman*, s. c. on appeal (D. C., Ohio), 30 Am. B. R. 776, 208 Fed. 62, (C. C. A., 6th Cir.), 136 C. C. A. 409, 220 Fed. 805.

Cases upholding the mortgage security because the lender did not know that the insolvent borrower intended to make improper payments to favored creditors—thus indicating that the mortgage would be fraudulent if such additional fact were shown: *Grinstead v. Union Sav. & T. Co.* (C. C. A., 9th Cir.), 27 Am. B. R. 123, 111 C. C. A. 398, 190 Fed. 546; *Powell v. Gate City Bank* (C. C. A., 8th Cir.), 24 Am. B. R. 316, 102 C. C. 55, 178 Fed. 609; *Re Kullberg* (D. C., Minn.), 23 Am. B. R. 758, 176 Fed. 585; *Ohio Valley Bank Co. v. Mack*, (C. C. A., 6th Cir.), 20 Am. B. R. 919, 24 L. R. A. (N. S.) 184, 89 C. C. A. 605, 163 Fed. 155; *Stedman v. Bank of Monroe* (C. C. A., 8th Cir.), 9 Am. B. R. 4, 54 C. C. A. 269, 117 Fed. 237; *Re Soudan Mfg. Co.* (C. C. A., 7th Cir.), 8 Am. B. R. 45, 51 C. C. A. 476, 113 Fed. 804.

In accord with this view are also the decisions which hold that a general assignment for the benefit of creditors, though without preferences, is void under section 67-e because its necessary effect is to hinder, delay or defraud creditors in their rights and remedies under the bankruptcy act. *Re Gutwillig* (D. C., Ia.), 1 Am. B. R. 78, 90 Fed. 475,

that the proceeds of the loan were to be used by the insolvent mortgagor to make preferential payments to certain creditors on the eve of bankruptcy is invalid.²⁰⁸ Where a transfer is made by a debtor who is in embarrassed circumstances although not insolvent, a jury in some cases may be warranted in finding the fact of intent to delay and defraud.²⁰⁹ A transfer made to secure a loan will not be set aside as fraudulent because the transferee knew that the proceeds of the loan were to be used in payment of an existing debt.²¹⁰ A transfer made in good faith to pay or to secure an honest antecedent debt by an insolvent within four months of the filing of a petition in bankruptcy by or against him constitutes no evidence of an intent to delay or defraud creditors, notwithstanding the fact that its necessary effect is to hinder and delay them, and to deprive them of the opportunity they might otherwise have had to collect their claims in full.²¹¹ Thus where a bankrupt conveys property in trust to secure a person who has indemnified a surety company on a bond discharging a lien of attachment the transfer is valid, where there is no evidence of a preference or a fraud upon the creditors.²¹² And where a mortgage was given by an insolvent debtor within the four months' period to secure a pre-existing debt owing to the mortgagee, who was in ignorance of the mortgagor's insolvency, an intent to hinder, delay or defraud other creditors must be shown in order to avoid the mortgage.²¹³ But a mortgage made to secure a much greater amount than that really

(C. C. A., 2d Cir.), 1 Am. B. R. 388, 34 C. C. A. 377, 63 U. S. App. 191, 92 Fed. 337; *Davis v. Bohle* (C. C. A., 8th Cir.), 1 Am. B. R. 412, 34 C. C. A. 372, 92 Fed. 325; *Rumsey & S. Co. v. Novelty & Mach. Mfg. Co.* (D. C., Mo.), 3 Am. B. R. 704, 99 Fed. 699. See *Randolph v. Scruggs*, 190 U. S. 533, 536, 10 Am. B. R. 1, 47 L. Ed. 1165, 1169, 23 Sup. Ct. 710; *George M. West Co. v. Lea Bros.*, 174 U. S. 590, 596, 2 Am. B. R. 463, 43 L. Ed. 1098, 1100, 19 Sup. Ct. 836.

It is difficult to reconcile the following cases or dicta in them with the great weight of authority and the decisions of this court: *Re Baar* (C. C. A., 2d Cir.), 32 Am. B. R. 465, 130 C. C. A. 292, 213 Fed. 628; *Re Hersey* (D. C., Iowa), 22 Am. B. R. 863, 171 Fed. 1004; *Sargent v. Blake* (C. C. A., 8th Cir.), 20 Am. B. R. 115, 17 L. R. A. (N. S.) 1040, 87 C. C. A. 213, 160 Fed. 57, 15 Ann. Cas. 58; *Re Bloch* (C. C. A., 2d Cir.), 15 Am. B. R. 748, 74 C. C. A. 250, 142 Fed. 674; *Githens v. Shiffler* (D. C., Pa.), 7 Am. B. R. 453, 112 Fed. 505.

208. *Matter of Soforenko* (D. C., Mass.), 32 Am. B. R. 32, 210 Fed. 562.

Advances to prevent bankruptcy until after four months.—In a suit by a trustee in bankruptcy to recover book accounts assigned by the bankrupt to the defendant because of advances, evidence held to show that the defendant made the advances for the purpose of keeping the bankrupt from going into bankruptcy before the expiration of four months from the time of other illegal preferences to the defendant. This is a fraud upon the law, and property assigned by the bankrupt for such purpose may be recovered by the trustee. *Rubenstein v. Lottow* (Mass. Sup. Ct.), 35 Am. B. R. 243, 220 Mass. 156.

209. *Holbrook v. International Trust Co.* (Sup. Jud. Ct., Mass.), 33 Am. B. R. 808, 107 N. E. 656.

210. *Van Iderstine v. National Discount Co.*, 227 U. S. 575, 582, 29 Am. B. R. 478, 57 L. Ed. 652, 33 Sup. Ct. 343; *Matter of Soforenko* (D. C., Mass.), 32 Am. B. R. 32, 210 Fed. 562.

211. *Coder v. Arts* (C. C. A., 8th Cir.), 18 Am. B. R. 513, 519, 152 Fed. 943, modifying 16 Am. B. R. 583, 145 Fed. 202, affd. 213 U. S. 223, 22 Am. B. R. 1, 53 L. Ed. 772, 29 Sup. Ct. 436; *Meseryey v. Roby* (C. C. A., 8th Cir.), 28 Am. B. R. 529, 198 Fed. 844, holding that where bankrupt's real estate was heavily incumbered by different mortgages and bankrupt conveyed a part of such real estate to a mortgagee holding a mortgage in a large amount, past due, in consideration of his discharging the liens upon all the property and the payment of a small sum in cash, in order to avoid such transfer under subsection e, actual fraud in fact, as distinguished from constructive fraud, must be shown.

Preference made for purpose of continuing business.—A preferential payment made by an insolvent in the hope and for the purpose of thereby continuing his business is not really fraudulent though it is under certain circumstances voidable by the trustee. *Matter of Soforenko* (D. C., Mass.), 32 Am. B. R. 32, 210 Fed. 562.

212. *Matter of Federal Biscuit Co.* (C. C. A., 2d Cir.), 32 Am. B. R. 612, 214 Fed. 221.

213. *Coder v. Arts*, 213 U. S. 223, 22 Am. B. R. 1, 53 L. Ed. 772, 29 Sup. Ct. 436; *In re Kullberg* (D. C., Minn.), 23 Am. B. R. 758, 176 Fed. 585.

due, with the specific intent and purpose on the part of both mortgagor and mortgagee to hinder, delay and defraud other creditors of the mortgagor, is invalid in equity not only as to the fictitious debts secured, but as to the genuine indebtedness.²¹⁴ When all the parties consent, the application of the partnership property to the payment of an individual debt of a partner within four months of the filing of a petition in bankruptcy, and while the partners and the partnership are insolvent, does not evidence any intent to hinder, delay, or defraud the creditors.²¹⁵ Inasmuch as the preferential equity of partnership creditors to have partnership debts paid out of partnership assets does not attach until the property is in *custodia legis*, the application of the partnership property to the payment of an individual debt of a partner when all the partners consent, within four months of the filing of the petition in bankruptcy, even though the partners and partnership were insolvent, does not evidence any intent on the part of the debtors to hinder, delay or defraud the creditors of the partnership.²¹⁶ Directors and stockholders who, with knowledge of the insolvent condition of the corporation within four months before the bankruptcy of the corporation, sell their stock to it and take in payment therefor notes of the corporation secured by a deed of trust cannot assert a preference under such deed.²¹⁷

(III) *Fraudulent intent implied from circumstances.*—Conveyances of real estate made by bankrupts to their wives, four months prior to the filing of a petition in bankruptcy, and without a present consideration, are void, since it may be implied from the circumstances of the transaction that they were made with intent to hinder and defraud creditors.²¹⁸ However the rule is different where the property transferred was the exempt property of the husband.²¹⁹ But a transfer in payment of a creditor of the bankrupt's wife is not *ipso facto* fraudulent; the intent to defraud must be proven.²²⁰ Although there is a presumption against the *bona fides* of a conveyance made by a failing husband to his wife, it is merely a presumption of fact, negating the idea of a valid consideration, and the burden is upon the wife to support her right by clear and convincing proof; there is no presumption of law against the validity of such a transfer which will stand against established facts to the contrary.²²¹ An agreement to withhold a mortgage from record is not of itself conclusive upon the question of fraud, but is a circumstance constituting more or less cogent evidence of a want of good faith.²²² A transfer in good faith

214. *McMahon v. Pithan* (Sup. Ct., Iowa), 33 Am. B. R. 125, 147 N. W. 920.

215. *Sargent v. Blake* (C. C. A., 8th Cir.), 20 Am. B. R. 115, 160 Fed. 57.

216. *Matter of McConnell v. Williams* (Ref., Cal.), 32 Am. B. R. 589.

217. *Moore & Co. v. Gilmore* (C. C. A., 4th Cir.), 32 Am. B. R. 186, 216 Fed. 99.

218. *Henkel v. Seider* (D. C., N. Y.), 20 Am. B. R. 773, 163 Fed. 553; *Fouche v. Shearer* (D. C., Ga.), 22 Am. B. R. 828, 172 Fed. 592; *Woodford v. Rice* (D. C., Okl.), 30 Am. B. R. 455, 207 Fed. 473; *Jackson v. Jetter* (Sup. Ct., Iowa), 32 Am. B. R. 667, 142 N. W. 431.

219. *Jackson v. Jetter* (Sup. Ct., Iowa), 32 Am. B. R. 667, 142 N. W. 431.

220. *In re Kayser* (C. C. A., 3d Cir.), 24 Am. B. R. 174, 177 Fed. 383.

Transfer by bankrupt to wife of property

purchased with her funds.—Where bankrupt's wife purchased and improved certain real property with her own means, as an investment for her own benefit, but the deed, by a mistake of the scrivener, was made out to bankrupt, a trust was thereby created in favor of the wife, who paid the purchase money, and when bankrupt subsequently transferred to her the legal title, he did no more than a court of equity in a proper proceeding would have compelled him to do. *Silling v. Todd* (Sup. Ct., Va.), 27 Am. B. R. 127, 72 S. E. 682. Compare *Phillips v. Kleinman* (Sup. Ct., Pa.), 27 Am. B. R. 195, 81 Atl. 648.

221. *Weld v. McKay* (C. C. A., 7th Cir.), 34 Am. B. R. 52, 218 Fed. 807.

222. *Rogers v. Page* (C. C. A., 6th Cir.), 15 Am. B. R. 502, 140 Fed. 596, 72 C. C. A. 164. See *In re Shaw* (D. C., Me.), 17 Am.

to pay an honest antecedent debt is not of itself sufficient to establish actual fraud in fact, or an intent on the debtor's part, or on the part of the creditor, to hinder, delay, or defraud other creditors, within the meaning of this subsection.²²³ A transfer by a corporation within the four months' period to a creditor of officers of such corporation in payment of an obligation incurred by them for the benefit of the corporation, is fraudulent where the parties had knowledge of the financial condition of the corporation and of the improper use of the corporate funds.²²⁴

(IV) *Sales of goods on account; bulk sales.*—An agreement whereby goods were consigned to a person for sale and account, the consignee to return the goods which were unsold, is not necessarily invalid; as to the goods unsold the agreement is one of bailment and if made in good faith the consignor may assert and sustain his title to the goods.²²⁵ If the contract requires the consignee "to buy and pay for" all the goods remaining in his hands at the expiration of a certain period, and the consignee subsequently becomes bankrupt, an attempted transfer of the goods to the consignor just before bankruptcy without consideration is fraudulent.²²⁶ Sales of goods in bulk otherwise than in the ordinary course of trade, are presumptively fraudulent under the statutes of many States; under such statutes the fact that full value was paid is immaterial, if it be shown that the vendee knew of the vendor's intent to defraud his creditors.²²⁷ So where a debtor mortgages his entire stock of

B. R. 196, 146 Fed. 243; *In re Hickerson* (D. C., Idaho), 20 Am. B. R. 682, 162 Fed. 345, holding that an agreement to withhold a chattel mortgage from record is evidence of fraudulent intent; *In re Duggan* (C. C. A., 5th Cir.), 25 Am. B. R. 479, 183 Fed. 405, affg. 25 Am. B. R. 105, 182 Fed. 252; *Matter of National Boat & Engine Co.* (D. C., Me.), 33 Am. B. R. 154, 216 Fed. 208.

Scheme to remove property beyond the reach of creditors.—Where the bankrupt made four conveyances simultaneously as part of a scheme to put his real estate beyond the reach of his creditors in view of his imminent and inevitable bankruptcy and the grantees knew or should have known of such intent and kept the conveyances from record, with the intent to assist in its accomplishment, such conveyances should be set aside. *Cowan v. Burchfield* (D. C., Ala.), 25 Am. B. R. 293, 180 Fed. 614.

223. *Meservey v. Roby* (C. C. A., 8th Cir.), 28 Am. B. R. 529, 198 Fed. 844.

224. *Matter of Rockaway Mfg. Co.* (D. C., N. Y.), 34 Am. B. R. 627, 226 Fed. 520, where the following facts appeared: "A corporation being in need of cash to purchase supplies, two of its officers sought to borrow money for that purpose from F., who refused to advance the money to the corporation, but told the officers he would loan the money to them personally for the use of the corporation. He did so, taking their notes and gave his check for the loan, which was endorsed by the two officers and immediately deposited in the corporation's bank account. Thereafter F. received checks of the corporation in payment of the loan, with knowledge that the officers were using corporate funds

to pay their individual debt, when the corporation was in such financial condition that they had no right so to do. It was held that the payments were fraudulent.

225. *Ludvigh v. American Woolen Co.*, 231 U. S. 522, 31 Am. B. R. 481, 58 L. Ed. 345, 34 Sup. Ct. 161, affg. 188 Fed. 30, 110 C. C. A. 180, which revd. 23 Am. B. R. 314, 176 Fed. 445.

226. *Parlett v. Blake* (C. C. A., 8th Cir.), 26 Am. B. R. 25, 188 Fed. 200.

227. *In re Calvi* (D. C., N. Y.), 26 Am. B. R. 206, 185 Fed. 642; *Bentley v. Young* (D. C., N. Y.), 31 Am. B. R. 506, 210 Fed. 202. See Am. Bankr. Dig. § 634.

Sales in bulk.—In the case of *Matter of Farrell Co.* (Ref., N. Y.), 9 Am. B. R. 341, it was held, where the provisions of the New York statute, L. 1902, chap. 528, entitled "An act to regulate the sale of merchandise in bulk," are willfully and deliberately ignored by an alleged bankrupt, upon such a sale made by him within the four months' period, the transfer is void under subsection e of the above section. *Matter of Robertshaw Mfg. Co.* (D. C., Pa.), 13 Am. B. R. 409, 133 Fed. 556; *Shelton v. Price* (D. C., Ala.), 23 Am. B. R. 759, 176 Fed. 585; *Carpenter v. Karnow* (D. C., Mass.), 28 Am. B. R. 21, 193 Fed. 762; *Parker v. Sherman* (D. C., Vt.), 29 Am. B. R. 862, 201 Fed. 155.

Validity of sale of entire retail stock.—Where bankrupt, a few days prior to the filing of the petition, transferred by bill of sale his entire stock of merchandise in a retail store to his sister, who failed to make the inquiries or give notice to his creditors, as required by the New Jersey "Sales in Bulk" Act, the sale was voidable under said

goods and uses the money to pay a portion of his creditors it will be presumed that he intended to hinder, delay, and defraud his other creditors.²²⁸

(V) *Burden of proof.*—The rule is that one who alleges fraud takes upon himself the burden of proving it.²²⁹ Circumstances of the transaction may be shown; if sufficient to show that the entire intent was to delay, hinder or defraud, the transaction should be set aside; if it is attempted to prove the intent by evidence apart from the face of the instrument attacked, the burden of proof is usually imposed upon the party attacking.²³⁰ Other illustrative cases under the present law are cited in the foot-note²³¹ and under subsequent paragraphs.

f. *Purchasers in good faith and for present fair consideration.*—This saves valid transfers,²³² as subsection *d* does valid liens. A purchaser is not in good faith who makes no effort to determine whether an insolvent may make a transfer which will not be in violation of the act;²³³ nor is he in good faith if he has knowledge of the insolvent's insolvency, or where facts are shown which place upon the purchaser the duty of making inquiries as to the insolvent's financial condition, and he fails to make them, as where the sale consists of the transfer of the entire stock of merchandise owned by a retail merchant.²³⁴

Act, and it appearing that the transfer was contrived and consummated in fraud of bankrupt's creditors, it came within the inhibition of subsection *e* and was void as to such creditors. In re Lipman (D. C., N. J.), 29 Am. B. R. 139, 201 Fed. 169.

Where the question is one of fact as to the purchasers' good faith, and they as witnesses have failed to satisfy the trial court thereof and their stories in the printed record are unpersuasive, the verdict will not be disturbed. Bentley v. Young (C. C. A., 2d Cir.), 34 Am. B. R. 365, 223 Fed. 536, affg. 31 Am. B. R. 506, 210 Fed. 202.

Creditors' bill by trustee.—A trustee in bankruptcy may maintain an action in the nature of a creditors' bill against the persons who have purchased and disposed of the entire assets of his bankrupt's estate in violation of the provisions of section 2651, Rev. St. 1913, commonly called the "Bulk Sales Law." Niklaus v. Lessenhop (Neb. Sup. Ct.), 37 Am. B. R. 401, 157 N. W. 1019.

228. In re Walden Bros. Clothing Co. (D. C., Ga.), 29 Am. B. R. 80, 199 Fed. 315. But in this case on appeal the court held (C. C. A., 5th Cir.), 29 Am. B. R. 673, that where a transfer of a bankrupt's entire stock of goods, which was made for a present fair consideration, is sought to be impugned on the ground that it was made to hinder, delay and defraud creditors, so far as the purchaser is concerned, actual fraud as distinguished from constructive fraud, must be shown.

229. In re Kayser (C. C. A., 3d Cir.), 24 Am. B. R. 174, 177 Fed. 383; Jackson v. Sedgwick (D. C., N. Y.), 26 Am. B. R. 836, 189 Fed. 508.

230. In re Elletson (D. C., W. Va.), 23 Am. B. R. 530, 174 Fed. 859; In re Kayser (C. C. A., 3d Cir.), 24 Am. B. R. 174, 177 Fed. 383.

231. Carter v. Goodykoontz (D. C., Ind.), 2 Am. B. R. 224, 94 Fed. 108; Johnson v.

Wald (C. C. A., 5th Cir.), 2 Am. B. R. 84, 93 Fed. 640; In re Steininger (C. C. A., 5th Cir.), 6 Am. B. R. 68, 107 Fed. 669; In re Hugill Mercantile Co. (D. C., Ohio), 3 Am. B. R. 686, 100 Fed. 616; In re Kellogg (Ref., N. Y.), 6 Am. B. R. 389, affd. 7 Am. B. R. 270, 112 Fed. 52; In re Shepherd (Ref., Ill.), 6 Am. B. R. 725.

232. Compare Tiffany v. Lucas, 15 Wall. 410; Sedgwick v. Wormser, Fed. Cas. 12,626; Curran v. Munger, Fed. Cas. 3,487.

233. In re Moody (D. C., Iowa), 14 Am. B. R. 272, 134 Fed. 628, holding that a transfer of all the bankrupt's property to a person with knowledge of the bankrupt's financial condition is not in good faith; In re Knopf (D. C., S. Car.), 16 Am. B. R. 432, 144 Fed. 245; Dokken v. Page (C. C. A., 8th Cir.), 17 Am. B. R. 228, 147 Fed. 438; Dreyer v. Kicklighter (D. C., Ga.), 36 Am. B. R. 199, 228 Fed. 744.

234. Parker v. Sherman (C. C. A., 2d Cir.), 32 Am. B. R. 393, 212 Fed. 917; Godwin v. Tuttle (Sup. Ct., Ore.), 33 Am. B. R. 93, 141 Pac. 1120; Matter of Rosenberg (Ref., N. Y.), 22 Am. B. R. 900.

Sale in bulk sustained in Shelton v. Price (D. C., Ala.), 23 Am. B. R. 431, 174 Fed. 891; see In re Walden Bros. Clothing Co. (D. C., Ga.), 29 Am. B. R. 80, 199 Fed. 315 (affd. 29 Am. B. R. 673), holding that where bankrupt mortgaged its entire stock of merchandise, and then used the money received from the mortgage to pay three creditors, leaving a number of its creditors wholly unprotected, it will be presumed (under Ga. Code, § 3224) that the mortgage was given by bankrupt with intent to hinder and delay such unprotected creditors, the circumstances being such as to have put the mortgagee upon inquiry which, if made, would have informed him of bankrupt's intention, and therefore the mortgage is void. See also In re Thweatt (D. C., Ga.), 29 Am. B. R. 84, 199 Fed. 319, affd. *sub nom.* Johnson v. Dismukes (C. C.

A payment of a note dated prior to the four months' period, which is immediately followed by bankruptcy, is not in good faith and for a present fair consideration.²³⁵ The fact that a mortgagee knew that the proceeds of a mortgage was to be used in the payment of mortgagor's creditors does not affect the good faith of the transaction, in the absence of proof that he had cause to believe that the mortgagor was insolvent.²³⁶ If the consideration is fair and passes to the bankrupt and goes into his estate, the transfer is valid, unless there is clear and convincing proof of fraud.²³⁷ If the bankrupt was solvent when he transferred the property, and there were no grounds for believing that an indebtedness would arise which would embarrass him, the transfer may be sustained as being in good faith, even if made to his wife, it appearing that the property had been acquired in part by money of the wife advanced to the husband in trust.²³⁸ A new corporation organized by the bondholders of an insolvent corporation to take over the assets of such corporation with no provision made for the payment of its debts, does not take such assets in good faith, or "for a present fair consideration."²³⁹ If valid as to the "present consideration" and void as to the remainder of the value of the property transferred because in fraud of creditors, the recovery will be limited to the part that is void and the remainder may be retained.²⁴⁰ If part of the consideration is present and made in good faith, such a mortgage will be good to that extent.²⁴¹ But where there is an entire absence of good faith, the fresh consideration does not save the mortgage; it is void even as to that.²⁴²

A., 5th Cir.), 29 Am. B. R. 686, 204 Fed. 382. And see under "Sales of goods on account; bulk sales," *ante*.

235. *Spencer v. Nekemoto* (D. C., Hawaii), 24 Am. B. R. 517.

236. *In re Kullberg* (D. C., Minn.), 23 Am. B. R. 758, 176 Fed. 585.

237. *Parker v. Sherman* (C. C. A., 2d Cir.), 32 Am. B. R. 393, 212 Fed. 917; *Matter of Baar* (C. C. A., 2d Cir.), 32 Am. B. R. 465, 213 Fed. 628; *Vollmer v. Plage* (D. C., N. Y.), 26 Am. B. R. 590, 186 Fed. 598.

A chattel mortgage given upon the payment of cash, which cash goes into the hands of the bankrupt and is used for the purposes of his estate and of which his creditors have the benefit, is a valid mortgage under § 67-e of the bankruptcy law even if made within four months of the filing of the petition, if no actual fraud be shown. *In re Mahland* (D. C., N. Y.), 26 Am. B. R. 81, 184 Fed. 743. As to assignment of book accounts made by parol as security for purchase price of goods delivered prior to four months period, see *In re Stiger* (D. C., N. J.), 29 Am. B. R. 253, 202 Fed. 791.

238. *Butcher v. Cantor* (D. C., N. Y.), 26 Am. B. R. 424, 185 Fed. 945.

239. *Reorganization of corporation to take assets of insolvent corporation; present consideration.*—Where a corporation, organized to operate stone quarries, had become insolvent, and, within the four months, prior to its adjudication in bankruptcy, a bondholders' committee organized a new corporation for the purpose of transferring to it by bill of sale all the assets of the quarry company, and such bill of sale within such four months' period was given with the in-

tent to hinder, delay or defraud the creditors of the quarry company, and the new corporation did not buy the property in good faith or give "present appropriate consideration therefor," such transfer is null and void under § 67-e of the bankruptcy act. *In re Medina Quarry Co.* (D. C., N. Y.), 24 Am. B. R. 769, 179 Fed. 929.

240. *Jackson v. Sedgwick* (D. C., N. Y.), 26 Am. B. R. 836, 189 Fed. 508; *Vollmer v. Plage* (D. C., N. Y.), 26 Am. B. R. 590, 186 Fed. 598; *In re Mahland* (D. C., N. Y.), 26 Am. B. R. 81, 184 Fed. 743.

241. *In re Wolf* (D. C., Iowa), 3 Am. B. R. 558, 98 Fed. 84; *City Nat. Bank v. Bruce* (C. C. A., 4th Cir.), 6 Am. B. R. 311, 109 Fed. 69, *affg.* *In re Alverson* (Ref., S. Car.), 5 Am. B. R. 855; *Stedman v. Bank of Monroe* (C. C. A., 8th Cir.), 9 Am. B. R. 4, 117 Fed. 237; *In re Davidson* (D. C., Iowa), 5 Am. B. R. 528, 109 Fed. 882; *In re Durham* (D. C., Md.), 8 Am. B. R. 115, 114 Fed. 750; *In re Sawyer* (D. C., Mass.), 12 Am. B. R. 269, 130 Fed. 384, where a chattel mortgage given in security for the payment of notes to a certain amount was sustained as to the amount actually loaned at the time the mortgage was executed; *In re Dismal Swamp Contracting Co.* (D. C., Va.), 14 Am. B. R. 175, 135 Fed. 415; *Angle v. Bankers' Trust Co.* (D. C., N. Y.), 32 Am. B. R. 71, 210 Fed. 289.

242. *In re Hugill* (D. C., Ohio), 3 Am. B. R. 686, 100 Fed. 616. See also a case somewhat analogous, *In re Barrett* (Ref., N. Y.), 6 Am. B. R. 48. Compare also *In re Soudans Mfg. Co.* (C. C. A., 7th Cir.), 8 Am. B. R. 45, 113 Fed. 804.

g. Transfers and incumbrances under State laws.—The last sentence of the subsection is in line with the policy of the law. It adopts all State laws which interdict fraudulent transfers and liens, provided the acts complained of are within four months of the bankruptcy. Section 70-e is broader and applies the period of limitation fixed by the State law. This sentence is of little importance.

h. Suits to recover property.—(1) **IN GENERAL.**—Though all fraudulent transfers or incumbrances are here declared null and void and, by § 70-a (4) the title to property affected thereby vests in the trustees, yet a suit to recover will often be necessary. This is invariably so, where possession is not in the bankrupt. If in his possession, it may be reached summarily.²⁴³ Not so where a third party is interested, save with his consent.²⁴⁴ The setting aside of a mortgage in which the wife of the bankrupt joined, to release her dower, revives the wife's right of dower.²⁴⁵ A payment of a premium to an insurance company upon an annuity policy, whereby a bankrupt becomes entitled to an annuity payable during life, may be recovered by the trustee of the annuitant; such a contract is wholly executory and the trustee may elect to cancel it, and recover the consideration for the benefit of creditors.²⁴⁶ The trustee must proceed by suit in the proper tribunal,²⁴⁷ and show facts bringing the case within this subsection. What has been said as to suits to set aside voidable preferences is largely applicable here.²⁴⁸

(2) **AMENDMENT OF 1903.**—The words added here are the same as those added to § 60-b. and § 70-e. Clearly, they refer to any suit which may be brought under the subsection, and not merely to a suit based on a State law. The meaning and purpose of the amendment have already been discussed. The amendatory act has conferred jurisdiction upon district courts concurrent with State courts to set aside transfers made by a bankrupt within the four months' period, which are alleged to be null and void as to creditors by a State law.²⁴⁹ If the property, against which the lien is asserted, is in the possession of a State court, the question of the validity of the lien should

^{243.} See *In re Deuell* (D. C., Mo.), 4 Am. B. R. 60, 100 Fed. 633, and many cases where the remedy of contempt has been resorted to.

^{244.} *Bardes v. Bank*, 178 U. S. 524, 4 Am. B. R. 163, 44 L. Ed. 1175, 20 Sup. Ct. 100; *Matter of Mansur* (Ref., Mass.), 36 Am. B. R. 57.

Consent of defendant.—An action, wherein it is alleged that the defendant claimed to be the owner of an account due the bankrupt and that such claim was based on a conspiracy between the bankrupt and the defendant, is in the nature of a suit to quiet title to personal property, and cannot be brought in the federal courts without the consent of the defendant. *Simpson v. Western Hardware & Metal Co.* (D. C., Wash.), 35 Am. B. R. 851, 227 Fed. 304.

^{245.} *Matter of Lingafelter* (C. C. A., 6th Cir.), 24 Am. B. R. 656.

^{246.} *Smith v. Mutual Life Ins. Co.* (C. C. Mass.), 24 Am. B. R. 514, 178 Fed. 510.

^{247.} See, generally, under Sections Two and Twenty-three of this work.

A receiver cannot sue to recover property which has been fraudulently transferred by

the bankrupt. *Frost v. Latham & Co.* (D. C., Ala.), 25 Am. B. R. 313, 181 Fed. 866.

Equity jurisdiction.—To establish a liability under section 67-e of the Bankruptcy Act actual fraud must be shown and therefore suits under that provision are peculiarly within the cognizance of, and should be entertained on, the equity side of the court. *Simpson v. Western Hardware & Metal Co.* (D. C., Wash.), 35 Am. B. R. 851, 227 Fed. 304.

^{248.} See under Section Sixty of this work.

^{249.} *Johnston v. Forsyth Mercantile Co.* (D. C., Ga.), 11 Am. B. R. 669, 127 Fed. 845. See *McNulty v. Feingold* (D. C., Pa.), 12 Am. B. R. 338, 129 Fed. 1,001, holding that a trustee in bankruptcy may maintain a suit in equity in a district court for an accounting of money collected by defendants on accounts fraudulently assigned to them by bankrupts, although the face value of such accounts is known to the trustee. As to actions by trustees to set aside fraudulent conveyances, see *Schmitt v. Dahl* (Sup. Ct., Minn.), 11 Am. B. R. 226, 183 Minn. 506; *Kohout v. Chalounka* (Sup. Ct., Neb.), 11 Am. B. R. 265, 69 Neb. 677; *Loganville Bank-*

be tried in the State court.²⁵⁰ For the time when the amendments became operative, see "Supplementary Section to Amendatory Act," *post*.

i. **Miscellaneous invalid transfers or incumbrances.**—(1) **IN GENERAL.**—The books are already well filled with precedents. All turn on their own facts.²⁵¹ It is impossible to deduce hard and fast rules. The more important cases are classified in the succeeding paragraphs.

(2) **MORTGAGES TO SECURE ANTECEDENT DEBTS.**—These are void.²⁵² Where the mortgagor remains in possession with power to sell in the usual course of business, under a mortgage that contains no provision that the proceeds of sales shall be applied upon the debt secured, the legal effect of the mortgage is to hinder and delay creditors; and if given within the four months' period is null and void.²⁵³ Although the mortgage is given to secure a present loan,

ing Co. v. Forrester (Ga. Ct. of App.), 36 Am. B. R. 279, 87 S. E. 694; *Simpson v. Western Hardware & Metal Co.* (D. C., Wash.), 35 Am. B. R. 851, 227 Fed. 304; *Rubenstein v. Lottow* (Mass. Sup. Ct.), 35 Am. B. R. 243, 220 Mass. 156.

250. *Pietri v. Wells* (La. Sup. Ct.), 36 Am. B. R. 105, 69 So. 847.

251. For instance, in *re Little River Lumber Co.* (D. C., Ark.), 1 Am. B. R. 483, 92 Fed. 585, and in *re Head* (D. C., Ark.), 7 Am. B. R. 556, 114 Fed. 489; in *re Faulhaber Stable Co.* (C. C. A., 2d Cir.), 22 Am. B. R. 381, 170 Fed. 68. See also for decisions on this general subject, *Harvey v. Smith* (Sup. Jud. Ct., Mass.), 7 Am. B. R. 497, and in *re Standard Laundry Co.* (C. C. A., 9th Cir.), 8 Am. B. R. 538, 116 Fed. 476.

252. In *re Ronk* (D. C., Ind.), 7 Am. B. R. 31, 111 Fed. 154; *Pollock v. Jones* (C. C. A., 4th Cir.), 10 Am. B. R. 616, 124 Fed. 163, affg. 9 Am. B. R. 262, 118 Fed. 673; *Farmers' Bank v. Carr & Co.* (C. C. A., 4th Cir.), 11 Am. B. R. 733, 127 Fed. 690; in *re Hill* (D. C., Cal.), 15 Am. B. R. 499, 140 Fed. 984; *Matter of Hutchinson Co.* (Ref., Mich.), 14 Am. B. R. 518; *Morgan v. First Nat. Bank* (C. C. A., 4th Cir.), 16 Am. B. R. 639, 145 Fed. 466. Compare in *re Wolf* (D. C., Iowa), 3 Am. B. R. 558, 98 Fed. 84, and *Sabin v. Camp* (D. C., Oreg.), 3 Am. B. R. 578, 98 Fed. 974.

Mortgage, when invalid.—But a transfer or mortgage made by an adjudged bankrupt, to secure a pre-existing debt, within four months of the filing of the petition, is not void, under section 67-e, unless it was either made with the intent on his part to hinder, delay or defraud his creditors, or some of them, or is held void as against his creditors by the laws of the jurisdiction in which the property is situated. *Coder v. Arts* (C. C. A., 8th Cir.), 18 Am. B. R. 513, 152 Fed. 943, modifying 16 Am. B. R. 583, affd. 213 U. S. 223, 22 Am. B. R. 1, 53 L. Ed. 772, 29 Sup. Ct. 436.

Chattel mortgage by corporation organized to take over business of bankrupt; lack of present consideration.—Where a creditor, with knowledge that a bankrupt had made various transfers of his property to his wife,

received stock in a corporation formed to take over bankrupt's business and which was at all times insolvent, and subsequently turned back the stock, taking in part payment therefor a chattel mortgage upon assets of the corporation, such mortgage was invalid, the evidence failing to establish that the creditor had ever purchased the stock for a present consideration or advanced money thereon as claimed. In *re Levine* (D. C., N. Y.), 28 Am. B. R. 481, 196 Fed. 589.

253. *Egan State Bank v. Rice* (C. C. A., 8th Cir.), 9 Am. B. R. 437, 119 Fed. 107; *Zartman v. National Bank*, 16 Am. B. R. 152, 109 N. Y. App. Div. 406, 96 N. Y. Supp. 633; *Skilton v. Codington*, 15 Am. B. R. 810, 185 N. Y. 80, 77 N. E. 790; in *re Marine Construction & Dry Dock Co.* (D. C., N. Y.), 14 Am. B. R. 466, 135 Fed. 921; *Dodge v. Norlin* (C. C. A., 8th Cir.), 13 Am. B. R. 177, 133 Fed. 363; in *re Standard Telephone & Electric Co.* (D. C., Wis.), 19 Am. B. R. 491, 157 Fed. 106; in *re Herman* (D. C., Iowa), 31 Am. B. R. 243, 207 Fed. 594.

Mortgage to secure prior advances.—Where bankrupt gave to a bank a mortgage to secure prior advances which had been made under an agreement to give such security and it plainly appeared that bankrupt, who was then knowingly, hopelessly insolvent, had determined, days before he gave the mortgage, to abscond and leave his creditors unpaid, except as secured, the mortgage constituted a transfer to hinder, delay and defraud creditors, and, there being no "present" consideration, it was void, notwithstanding that the mortgagee might have acted in good faith. In *re Thomas* (D. C., N. Y.), 29 Am. B. R. 945, 199 Fed. 214.

Mortgage on shifting stock of merchandise.—A chattel mortgage given by a bankrupt on a stock consisting of wines, liquors and cigars, etc., which, with the knowledge of the mortgagee, were bought and sold and dealt in from day to day in the usual course of trade, all of the proceeds being retained by the bankrupt and no part being turned over to the mortgagee, is invalid. In *re Noethen* (C. C. A., 2d Cir.), 29 Am. B. R. 234, 201 Fed. 97, affg. 27 Am. B. R. 910, 195 Fed. 573.

if the money borrowed is to be used in part payment of antecedent debts, the mortgage has been held to be void.²⁵⁴

(3) CHATTEL MORTGAGES.—Here the cases are quite numerous and in each instance turn upon the requirements of the State law.²⁵⁵ Any chattel mortgage which was ineffectual as against creditors under the law of the State of the transaction, is ineffectual as against the bankrupt's trustee.²⁵⁶

254. In re Pease (D. C., Mich.), 12 Am. B. R. 66, 129 Fed. 446; In re Butler (D. C., Ga.), 9 Am. B. R. 539, 120 Fed. 100; In re Soudans Mfg. Co. (C. C. A., 7th Cir.), 8 Am. B. R. 45, 113 Fed. 804; In re Hersey (D. C., Iowa), 22 Am. B. R. 763, 171 Fed. 998; Matter of Schacht Motor Car Co. (Ref., Cal.), 31 Am. B. R. 624.

Mortgage to secure advances to pay pre-existing debt.—A mortgage, executed by an insolvent debtor within four months of bankruptcy, covering all his property, to secure notes representing a loan with which the mortgagee had taken upon notes discounted by a bank and on which the debtor was threatened with arrest for forgery, held, on all the evidence, to constitute a fraudulent transfer, void under section 67-e of the bankruptcy act. *Dean v. Davis*, 242 U. S.—, 38 Am. B. R. 664, 37 Sup. Ct. 230, and cases cited in marginal note.

255. In re Adams (Ref., Mich.), 2 Am. B. R. 415; In re Leigh (Ref., Col.), 2 Am. B. R. 606; *Stroud v. McDaniel* (C. C. A., 4th Cir.), 5 Am. B. R. 695, 106 Fed. 493; In re Shirley (C. C. A., 6th Cir.), 7 Am. B. R. 299, 112 Fed. 301; In re Platts (D. C., S. Dak.), 6 Am. B. R. 568, 110 Fed. 126; In re Ronk (D. C., Ind.), 7 Am. B. R. 31, 111 Fed. 154; In re Pekin Plow Co. (C. C. A., 8th Cir.), 7 Am. B. R. 369, 112 Fed. 308; In re Soudans Mfg. Co. (C. C. A., 7th Cir.), 8 Am. B. R. 45, 113 Fed. 804; *Dodge v. Norlin* (C. C. A., 8th Cir.), 13 Am. B. R. 177, 133 Fed. 363; Bank of Dillon v. Murchison (C. C. A., 4th Cir.), 31 Am. B. R. 740, 213 Fed. 147. As to binding effect of State law and decisions, compare *In re Hull* (D. C., Vt.), 8 Am. B. R. 302, 115 Fed. 858, with *In re Josephson* (D. C., Ga.), 8 Am. B. R. 423, 111 Fed. 404. The latter case is thought the more reliable.

The validity of a mortgage is a local question, and the decisions of the State courts will control. In re *Hickerson* (D. C., Idaho), 20 Am. B. R. 682, 688, 162 Fed. 345; In re *Harnden* (D. C., N. Mex.), 29 Am. B. R. 507, 200 Fed. 175; *Scandinavian-American Bank v. Sabin* (C. C. A., 9th Cir.), 36 Am. B. R. 151, 227 Fed. 579.

A bill of sale executed by a corporation while it is insolvent, to secure a loan, is invalid under this section. In re *Arkonia Fabric Mfg. Co.* (D. C., Pa.), 18 Am. B. R. 470, 151 Fed. 914.

Possession and sale of property by mortgagor.—A provision in a chattel mortgage, that the mortgagors may remain in possession of a stock of merchandise and sell it out in the usual course, paying a per cent. of the sales each week to the mortgagee, does

not render the mortgage void *per se*. Good faith is the controlling principle in testing the validity of such a conveyance, and this must be in each case decided upon the evidence. *Cauthorn v. Burley State Bank* (Sup. Ct., Idaho), 33 Am. B. R. 794, 144 Pac. 1608.

256. In re *First National Bank of Canton* (C. C. A., 6th Cir.), 14 Am. B. R. 180, 135 Fed. 62; In re *Birk & Co.* (C. C. A., 7th Cir.), 15 Am. B. R. 694, 142 Fed. 438, holding that under the Illinois statute a chattel mortgage is void as against the mortgagor's trustee, where such mortgage was given to secure notes containing no mention upon their face that they were secured by an instrument in the form of a chattel mortgage. In re *Shaw* (D. C., Me.), 17 Am. B. R. 196, 146 Fed. 243; In re *Chadwick* (D. C., Ohio), 15 Am. B. R. 528, 140 Fed. 674.

Sale of mortgaged property without accounting for proceeds.—Where bankrupt who had given a chattel mortgage on a stock of goods to a bankrupt was, with the knowledge of the mortgagee, permitted to sell the goods and, having deposited the proceeds in the bank, to use them for his own benefit and in the purchase of new merchandise, with no understanding that the proceeds should be reinvested and the mortgage lien attach to the goods, so purchased, and, although many times the mortgage indebtedness, in goods, were sold and the proceeds so deposited, only a small payment was made to the bank and no account rendered of the disposition of the proceeds, the transaction, under the law of South Dakota, constituted a legal fraud which voided the mortgage as against bankrupt's creditors. In re *Geiver* (D. C., S. Dak.), 28 Am. B. R. 413, 193 Fed. 128.

Validity of chattel mortgage as to creditors extending credit.—A trustee in bankruptcy takes the property of the bankrupt subject to all the rights, claims and equities that have been impressed upon it in the hands of the bankrupt, and the validity of such rights, claims and equities is to be determined, in the absence of Federal statute, by the local law as evidenced by the decisions of the State courts. A chattel mortgage was given September 30th, 1909, but not recorded until March 9th, 1910. In August, 1910, the mortgagor was adjudged a bankrupt. It appeared that certain persons became creditors between the date of execution and of recording the mortgage. Held, that the trustee in bankruptcy took subject to the rights, claims and equities existing against the bankrupt's property, the validity of which was to be determined by the local (Missouri)

If a bankrupt purchases property subject to a chattel mortgage, his trustee cannot attack the mortgage because not filed as required by statute; the bankrupt received the property subject to the lien, and his trustee cannot avail himself of the remedies afforded the creditors of the original mortgagor.²⁵⁷ Cases where the validity of conditional sales has been attacked are also cited here.²⁵⁸ So also where a pledge of collateral has been called in question.²⁵⁹

(4) VOLUNTARY SETTLEMENTS.—These are avoided in terms by the English law. We have no similar provision, but judicial construction has made our rule substantially the same. If made by an insolvent husband to his wife they are held void.²⁶⁰ No matter how devious the method, if the wife gets the property from an insolvent husband without consideration, intent will be presumed and the transfer be set aside.²⁶¹ Similarly, transfers

statute; that, in Missouri, an unrecorded chattel mortgage is void as to creditors extending credit to the mortgagor between the time of giving the mortgage and the date of recording, and that the superior equity of such creditors follows the property into the hands of the trustee in bankruptcy. In re Wade (D. C., Mo.), 26 Am. B. R. 169, 185 Fed. 664.

Right of trustee to take advantage or invalidity.—Prior to bankruptcy, the bankrupt had given to his father-in-law a chattel mortgage covering tools, furniture, personal property, etc., of every kind. He was at the time running a small store and his stock of merchandise, covered by the mortgage, was sold from time to time as his own and the proceeds used primarily for the support of the bankrupt's family, though occasional payments were made upon the mortgage but no account of sales was kept, and the mortgagee made no objection to the disposition made of the proceeds. *Held*, that the mortgage was invalid as to any of the property, as against the general creditors, and that the trustee in bankruptcy might take advantage of such invalidity. In re Hartman (D. C., N. Y.), 26 Am. B. R. 76, 189 Fed. 196.

Mortgage on shifting stock of merchandise.—A New York chattel mortgage given to secure a part of the purchase price of a stock of goods, which permits the mortgagor to sell the goods in the ordinary course of business, although providing that the stock shall be kept up to its present standard as to quality and quantity and purporting to give a lien on all goods purchased to replenish the stock, is void as to the mortgagor's creditors, in the absence of a provision for turning over the proceeds of sales to the mortgagee or for using such proceeds to replenish the stock or for a renewal of the lien by giving renewal or new mortgages on new stock purchased. Matter of Purtell (D. C., N. Y.), 32 Am. B. R. 824, 215 Fed. 191.

Under the decisions of Oregon, when it appears either upon the face of a chattel mortgage or by parol evidence *abundante*, that a mortgagee of personal property has given the mortgagor unlimited power and authority

to dispose of the property in the usual course of trade, the mortgage is void as to attaching creditors, even though there was not actual fraudulent intent on the part of either of the parties to the instrument, and hence it is also void as to the trustee in bankruptcy of the mortgagor. *Scandinavian-American Bank v. Sabin* (C. C. A., 9th Cir.), 36 Am. B. R. 151, 227 Fed. 579.

257. In re Columbia Fireproof Door & Trim Co. (D. C., N. Y.), 21 Am. B. R. 714, 168 Fed. 159.

258. In re Klingaman (D. C., Iowa), 4 Am. B. R. 254, 101 Fed. 691; In re Howland (D. C., N. Y.), 6 Am. B. R. 495, 109 Fed. 860; In re Tatem (D. C., N. Car.), 6 Am. B. R. 426, 110 Fed. 519; In re Sewell (D. C., Ky.), 7 Am. B. R. 133, 111 Fed. 791; In re Garcewich (C. C. A., 2d Cir.), 8 Am. B. R. 149, 115 Fed. 87.

259. *Chattanooga Nat. Bank v. Rome Iron Co.* (D. C., Ga.), 4 Am. B. R. 441, 102 Fed. 755; In re Cobb (D. C., N. Car.), 3 Am. B. R. 129, 96 Fed. 821; *Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779; *Clark v. Iselin*, 21 Wall. 360; *Adams v. Nat. Bank*, 2 Fed. 174; *Davis v. R. R. Co.*, Fed. Cas. 3,640. In re Grinnell, Fed. Cas. 5,829.

260. In re Skinner (D. C., Ia.), 3 Am. B. R. 163, 97 Fed. 190; In re Grahs (Ref., Ohio), 1 Am. B. R. 465; *Kehr v. Smith*, 20 Wall. 31; *Sedgwick v. Place*, Fed. Cas. 12,622; *Pratt v. Curtis*, Fed. Cas. 11,375; *Antrim v. Kelly*, Fed. Cas. 494.

261. In re Smith (D. C., Ga.), 3 Am. B. R. 95, 100 Fed. 795; In re Eldred, Fed. Cas. 4,328. Compare In re Teter (D. C., Va.), 23 Am. B. R. 223, 173 Fed. 798, *affd.* 24 Am. B. R. 242, 179 Fed. 655; *Phillips v. Kleinman* (Pa. Com. Pleas, Alleg. Co.), 23 Am. B. R. 266.

Assignment of life insurance policy; chattel mortgage to wife to secure note.—A bankrupt had two policies of life insurance in which his wife was named as beneficiary subject to the usual right of the insured to change the beneficiary. Assignments of both of the policies to the company as security for loans were signed by the wife. Thereafter a note was given to the wife secured by a mortgage, for the amount of the loan with interest.

to other relatives are suspicious and require proof.²⁶² But if a transfer be made in good faith to a wife, in consideration of her release of her inchoate dower right, it is valid.²⁶³ A husband may give his earnings or other property to his wife, without affecting the rights of his creditors, provided he is at the time in solvent circumstances, and there is no purpose to avoid his obligations.²⁶⁴

(5) **GENERAL ASSIGNMENTS.**—Voluntary general assignments, whether with or without preferences, are legal frauds, and therefore voidable. The cases are already numerous,²⁶⁵ and establish a doctrine not always recognized under the former laws. The legal effect of a general assignment is considered elsewhere.²⁶⁶

j. Practice.—If the property may be recovered summarily, a petition, duly verified, will usually be enough to secure the order to show cause. It should show facts bringing it within the terms of some of the subsections of this section.²⁶⁷ If the bankrupt or his agent who is in possession refuses to deliver the property, contempt proceedings may be brought. In cases where a suit is necessary, it must be for either the property or its value, and in accordance with the rules and practice of the court where brought. The trustees should not, however, bring such a suit without obtaining a direction to that effect by the referee in charge.²⁶⁸

VI. LIENS THROUGH LEGAL PROCEEDINGS.

a. In general.—Subsections *c* and *f* both relate to liens obtained through legal proceedings. Subsection *c* relates to liens obtained in suits or pro-

The mortgaged property was sold free from liens. *Held*, that the note to the wife and the mortgage to secure it were without consideration, and that the proceeds of the sale of the property belong to the estate in bankruptcy. *Matter of Farrand* (D. C., Me.), 38 Am. B. R. 101, 235 Fed. 809.

^{262.} *In re Johann*, Fed. Cas. 7,331. Compare *Adams v. Collier*, 122 U. S. 382, 30 L. Ed. 1207, 7 Sup. Ct. 1208.

^{263.} *In re Porterfield* (D. C., W. Va.), 15 Am. B. R. 11, 138 Fed. 192; *In re Grandy* (D. C., S. Car.), 17 Am. B. R. 206, 146 Fed. 318.

^{264.} **Gifts by husband to wife; recovery by trustee.**—Small sum of moneys voluntarily given by a husband to his wife from time to time when he was entirely solvent, should not be taken from her to pay persons who became creditors as a result of a business enterprise into which he subsequently engaged; but sums so given the wife, when the husband is not in a financial condition to do so, may be recovered by the trustee in bankruptcy. *Milkman v. Arthe* (C. C. A., 2d Cir.), 34 Am. B. R. 536, 223 Fed. 507, revg. 32 Am. B. R. 519, 213 Fed. 642.

^{265.} *West Co. v. Lea*, 174 U. S. 590, 2 Am. B. R. 463, 43 L. Ed. 1098, 19 Sup. Ct. 836; *Davis v. Bohle* (C. C. A., 8th Cir.), 1 Am. B. R. 412, 92 Fed. 325, affg. *In re Sievers* (D. C., Mo.), 1 Am. B. R. 117, 91 Fed. 366; *In re Gutwillig* (D. C., N. Y.), 1 Am. B. R. 78, 90 Fed. 475, affd., s. c., 1 Am. B. R. 388, 92 Fed. 327; *In re Gray*, 3 Am. B. R. 647, 47 N. Y. App. Div. 554, 62 N. Y. Supp. 618; *Globe*

Ins. Co. v. Cleveland Ins. Co., Fed. Cas. 5,486; *Boese v. King*, 108 U. S. 379, 27 L. Ed. 760, 2 Sup. Ct. 765; *Detroit Trust Co. v. Pontiac Sav. Bank* (C. C. A., 6th Cir.), 27 Am. B. R. 821, 196 Fed. 29, affd. 237 U. S. 186, 34 Am. B. R. 759, 35 Sup. Ct. 509; *Matter of Braus* (D. C., N. Y.), 38 Am. B. R. 112, 237 Fed. 139; *Matter of Vorek* (D. C., Mont.), 38 Am. B. R. 203, 235 Fed. 655.

—A general assignment, even though without preferences, is now, if made within four months of the filing of the petition, a constructive fraud on the bankruptcy act. *Cohen v. American Surety Co.*, 20 Am. B. R. 65, 72, 192 N. Y. 227, 84 N. E. 947; *Eichholz v. Polack* (N. Y. App. Div.), 25 Am. B. R. 243, 140 N. Y. App. Div. 551, 125 N. Y. Supp. 1108.

^{266.} See under Sections Three and Twenty-three of this work.

^{267.} **Allegations in pleadings.**—For instance, in the case of *McNulty v. Wiesen* (D. C., Pa.), 12 Am. B. R. 341, 130 Fed. 1,012 it was held that an allegation in an answer that the purchase of book accounts was made without intent on the part of the defendants to delay, hinder and defraud the bankrupt's creditors, or any of them, is not impertinent, for the reason that under subsection *c* the defendants are required to show that they were purchasers in good faith and for a present fair consideration. See also *Johnston v. Forsyth Mercantile Co.* (D. C., Ga.), 11 Am. B. R. 669, 127 Fed. 84.

^{268.} See also, generally, under Sections Three, Twenty-three and Sixty of this work.

ceedings at law or in equity against the bankrupt, begun within the four months' period. Such liens are nullified, or if the nullification would work an injury to the bankrupt estate, they may be preserved for the benefit of the estate, and the trustee may be subrogated to the rights of the holder of the lien, and be empowered to perfect and enforce the same. Subsection *f* nullifies all liens obtained through legal proceedings "against a person who is insolvent," which are perfected within the four months' period.²⁶⁹ The property subject thereto passes upon the bankruptcy of such person to his trustee. The court may also preserve such liens for the benefit of the estate. *Bona fide* purchasers are protected under this subsection. The provisions of this subsection are not limited to the annulment of liens on property that passes to the trustee; it is general and sweeping and applies to all liens acquired through legal proceedings during the four months' period, on all property of the bankrupt, including exempt property.²⁷⁰

b. Comparative legislation.—The wide gulf between the former and the present law here needs little comment. Then, as has been said, only attachment liens were dissolved. Now all liens through legal proceedings share the same fate. Thus, the subsections under discussion are in harmony with the so-called "passive" act of bankruptcy²⁷¹ and, with it, establish a new class of constructive frauds resulting from what we have been wont to think justifiable foresight. This is the high-water mark of bankruptcy jurisprudence both in England and the United States. The change is so marked that the constitutionality of the clause has been attacked, though unsuccessfully.²⁷²

c. Confusion concerning subs. c and subs. f.—A question much discussed early in the administration of the law was whether subsection *f* applied to voluntary bankruptcies. Some cases held that it did not.²⁷³ The great weight

^{269.} *Matter of Southern Arizona Smelting Co.* (C. C. A., 9th Cir.), 36 Am. B. R. 827, 231 Fed. 87.

^{270.} *In re Forbes* (C. C. A., 9th Cir.), 26 Am. B. R. 355, 186 Fed. 79. It is apparent that the effect of § 67-f of the Act of 1898 is not to avoid attachments, levies or liens therein referred to against all the world, but merely as against the trustee in bankruptcy and those claiming under him, so that the property may pass to and be distributed by him among the creditors of the bankrupt, and such is the view entertained by several well-considered cases. *Casady & Co. v. Hartzell*, 34 Am. B. R. 236, 151 N. W. 97; *Peoples' Nat'l Bank v. Maxson* (Sup. Ct., Iowa), 33 Am. B. R. 765, 150 N. W. 601. See discussion under Section Six of this work, sub-title "*Exemptions out of incumbered property.*"

Failure of trustee to claim property.—The lien of a judgment acquired within four months of bankruptcy is rendered void by section 67-f of the bankruptcy act, although the trustee does not claim the property against which the lien is asserted. *Peoples' Nat'l Bank v. Maxon* (Sup. Ct., Iowa), 33 Am. B. R. 765, 150 N. W. 601.

Contractual liens not affected.—The language of section 67 of the bankruptcy act, which provides that "levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is in-

solvent, at a time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is alleged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt," relates merely to levies, judgments, attachments, and liens which are acquired through legal proceedings, and does not affect contractual or quasi contractual liens. Scrupulous care, indeed, is evidenced throughout the act to save all such rights and liens which are obtained in good faith from the bankrupt. *Gray v. Arnot* (N. Dak. Sup. Ct.), 35 Am. B. R. 704, 154 N. W. 268.

^{271.} Bankr. Act, § 3-a (3).

^{272.} *In re Rhoads* (D. C., Pa.), 3 Am. B. R. 380, 98 Fed. 399.

^{273.} **Voluntary bankruptcies.**—In the case of *In re DeLue* (D. C., Mass.), 1 Am. B. R. 387, 91 Fed. 510, it was held that where an attachment of the property of a voluntary bankrupt had been made by virtue of a precept issued within four months prior to the filing of the petition or in a suit that was commenced a year before the filing of the petition the lien of attachment was not destroyed by an adjudication of the petitioner in bankruptcy on the ground that the case falls within section 67-e, and the provisions of

of authority, however, is that both subsections may refer to either voluntary or involuntary cases.²⁷⁴ The courts were at first also much confused by two subsections with apparently the same purpose, yet, while inconsistent in part, at the same time overlapping. This confusion is not now important. Subsection *f* seems to cover in general terms almost every lien specifically declared voidable in subsection *c*, as well as many more. Besides, it occurs later in the law and, having been inserted while the bill was in conference committee of the two Houses of Congress, thus represents, as it were, the last word of the framers of the statute.²⁷⁵ It, therefore, is now usually relied on; subsection *c* is important only in those rare instances where subsection *f* does not apply.

d. When subs. c applies.—The element of insolvency at the time of the lien not always being essential under subsection *c*, as under subsection *f*, cases where this matter is in doubt will often, if possible, be brought within the former. This distinction is not important where the facts bring the alleged lien within subdivisions *c* (1) or *c* (2). Still, liens may be obtained through legal proceedings which amount to a fraud on the act irrespective of insolvency. In that event, while such cases will be rare, subsection *c*, and not its companion, applies. The distinction between "void" and "voidable," in the respective subsections, is not important. Several of the clauses making up subsection *c* have been considered elsewhere.²⁷⁶ The phrase "in fraud of the provisions of the act" comes from the law of 1867.²⁷⁷ It means, in brief, any act intended to disturb or resulting in a disturbance of that equilibrium between creditors of the same class which is the basic principle

section 67-f, being limited to voluntary bankruptcy, have no application. This case was followed by *In re Easley* (D. C., Va.), 1 Am. B. R. 715, 93 Fed. 419, where property had been levied upon by an execution issued upon a judgment prior to the statutory four months, and also by the case of *In re O'Connor*, 95 Fed. 943.

274. *In re Friedman* (Ref., N. Y.), 1 Am. B. R. 510; *Peck, etc., Co. v. Mitchell*, 95 Fed. 258; *In re Fellerath* (D. C., Ohio), 2 Am. B. R. 40, 95 Fed. 121; *In re Rhoads* (D. C., Pa.), 3 Am. B. R. 380, 98 Fed. 399; *In re Dobson* (D. C., Ill.), 3 Am. B. R. 420, 8 Fed. 86; *In re Lesser* (D. C., N. Y.), 3 Am. B. R. 815, 100 Fed. 433; *In re Kemp* (D. C., Col.), 4 Am. B. R. 242, 101 Fed. 689; *Brown v. Case* (Sup. Jud. Ct., Mass.), 6 Am. B. R. 744, 61 N. E. 279; *In re Benedict*, 8 Am. B. R. 463, 37 N. Y. Misc. 230, 75 N. Y. Supp. 165; *Mohr v. Mattox* (Sup. Ct., Ga.), 12 Am. B. R. 330, 120 Ga. 962; *McKenney v. Cheney* (Sup. Ct., Ga.), 11 Am. B. R. 54, 45 S. E. 433, in which case the court expressly dissented from the holding of Judge Thomas in the case of *In re O'Connor*, 95 Fed. 943, and held that a proper construction of subsection *f* requires the holding that it is applicable to both cases of voluntary and involuntary bankruptcy. *Mencke v. Rosenberg*, 9 Am. B. R. 323, 202 Pa. St. 131. And see *Matter of Southern Arizona Smelting Co.* (C. C. A., 9th Cir.), 36 Am. B. R. 827, 231 Fed. 87, where the court concludes that the language and purpose of the two subsections clearly indicate that it was intended that they should apply

to both voluntary and involuntary proceedings.

Liens obtained by judgment notes which gave the holder the power of attorney to enter up judgment were considered to be annulled and rendered void by the adjudication, where the notes had been given before the statutory period, or the entry of the judgment had been made within that time. *In re Richards* (C. C. A., 7th Cir.), 3 Am. B. R. 145, 96 Fed. 935. So, in the case of *In re Higgins* (D. C., Ky.), 3 Am. B. R. 364, 97 Fed. 775, an attachment issued within four months, though the case in which the attachment was issued was begun long before, was annulled. See also *In re Vaughan* (D. C., N. Y.), 3 Am. B. R. 362, 97 Fed. 560, in which many cases are collected.

275. See *In re Tune* (D. C., Ala.), 8 Am. B. R. 285, 115 Fed. 906.

Wherever there is any inconsistency between the provisions of paragraphs *c* and *f*, the latter controls and supersedes the former under the well-known rule of statutory construction, as the last statement of the legislative will. *In re Rhoades* (D. C., Pa.), 3 Am. B. R. 380, 98 Fed. 399.

276. For instance, "Within four months prior to filing the petition," "Reasonable cause to believe that the defendant was insolvent," "In contemplation of bankruptcy," "Obtained or permitted" and "Insolvency" have been considered in the discussion under Section Sixty of this work.

277. Act of 1867, § 35, R. S., § 5128.

of all bankruptcy laws. Illustrative cases under the former law will be found in the foot-note.²⁷⁸ The concluding clause of subsection *c* is doubtless expressive of the law. It extends to liens through legal proceedings²⁷⁹ the rule of subrogation stated in subsection *b*. The fact that to be voidable under subsection *c* a lien must arise in a proceeding begun within the four months' period should also be noted.

e. Insolvency essential.—Here the distinction between liens through legal proceedings and other liens has already been pointed out. None of the former are dissolved by bankruptcy unless the lienee was insolvent at the time they were perfected.²⁸⁰ If the debtor was insolvent at the time the liens through legal proceedings were obtained, a court of bankruptcy has power to effect an avoidance of such liens in summary proceedings; but the insolvency of the debtor at the time such liens were acquired is an indispensable condition of the existence and of the exercise of the power.²⁸¹ If the lien consists of an attachment levied within four months of the adjudication, the solvency of the bankrupt at the time the levy was made does not save the lien; the adjudication is conclusive as to the insolvency of the debtor.²⁸²

f. Four months prior to the filing of the petition.—Liens through legal proceedings acquired more than four months before the bankruptcy are not affected.²⁸³ This section has no application to judgments, levies, attachments, or other liens obtained after the filing of a voluntary petition in bankruptcy,²⁸⁴ nor does it affect the claim of a sheriff for fees for services rendered

²⁷⁸ *Wagner v. Hall*, 16 Wall. 584; *Buchanan v. Smith*, 16 Wall. 277; *Toof v. Martin*, 13 Wall. 40.

²⁷⁹ *In re Moore* (D. C., Vt.), 6 Am. B. R. 175, 107 Fed. 234; *In re Higgins* (D. C., Ky.), 3 Am. B. R. 364, 97 Fed. 775.

²⁸⁰ *Simpson v. Van Etten* (D. C., Pa.), 6 Am. B. R. 204, 108 Fed. 199; *Keystone Brewing Co. v. Schermer* (Pa. Sup. Ct.), 31 Am. B. R. 279, 88 Atl. 657; *Mowbray Pearson Co. v. Pershall* (Wash. Sup. Ct.), 37 Am. B. R. 622, 159 Pac. 682.

²⁸¹ *Stone Ordean Wells Co. v. Mark* (C. C. A., 8th Cir.), 35 Am. B. R. 663, 227 Fed. 975 (citing text) and holding also that the burden is on him who claims a lien is void under section 67-f to plead and prove the insolvency of the person against whom it was obtained at the time it was secured.

²⁸² **Insolvency when attachment was levied immaterial.**—Subdivision "c" of section 67, declaring in effect that a lien acquired by attachment shall be dissolved by the adjudication if it appear that such lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, is repugnant to the provisions of subdivision "f" of said section, whereby all attachments levied against a person insolvent at any time within the four months' period are deemed null and void in case adjudication is had, and the latter provisions will prevail, so that an attachment levied within four months prior to the filing of the petition is rendered null and void by bankrupt's adjudication, and, the question of bankrupt's insolvency within that period being determined by the

adjudication, his insolvency at the time the attachment was levied is immaterial. *Cook v. Robinson* (C. C. A., 9th Cir.), 28 Am. B. R. 182, 194 Fed. 785. See also *In re Richards* (C. C. A., 7th Cir.), 3 Am. B. R. 145, 96 Fed. 935, 37 C. C. A. 634; *Matter of Southern Arizona Smelting Co.* (C. C. A., 9th Cir.), 36 Am. B. R. 827, 231 Fed. 87.

²⁸³ *In re Blumberg* (D. C., Tenn.), 1 Am. B. R. 633, 94 Fed. 476; *Fairlamb v. Smedley Const. Co.*, 36 Pa. Super. Ct. 17, 22 Am. B. R. 824, 36 Pa. Super. Ct. 17; *Matter of Schow* (D. C., Conn.), 32 Am. B. R. 494, 213 Fed. 514; *Broach v. Mullis* (D. C., Ga.), 35 Am. B. R. 841, 228 Fed. 551. See Am. Bankr. Dig. § 431.

Suit by general creditors to set aside fraudulent conveyance.—General creditors, who more than four months prior to bankruptcy, file a bill to cancel a fraudulent conveyance of their debtor, acquire a specific lien on the property conveyed, and gain thereby a priority in the distribution of the fund recovered. *Boyd v. Arnold* (Ark. Sup. Ct.), 32 Am. B. R. 859, 146 S. W. 118.

Judgment against husband and wife.—Where a judgment was entered against a husband and wife more than four months before the husband was adjudicated a bankrupt it is a valid lien against property held by the entirety and is not affected by the husband's discharge in bankruptcy and may be enforced against such property after the death of the wife. *Frey v. McGaw* (Md. Ct. of App.), 35 Am. B. R. 822.

²⁸⁴ *In re Engle* (D. C., Pa.), 5 Am. B. R. 372, 105 Fed. 893.

prior to bankruptcy on an execution levied within the four months' period.²⁸⁵ Where the valid lien has been secured more than four months prior to the bankruptcy, proceedings to enforce the same do not conflict with the bankruptcy law, and may be instituted and prosecuted to the end.²⁸⁶ When the question is one of hours, only whole days are counted.²⁸⁷ But it is the accrual of the lien, not the entry of a judgment not amounting to a lien, from which the time runs.²⁸⁸ Where the lien was created or existed prior to the four months' period, a judgment obtained within such period for the enforcement thereof in legal proceedings instituted for such purpose is not invalid or ineffective.²⁸⁹ If the lien exists from the date of the summons, the lien does not accrue as against the defendant's trustee if the summons was served within the four months' period.²⁹⁰ If the lien has been dormant for a long period, as where the sale under an execution issued more than four months before bankruptcy was postponed, with the consent of the creditor, for a number of times it becomes unenforceable against the trustee.²⁹¹ The effect where the lien is inchoate before the four months' period and does not become fixed until followed by a judgment within the period is considered, *post*.

g. Miscellaneous invalid liens through legal proceedings.—(1) **BY JUDGMENT AND EXECUTION.**—An important distinction must be noted here. A mere judgment is often not a lien. Until it becomes such, as by issue of execution or docketing in a register's office, it is not affected by this subsection,²⁹² and this in spite of the use of the word "judgment" in the first

^{285.} *Matter of Schmidt & Co.*, (C. C. A., 2d Cir.), 21 Am. B. R. 593, 165 Fed. 1,006.

^{286.} *In re Koslowski* (D. C., Pa.), 18 Am. B. R. 723, 153 Fed. 823; *In re Crafts-Riordan Shoe Co.* (D. C., Mass.), 26 Am. B. R. 449, 185 Fed. 931; *Matter of McCausland* (D. C., N. J.), 37 Am. B. R. 519, 235 Fed. 173.

Receiver in supplementary proceedings.—The title which a State receiver in supplementary proceedings acquires to the personal property of a judgment debtor relates back to the time of the institution of the proceedings, and the title of a trustee in bankruptcy appointed within four months after the appointment of the receiver is subject to the title of the receiver where the proceedings was commenced more than four months prior to the appointment of the trustee. *Arnold v. Greene Gold-Silver Co.* (N. Y. Sup. Ct., Spec. T.), 24 Am. B. R. 846, 68 Misc. 449, 125 N. Y. Supp. 29.

Where receivers, appointed in a creditor's suit commenced in a State court, have reduced to possession property of one subsequently adjudged bankrupt more than four months prior to the filing of the petition in bankruptcy, a court of bankruptcy may not take from their grasp the administration of the property so situated. *Blair v. Brailley* (C. C. A., 5th Cir.), 34 Am. B. R. 12, 221 Fed. 1.

Where a mortgage on real property is foreclosed the lien against the property is not derived from the judgment of foreclosure, but from the original mortgage. *Broach v. Mullis* (D. C., Ga.), 35 Am. B. R. 841, 228 Fed. 551.

^{287.} *Jones v. Stevens* (Sup. Ct., Me.), 5 Am. B. R. 571, 48 Atl. 170. See also under Section Thirty-one.

^{288.} *Compare Parmenter Mfg. Co. v. Strover* (C. C. A., 1st Cir.), 3 Am. B. R. 220, 97 Fed. 330. See also *Metcalf v. Barker*, 187 U. S. 165, 9 Am. B. R. 36, 47 L. Ed. 122, 23 Sup. Ct. 67.

^{289.} *Spadlin v. Kramer* (Ga. Sup. Ct.), 38 Am. B. R. 821, 91 S. E. 409.

^{290.} *Fairlamb v. Smedley Const. Co.*, 22 Am. B. R. 824, 35 Pa. Super. Ct. 17.

^{291.} *Matter of Zeis* (D. C., N. Y.), 36 Am. B. R. 581, 229 Fed. 472.

^{292.} *In re Kenney* (C. C. A., 2d Cir.), 5 Am. B. R. 355, 105 Fed. 897; *Levor v. Seiter*, 5 Am. B. R. 576, 34 N. Y. Misc. 382, 69 N. Y. Supp. 987. Compare *In re Kavanaugh* (D. C., Ky.), 3 Am. B. R. 832, 99 Fed. 928; *Doyle v. Heath* (Sup. Ct., R. I.), 4 Am. B. R. 705, 22 R. I. 213; *In re Darwin* (C. C. A., 6th Cir.), 8 Am. B. R. 703, 117 Fed. 407; *Matter of Schow* (D. C., Conn.), 32 Am. B. R. 494, 213 Fed. 514.

A judgment obtained more than four months before the adjudication creates no lien, and a levy within the four months is within section 67-f of the act, and gives no priority, and does not relate back to the judgment to the extent of creating a lien by virtue of the fact that the judgment was rendered more than four months before the adjudication. *Matter of S. Ah Mi* (D. C., Hawaii), 18 Am. B. R. 138; see *Keystone Brewing Co. v. Schermer* (Pa. Sup. Ct.), 31 Am. B. R. 879, 88 Atl. 657.

clause.²⁹³ The law of each State determines when a judgment becomes a lien.²⁹⁴ Under the former law, judgments, even when followed by execution and levy, were not affected by bankruptcy.²⁹⁵ Now, if in fact liens and the element of insolvency appears, such judgment-liens are annulled by bankruptcy if the petition is filed within four months.²⁹⁶ But this is not so where the money collected has already been paid to the judgment creditor.²⁹⁷ Where property is sold under an execution on a judgment obtained within the four months' period, the proceeds being applied in payment of the debt, this subsection does not apply, as it does not operate to restore and then vacate a judgment or lien which no longer exists.²⁹⁸ The liens of all judgments, executions and levies, obtained within four months prior to the filing of the petition, are annulled upon adjudication; such annulment dates from the entry of the judgment and affects all proceedings based thereon.²⁹⁹ The annulment of the lien of the judgment invalidates the sale made by virtue of a levy thereunder, and the trustee may recover the property sold, unless the purchaser shows that he is a *bona fide* purchaser for value without notice or reasonable cause for inquiry as to the insolvency of the bankrupt.³⁰⁰ The term "all levies" is comprehensive enough to include a seizure of the property of an insolvent under replevin process.³⁰¹ There is a "levy" when a

293. *In re Pease* (Ref., N. Y.), 4 Am. B. R. 547; *In re Beaver Coal Co.* (D. C., Or.), 6 Am. B. R. 404, 110 Fed. 630; *affd. s. c.*, 7 Am. B. R. 542, 113 Fed. 889; *In re Lesser* (C. C. A., 2d Cir.), 5 Am. B. R. 326, 108 Fed. 201; *s. c.*, in Supreme Court, 187 U. S. 165, 9 Am. B. R. 36, 47 L. Ed. 122, 23 Sup. Ct. 67. *Contra: St. Cyr v. Daignault* (D. C., Vt.), 4 Am. B. R. 638, 103 Fed. 854. Compare also *Mauran v. Crown Carpet Lining Co.* (Sup. Ct., R. I.), 6 Am. B. R. 734, 23 R. I. 324, 50 Atl. 331.

294. *In re Blair* (D. C., Mass.), 6 Am. B. R. 206, 108 Fed. 509; *In re Darwin* (C. C. A., 6th Cir.), 8 Am. B. R. 703, 117 Fed. 407; *Matter of Schow* (D. C., Conn.), 32 Am. B. R. 494, 213 Fed. 514.

Under the law of Illinois, the delivery to the sheriff of executions upon judgments operates, without levy, to create liens on the property of the judgment-debtor within the county, which liens are paramount to rights in such property, possessed by a vendor under a contract of conditional sale. *Rock Island Plow Co. v. Reardon*, 222 U. S. 354, 27 Am. B. R. 492, 56 L. Ed. 231, 32 Sup. Ct. 164.

295. *In re Gold, etc., Co.*, Fed. Cas. 5,515; *In re Winn*, Fed. Cas. 17,876.

296. Compare *In re Richards* (D. C., Wis.), 2 Am. B. R. 518, 95 Fed. 258. See also *In re Storm* (D. C., N. Y.), 4 Am. B. R. 601, 103 Fed. 618; *In re Stout* (D. C., Mo.), 6 Am. B. R. 505, 109 Fed. 794; *In re Benedict*, 8 Am. B. R. 463, 37 N. Y. Misc. 230, 75 N. Y. Supp. 165.

297. *Levor v. Seiter*, 8 Am. B. R. 459, 69 N. Y. App. Div. 33, 74 N. Y. Supp. 499, modifying *s. c.*, 5 Am. B. R. 576, 34 N. Y. Misc. 382, 69 N. Y. Supp. 987; *Matter of Pollman* (Ref., N. Y.), 16 Am. B. R. 144; *In re Bailey* (D. C., Oreg.), 16 Am. B. R. 289, 144 Fed.

214; *In re Resnet* (D. C., Pa.), 21 Am. B. R. 740, 167 Fed. 574.

298. *In re Weitzel* (D. C., N. Y.), 27 Am. B. R. 370, 191 Fed. 463; *In re Bailey* (D. C., Ore.), 16 Am. B. R. 289, 144 Fed. 214.

299. *Clark v. Larremore*, 188 U. S. 486, 9 Am. B. R. 476, 47 L. Ed. 555, 23 Sup. Ct. 363.

A judgment obtained and levy made by a conditional vendor within four months prior to the filing of a petition against the vendee and while he was insolvent, are null and void and the property attached is released from the same. *Matter of O'Brien, Jr.* (D. C., N. J.), 32 Am. B. R. 347, 215 Fed. 129.

Judgment within four months of bankruptcy.—Where within four months prior to the filing of a petition in bankruptcy against a corporation, followed by an adjudication that it was a bankrupt, and while it was insolvent, a creditor obtained a judgment against it, and in the bankruptcy proceedings there was no order for the preservation of the lien of the judgment for the benefit of the estate, such lien was, by section 67-f of the bankruptcy act rendered "null and void." Accordingly, it could not be levied on property of the bankrupt's estate which was sold by the trustee under order of the bankruptcy court. *Finney v. Knapp Co.* (Ga. Sup. Ct.), 37 Am. B. R. 37, 89 S. E. 413.

300. *Dreyer v. Kichlighter* (D. C., Ga.), 36 Am. B. R. 199, 228 Fed. 744.

301. *In re Hymes, etc., Co.* (D. C., Mo.), 12 Am. B. R. 477, 130 Fed. 977; *In re Haynes* (D. C., Vt.), 10 Am. B. R. 715, 123 Fed. 1001; *Matter of Weinger & Co.* (D. C., N. Y.), 11 Am. B. R. 424, 126 Fed. 875; *Matter of Rudnick & Co.* (D. C., N. Y.), 18 Am. B. R. 750, 158 Fed. 223, holding that a seizure in replevin may be vacated under section 67-f.

seizure of the property is effected by receivers appointed in a creditor's suit.³⁰² The annulment not only affects property which passes to the trustee for the benefit of the bankrupt's creditors, but also other property, such as the bankrupt's exempt property, which is freed from the liens thereof;³⁰³ except that rights accruing under waiver remain valid for enforcement under the State laws.³⁰⁴ It has been held that the provisions of §. 67-f will not be extended so as to affect a judgment obtained without the filing of a petition.³⁰⁵ A judgment, in an action to foreclose a mortgage upon the property of an alleged bankrupt, entered within the four months' period, being merely a decree by a court of competent jurisdiction, cannot be affected by bankruptcy proceedings.³⁰⁶ But under circumstances involving the interests of the bankrupt's estate and the rights of other creditors, a sale under the decree may be stayed and the property be sold by the trustee, the superior lien of the mortgage creditor being preserved.³⁰⁷ A judgment or decree enforcing a pre-existing lien is not necessarily within the prohibition of subsection f, since such subsection is confined to judgments which themselves create liens.³⁰⁸ But if a judgment

302. *Blair v. Brailey* (C. C. A., 5th Cir.), 34 Am. B. R. 12, 221 Fed. 1.

303. The Supreme Court in the case of *Chicago, Burlington & Quincy Ry. Co. v. Hall*, 229 U. S. 511, 30 Am. B. R. 619, 57 L. Ed. 1306, 33 Sup. Ct. 885, has settled such doubt as may have existed in respect to this matter. The court says: "On this question there is a difference of opinion, some State and Federal courts holding that the bankruptcy act was intended to protect the creditor's trust fund, and not the bankrupt's own property, and that therefore liens against the exempt property were not annulled even though obtained by legal proceedings within four months of filing the petition. *Re Driggs* (D. C., N. Y.), 22 Am. B. R. 621, 171 Fed. 897; *Re Durham* (D. C., Ark.), 4 Am. B. R. 760, 104 Fed. 231. On the other hand, *Re Tune* (D. C., Ala.), 8 Am. B. R. 285, 115 Fed. 906; *Re Forbes* (C. C. A., 9th Cir.), 26 Am. B. R. 355, 108 C. C. A. 191, 186 Fed. 79, holds that 67-f annuls all such liens, both as against the property which the trustee takes and that which may be set aside to the bankrupt as exempt. This view, we think, is supported both by the language of the section and the general policy of the act, which was intended not only to secure equality among creditors, but for the benefit of the debtor in discharging him from his liabilities and enabling him to start afresh with the property set apart to him as exempt. Both of these objects would be defeated if judgments like this present were not annulled, for otherwise the two Iowa plaintiffs would not only obtain a preference over other creditors, but would take property which it was the purpose of the bankruptcy act to secure to the debtor."

304. *First Nat. Bank of Sayre v. Bartlett*, 21 Am. B. R. 88, 35 Pa. Super. Ct. 593. See discussion under Section Six of this work, subtitle "*Exemptions out of encumbered property.*"

305. *Kinmouth v. Braeutigan* (Sup. Ct., N. J.), 4 Am. B. R. 344, 46 Atl. 769.

306. *Matter of McKane* (D. C., N. Y.), 18 Am. B. R. 594, 158 Fed. 647; *Reed v. Equitable Trust Co.*, 8 Am. B. R. 242, 115 Ga. 780.

307. *In re Vastbinder* (D. C., Pa.), 13 Am. B. R. 148, 132 Fed. 718.

When sale in suit to foreclose mortgage enjoined.—Alleged bankrupts gave a mortgage upon their stock of merchandise, which mortgage contained no provision whereby the lien thereof should attach to substitution or accessions to the stock or to after-acquired property and gave no authority or power to the mortgagors to sell the merchandise. Thereafter three-fourths of the merchandise which comprised the stock when the mortgage was given, was sold in the usual course of trade by the alleged bankrupts, and other merchandise was added to the balance of the stock and intermingled and confused with it. Within four months of the filing of the petition and while the alleged bankrupts were insolvent, in a suit to foreclose the mortgage brought in the State court, it was decreed by the court that the entire stock be sold to satisfy the claim of the mortgagees. *Held*, that in order to give effect to section 67-f which declares null and void all liens obtained through legal proceedings against a person who is insolvent, at any time within the four months' period, the sale directed by the State court should be enjoined, but, if an adjudication of bankruptcy took place, the lien of the mortgage would be upheld to whatever extent it was valid. *In re Oxley & White* (D. C., Wash.), 25 Am. B. R. 656, 182 Fed. 1019.

308. *Metcalf v. Barker*, 187 U. S. 165, 9 Am. B. R. 36, 47 L. Ed. 122, 23 Sup. Ct. 67.

Lien of pre-existing judgment, where a judgment had been recovered and docketed more than four months prior to the filing of a petition in bankruptcy by the judgment debtors, it was held that the lien thus impressed upon the real estate of the debtors could be enforced within such period either

is rendered upon an unsecured claim within the four months' period it becomes null and void under such subsection upon the debtor being adjudicated a bankrupt, in which case the invalidity of the judgment relates back to the time the judgment was rendered, and nullifies such judgment and all subsequent proceedings thereon.³⁰⁹ The lien of a judgment and execution, recovered within the four months' period, imposing a fine for illegal liquor selling, falls within this subsection, and is void, and the execution should be stayed pending bankruptcy proceedings.³¹⁰ The lien of the judgment is annulled regardless of the intent of the parties to the proceedings in which it was obtained; "reasonable cause to believe" that a preference would ensue, need not be shown; the subsection is entirely separate from § 60-b and is unaffected by amendment of 1910 to that section.³¹¹

(2) GARNISHMENT PROCEEDINGS.—Garnishment proceedings instituted under a State statute against the bankrupt, based upon a judgment obtained within the four months' period are nullified.³¹² A lien acquired by a writ of

by a sale of the land under execution or by an action in equity to obtain a decree adjudging transfers made by the judgment debtors to have been void. *Hiller v. Le Roy*, 12 Am. B. R. 733, 179 N. Y. 369, 72 N. E. 237. Compare *Mencke v. Rosenberg*, 9 Am. B. R. 323, 202 Pa. St. 131, in which case it was held that under the Pennsylvania statute, if a *testatum f. fa.* is issued within the period of four months prior to the filing of the petition, a lien is created which is invalidated by subsection f.

309. *Clark v. Larremore*, 188 U. S. 486, 9 Am. B. R. 476, 47 L. Ed. 555, 23 Sup. Ct. 363; *Mohr v. Mattox* (Sup. Ct., Ga.), 12 Am. B. R. 330, 120 Ga. 962; *McKenney v. Cheney* (Sup. Ct., Ga.), 11 Am. B. R. 54, 45 S. E. 433; *Kinmouth v. Braeutigan* (Ct. Ch., N. J.), 10 Am. B. R. 83, 52 Atl. 226; *In re Breslauer* (D. C., N. Y.), 10 Am. B. R. 33, 121 Fed. 910; *In re Martin* (Ref., Tex.), 27 Am. B. R. 151; *In re Ottenwess v. Huxall* (C. C. A., 6th Cir.), 27 Am. B. R. 579, 193 Fed. 851.

310. Judgment for fine for illegal liquor traffic.—In the case of *In re Green* (D. C., Pa.), 24 Am. B. R. 665, 179 Fed. 870, the court, in speaking of a judgment for a fine imposed for illegal liquor selling under the Pennsylvania statute, said: "It does not seem to us necessary to determine whether or not the judgment in favor of the commonwealth is provable, or whether or not the claim would be affected by the discharge of the bankrupt. It is sufficient to note that the commonwealth of Pennsylvania has recovered a lien upon the bankrupt's estate within four months prior to the filing of the petition in bankruptcy. I am satisfied that section 67-f of the Bankruptcy Act makes no exceptions in favor of any lien creditor whose lien has been obtained through legal proceedings against the bankrupt within four months prior to the filing of the petition, other than such person who may have obtained title by virtue of such proceedings and has been a bona fide purchaser for value without notice or reasonable cause for in-

quiry. It is not pretended that the commonwealth of Pennsylvania has obtained title by virtue of the legal proceedings. At most the commonwealth has a lien by judgment and as well by execution, and the order restraining the commonwealth of Pennsylvania from proceeding thereon should not have been rescinded. The purpose of the Bankruptcy Act would be destroyed in this proceeding, if the commonwealth of Pennsylvania should realize the full amount due her upon the judgment at the expense of other creditors of the bankrupt, and particularly so if the claim of the commonwealth will not be discharged, while the claims of other creditors would be."

311. *In re Petersen* (C. C. A., 7th Cir.), 29 Am. B. R. 26, 200 Fed. 739, holding that where a trustee in bankruptcy seeks to enjoin the enforcement of a judgment recovered against a bankrupt within the four months' period and while he was insolvent, upon the ground that such judgment constitutes a cloud on the bankrupt's property and interferes with its sale, it is not necessary for him to charge in his petition, that the judgment creditor at the time of the entry of his judgment, had reasonable cause to believe that the enforcement of such judgment would effect a preference.

312. *Hall v. Chicago, B. & Q. R. Co.* (Sup. Ct., Neb.), 25 Am. B. R. 53, 128 N. W. 645; *Southern Pac. Co. v. I. X. L. Furniture, etc., House* (Utah Sup. Ct.), 32 Am. B. R. 327, 140 Pac. 665.

Garnishment.—For liens growing out of garnishment proceedings, see *In re McCartney* (D. C., Wis.), 6 Am. B. R. 367, 109 Fed. 621; *In re Beals* (D. C., Ind.), 8 Am. B. R. 639, 116 Fed. 530; *In re Ransford* (C. C. A., 6th Cir.), 28 Am. B. R. 78, 194 Fed. 658, in which case it was also held that where, as under the law of Michigan, a garnishee judgment against a bank in which the principal defendant had a deposit, does not exonerate the principal defendant from liability to the judgment creditor and can not do so until paid by the bank, it does not operate as a novation, so as to entitle the

garnishment acquired within the prescribed period is ineffectual, and the trustee may sue to recover the money garnisheed, and the right to recover will not be affected by his failure to intervene in the action in which the judgment was obtained upon which the writ was issued.³¹³ An order of a court of bankruptcy relating to the moneys collected under the garnishee order is not an unauthorized interference with the process of the State court.³¹⁴ Money collected under the garnishee order, issued against the salary of the bankrupt, during the four months period belongs to the trustee, but that collected prior to such period should be paid to the judgment debtor.³¹⁵

(3) BY ATTACHMENT.—Here the cases under the former law are quite generally applicable.³¹⁶ An attachment lien is within the terms of subsection *c* as well as subsection *f*,³¹⁷ and is dissolved by the filing of a petition in bankruptcy by or against the debtor, within four months after its date.³¹⁸ And this subdivision strikes with nullity all attachments sued out against an insolvent within four months prior to the filing of the petition in bankruptcy, and wholly discharges and releases the property affected by the attachment, if the insolvent is adjudged a bankrupt.³¹⁹ The effect of this subdivision in dissolving attachments is not confined to those issuing from the Federal courts,

judgment creditor to the funds in the bank as against the principal defendant's trustee in bankruptcy.

Stay of execution against future salary.—Where six days before bankrupt's adjudication a creditor had obtained a judgment against him upon a debt provable in bankruptcy and from which a discharge would be a release, and after adjudication levied execution against the salary of the bankrupt to the extent of 10 per cent., as authorized by section 1391 of the New York Code of Civil Procedure, *held*, that since a discharge, if granted, would relate back to the adjudication and release bankrupt from all liability on such debts as were provable and existed at that time, an order was properly granted, which enjoined the enforcement of the garnishee execution but impounded the 10 per cent. until the question of bankrupt's discharge should be determined. *In re Harrington* (D. C., N. Y.), 29 Am. B. R. 666, 200 Fed. 1010.

Where service of the summons of garnishment was made more than four months prior to the adjudication in bankruptcy, the property in the hands of the garnishee is not discharged from the lien thereof. A judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the federal statute, which is plainly confined to judgments creating liens. *Citizens' National Bank v. Dasher*, 34 Am. B. R. 136; 84 S. E. 482.

313. *Wilson v. Van Buren Co. Farmers' Mut. Fire Ins. Co.* (Mich. Sup. Ct.), 34 Am. B. R. 678, 151 N. W. 752.

314. *Matter of Obergfall* (C. C. A., 2d Cir.), 38 Am. B. R. 645.

315. *Matter of Beck* (D. C., N. Y.), 38 Am. B. R. 797, 238 Fed. 653.

316. See *American Digest* (Century ed.), "Bankruptcy," §§ 296-305.

317. *In re Higgins* (D. C., Ky.), 3 Am. B. R. 364, 97 Fed. 775; *In re Kemp* (D. C., Col.), 4 Am. B. R. 242, 101 Fed. 689; *Wood v. Carr* (Ct. App., Ky.), 10 Am. B. R. 577, 73 S. W. 762; *Matter of Southern Arizona Smelting Co.* (C. C. A., 9th Cir.), 36 Am. B. R. 827, 231 Fed. 87; *De Freice v. Bryant* (D. C., Ky.), 37 Am. B. R. 275, 232 Fed. 233; *Matter of Pilar Hermanos* (D. C., Porto Rico), 37 Am. B. R. 405; *Gray v. Arnot* (N. Dak. Sup. Ct.), 35 Am. B. R. 704, 154 N. W. 268. See Am. Bankr. Dig. § 462.

An attachment, levied against stock of another corporation in the possession of the treasurer of a bankrupt corporation, within four months of bankruptcy, is dissolved and released by the bankruptcy under section 67d of the Bankruptcy Act, and the trustee, representing the creditors and the court, can be divested of title only by a sale under order of the court, or by a disclaimer filed with its consent. *Matter of Gilsonite Mines Co.* (D. C., Pa.), 37 Am. B. R. 473.

318. *Matter of Federal Biscuit Co.* (C. C. A., 2d Cir.), 32 Am. B. R. 612, 214 Fed. 221.

Attachment released.—All attachments obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, are null and void in case he is adjudged a bankrupt, and the property affected by such attachments shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate in bankruptcy. *Wolff Mfg. Co. v. Battreal Shoe Co.* (Mo. Kan. City Ct. of App.), 35 Am. B. R. 895, 180 S. W. 396.

319. *Lehman, Stern & Co. v. Martin & Co.* (La. Sup. Ct.), 32 Am. B. R. 681, 61 So. 212.

but applies to the process of State courts.³²⁰ The fact that a lien by attachment was obtained in a foreign country can make no difference in the meaning of the phrase "in fraud of the provisions of this act."³²¹ An attachment lien is released by an adjudication in bankruptcy, unless the court of bankruptcy shall order the lien preserved for the benefit of the bankrupt estate.³²² The effect of the nullification of the attachment is to transfer the title of the goods attached in the hands of the officer of the State court to the trustee of the bankrupt debtor. If a question arises as to the title to the goods, the trustee need not intervene in the action brought for the determination of title.³²³ While this subsection discharges the lien of an attachment, it does not vacate the writ.³²⁴ If the bond is one which in legal contemplation takes the place of the attachment lien, and gives the person in whose favor the bond is executed the right to recover on the bond without affecting the property, the annulment of the lien of the attachment does not destroy the bond. But if the bond is substituted for the property attached, the destruction of the attachment necessarily annuls liability on the bond.³²⁵ The provisions of a State insolvency law, preferring a claim for costs incurred in an attachment, are suspended by this section.³²⁶ Exempt property constitutes no part of the

320. *Matter of Federal Biscuit Co.* (C. C. A., 2d Cir.), 32 Am. B. R. 612, 214 Fed. 221.

321. *Matter of Pollmann* (D. C., N. Y.), 19 Am. B. R. 474, 156 Fed. 221, holding that a lien by attachment obtained in Germany is in fraud of the act within the meaning of section 67-c (3).

Where an attachment under the *Porto Rican* law was levied more than four months before bankruptcy, but was not perfected by judgment in the main suit until within four months of the bankruptcy, a rule to show cause, why a stay of the sale under the attachment should not be dissolved, should be discharged, and the bankruptcy should proceed in the usual manner, all rights of the attachment creditors being respected by the referee. *Matter of Pilar Hermanos* (D. C., P. R.), 37 Am. B. R. 405.

322. *In re Walsh Bros.* (D. C., Ia.), 20 Am. B. R. 472, 159 Fed. 560, s. c., 28 Am. B. R. 243, 195 Fed. 576; *Crook-Horner Co. v. Gilpin* (Md. Ct. of App.), 23 Am. B. R. 350, 75 Atl. 1049, holding that both the attachments and the bond fail at the bankrupt's adjudication, and the State court cannot enter judgment for the purpose of allowing a proceeding to be maintained against the surety on the bond; *Matter of Alabama Coal & Coke Co.* (D. C., Ky.), 31 Am. B. R. 387, 210 Fed. 941.

323. *Gray v. Arnot* (N. Dak. Sup. Ct.), 35 Am. B. R. 704, 154 N. W. 268, holding that where an action is brought by the vendor of goods to recover the purchase price thereof, and an attachment is issued and levied on such goods in said proceeding, and within four months of the bringing of such action a petition in bankruptcy has been filed, the trustee in bankruptcy has no right or power to intervene in the action in order to gain the possession of the goods. The action being

for money merely, and the lien of the attachment having been nullified by the filing of the petition in bankruptcy, such trustee cannot, by filing a petition in intervention, transform the action into one for the recovery of goods, or for the trial of the right of title thereto.

324. *King v. Block Amusement Co.*, 20 Am. B. R. 784, 126 N. Y. App. Div. 48, 111 N. Y. Supp. 102, holding that a warrant of attachment issued within four months of the filing of a petition in bankruptcy of defendant and discharged by an undertaking for which the surety takes no security, will not be vacated after the adjudication in bankruptcy so as to discharge the surety; *affd.* 193 N. Y. 608, 86 N. E. 1126; *Dyke v. Farmersville Mill & Light Co.* (Tex. Ct. of App.), 34 Am. B. R. 720, 175 S. W. 478; *Matter of Federal Biscuit Co.* (C. C. A., 2d Cir.), 32 Am. B. R. 612, 214 Fed. 221.

325. *Casady & Co. v. Hartzell*, 34 Am. B. R. 236, 151 N. W. 97; *Schunack v. Art Metal Novelty Co.*, 26 Am. B. R. 731, 84 Conn. 331; *Windisch-Muhlhauser Brewing Co. v. Simms*, 26 Am. B. R. 714, 129 La. 134, 55 So. 739; *Payne v. Able*, 7 Bush. 344; *Hamilton v. Bryant*, 114 Mass. 543; *House v. Schnadig*, 235 Ill. 301; *Keyes v. Shannon*, 8 Rob. 172; *Klipstein v. Allen-Miles Co.* (C. C. A., 5th Cir.), 14 Am. B. R. 15, 136 Fed. 385; *King v. Block Amusement Co.*, 20 Am. B. R. 784, 126 N. Y. App. Div. 48, 111 N. Y. Supp. 102, *affd.* 193 N. Y. 608, 86 N. E. 1126; *McCombs v. Allen*, 82 N. Y. 114. But in the case of *Crook-Horner Co. v. Gilpin*, 112 Md. 1, 23 Am. B. R. 350, 75 Atl. 1,049, 28 L. R. A. (N. S.) 233, 136 Am. St. Rep. 376, it was held that both the attachment and the bond fall at the bankrupt's adjudication.

326. *In re Copper King* (D. C., Cal.), 16 Am. B. R. 148, 143 Fed. 649.

estate passing to the trustee, and where such property is subject to an attachment lien, it has been held that such lien is unaffected by the bankruptcy of the debtor.³²⁷ Where, under a State statute, a vendor's lien can only be enforced against property in the possession of the court, and since such possession is not acquired by the service of a summons of garnishment, a lien created by the attachment of property in the possession of a garnishee within four months of bankruptcy, is dissolved by the express provisions of § 67-f.³²⁸ Even if the judgment antedates the law, and the attachment is within the four months' period, it is dissolved.³²⁹ Where a petition in bankruptcy was filed more than four months after the bankrupt's property had been attached on suits then pending such attachments constituted liens that were not invalidated by the subsequent adjudication of bankruptcy, and were paramount to the rights of a trustee in bankruptcy, or of a receiver of the bankrupt's property appointed after such adjudication.³³⁰ The lien of a foreign attachment, levied upon the property of a bankrupt anterior to the four months' period, is not divested by the bankruptcy act.³³¹ It has been held that where the lien is by attachment on *mesne* process made before such four months' period and followed by a judgment and levy within it, the attachment is not dissolved by subsection f.³³² Prior to *Metcalf v. Barker*,³³³ the weight of authority was to the contrary; indeed, it was thought that attachments so made were in the

327. *Jewett Bros. v. Huffman* (Sup. Ct. N. D.), 13 Am. B. R. 738, 14 N. Dak. 110. Compare *Matter of Downing* (D. C., Ky.), 15 Am. 432, 139 Fed. 590.

Attachment lien upon property claimed by bankrupt as homestead.—One P., upon commencing suit against bankrupt, levied an attachment against his real estate. Three days afterward bankrupt filed a declaration of homestead exemption of said property, valuing it at \$2,500, the amount for which he was entitled to be exempted under the statute of Arizona, where the property was situated. Subsequently and within four months prior to the filing of a petition in involuntary bankruptcy, P. secured a judgment against bankrupt by default, the lien of the attachment being merged in said judgment. Thereafter the trustee in bankruptcy sold said property and the proceeds of the sale, over and above the amount of exemption claimed, were awarded *pro rata* to the general creditors. P. claimed that the \$2,500 undistributed should be specifically applied to the payment of her judgment. *Held*, that upon the filing of the petition in bankruptcy the attachment lien was dissolved, and the bankrupt was entitled to the amount of exemption claimed. *In re Forbes* (C. C. A., 9th Cir.), 26 Am. B. R. 355, 186 Fed. 79.

Attachment of exempt property.—Section 67-f, only avoids liens upon property which passes to the trustee in bankruptcy, and over which the bankruptcy court could and has assumed jurisdiction. By setting aside property as exempt, such court is *held* to have disclaimed any intention of ever assuming or having ever assumed jurisdiction over it, and it cannot be said to have passed, at any time, to the trustee in bankruptcy. Where, therefore, property is seized upon a writ of at-

tachment, and thereafter bankruptcy proceedings are instituted and said property is scheduled, but in said proceedings is set apart as and for the exemptions of the debtor, the lien of the attachment writ will not be considered to have been avoided. *First National Bank of Portal v. Lee* (N. Dak. Sup. Ct.), 34 Am. B. R. 555, 141 N. W. 716.

328. *Lehman, Stern & Co. v. Gumbel & Co.*, 236 U. S. 448, 34 Am. B. R. 174, 35 Sup. Ct. 307, affg. 32 Am. B. R. 681, 61 So. 212.

329. *Peck v. Lumber Co. v. Mitchell*, 95 Fed. 258. *Contra*: *In re De Lue* (D. C., Mass.), 1 Am. B. R. 387, 91 Fed. 510.

330. *Batchelder & Co. v. Wedge* (Sup. Ct., Vt.), 19 Am. B. R. 268, 80 Vt. 353.

331. *In re United States Graphite Co.* (D. C., Pa.), 20 Am. B. R. 573, 161 Fed. 583.

332. *In re Blair* (D. C., Mass.), 6 Am. B. R. 206, 108 Fed. 529; *Pepperdine v. Bank of Seymour* (Ct. App., Mo.), 10 Am. B. R. 570, 100 Mo. App. 387; *Pelton v. Sheridan* (Ore. Sup. Ct.), 33 Am. B. R. 472, 144 Pac. 410.

Attachment before four months' period.—Since the provisions of the bankruptcy act regarding valid liens include all liens valid by the laws of the States, and the laws of Massachusetts give a lien to a plaintiff attaching under *mesne* process, though he has obtained no judgment, a lien by such attachment in Massachusetts is not avoided by the provisions of section 67-f of the bankruptcy act, if the attachment is made more than four months before bankruptcy, though the judgment or decree enforcing the lien is obtained within the four months' period. *In re Crafts-Riordan Shoe Co.* (D. C., Mass.), 26 Am. B. R. 449, 185 Fed. 931.

333. 187 U. S. 165, 9 Am. B. R. 36, 47 L. Ed. 122, 23 Sup. Ct. 67.

same category as those actually within four months of bankruptcy.³³⁴ However, while *Metcalf v. Barker* is not exactly in point, its conclusion seems to apply to all cases involving inchoate liens antedating the four months' period, so that where a valid attachment is obtained more than four months prior to the commencement of the bankruptcy proceedings, the attachment creditor should be permitted to prosecute the action to judgment and satisfy the same by an execution sale.³³⁵ Other cases, more or less affected by this decision, are referred to in the foot-note.³³⁶

(4) BY CREDITOR'S BILL.—Until January, 1903, a clash of authority similar to that just noted existed here. It was well settled that the beginning of a creditor's suit to reach equitable assets gave such a creditor at least an inchoate lien; and the authorities were quite equally divided as to whether, when the suit antedated the four months' period, such a lien was dissolved.³³⁷ *Metcalf v. Barker*, *supra*, has settled the question. If the creditor's suit was begun before the period, no matter if the judgment was entered within it, the lien is not affected by § 67-f and the bankruptcy court has no power to enjoin further proceedings in such suit.³³⁸ The general rule is that a court, not even a court of bankruptcy, may interfere with another court's control over property which rightfully has been subjected to its jurisdiction.³³⁹

334. In re Lesser (D. C., N. Y.), 5 Am. B. R. 326, 108 Fed. 201; In re Johnson (D. C., Vt.), 6 Am. B. R. 202, 108 Fed. 373. Compare also In re Lesser (D. C., N. Y.), 3 Am. B. R. 815, 100 Fed. 433; *affd.* 5 Am. B. R. 320, 108 Fed. 201; and both *revd.* in *Metcalf v. Barker*, 187 U. S. 165, 9 Am. B. R. 36, 47 L. Ed. 122, 23 Sup. Ct. 67.

335. In re Snell (D. C., Cal.), 11 Am. B. R. 35, 125 Fed. 154.

336. *Botts v. Hammond* (C. C. A., 4th Cir.), 3 Am. B. R. 775, 99 Fed. 916; In re Burlington Malting Co. (D. C., Wis.), 6 Am. B. R. 369, 109 Fed. 777; In re Schenkein (D. C., N. Y.), 7 Am. B. R. 162, 113 Fed. 421; *Watschke v. Thompson* (Sup. Ct., Minn.), 7 Am. B. R. 504, 85 Minn. 105; *Powers Dry Goods Co. v. Nelson* (Sup. Ct., N. D.), 7 Am. B. R. 506, 507, 10 N. Dak. 580; *Schmilovitz v. Bernstein*, 47 Atl. 884, 22 R. I. 330; *Matter of Downing* (D. C., Ky.), 15 Am. B. R. 423, 139 Fed. 590.

337. Thus, compare In re Lesser (D. C., N. Y.), 3 Am. B. R. 815, 100 Fed. 433; *affd.* 5 Am. B. R. 326, 108 Fed. 201, and *revd.* in *Metcalf v. Barker*, 187 U. S. 165, 9 Am. B. R. 36, 47 L. Ed. 122, 23 Sup. Ct. 67, and In re Adams (Ref., N. Y.), 1 Am. B. R. 94, with *Taylor v. Taylor* (Ch., N. J.), 4 Am. B. R. 211, 45 Atl. 440, and *Doyle v. Heath* (Sup. Ct., R. I.), 4 Am. B. R. 705, 22 R. I. 213.

Income of trust fund.—As to effect of adjudication in bankruptcy upon proceedings instituted under N. Y. Code Civ. Proc., § 1391, to apply income of trust fund to payment of judgment for necessaries, see In re Tiffany (D. C., N. Y.), 13 Am. B. R. 310, 133 Fed. 799.

Right of trustee to levy by garnishment upon annuity under N. Y. Code.—Bankrupt, a widow, upon rejecting an annuity created

by the will of her husband in lieu of dower, settled her dower and other claims against the estate upon the execution of an agreement whereby she was to receive \$300 per quarter as long as she remained a widow and unmarried, and \$150 per quarter during her life in case of remarriage. *Held*, that the income was an annuity, assignable by bankrupt and subject to levy by creditors; that bankrupt's trustee had the right to sell the annuity or to collect ten per cent. thereof, from time to time, under section 1391 of the New York Code of Civil Procedure, which provides for the levying of a continuing execution against income from trust funds or profits to become due to a judgment debtor to the amount of \$12 or more per week and for the collection of ten per cent. of such income under the continuing execution. In re Burtis (D. C., N. Y.), 26 Am. B. R. 680, 188 Fed. 527.

338. Compare In re Porterfield (D. C., W. Va.), 15 Am. B. R. 11, 138 Fed. 192. But see *Dunn Salmon Co. v. Fillmore*, 19 Am. B. R. 172, 55 N. Y. Misc. 546, 106 N. Y. Supp. 88.

339. **Jurisdiction of a court taking possession of property prior to bankruptcy.**—Where receivers, appointed in a creditors' suit commenced in a State court, have taken possession of the property of a person who subsequently became bankrupt, and have instituted proceedings for the sale thereof more than six months before the institution of proceedings in bankruptcy, the State court is entitled to prosecute its suit to the end, to the exclusion of the bankruptcy court, and need not surrender any property to the bankruptcy court, unless there is a surplus after the satisfaction of the claims presented. *Blair v. Brailey* (C. C. A., 5th Cir.), 34 Am. B. R. 12, 221 Fed. 1.

h. Practice on suits to annul liens.—The distinction here between subsection *f* and subsection *c* is not important. Though the former makes the liens it condemns void, and declares that "the lien shall be deemed wholly discharged," when the lien has resulted in possession adverse to the trustee, a suit is usually necessary though application for possession addressed to the State court will sometimes be enough.³⁴⁰ The forum for such suits has already been considered.³⁴¹ The amendments of 1903 make it optional with the trustee to sue in the Federal district court or in the State court. The practice depends on the law and rules applicable to the court in which the suit is brought. Before beginning such a suit, the trustee customarily applies to the referee for permission.

i. Preserving liens.—Here the statute is sufficiently explicit. If the creditor has a void or voidable lien, the court may order it preserved for the benefit of the estate. Thus, in those States where the filing of a creditor's bill does not create a lien that survives the bankruptcy, the court may order the trustee to intervene and ask to be substituted as plaintiff. Likewise, "the court may order such conveyance as shall be necessary to carry the purposes of this section into effect." Subsection *f* makes two distinct provisions for the disposition of the property of an insolvent attached within four months prior to the filing of a petition in bankruptcy against him. First, such attachments shall be declared null and void, and the property affected shall be deemed released and shall pass to the trustee of the estate of the bankrupt; or second, the court may order that the right acquired by the attachment shall be preserved for the benefit of the estate.³⁴² Where the benefit of an attachment issued by a State is claimed by the trustees in bankruptcy, and the court of bankruptcy orders the same to be preserved for the benefit of the estate, so much of the value of the property attached as was represented by the attachment passes to the trustee for the benefit of the entire body of creditors; the statute recognizes the lien of the attachment, but distributes the lien of the attachment among the whole body of creditors.³⁴³ Creditors entitled to priority under State statutes relative to attachment, are not entitled to priority where the lien of attachment is preserved for the benefit of the bankrupt estate.³⁴⁴ If the lien by attachment acquired within the four months' period is preserved, the property passes to the trustee to be administered and applied for the benefit of all the creditors, although under a State statute the attaching creditors had special privileges not accruing to the other creditors.³⁴⁵ Where it is desirable to preserve an attachment or execution lien

340. Thus see *Hardt v. Schuykill, etc., Co.*, 8 Am. B. R. 479, 69 N. Y. App. Div. 90, 74 N. Y. Supp. 549.

341. In Section Twenty-three.

342. *Matter of Alabama Coal & Coke Co.* (D. C., Ky.), 31 Am. B. R. 387, 210 Fed. 941; *Matter of Malone's Estate* (D. C., Idaho), 36 Am. B. R. 364, 228 Fed. 566.

343. *Globe Bank & Trust Co. v. Martin*, 236 U. S. 288, 34 Am. B. R. 162, 59 L. Ed. 583, 35 Sup. Ct. 377; *First Nat. Bank v. Staake*, 202 U. S. 141, 15 Am. B. R. 639, 50 L. Ed. 967, 26 Sup. Ct. 580, affg. 13 Am. B. R. 281, 133 Fed. 717; *Matter of Fitzhugh Hall Amusement Co.* (D. C., N. Y.), 36 Am. B. R. 289, 228 Fed. 169, affd. 36 Am. B. R. 493, 230 Fed. 811.

344. The right of antecedent creditors under a State statute to be preferred is not protected by § 64-b, subd. 5 which provides that debts to have priority must be those owing to a person who, by the laws of the States and the United States, is entitled to priority. *Globe Bank & Trust Co. v. Martin*, 236 U. S. 288, 34 Am. B. R. 162, 59 L. Ed. 583, 35 Sup. Ct. 377, affg. 27 Am. B. R. 545, 193 Fed. 841, and 29 Am. B. R. 935, 201 Fed. 31.

345. *Martin v. Globe Bank & Trust Co.* (C. C. A., 6th Cir.), 27 Am. B. R. 545, 193 Fed. 841, affd. 236 U. S. 288, 34 Am. B. R. 162, 59 L. Ed. 583, 35 Sup. Ct. 377.

upon the bankrupt's property for the benefit of the estate, steps must be taken to that end before the lien is discharged; the subrogation of the trustee as plaintiff in the attachment proceedings after the discharge of the attachment lien by operation of law, does not revive the lien.³⁴⁶ An order to preserve an attachment is not necessary where such attachment is the only lien.³⁴⁷ As stated in the third edition of this work: "The first provision contemplates the attachment of property to which the bankrupt has the complete legal and equitable title, which, as soon as the attachment is dissolved, passes at once to the bankrupt's trustee as part of his estate. The second provision evidently does not apply to this, as there is no object in preserving the lien of the attachment for the benefit of the estate, since under the first clause the entire value of the property attached passes to the trustee free from the attachment. The second clause contemplates property in which the bankrupt has an interest which has been secured to attaching creditors by the levy of the writ, but which might have passed to another person, as, for instance, a purchaser under an unrecorded deed, but for the fact that the attaching creditors had acquired a prior lien thereon. In such case the statute recognizes the validity of the lien, but preserves it for the benefit of the entire body of creditors, by reason of the fact that the attachment was dissolved as a preferential lien in favor of the attaching creditors, by the institution of proceedings in bankruptcy."

j. Saving clause.—The proviso at the end of subsection *f* corresponds to subsection *d*, which has reference to liens other than through legal proceedings, as well as to a clause in the body of subsection *e*, saving *bona fide* transactions from the penalties attending fraudulent transfers. It is also expressive of the law, and was seemingly inserted for reasons of caution only.³⁴⁸ That neither the plaintiff nor the sheriff holding under a void attachment is a *bona fide* purchaser for value has already been held.³⁴⁹

346. *In re Walsh Bros.* (D. C., Iowa), 287 Am. B. R. 243, 195 Fed. 576; *Davis v. Compton* (C. C. A., 3d Cir.), 20 Am. B. R. 53, 158 Fed. 735, 85 C. C. A. 633; *Matter of Alabama Coal & Coke Co.* (D. C., Ky.), 31 Am. B. R. 387, 210 Fed. 941; *Matter of Jules & Frederic Co.* (D. C., Mass.), 36 Am. B. R. 233.

347. *First Nat. Bank v. Staake*, 202 U. S. 141, 15 Am. B. R. 639, 50 L. Ed. 967, 26 Sup. Ct. 580; *Goodnough Mercantile & Stock*

Co. v. Galloway (D. C., Oreg.), 22 Am. B. R. 803, 171 Fed. 940; *Rock Island Plow Co. v. Reardon*, 222 U. S. 354, 27 Am. B. R. 492, 56 L. Ed. 231, 32 Sup. Ct. 164.

348. Text quoted in *Matter of Alabama Coal & Coke Co.* (D. C., Ky.), 31 Am. B. R. 387, 210 Fed. 941.

349. *In re Kaupisch Creamery Co.* (D. C., Oreg.), 5 Am. B. R. 790, 107 Fed. 93; *Jones v. Stevens* (Sup. Ct., Me.), 5 Am. B. R. 571, 48 Atl. 170.

SECTION SIXTY-EIGHT.

SET-OFFS AND COUNTERCLAIMS.

§ 68. **Set-offs and Counterclaims.**—*a* In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

- *b* A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.

Analogous provisions: In U. S.: Act of 1867, § 20, R. S., § 5073; Act of 1841, § 5; Act of 1800, § 42.

In Eng.: Act of 1883, § 38.

Cross-references: To the law: Claims of partnership against individual estates, and *vice versa*, § 5-g.

Liability of co-debtors of bankrupt, § 16.

Proof and allowance of claims; proof of claim by surety, § 57-i.

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I. SET-OFFS IN BANKRUPTCY.

a. **Comparative legislation.**—All bankruptcy laws contain clauses similar to these. They are doubtless merely expressive of recognized principles.¹ The English rule differs from ours only in stopping the set-off at the moment of notice of the commission of an act of bankruptcy.² Our law of 1800 went no further than does subsection *a* of the present statute—declaring the principle and leaving the exceptions to the courts.³ So also of that of 1841.⁴ The original act of 1867⁵ was identical with that now in force, save that it did not refuse allowance to set-offs growing out of debts or credits “with a view . . . and with knowledge” within the four months’ period; the genesis of the words just quoted, which are found in the law of 1898, appears in the amendment of 1874, which, however, was applicable only to involuntary cases.⁶ Considered historically, the purpose and development of the section are clear. In their application to given sets of facts, however, the law of set-off as applied to bankruptcy is somewhat hazy, and precedents are not always reliable.

b. **Cross-references.**—The most important is § 60-c which provides that new credits may be set off. Indeed, the courts have had little to do with set-offs under the act of 1898, save collaterally to the animated controversy over the surrender of so-called innocent preferences.⁷

c. **Section is not self-executing; general principles.**—The provision as to set-off is permissive and not mandatory, and does not enlarge the doctrine, and may not be invoked in cases where the general principles of set-off would not justify it.⁸ The determination is within the discretionary control of the bankruptcy court, to be exercised in accord with general principles of equity.⁹

1. **Doctrines of set-off not enlarged.**—Thus, in *Sawyer v. Hoag*, 17 Wall. 610, 9 N. B. R. 145, it was said by the United States Supreme Court, with reference to Revised Statutes, section 5,073 (Act of 1867, sec. 20), the section analogous to the one now under consideration: “This section was not intended to enlarge the doctrine of set-off, or to enable the party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it. The debts must be mutual; must be in the same right.” *Morris v. Windsor Trust Co.* (N. Y. Ct. of App.), 33 Am. B. R. 283, 106 N. E. 753.

2. Eng. Act of 1883, § 38.

3. Act of 1800, § 42.

4. Act of 1841, § 5.

5. Act of 1867, § 20.

6. R. S., § 5073.

7. See discussion under Section Sixty of this work, subtitle, “*Set-off of a subsequent credit.*”

8. *Cumberland Glass Mfg. Co. v. DeWitt*,

237 U. S. 447, 34 Am. B. R. 723, 59 L. Ed. 1042, 35 Sup. Ct. 636; *Matter of Kyte* (D. C., Pa.), 25 Am. B. R. 337, 182 Fed. 166.

9. In the case of *Cumberland Glass Mfg. Co. v. DeWitt*, 237 U. S. 447, 34 Am. B. R. 723, 59 L. Ed. 1042, 35 Sup. Ct. 636, the court said: “The matter is placed within the control of the bankruptcy court, which exercises its discretion in these cases upon the general principles of equity. *Hitchcock v. Rollo*, 3 Biss. 267, Fed. Cas. No. 6,535. The section was taken almost literally from § 20 of the Act of 1867. In *Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731, in considering that section of the Act of 1867, this court said: ‘This section was not intended to enlarge the doctrine of set-off or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it.’ While the operation of this privilege of set-off has the effect to pay one creditor more than another, it is a provision based upon the general recognized right of mutual debtors, which has been enacted as

The section is not automatic. It does not give rise to a positive right existing independent of judicial action or determination. Its benefit is to be had upon the action of the District Court when it is properly invoked, and that court has the primary duty of determining for itself whether there are "mutual debts or credits" that should be set off one against the other according to the true intent and meaning of the bankruptcy act.¹⁰ The section under consideration does not create the right of set-off, but recognizes its existence and provides a method by which it could be enforced even after bankruptcy.¹¹

d. Mutual debts or mutual credits.—These words or equivalents are found in the set-off clauses in all bankruptcy laws. Indeed, the words, "mutual creditors" seem to be peculiar to such laws.¹² High authority has declared that "mutual credits" are something different from "mutual debts."¹³ To the lay mind, the distinction is one without a difference for a mutual credit, as, for instance, the delivery of collateral to collect and apply in the end becomes a debt and is set off as such.¹⁴ Indeed, in effect, at least under the present law, there can be practically no difference. In ultimate analysis a mutual credit is not unlike an unliquidated debt, and such debts are now provable.¹⁵ There are, however, some exceptions to the rule of mutual credits. Thus, if the credit will not terminate in a debt,¹⁶ or if a creditor intrusted by his debtor with goods has not the right to sell them until after the bankruptcy,¹⁷ or if such goods are delivered to the creditor for a specific purpose,¹⁸ a mutual credit does not arise, and there can be no set-off. These distinctions are, however, not important. The claim to set-off is usually made on mutual debts, the creditor owing the bankrupt a sum of money and the bankrupt, and, therefore, his estate, being liable to the creditor for a larger sum. In such a

part of the bankruptcy act, and when relied upon should be enforced by the court. *New York County Nat. Bank v. Massey*, 192 U. S. 138, 11 Am. B. R. 42, 48 L. Ed. 380, 24 Sup. Ct. 199. It hence appears that the object of this section was to give the district court the right to apply the established principles of set-off to mutual credits, when its action was invoked for the purpose."

10. *Cumberland Glass Mfg. Co. v. De Witt*, 237 U. S. 447, 34 Am. B. R. 723, 59 L. Ed. 1042, 35 Sup. Ct. 636.

11. *Studley v. Boylston Nat. Bank*, 229 U. S. 523, 30 Am. B. R. 161, 57 L. Ed. 1313, 33 Sup. Ct. 806; *Fourth Nat. Bank of Wichita v. Smith* (C. C. A., 8th Cir.), 38 Am. B. R. 771.

12. *In re Dow* (Ex parte Whiting), Fed. Cas. 17,573. Compare also *Libby v. Hopkins*, 104 U. S. 303, 26 L. Ed. 769, where the Supreme Court laid down the rule that the term "mutual credit" includes only such where a debt might have been within the contemplation of the parties.

The term "mutual credits" in the bankruptcy act has a more comprehensive meaning than the term "mutual debts" in the statutes of set-off. The term "credit" is synonymous with trust, and the trust need not be of money on both sides, but if one party intrusts the other with goods or value, it will be a case of mutual credit. *In re Catlin*, Fed. Cas. 2,519.

13. *Rose v. Hart*, 8 Taunt. 499; s. c. in *Smith Leading Cases*, Vol. 2, p. 330, holding that where cloth was deposited with a fuller to dress, by a party who afterward became a bankrupt, there was a case of mutual credit to the value of the services for dressing the cloth, but not for a general balance due from the bankrupt. And in this case the general rule was laid down that the credits intended by the act were only such as must, in their very nature, terminate in cross debts.

14. *In re Dow* (Ex parte Whiting), Fed. Cas. 17,573; *Myers v. Davis*, 22 N. Y. 489; *Aldrich v. Campbell*, 70 Mass. 284; *Medomak Bank v. Curtis*, 24 Me. 36.

15. See Bankr. Act, § 63-b.

16. *Rose v. Hart*, 8 Taunt. 499; *Groom v. West*, 8 Ad. & E. 758.

17. *In re Dow* (Ex parte Whiting), Fed. Cas. 17,573.

18. *Libby v. Hopkins*, 104 U. S. 503; *Alsager v. Currie*, 12 Mees. & W. 751.

Money held by creditor in fiduciary capacity.—Money received by a creditor from property delivered to him by the debtor to indemnify him against loss on a suretyship bond is not a mutual credit as against a debt of the bankrupt to such creditor. *Alvord v. Ryan* (C. C. A., 8th Cir.), 32 Am. B. R. 1, 212 Fed. 83.

case, a balance is struck and the claim is allowed for the balance, provided the facts do not fall within subsection *b*.¹⁹ But mere payments on account before bankruptcy are not mutual debits or credits within the meaning of this section.²⁰

e. Time when set-off may be made.—The time when the right of set-off may be exercised is not restricted to the adjudication but may be valid, if otherwise unassailable, at any time within four months prior to bankruptcy.²¹ The set-off may be made by a bank at any time before a petition is filed, and even with full knowledge that the depositor was insolvent.²² The fact that at the time of a set-off the obligation was not due does not prevent the creditor from making the set-off.²³ There is nothing in this section which prevents the parties from voluntarily doing before the petition is filed, what the law itself requires to be done after proceedings in bankruptcy are instituted.²⁴

19. Walther v. Williams Mercantile Co. (C. C. A., 6th Cir.), 22 Am. B. R. 328, 169 Fed. 270, holding that where an agreement, giving the business and possession of the goods of a mercantile company to bankrupts to operate for a year, provided that upon its termination the mercantile company should pay any inventory excess to the extent of \$500, and that the bankrupts should be liable for any deficiency, and at the termination of the agreement the stock was appraised at \$1,323.24 in excess of the original inventory value, and the bankrupt owed the company on the contract and incidental thereto the sum of \$769.93, such items constitute "mutual debts" within the meaning of section 68 and are subject to set-off.

Damages for breach of contract by bankrupt may not be set off against claim for services and materials furnished by trustee.—Damages growing out of the failure of the receivers or trustees in bankruptcy to continue a contract of the bankrupt are properly claims against the bankrupt, but not against the receivers or trustees, as such, and where the trustees of a bankrupt sued upon a claim for services and materials, furnished by bankrupt and by themselves, as receivers and trustees in bankruptcy, a counterclaim, based upon bankrupt's failure to perform a contract subsequent to bankruptcy, may not be set up by defendant as against the trustees, although such a claim would, under section 68-a of the bankruptcy act, constitute a proper set-off against any claim of the bankrupt set up by the trustees. *Brown v. Hannagan* (N. Y. App. Div.), 27 Am. B. R. 294, 96 N. E. 714, citing *Collier on Bankruptcy* (8th Ed.), p. 792.

Money due partner against joint liability of bankrupt firm.—Executors of the wife of a member of a bankrupt partnership, upon the presentation of a claim for money loaned to the firm, may credit or set-off under section 68 of the Bankruptcy Act money due the member of the firm under the will of his wife, even though the indebtedness of the bankrupt is a joint liability. *Matter of Neaderthal and Flappingier* (Ref., N. Y.), 33 Am. B. R. 152.

20. Payments on account.—Payments in money intended to be applied upon an existing open account constituting a preference do not create a case of mutual debits and credits between the bankrupt and the creditor. In *re Christensen* (Ref., Ia.), 4 Am. B. R. 202; In *re Ryan* (D. C., Ill.), 5 Am. B. R. 396, 105 Fed. 760, the judge said: "I am of the opinion that the mutual debits and credits contemplated by section 68-a, Bankr. Act, do not include cash payments on account within four months of the filing of the petition against the bankrupt, and that the referee's finding herein that creditors should be permitted to have an accounting of all transactions between them and the bankrupt, both prior to and during such four months, and to have their claims allowed for the balance shown by such accounting, is not sustainable."

When right to set-off is determined; deposit by bankrupt after filing of petition as set-off to his indebtedness to bank.—The time when the right to set-off is determined under section 68 of the bankruptcy act is the date of the filing of the petition in bankruptcy, and where a bankrupt deposited money in a bank, after an involuntary petition in bankruptcy had been filed against him, and at a time when neither he nor the bank knew of the pendency of the petition, the bank is not entitled to retain the sum so deposited on the ground that it constitutes a set-off to a larger amount for which the bankrupt is indebted to them. In *re Michaelis & Lindeman* (D. C., N. Y.), 27 Am. B. R. 299, 196 Fed. 718.

21. Studley v. Boylston Nat. Bank, 229 U. S. 523, 30 Am. B. R. 161, 57 L. Ed. 1313, 33 Sup. Ct. 806; *Putnam v. U. S. Trust Co.* (Mass. Sup. Ct.), 36 Am. B. R. 658, 111 N. E. 969.

22. Fourth Nat. Bank of Wichita v. Smith (C. C. A., 8th Cir.), 38 Am. B. R. 771; *Dunlap v. Seattle Nat. Bank* (Wash. Sup. Ct.), 38 Am. B. 937, 161 Pac. 364.

23. Fourth Nat. Bank of Wichita v. Smith (C. C. A., 8th Cir.), 38 Am. B. R. 771.

24. Studley v. Boylston Nat. Bank, 229 U. S. 523, 30 Am. B. R. 161, 57 L. Ed. 1313, 33 Sup. Ct. 806.

f. Time when right to set-off is determined.—Strictly, the time when the right to set-off is determined is the time the petition is filed.²⁵ But it makes no difference whether the debts are payable *in futuro* or *in praesenti*.²⁶ "Debt" means any debt, demand, or claim provable in bankruptcy.²⁷ To determine, therefore, whether the holder of a claim is entitled to the benefit of § 68, it is necessary only to inquire whether his claim is one provable in bankruptcy.²⁸ Thus, unliquidated claims may be set off against liquidated,²⁹ and, it is thought, under the present law, even liabilities sounding in tort against those purely *ex contractu*. But this doctrine as to time is subject to the exception stated in subsection *b* (2), considered *post*; a further exception in cases of mutual credits has already been noted.

g. Nature of liability.—(1) **IN GENERAL.**—It is not necessary that the debts or credits be of the same character. Thus the mutual debts need not arise out of the same transaction,³⁰ or be for money owed the one to the other. The basic test is mutuality, not similarity, of obligation. Illustrative cases under the former law are cited in the foot-note.³¹ Advancements made by a bankrupt to his daughter, during his insolvency, may be set off against a claim made by her against his estate in bankruptcy.³² Where a treasurer of a cor-

25. *Toof v. City National Bank* (C. C. A., 6th Cir.), 30 Am. B. R. 79, 206 Fed. 250.

Valuation of stock.—Where bankrupt stock-brokers had enough stock to fill their orders, but it had been pledged, the customer is entitled to a set-off equal to the purchase-price, if the order was never executed, or to the value of the stock when sold, if later converted, and the value of the stock may be fixed as of the date of bankruptcy, in the absence of evidence to the contrary. *Matter of Pierson, Jr. & Co.* (D. C., N. Y.), 35 Am. B. R. 213, 225 Fed. 889.

26. *In re City Bank*, Fed. Cas. 2,742; *Drake v. Rollo*, Fed. Cas. 4,066; *Collins v. Jones*, 10 B. & C. 777; *Taylor v. Nichols*, 23 Am. B. R. 306, 134 N. Y. App. Div. 783, 119 N. Y. Supp. 919, holding that where both a note surrendered to the maker and the claim of the maker against the bankrupt had matured prior to the transfer of the assets to his trustee in bankruptcy, there was a right of set-off. *Mandel v. Koerner* (Mun. Ct., N. Y. C.), 33 Am. B. R. 40, 149 N. Y. Supp. 455, quoting text with approval.

27. Bankr. Act, § 1 (11).

Meaning of "debt."—It is well settled that this provision of the act applies to any debt provable in bankruptcy, even though not then due. *Steinhardt v. Nat. Park Bank*, 19 Am. B. R. 72, 120 N. Y. App. Div. 255, 105 N. Y. Supp. 23, revg. 18 Am. B. R. 86; *In re Semmer Glass Co.* (C. C. A., 2d Cir.), 14 Am. B. R. 25, 135 Fed. 77. The word "debt" as used in section 68-a includes any debt provable in bankruptcy. And a debt is provable whether due or not at the time of bankruptcy. *Germania Sav. Bk. & Trust Co. v. Loeb* (C. C. A., 6th Cir.), 26 Am. B. R. 238, 243, 188 Fed. 287, citing *Collier on Bankruptcy* (8th Ed.), p. 793; *In re Percy Ford Co.* (D. C., Mass.), 28 Am. B. R. 919, 199 Fed. 334.

28. *In re Semmer Glass Co.* (C. C. A., 2d Cir.), 14 Am. B. R. 25, 135 Fed. 77; *Mandel v. Koerner* (Mun. Ct., N. Y. C.), 33 Am. B. R. 40, 149 N. Y. Supp. 455.

29. Compare *Bell v. Carey*, 8 C. B. 887, and even under the narrower doctrine of the English laws, *Jack v. Kipping*, 9 Q. B. D. 113. See also generally under Section Sixty-nine.

Set-off of unliquidated claims.—A bankrupt corporation which, prior to bankruptcy, was engaged in the business of manufacturing cloth for the defendant, had given the defendant a note for losses caused the defendant because the manufacturing was not, at all times, perfectly done. Later the bankrupt and the defendant entered into an agreement whereby the defendant paid the bankrupt only eighty per centum of the manufacturing charge, reserving the other twenty per centum of each bill against counter-charges for imperfect work. The bankrupt, on finding itself unable to continue the business, arranged with the defendant to take over the mill on a rental basis in order that the defendant might run out its own stock, after which the mill was closed. In an action by the trustee to recover the rent and so much of the twenty per centum as was not needed for countercharges it was held that under section 68a of the Bankruptcy Act the defendant might set off the claim on the note. *Clifford v. Oak Valley Mills* (D. C., Mass.), 36 Am. B. R. 867, 229 Fed. 851.

30. *In re Christensen* (D. C., Ia.), 4 Am. B. R. 99, 101 Fed. 802. Consult also *In re Brewster* (Ref., N. Y.), 7 Am. B. R. 486.

31. *In re Petrie*, Fed. Cas. 11,040; *Ex parte Howard Nat. Bank*, Fed. Cas. 6,764; *Ex parte Pollard*, Fed. Cas. 11,252.

32. *Matter of Brewster* (Ref., N. Y.), 7 Am. B. R. 486.

poration, which had gone into voluntary dissolution, was indebted to the corporation for money received by him, unaccounted for, the amount due may be set off against any sum due him as a stockholder of the corporation, upon the liquidation.³³ It seems that the rule with respect to set-offs is the same even though the claim of the creditor against the bankrupt is fully secured.³⁴

(2) SET-OFF BY BANK.—A question somewhat discussed is the right of a bank to set off its deposit debt against the unpaid note of a bankrupt depositor. This right has been denied in one case, because the bookkeeping entries were not actually made before the bankruptcy, and the set-off, therefore, amounted to a preference.³⁵ But every set-off is, in a sense, a preference, and the ancient rule permitting a banker so to charge a deposit against notes is undoubtedly the rule under the present, as under the former law.³⁶ So that it is now well settled that where deposits are made by a depositor in good faith, in the regular course of business, and not for the purpose of enabling the bank to secure a preference, the bank has a right to set-off a deposit against a claim held by it against the depositor who subsequently becomes bankrupt.³⁷ As

33. *Marcus Shipping Assn. v. Baines* (Iowa Sup. Ct.), 34 Am. B. R. 682, 151 N. W. 525.

34. *Steinhardt v. Nat. Park Bank*, 19 Am. B. R. 72, 120 N. Y. App. Div. 255, 105 N. Y. Supp. 23, revg. 18 Am. B. R. 86, holding that, in an action by a trustee to recover moneys of the bankrupt on deposit with a bank at the time the petition was filed, the defendant is entitled to set off the amount of certain demand notes of the bankrupt which is then held but for which it held securities greater in value than the amount of the notes, though, by reason of their depreciation seventeen months thereafter when sold, the securities did not bring enough to pay the notes.

Right to set-off proceeds of surplus collateral against unsecured note.—Where a creditor, holding an unsecured note for which he had filed proof of claim as such, making no mention of any security available, thereafter sold collateral which he held to secure another note, and realized a sum in excess of the amount of the secured note, he was entitled to set off the amount of the surplus against his unsecured debt, there being no estoppel because of a failure to claim such surplus in his proof of claim. In *re Searles* (D. C., N. Y.), 29 Am. B. R. 635, 200 Fed. 893.

35. In *re Tacoma, etc., Co.*, 3 N. B. N. Rep. 9.

36. In *re Kalter*, 2 N. B. N. 264, and see In *re Myer* (D. C., N. Y.), 5 Am. B. R. 596, 106 Fed. 828.

37. *Fourth Nat. Bank of Wichita v. Smith* (C. C. A., 8th Cir.), 38 Am. B. R. 771; *Dunlap v. Seattle Nat. Bank* (Wash. Sup. Ct.), 38 Am. B. R. 937, 161 Pac. 364; *Johnson v. Gratiot County State Bank* (Mich. Sup. Ct.), 38 Am. B. R. 518, 160 N. W. 544; *German American State Bank v. Larimer* (C. C. A., 8th Cir.), 37 Am. B. R. 556, 235 Fed. 501; *Wilson v. Citizens Trust Co.* (D. C., Ga.), 37 Am. B. R. 86, 233 Fed. 697; *American Bank & Trust Co. v. Coppard* (C.

C. A., 5th Cir.), 35 Am. B. R. 742, 227 Fed. 597; *Chisholm v. First Nat. Bank of Le Roy* (Ill. Sup. Ct.), 35 Am. B. R. 598, 109 N. E. 657. See Am. Bankr. Dig. § 802.

A banker may set off the debt due to him on loans, overdrafts, or otherwise against deposits which are made with him. In *re George M. Hill Co.* (C. C. A., 7th Cir.), 12 Am. B. R. 221, 130 Fed. 315; In *re Bank of Madison*, Fed. Cas. 890, 9 N. B. R. 184; In *re Petrie*, Fed. Cas. 11,040, 7 N. B. R. 332; *Denman v. Boylston*, 5 Cush. 194. Upon the bankruptcy of one of its depositors a bank is entitled to have the amount standing to his credit upon its books applied as an off set upon its note against him, in the absence of collusion between them, and to have the balance of the note allowed as a claim against the bankrupt estate, provided the bank has not otherwise received a preference. In *re Scherzer* (D. C., Ia.), 12 Am. B. R. 451, 130 Fed. 631. Where an insolvent person has money on deposit in a bank subject to check, and also owes the bank upon a promissory note, upon such insolvent person being adjudged a bankrupt, the bank is entitled to have the amount of the bankrupt's deposit set off against the sum due on the promissory note, and to prove its claim against the bankrupt for the balance. *West v. Bank of Lahoma*, 16 Am. B. R. 733, 16 Okl. 508; *Whitaker v. State Bank* (Sup. Ct., Okl.), 25 Am. B. R. 876, 110 Pac. 776. So if the banker has received drafts for collection the proceeds of which afterward came into his hands, he may offset them against debts due to him. In *re Farnsworth*, Fed. Cas. 4,673, 14 N. B. R. 148.

Deposits may be set off against overdrafts. *Tomlinson v. Bank of Lexington* (C. C. A., 4th Cir.), 16 Am. B. R. 632, 145 Fed. 824. Money deposited to a bankrupt's credit, at the time of filing his petition in bankruptcy, may be set off against a debt due from him to the bank. In *re Little* (D. C., Ia.), 6 Am. B. R. 681, 110 Fed. 621.

stated by the United States Supreme Court: "The money deposited in a bank becomes a part of its general funds, to be dealt with by it as other moneys, to be lent to customers, and parted with at the will of the bank, and the right of the depositor is to have the deposit repaid in whole or in part by honoring the depositor's checks drawn thereon. Such deposit creates an ordinary debt, not a privilege or right of a fiduciary character. The amount of such a deposit may, therefore, be set off in bankruptcy against a claim against the depositor, allowing the bank to prove for the balance."³⁸ A bank

A bank, upon the insolvency of one of its depositors, is entitled to retain and apply the amount of his deposit in part payment of his note then due and held by the bank. Such debts are mutual and the set-off, if made in good faith and not as a mere trick or device for the benefit of the indorser, is not a "transfer of property" nor does it constitute a preference within the meaning of the bankruptcy act. *Booth v. Prete*, 22 Am. B. R. 579, 81 Conn. 636, 71 Atl. 938.

Set-off of proceeds of check deposited for collection just prior to bankruptcy.—Where a bank accepts a check for collection, and receives the proceeds on the following day without having paid out in the meantime anything on account of the deposit, it cannot apply the proceeds of the check toward a debt due by the depositor, where it appears that on the day the check was deposited for collection, but at a subsequent hour, a petition in bankruptcy was filed against the depositor. *Moore v. Third Nat. Bank of Phila.* (Super. Ct., Pa.), 24 Am. B. R. 568, 41 Pa. Super. Ct. 497.

Effect of failure to offset.—In *Traders' Bank v. Campbell*, 14 Wall. 87, 6 N. B. R. 353, it appeared that insolvents upon the eve of bankruptcy gave to their banker a check upon funds to their credit in that bank to apply upon the indebtedness due to the bank, although the banker and the bankrupts knew of the insolvency of the latter. The Supreme Court held the transaction to be a preference and voidable by the assignee in bankruptcy and that he had the right to recover the amount so paid, and further held that although possibly had the bankrupt stood upon its right of offset, that right might have been available to them, yet when they treated the money as the bankrupt's own property, taking his check and crediting the amount as a payment on the indebtedness, the transaction became a voidable preference.

Instruction to jury; usual course of business.—Where in an action by a trustee in bankruptcy to recover an alleged voidable preference it appears that the bankrupt within four months of bankruptcy and while insolvent sold his stock of merchandise and store fixtures and deposited the check therefor with the defendant bank to which it was indebted, the real question for the jury to decide is whether the deposit was in good faith in the usual course of business, and the bank is entitled to have the jury in-

structed that if they find that the deposit was received in the usual course of business, the bank may apply it as a set-off against the indebtedness of the bankrupt. *German American State Bank v. Larimer* (C. C. A., 8th Cir.), 37 Am. B. R. 556, 235 Fed. 501.

38. *New York County National Bank v. Massey*, 192 U. S. 138, 11 Am. B. R. 42, 48 L. Ed. 380, 24 Sup. Ct. 199, revg. 8 Am. B. R. 515, 116 Fed. 342; *Studley v. Boylston Nat. Bank*, 229 U. S. 523, 30 Am. B. R. 161, 57 L. Ed. 1313, 33 Sup. Ct. 806; *Continental & Com. Trust & Sav. Bank v. Chicago Title & Trust Co.*, 229 U. S. 435, 30 Am. B. R. 624, 57 L. Ed. 1268, 33 Sup. Ct. 829; *Whitaker v. State Bank* (Sup. Ct., Okl.), 25 Am. B. R. 876, 110 Pac. 776. See also *Matter of Levi* (D. C., N. Y.), 9 Am. B. R. 176, 121 Fed. 198; *Matter of Semmer Glass Co.* (Ref., N. Y.), 11 Am. B. R. 665; *West v. Bank of LaHoma*, 16 Am. B. R. 736, 16 Okl. 508, 86 Pac. 59; *Matter of National Lumber Co.* (C. C. A., 3d Cir.), 32 Am. B. R. 389, 212 Fed. 928.

Money paid by a bank in ignorance of a general assignment, having been returned by order of the court, may be set off against the assignee's notes. In *re Meyer & Dickinson* (D. C., N. Y.), 5 Am. B. R. 593, 107 Fed. 86.

Set-off and proof of balance.—Where at the suggestion of the president of a bank in which a company, indebted to it upon certain notes, kept an account, it was agreed that he should O. K. checks drawn against said account, but he did not attempt in any way to interfere with the management of the business of the company or seek to control it, and was not aware of its insolvency at the time the agreement as to the checks was made, the bank, upon the adjudication of the company, may set off its deposits against the notes, and prove its claims for the balance. In *re Medaris-Vine Carriage Co.*, 15 Am. B. R. 897, 15 Ohio Fed. Dec. 223.

Payment to bank from deposit account.—Where bankrupt had a deposit account with defendant bank, payments of discounted notes, made at the maturity of such notes within the four months' period by bankrupt's check drawn on the deposit account and by the bank charging up the amounts due against the deposit account with bankrupt's acquiescence, did not constitute preferences, it appearing that the deposits had been made honestly, and with no intention of enabling the bank to secure an advantage over other

is entitled to set off certain demand notes of a bankrupt where an action is brought by the trustee to recover moneys on deposit.³⁹ The liability of a depositor as an indorser on a note held by the bank may be set off against a deposit, although the liability of the indorser did not become absolute until after the petition in bankruptcy was filed.⁴⁰ And so also the amount of a note held by a bankrupt bank may be set off against the amount on deposit in the bank to the credit of the maker of the note.⁴¹ But deposits made after the petition against the bankrupt was filed belong to the trustee; the right to off-set only applies to deposits in the bank when the petition was filed, although the bank had no notice of it.⁴² A response by a bank to an order of a referee to show cause why it should not pay over to the trustee moneys deposited with it by the bankrupt three days before the filing of the petition in bankruptcy, that the money was deposited without solicitation or agreement and that at the time of the deposit the bankrupt owed the bank on an overdraft and on past-due notes a certain amount which it claims to off-set against its liability to the bankrupt and the trustee, states an adverse claim and a good plea to the jurisdiction of the referee and the district court summarily

creditors in the face of threatened insolvency. *Studley v. Boylston National Bank of Boston* (C. C. A., 1st Cir.), 29 Am. B. R. 649, 200 Fed. 249.

Where a bank after it had discounted a note for a depositor, with knowledge of the latter's insolvency, accumulated deposits and allowed other notes to be protested, until two days before the bankruptcy of the depositor, when the deposit being sufficient a check was drawn to the order of the bank for the amount of the note, a preference was effected. *Matter of National Lumber Co.* (C. C. A., 3d Cir.), 32 Am. B. R. 389, 212 Fed. 928.

Liability of endorsers; set-off prior to bankruptcy.—Where a bankrupt is continually liable to a bank as an endorser on immatured paper the bank cannot claim that money it applied in payment of that liability prior to bankruptcy should operate as a set-off. *Heyman v. Third National Bank* (D. C., N. J.), 32 Am. B. R. 716, 216 Fed. 685.

39. *Steinhardt v. Nat. Park Bank*, 19 Am. B. R. 72, 120 N. Y. App. Div. 255, 105 N. Y. Supp. 23, revg. 18 Am. B. R. 86; *Irish v. Citizens' Trust Co.* (D. C., N. Y.), 21 Am. B. R. 39, 163 Fed. 880, holding that the right of a bank to set off overdue notes of a depositor against his general deposit is not a lien in the sense of the bankruptcy act, and may not be exercised as to notes not yet due.

Set-off of deposit against notes.—In the case of *Germania Sav. Bk. & Trust Co. v. Loeb* (C. C. A., 6th Cir.), 26 Am. B. R. 238, 188 Fed. 287, the bankrupt, prior to bankruptcy, had a deposit in claimant bank amounting to about \$5,000 and the bank held notes of the bankrupt amounting to \$20,000. Within four months of the bankruptcy, the bank, feeling itself insecure, caused a confer-

ence to be had between its attorney and the attorney for the bankrupt. Thereupon, the bankrupt's attorney, not realizing the financial condition of the bankrupt, proposed that the bankrupt continue to make deposits, but withdraw only up to the amounts deposited after the date of the conference, leaving the amount already deposited intact until the exact financial condition could be learned. Between the date of said conference and the bankruptcy about \$4,500 more were deposited which were not withdrawn. The bank claimed the right to off-set the \$5,000 and the \$4,500 deposits against the claim. The trustee claimed that the \$5,000 off set amounted to a preference and that the \$4,500 deposit was a deposit in trust, or special deposit as to which there could be no off set. It was held that the \$5,000 off set did not amount to a preference, in the absence of fraud or collusion; that the evidence as to the conference between the attorneys did not indicate fraud or collusion; and that it was immaterial, under 68-a of the bankruptcy act, that the notes upon which the bank's claim was based had not matured. See also *In re Percy Ford Co.* (D. C., Mass.), 28 Am. B. R. 919, 199 Fed. 334.

40. **Set-off of note not yet due.**—In *re Semmer Glass Co.* (C. C. A., 2d Cir.), 14 Am. B. R. 25, 135 Fed. 77. In an action by a trustee to recover a debt due the bankrupt estate, the defendant may plead as a set-off the amount of a note against the bankrupt, even though it had not matured at the date of adjudication, but the defendant is not entitled to any affirmative judgment thereon. *Frank v. Mercantile Nat. Bank*, 14 Am. B. R. 125, 182 N. Y. 264, 74 N. E. 841.

41. *In re Shults* (D. C., N. Y.), 13 Am. B. R. 84, 132 Fed. 573.

42. *Toof v. City National Bank* (C. C. A., 6th Cir.), 30 Am. B. R. 79, 206 Fed. 250.

to determine the validity of that claim under § 23-b of the bankruptcy law.⁴³ The form in which the set-off is attained is immaterial.⁴⁴

h. Being in the same right.—To be mutual, debts between parties must be owing to and be due in the same rights and capacities.⁴⁵ Thus, a debt due one as an executor cannot be set off against a debt due from him individually;⁴⁶ a tenant's unliquidated damages for the landlord's negligence in permitting water to come upon the premises may not be set off against the landlord's claim for rent;⁴⁷ a pledgee, after the debt for which the pledge was given is paid, holds the property pledged in trust for the pledgor and cannot off-set against such pledgee another debt belonging to him in his own right;⁴⁸ a creditor of a corporation cannot set-off his liability for unpaid subscriptions for its stock;⁴⁹ a claim based on individual promissory notes of a member of a bankrupt firm cannot be set off against a judgment recovered against the claimant on behalf of such firm by its trustee in a suit for unliquidated damages *ex contractu*,⁵⁰ and, where the ownership of the claim is merely nominal, it cannot be set off against a debt due from such owner.⁵¹ But the trustee in bankruptcy may set off claims which have vested in him, even though they never vested in the bankrupt.⁵² It has been held that a claim for unliquidated damages for false representations, inducing a contract for the sale and delivery of goods, may be set off against a claim arising upon the contract of sale.⁵³ A surety who, by paying the principal's debt, has become subrogated to the latter's rights may, of course, avail himself of a set-off in favor of the principal.⁵⁴ Such debts are in the same right.

43. *In re Gill* (C. C. A., 8th Cir.), 26 Am. B. R. 883, 190 Fed. 706.

44. **Method of making set-off.**—Whether a bank charges off the deposit of its customer and applies it on the indebtedness which it holds against the customer, or whether it draws a check in the name of the customer covering his deposit and applies it as a credit on the indebtedness, or whether it does neither of these things, but relies upon section 68 of the bankruptcy act to do the same thing in effect, is immaterial. *Wilson v. Citizens' Trust Co.* (D. C., Ga.), 37 Am. B. R. 86, 233 Fed. 697.

45. *In re Leshner & Son* (D. C., Pa.), 25 Am. B. R. 218, 176 Fed. 650, citing *Collier on Bankruptcy* (7th ed.), p. 796; *West v. Pryer*, 2 Bing. N. C. 455; *Ex parte Bailey*, 1 M. D. 263; *Morris v. Windsor Trust Co.* (N. Y. Ct. of App.), 33 Am. B. R. 283, 106 N. E. 753.

46. *Bishop v. Church*, 3 Atl. 691.

47. *In re Becher* (D. C., Pa.), 15 Am. B. R. 228, 139 Fed. 366.

48. *Morris v. Windsor Trust Co.* (N. Y. Ct. of App.), 33 Am. B. R. 283, 106 N. E. 753.

49. *In re Goodman Shoe Co.* (D. C., Pa.), 3 Am. B. R. 200, 96 Fed. 949; *Sawyer v. Hoag*, 17 Wall, 610; *Jenkins v. Armour*, Fed. Cas. 7,260; *In re Royce Dry Goods Co.* (D. C., Mo.), 13 Am. B. R. 258, 133 Fed. 100; *Babbitt v. Read* (C. C., N. Y.), 23 Am. B. R. 254, 173 Fed. 712, holding that bondholders, who are also stockholders, are not entitled to set-off the amount of their bonds against a claim established against them in a suit to enforce the liability as stockholders.

A debt due for stock in a corporation cannot be set-off against a debt due from said corporation, not being mutual nor in the same right, since the latter is due from the corporation in its individual right while the former constitutes a trust fund for the benefit of creditors of the corporation. *Matter of Howe Mfg. Co.* (D. C., Ky.), 27 Am. B. R. 477, 193 Fed. 524, citing *Collier on Bankruptcy* (8th ed.), p. 796.

50. *In re Leshner & Son* (D. C., Pa.), 25 Am. B. R. 218, 176 Fed. 650, citing *Collier on Bankruptcy* (7th ed.), p. 796.

Debts and credits not in same right.—In a suit by a trustee in bankruptcy of a corporation to recover money alleged to have been paid to defendant as commissions under contracts invalid under section 439 of the New York Penal Law, the defendant cannot set-off an indebtedness growing out of a deficiency judgment in an action upon bonds of the bankrupt and also based upon drafts accepted and paid by the defendant for account of the bankrupt, because such indebtedness is not in the same right and does not fall within the provisions of section 68 of the bankruptcy act. *Palmer v. Doull Miller Co.* (D. C., N. Y.), 37 Am. B. R. 617, 233 Fed. 309.

51. *In re Lane*, Fed. Cas. 8,043. Compare *Boyd v. Mangles*, 16 Mees. & W. 336.

52. *In re Crystal*, etc. (D. C., Vt.), 4 Am. B. R. 55, 104 Fed. 265.

53. *In re Harper* (D. C., N. Y.), 23 Am. B. R. 918, 175 Fed. 412.

54. Compare *Bankr. Act*, §§ 16 and 57-i. See also *In re Bingham* (D. C., Vt.), 2 Am. B. R. 223, 94 Fed. 796; *Morgan v. Wor-*

i. **Joint and several claims.**—Here the general rule is that a joint claim, as that of a partnership, cannot be set off against the debt of one of the individuals jointly claiming.⁵⁵ The reason for this is that the individual partner should not in justice to his associates, be permitted to pay his debts out of partnership property. The copartnership estate is separate and distinct from the individual estates of the partners; so where a bankrupt partnership owes its creditor a certain amount, and such creditor owes one of the partners a less amount, the debts are not mutual, and there may be no off-set.⁵⁶ A further exception is stated in a case,⁵⁷ where the joint credit was given on account of a separate debt, this being strictly an instance of "mutual dealing."⁵⁸

j. **Waiver of set-off.**—If a creditor proves his debt, without claiming set-off, he will generally be deemed to have waived it.⁵⁹ And if he accepts dividends on composition without invoking his right of set-off, he will not be permitted to set up his claim as a defense.⁶⁰ At the same time, inadvertence or mistake is usually a sufficient excuse for leave to withdraw and amend. There are no cases under the present law yet reported.⁶¹

k. **Practice.**—This section seems to contemplate that, if a creditor's claim against the bankrupt is greater than the bankrupt's claim against him, he shall only prove for the balance; and if the creditor's claim is less than the bankrupt's claim against him, the time for a set-off would seem to be when the creditor is sued, and the place the forum in which the suit is brought.⁶² Where a creditor files a proof of claim, the burden of proof is upon the trustee to establish a counterclaim thereto.⁶³

II. WHEN NOT ALLOWED.

a. **Not provable against the estate.**—Subdivision 1 of subsection b requires the debt, sought to be set off or counterclaimed, to be provable against the bankrupt's estate.⁶⁴ There is a difference between the former and the present

dell (Sup. Ct., Mass.), 6 Am. B. R. 167, 178 Mass. 350, 59 N. E. 1037.

Set-off by surety of payment on principal's debt.—In the case of *In re Dillon* (D. C., Mass.), 4 Am. B. R. 63, 66, 100 Fed. 627, the judge said: "The right of set-off, however, may not depend altogether upon the form required in proving the debt. A debt provable only in the name of A may perhaps be availed of in set-off by B. To hold this would not contravene the language of the present act. The rule that a surety may generally set-off a payment made on his principal's debt against his debt due to the principal does not seem to be based upon the technical form of proof, but upon broad principles applicable generally in bankruptcy."

55. *Gray v. Rollo*, 18 Wall. 629; *Ex parte Twogood*, 11 Ves. 516; *Ex parte Caldicott*, 25 Ch. D. 716. A debt due from a bankrupt to an individual partner of a solvent firm cannot be set-off against a debt due to the estate from the partnership. *In re Shults* (D. C., N. Y.), 13 Am. B. R. 84, 132 Fed. 573.

56. *Tucker v. Oxley*, 5 Cranch, 34. See *Matter of Neaderthal* (C. C. A., 2d Cir.), 34 Am. B. R. 542, 225 Fed. 38, revg. 33 Am. B. R. 152, holding that money due to an individual partner under the will of his mother cannot be set-off against an indebtedness of the bankrupt firm to the estate of the mother

for money borrowed, although one of the notes given for the money borrowed was endorsed by the individual partners, as the debts are not "mutual," within the meaning of this section.

57. *In re Crystal, etc., Co.* (D. C., Vt.), 4 Am. B. R. 55, 104 Fed. 265; *Gray v. Rollo*, 18 Wall. 629, 21 L. Ed. 927, holding that a separate debt cannot be set-off against a joint debt in bankruptcy unless growing out of a transaction or under circumstances establishing that the joint credit had been given on account of a separate debt.

58. These words occur in the English section on set-off.

59. *Russell v. Owen*, 61 Mo. 185.

60. *Cumberland Glass Mfg. Co. v. De Witt*, 236 U. S. 288, 34 Am. B. R. 723, 59 L. Ed. 583, 35 Sup. Ct. 377.

61. Cases under the law of 1876 are: *Hunt v. Holmes*, Fed. Cas. 6,890; *Brown v. Farmers' Bank*, 6 Bush (Ky.), 198; *Standard Oil Co. v. Hawkins*, 74 Fed. 395.

62. *In re Leshner & Son* (D. C., Pa.), 25 Am. B. R. 218, 176 Fed. 650, citing *Collier on Bankruptcy* (7th ed.), p. 796.

63. *In re Harper* (D. C., N. Y.), 23 Am. B. R. 918, 175 Fed. 412.

64. Debt must be provable.—*In re Harper* (D. C., N. Y.), 23 Am. B. R. 918, 175 Fed. 412, the judge said: "This is not

law here, which has given rise to some speculation.⁶⁵ Formerly, to entitle to set-off, a debt must have been "provable in its nature;" now, it must be "provable." Under the law of 1867, it was held that a debtor of the estate holding a claim on which he had attempted to secure a preference might still use it as a set-off, because it was provable in its nature.⁶⁶ The distinction seems rather tenuous. Thus, under the present law, which denies allowance to claims whose owners have been preferred, the word "provable" was held to mean the same as "provable in its nature" and, the case being one of mutual credit, the set-off was allowed, in spite of a preference making it technically not provable.⁶⁷ Subject, however, to exceptions based on equitable principles like those applied in *Morgan v. Wordell*, *supra*, the general rule is that no claims tainted with a preference may be asserted by way of set-off, except those within the terms of § 60-e. The latter is new. It has already been discussed.⁶⁸

b. Purchased after bankruptcy or within four months before.—(1) **IN GENERAL.**—Subdivision 2 of subsection *b* prevents the set-off or counterclaim of a claim which was acquired after the filing of the petition, or within four months before such filing, "with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy." This clause differs from that in the law of 1867 only in denying set-off to claims purchased within the four months' period; this that law did not do. The necessity of the rule is apparent. The doctrine of set-off would foster preferences of the worst kind, if a well-informed debtor of an insolvent could buy up claims against him either within four months of the bankruptcy or after the filing of the petition. For instance, if property was sold by the bankrupt within the four months' period to one of his creditors, partly for cash and partly on credit, the amount due on the sale should not be offset against the creditor's claim against the estate.⁶⁹ This provision prevents the set-off, against the amount due by a bankrupt to a creditor, of orders issued by employees of such creditor within the four months' period directing the payment of a part of the wages earned by them on account of

a limitation or restriction on the right of the trustee to set up, prove, and use any claim he has and which he may enforce against a creditor of the bankrupt presenting a claim against the estate he represents, provided it be a 'debt' owing by such creditor to the bankrupt estate within the meaning of section 68-a. The plainly disclosed policy of the Act is that where a person is indebted to the bankrupt estate, and the trustee seeks to enforce the indebtedness, the debtor to the estate may set up as an off-set or counterclaim only such just demands as he has against the estate which are provable in bankruptcy as a claim against the estate . . . The debtor is limited to claims provable in bankruptcy. There is no provision or suggestion in the Act that a claim against a creditor of the bankrupt in the hands of the trustee, and which came to him by operation of law on his appointment, cannot be used as an off-set to or counterclaim against the claim of such creditor of the bankrupt estate, unless such claim in the hands of the trustee

be one of a character provable in bankruptcy in case the one liable thereon had been adjudicated a bankrupt."

^{65.} See *In re Dillon* (D. C., Mass.), 4 Am. B. R. 63, 100 Fed. 627, in which case the court said: "The language of the different statutes of bankruptcy doubtless differs, and the provision of section 68-b of the act of 1898, that a set-off, to be allowed, must be provable against the estate, is not found in all bankrupt acts, and apparently was not the law under the Act of 1800 . . . The right of set-off, however, may not depend altogether upon the form required in proving the debt. A debt provable only in the name of A may perhaps be availed of in set-off by B."

^{66.} *Clark v. Iselin*, 21 Wall. 360.

^{67.} *Morgan v. Wordell* (Mass. Sup. Ct.), 6 Am. B. R. 167, 78 Mass. 350. Compare *In re Kingsley*, Fed. Cas. 7,819.

^{68.} See under Section Sixty of this work.

^{69.} *In re White* (C. C. A., 7th Cir.), 24 Am. B. R. 197, 177 Fed. 194.

supplies furnished by the bankrupt.⁷⁰ The mere fact of insolvency or mere knowledge of such insolvency is not alone sufficient to take away a bank's right of set-off.⁷¹

(2) "WITH A VIEW TO SUCH USE AND WITH KNOWLEDGE," ETC.—The words here were not in the original law of 1867.⁷² The idea expressed by the words "with a view to such use" was incorporated by the amendatory act of 1874, but only as to involuntary cases; the words "with knowledge or notice," etc., to the end of the subsection, are new. The use of the conjunction "and" should be noted; those opposing a claim to set-off on the ground specified in subdivision 2 must show, not only its purchase within the time specified, but that such purchase was with a view to its use as a set-off and with knowledge or notice that the bankrupt was insolvent, or had committed an act of bankruptcy.⁷³ Such proof will not be difficult if the purchase antedates the bankruptcy; it may, if within the four months' period. The cases under the former should be read with the date of the amendatory act of 1874 carefully in mind.⁷⁴

70. *Western Tie & Timber Co. v. Brown*, 196 U. S. 502, 13 Am. B. R. 447, 49 L. Ed. 571, 25 Sup. Ct. 339.

71. *Matter of Wright Dana Hardware Co.* (C. C. A., 2d Cir.), 31 Am. B. R. 816, 212 Fed. 397, modg. 31 Am. B. R. 192, 207 Fed. 636. As said in *Studley v. Boylston National Bank*, 229 U. S. 523, 30 Am. B. R. 161, 57 L. Ed. 1313, 33 Sup. Ct. 806, "there is nothing in the statute which deprives a bank, with whom an insolvent is doing business, of the rights of any other creditor taking money without reasonable cause to believe that a preference will result from the payment. The bankruptcy act contemplates that by remaining in business and at work an insolvent may become able to pay off his debts. It does not prevent him from continuing to trade, depositing money in bank, drawing checks and paying debts as they mature, either to his own bank or any other creditor. It does provide, however, that if bankruptcy ensues all payments thus made, within the four months' period, may be recovered by the trustee, if the creditor had reasonable cause to believe that a preference would be thereby effected."

72. *In re City Bank*, Fed. Cas. 2,742. Compare *Hitchcock v. Rollo*, Fed. Cas. 6,535.

73. See *Tomlinson v. Bank of Lexington* (C. C. A., 4th Cir.), 16 Am. B. R. 632, 145 Fed. 824; *Mason v. Herkimer Co. Bank* (C. C. A., 2d Cir.), 22 Am. B. R. 733, 172 Fed. 529, revg. 21 Am. B. R. 98.

Burden of proof.—Where a claim made up and based upon a certificate of deposit issued by the bankrupts, engaged in the business of private bankers, payable to the order of the claimant's wife and assigned to him, is sought to be used as an off-set against his indebtedness to the bank when it closed its doors, the burden of showing that the certificate was transferred before the bank suspended payment and without knowledge of its insolvency is upon the claimant. *In re Shults* (D. C., N. Y.), 14 Am. B. R. 278, 135 Fed. 623.

74. *Hovey v. Insurance Co.*, Fed. Cas. 6,743; *Hunt v. Holmes*, Fed. Cas. 6,890; *In re Perkins*, Fed. Cas. 10,982; *Bashore v. Rhodes*, 16 N. B. R. 72. Compare also *Smith v. Hill*, 8 Gray, 572; *Smith v. Brinkerhoff*, 6 N. Y. 305; also the numerous English cases on the same subject.

SECTION SIXTY-NINE.

POSSESSION OF PROPERTY.

§ 69. **Possession of Property.**—*a* A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties, as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition.

Analogous provisions: In U. S.: Act of 1867, § 40, R. S., § 5024.

In Eng.: Act of 1883, none.

Cross-references: To the law: Jurisdiction of court to appoint marshal to take custody of property, § 2(3).

Bond to be filed upon application to take possession of property, § 3-e

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e. *Remedy where property is claimed by a third person*, 1104.

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I. SEIZURE OF BANKRUPT'S PROPERTY.

a. Cross-references.—The value of this section is not apparent; § 3-e, in connection with § 2 (3) and § 2 (15), is much broader.¹ It is difficult to conceive of a case within the terms of § 69 which is not also within those of the sections just mentioned. Further, a seizure under this provision can be authorized only by the judge, save in the contingency stated in § 38-a (3); while, under the earlier sections, property may be taken possession of by a receiver acting under the order of a referee. A similar practice was authorized by the law of 1867;² it included the arrest and detention of the debtor, but did not authorize the court to release the property to him on filing a new bond.

b. Scope of section.—The section divides itself naturally into three parts: (1) the authority to seize on a showing of specified facts, (2) a provision as to the bond to be given and its conditions and (3) a provision permitting the bankrupt to regain possession on filing a similar bond. A creditor desiring to seize property under this section must satisfy the judge that an alleged involuntary bankrupt either (1) has committed an act of bankruptcy, or (2) has so neglected or is so neglecting, or is about so to neglect his property that it has deteriorated or is deteriorating or will deteriorate in value. If so, on a specified bond being filed, the judge must issue the warrant to the marshal, but not to another; and the marshal must seize and hold the property subject to further orders. The application may be made only in involuntary cases, but not before the bankruptcy petition is filed or after the adjudication.³ The remedy is, therefore, provisional. Its purpose is clearly to prevent deterioration or waste in the often long interval between the filing of an involuntary petition and an adjudication or dismissal.

c. Bond of petitioning creditors.—It is the obvious purpose of this section and of § 3-e to require indemnity to be given to an alleged bankrupt before his property shall be seized or taken from his possession in behalf of the petitioning creditor or creditors before there has been an adjudication. Without such indemnity a person not a bankrupt, or who has committed no act of bankruptcy, would not be adequately protected. Upon a dismissal of the petition for his adjudication he could in an extreme case probably maintain an action for malicious prosecution and recover in such action incidentally such damages as he may have sustained by the loss of the use of his property pending its restitution to him by the marshal. It would also be open to him to apply to the court and obtain an order directing a restitution of his property to him. It is the purpose of this provision to spare him the expense and trouble of seeking either of these remedies, by requiring the party or parties who seek to dispossess him of his property in advance of an adjudication to furnish him with a security adequate for his complete protection.⁴ Before a warrant is issued the creditors petitioning therefor must give a bond in an amount and with such sureties as may be required by the judge, to indemnify the bankrupt for "such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained." The words here, unlike the

1. See under Section Three of this work.

2. Act of 1867, § 40, R. S., § 5924.

3. This follows from the words "against

whom an involuntary petition has been filed and is pending."

4. *Matter of Haff* (C. C. A., 2d Cir.), 13 Am. B. R. 354, 135 Fed. 742.

section itself, are somewhat broader than those employed in § 3-e. It is thought that they mean substantially the same thing. "Damages" doubtless includes "costs" and "expenses."⁵ The discretion given the judge as to the sureties is no more than is allowed him by general statutes.⁶

d. Bonding the property back.—This is equivalent to the reclaimer of a defendant in replevin. The judge has like discretion as to the amount of the bond and the sureties. The condition of the bond is specified in the statute.⁷

e. Remedy where property is claimed by a third person.—Manifestly, this section applies only to cases where the property is physically in the possession of the bankrupt or his agent.⁸ The remedy is summary, as is that where a bankrupt, after adjudication, refuses to turn over property to his trustee.⁹ But, where the property is held adversely, even if fraudulently, the usual remedy of a plenary suit must be resorted to.¹⁰ This does not exclude the provisional remedy of injunction in cases where such a remedy is essential until an officer representing the court and the creditors can bring such suit.

f. The marshal's liability.—The marshal must decide what is, and what is not, the property of the bankrupt. If he seizes the property of another, he

5. A claim for damages under section 69-a, for a wrongful seizure of the bankrupt's property, is properly dismissed, where a judgment has already been awarded against the petitioning creditors and obligors upon the bonds filed in their behalf, as provided by section 3-e, for counsel fees, costs, disbursements and expenses, incurred in the proceeding. *Nixon v. Fidelity & Deposit Co. of Maryland* (C. C. A., 9th Cir.), 18 Am. B. R. 174, 150 Fed. 574.

6. See under Section Three of this work.

7. Compare *In re Harthill*, Fed. Cas. 6,161.

8. See *In re Hammond* (D. C., Mass.), 3 Am. B. R. 466, 474, 98 Fed. 845; *In re Ward* (D. C., Mass.), 5 Am. B. R. 215, 104 Fed. 985; *Bryan v. Bernheimer*, 181 U. S. 188, 5 Am. B. R. 623, 629; *In re Moody* (D. C., Ia.), 12 Am. B. R. 718, 721, 131 Fed. 525.

The filing of a petition in bankruptcy does not confer summary jurisdiction over property transferred to and in possession of a trustee for creditors. *Morning Telegraph Pub. Co. v. Hutchinson Co.* (Sup. Ct., Mich.), 17 Am. B. R. 425, 146 Mich. 38.

Seizure of property claimed by third person unauthorized.—"Section 69 is intended to authorize the court to prevent the waste, deterioration, or loss of the bankrupt's property in his possession, pending the hearing on the petition for adjudication, but it is not intended to authorize the taking away from third parties property to which they assert title" Thus, a warrant should not be issued to seize property claimed by virtue of a chattel mortgage and possessed prior to the filing of the petition. *In re Rockwood* (D. C., Ia.), 1 Am. B. R. 272, 91 Fed. 368. A warrant directing the marshal to seize property in the possession of third persons, under claim of title, is wholly unauthorized by the bankruptcy act, even though it is

claimed that the party holding the property received it by a transfer which is voidable or null under the act. *In re Kelly* (D. C., Tenn.), 1 Am. B. R. 306, 91 Fed. 504.

9. In such a case, a recusant bankrupt is, however, reached by contempt process.

10. See, generally, under Section Twenty-three of this work. Note also the method of avoiding preferences and fraudulent transfers considered under Sections Sixty, Sixty-seven and Seventy. All these remedies are generally available only *after adjudication*.

Property in possession of marshal.—Where the marshal, under the order of the bankruptcy court directing him to seize the estate of the bankrupt, peaceably and quietly becomes possessed of property as the property of the bankrupt, although the latter was holding it merely as the agent for his mortgagee, whose mortgage is on record, but of which the marshal had no actual notice at the time, the court will not turn over the property so seized by the marshal to the mortgagee claimant. *In re Bender* (D. C., Ark.), 5 Am. B. R. 632, 106 Fed. 873.

Property held adversely.—In *Matter of Andre* (C. C. A., 2d Cir.), 13 Am. B. R. 132, 135, 68 C. C. A. 374, the court, in construing sections 2 and 69, said: "We conclude that it is only in cases in which the property of the bankrupt is in the possession of a party not an adverse claimant that the courts of bankruptcy have authority under these sections to interfere with it unless the adverse claimant chooses to consent, but that these courts have jurisdiction to entertain proceedings to ascertain whether there is an adverse claimant and that the mere refusal of a person in possession to surrender the property does not constitute him an adverse claimant."

Where, prior to his adjudication in bankruptcy, an insolvent debtor had made a gen-

is liable to that other.¹¹ It is elementary that his warrant is not operative outside of his district.

g. Practice.—This remedy will rarely be resorted to. The requirement of a bond against damages will halt most petitioning creditors. Besides, there are the equivalent remedies of a receiver or an injunction, or the two combined.¹² When resort is had to it, the practice is simple. The application is made by motion based on affidavits, usually accompanying and perhaps referring to the involuntary petition, but always separate and distinct from such petition.¹³ The affidavits should be positive in their averments, not mere statements of opinions or conclusions, and establish all the essential facts.¹⁴ In short, they should amount to a proven *prima facie* case. The form of the bond is suggested by Form No. 10, though the latter is intended for use by the alleged bankrupt in reclaiming the property. It is thought that affidavits for the justification of sureties should be added; this, that the court may be satisfied as to their responsibility without further inquiry. A surety company bond can be used. If the affidavits and bond are sufficient, the warrant issues in the form prescribed by Form No. 8. The procedure thereafter is the same as that on any seizure by a Federal marshal. A marshal of seizure will not be issued under this section except upon a compliance with all the conditions prescribed therein; there can, therefore, be no waiver of the required affidavits and bond.¹⁵ The alleged bankrupt has two remedies; to move to vacate the warrant on the insufficiency of the affidavits or bond, or both, or to reclaim the property by filing a new bond. The latter method is more direct and is usually followed.¹⁶

eral assignment for the benefit of his creditors and subsequent to the filing of a petition in bankruptcy against the assignor, the assignee had sold the property of the bankrupt, and where, upon the petition of creditors of the bankrupt, the court of bankruptcy issued an order directing the marshal to seize the property so sold, and granted a rule directing the purchaser to appear before the court and prove his title to such property, it was held that the court of bankruptcy did not have jurisdiction by a summary proceeding to order the marshal to seize the property. The proper proceeding in such a case is a plenary action at law

or in equity. In re Abraham (C. C. A., 5th Cir.), 2 Am. B. R. 266, 93 Fed. 967.

11. In re Miller, Fed. Cas. 9,913; In re Marks, Fed. Cas. 9,096; Marsh v. Armstrong, 20 Minn. 81. This doctrine is subject to exceptions. In re Vogel, Fed. Cas. 16,982; In re Havens, Fed. Cas. 6,230.

12. Compare Blake v. Valentine (D. C., Cal.), 1 Am. B. R. 372, 89 Fed. 691. See also, generally, § 2(3) (15) and § 11-a, *ante*.

13. In re Kelly (D. C., Tenn.), 1 Am. B. R. 306, 91 Fed. 504.

14. *Id.*

15. In re Sarsar (D. C., Tenn.), 9 Am. B. R. 576, 120 Fed. 40.

16. See Form No. 10.

SECTION SEVENTY.

TITLE TO PROPERTY

§ 70. **Title to Property.**—*a* The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: *Provided*, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.

b All the real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value.

c The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee.

d Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge.

e The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a *bona fide* holder for value. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.**

f Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revert in him.

Analogous provisions: In U. S. As to property in general passing to the trustee, Act of 1867, § 14, R. S., § 5044; Act of 1841, § 3; Act of 1800, §§ 10, 11, 17, 27, 50; As to patents, copyrights, rights of action and the like, Act of 1867, § 14, R. S., § 5046; Act of 1841, § 3; Act of 1800, §§ 13, 17; As to sales by the trustee, Act of 1867, §§ 15, 25, R. S., §§ 5062, 5062B, 5063, 5064, 5065, 5066; As to sales of incumbered property, Act of 1867, § 20, R. S., § 5075.

In Eng.: As to property passing to the trustee, Act of 1883, §§ 43, 44, 59; As to burdensome property, Act of 1883, § 55; Act of 1890, § 13; As to sales by the trustee, Act of 1883, §§ 56(1), 70.

Cross-references: To the law: "Document" includes book, deed or instrument in writing, § 1(13).

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Collection of estates and distribution among creditors, § 2(7).

Bond where creditors ask for appointment of receiver prior to adjudication, § 3-e.

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* This sentence was added by the amendatory act of 1903.

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I. SECTION IN GENERAL.

a. Comparative legislation.—The analogous provisions of the English law are referred to in the Synopsis. The main differences are that title vests as of the date of the commission of the first act of bankruptcy,¹ and the property divisible among creditors includes not only what the debtor had at the commencement of the proceeding, but also what is acquired by or devolves on him before his discharge.² Each of our laws has had clauses regulating the vesting of title and indicating what vests.³ That of 1867 is most nearly like the section under discussion.⁴ Specific differences are considered in appropriate paragraphs, *post*. The differences between the old method of evidencing the vesting of title and that now the law have already been considered.⁵

b. Scope of section.—This section is chiefly important (*a*) for its provisions fixing what property of a bankrupt vests in his trustee and the time when it vests, and (*b*) as adopting as a part of the bankruptcy system the respective State statutes providing a remedy against fraudulent transfers.⁶ It also includes nearly all that is in the law relative to the method of selling a bankrupt's property. Besides, it provides for the appointment and reports of appraisers. The other subdivisions, *c*, *d* and *f*, have to do either with minor matters of practice or else refer directly to and would have been more appropriately incorporated in sections previously discussed.⁷

c. Conflict between bankruptcy act and State law.—Where the trustee in bankruptcy and a transferee of the bankrupt both claim certain property which once belonged to the bankrupt, it may be difficult to decide how far the title to the property in question depends upon the State law which determines the effect of the bankrupt's conveyance, and how far upon the bankrupt act which declares what property the trustee shall take. The one law regulates the passage of title from the bankrupt, and is interpreted by the State court. The other law regulates its passage to the trustee, and is interpreted by the federal court.⁸ Where there is conflict of jurisdiction, the exclusiveness of the jurisdiction of the court of bankruptcy will depend upon the possession, either actual or implied, of the property in question. If a petition has been filed and there has been an adjudication in the bankruptcy court, the property of the bankrupt, wherever situated, is brought into the control of the bankruptcy court and must be administered therein.⁹ So that where a petition

1. Eng. Act of 1883, § 43.

2. Eng. Act of 1883, § 44.

3. See "Analogous Provisions" at head of section.

4. For cases under that law, see *In re Rosenberg*, Fed. Cas. 12,055; *In re Wynne*, Fed. Cas. 18,117; *Markson v. Heaney*, Fed. Cas. 9,098.

5. See discussion under Section Twenty-one of this work. Compare, also, law of 1841, where the decree itself divested the bankrupt's title.

6. See under this section, *post*, subtitle "*Transfers Fraudulent Under State Laws May Be Avoided by Trustee.*"

7. As to *d*, see discussion under Sections Thirteen and Fifteen of this work. As to *f*, see discussion under Section Twelve.

8. *In re Littlefield* (C. C. A., 1st Cir.), 19

Am. B. R. 18, 155 Fed. 838, holding that "although the rights of a trustee in bankruptcy and those of an assignee in insolvency under the statute of Massachusetts are defined in similar language, yet a statute making a certain transfer void as against the latter *eo nomine* does not make it void as against the former."

9. *Bailey v. Baker Ice Machine Co.*, 239 U. S. 268, 35 Am. B. R. 814, 60 L. Ed. 275, 36 Sup. Ct. 50; *Lazarus v. Prentice*, 234 U. S. 263, 32 Am. B. R. 559, 58 L. Ed. 1305, 34 Sup. Ct. 851; *Robertson v. Howard*, 229 U. S. 254, 30 Am. B. R. 611, 57 L. Ed. 1174, 33 Sup. Ct. 854; *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 27 Am. B. R. 262, 56 L. Ed. 208, 32 Sup. Ct. 96; *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224, 46 L. Ed. 405, 22 Sup. Ct. 269;

has been filed against an alleged bankrupt, a State court has no right to seize or attach property admittedly belonging to the bankrupt, without the consent of the bankruptcy court, regardless of whether actual possession of the property has been taken by its officers.¹⁰

II. TRUSTEE VESTED WITH TITLE OF BANKRUPT.

a. In general.—Subsection *a* is the most important of all the subsections of this section. Under it the trustee is vested with the title of the bankrupt to all property possessed by him at the date of the adjudication, being within the classes therein enumerated, "except in so far as it is to property which is exempt." He is vested with such title only for the purpose of administration and distribution of the estate among the bankrupt's creditors.¹¹ He represents both the bankrupt and creditors. He succeeds to the right and title of the bankrupt for the benefit of his creditors, and in this capacity occasionally has rights not possessed by the bankrupt, as for instance, the right to recover assets which the bankrupt has conveyed in fraud of his creditors.¹²

b. When title vests.—(1) **IN GENERAL.**—Under the previous law, the trustee's title vested by relation as of the date of the commencement of the proceeding. This casts doubt on the validity even of *bon fide* transactions between petition filed and adjudication; in short, made business by an alleged, but not yet adjudicated, bankrupt practically impossible. Under the act of 1841, there seems to have been a similar doubt.¹³ The words "as to the date he was adjudicated a bankrupt" seem to have been inserted to meet these difficul-

Matter of Continental Coal Corp. (C. C. A., 6th Cir.), 38 Am. B. R. 168, 238 Fed. 113. See discussion under § 23, *ante*.

Property in custodia legis.—All the bankrupt's property, title to which is not held adversely by a third person, is, upon the filing of the petition in bankruptcy, placed in *custodia legis*. Matter of Larkey (D. C., N. J.), 32 Am. B. R. 287, 214 Fed. 867.

10. Matter of Wellmade Gas Mantle Co. (D. C., Mass.), 36 Am. B. R. 354, 230 Fed. 502, *affg.* 36 Am. B. R. 62; Matter of Huffman-Salvar Roofing Paint Co. (D. C., Ala.), 37 Am. B. R. 426, 234 Fed. 798.

11. Bracklee Co. v. O'Connor, 24 Am. B. R. 499, 122 N. Y. Supp. 710, 67 N. Y. Misc. 599; Reilley v. Buffalo German Insurance Co. (Sup. Ct. Spec. T., N. Y.), 32 Am. B. R. 728, 86 N. Y. Misc. 69, 147 N. Y. Supp. 1086; Chambers v. Kirk (Okla. Sup. Ct.), 32 Am. B. R. 175, 139 Pac. 986.

12. Matter of Place (D. C., N. Y.), 35 Am. B. R. 426, 224 Fed. 778.

Representative of creditors in action to set aside fraudulent conveyance.—In the case of Cartwright v. West (Ala. Sup. Ct.), 26 Am. B. R. 831, 55 So. 917, the court said: "The trustee in bankruptcy in a sense is representative of both the bankrupt and the creditors. As such he succeeds in right and title to the bankrupt's estate for the benefit of his creditors. He may, as a general rule, maintain all actions, both at law and in equity, for the recovery and preservation of the assets, both real and personal, of the

bankrupt's estate that the bankrupt himself, but for the bankruptcy, could have maintained. Even more, he may maintain an action the bankrupt could not, where, as in the present case, he seeks to avoid conveyances made by the bankrupt in fraud of his creditors. In this latter instance it cannot be said that the trustee is a representative of the bankrupt, for he (the bankrupt) could not maintain such a bill, nor in any legal or equitable proceeding become a beneficiary of his own fraudulent act."

Rights of trustee as against committee of creditors.—Where after bankrupt had absconded, a committee of creditors, prior to bankruptcy, took charge of his property without authority, selling and disposing of the same, paying the claims of alleged lienors, and depositing the balance, which was afterwards turned over to bankrupt's trustee, and it appeared that the bankrupt never ratified the transaction nor was informed thereof prior to his adjudication, the acts of the committee constituted a conversion of bankrupt's property, and bankrupt's trustee had the right to repudiate the transactions and follow the property, or, waiving the tort, sue the committee for the value. In re Thomas (D. C., N. Y.), 29 Am. B. R. 945, 199 Fed. 214.

See discussion under heading "*Transfers fraudulent under State laws*," *post*.

13. Compare *Ex parte Foster*, Fed. Cas. 4,960; *Ex parte Newhall*, Fed. Cas. 10,159; *In re Rust*, Fed. Cas. 12,171.

ties.¹⁴ They are not antagonistic to the words found later in subdivision (5). The former refer to the time of vesting; the latter to what vests.¹⁵

(2) TITLE VESTS AT DATE OF ADJUDICATION RELATING BACK TO DATE OF FILING PETITION.—Under the present law the trustee's title is that only which exists at the date of the adjudication,¹⁶ although such title relates back to the time of filing the petition.¹⁷ The purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed, and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition.¹⁸ The filing of an involuntary petition does not, *ipso facto*, take from the alleged bankrupt his dominion over his property; while his disposition of his property may be invalidated and set aside under certain circumstances, such property remains under his control until the adjudication. The remedy of the petitioning creditors, in case this freedom to trade is abused, is by the appointment of a receiver under § 2 (3) (15), or an appropriate proceeding under § 3-e or § 69.¹⁹ The trustee must exercise

14. See House Report No. 1,228, 54th Congress. The reason given in the text for the use of the language is sustained in the case of *Matter of Zotti* (C. C. A., 2d Cir.), 26 Am. B. R. 234, 186 Fed. 84, in which the court said: "It was because the act of 1867 threw doubt upon the validity of honest transactions that the words 'as of the date he was adjudicated a bankrupt,' were inserted by the act of 1898." (Citing *Collier*, 8th ed., p. 807.)

15. In *re* Pease (Ref., N. Y.), 4 Am. B. R. 578; In *re* Barrow (D. C., Va.), 3 Am. B. R. 414, 98 Fed. 582; In *re* Burka (D. C., Mo.), 5 Am. B. R. 12, 104 Fed. 326; In *re* Elmira Steel Co. (D. C., N. Y.), 5 Am. B. R. 484, 109 Fed. 456. Compare In *re* Harris (Ref., Ill.), 2 Am. B. R. 359, and In *re* Mussey (D. C., Mass.), 3 Am. B. R. 592, 99 Fed. 71.

16. *Matter of Zotti* (C. C. A., 2d Cir.), 26 Am. B. R. 234, 186 Fed. 84; In *re* Hurley (D. C., Mass.), 26 Am. B. R. 434, 185 Fed. 851; *Williams v. Noyes & Nutter Mfg. Co.* (Maine Sup. Ct.), 33 Am. B. R. 865, 92 Atl. 482.

17. *Everett v. Judson*, 228 U. S. 471, 30 Am. B. R. 1, 57 L. Ed. 927, 33 Sup. Ct. 568, affg. 27 Am. B. R. 704, 192 Fed. 834; *Toof v. City National Bank* (C. C. A., 6th Cir.), 30 Am. B. R. 79, 206 Fed. 250.

Title vests as of date of adjudication.—In the *Matter of Mertens* (C. C. A., 2d Cir.), 15 Am. B. R. 362, 368, 142 Fed. 445, 75 C. C. A. 548, Judge Wallace, speaking for this court, said: "By the present act, the title of the trustee is vested in the estate of the bankrupt 'as of the date he was adjudged a bankrupt.' We are of opinion that until the date of the adjudication a lienor or pledgee is at liberty to perfect any title which the nature of the lien permits. Under the act of 1867, no lien could be acquired after the filing of the petition in bankruptcy, because the title of the assignee vested as of the commencement of the proceeding in bankruptcy. Now the trustee takes the prop-

erty of the bankrupt in the condition in which he finds it at the date of the adjudication, unless it has been incurred fraudulently or in contravention of some of the provisions of the act." The principle here declared is in conflict with the rule laid down by the Supreme Court in *Everett v. Judson*, 228 U. S. 474, 30 Am. B. R. 1, 57 L. Ed. 927, 33 Sup. Ct. 568.

18. *Matter of Continental Coal Corp.* (C. C. A., 6th Cir.), 38 Am. B. R. 168, 238 Fed. 113; *Arnold v. Hoorigan* (C. C. A., 6th Cir.), 38 Am. B. R. 174, 238 Fed. 39; *Emerson-Brantingham Co. v. Lawson* (D. C., Iowa), 38 Am. B. R. 344, 237 Fed. 877; *Duncan v. Watson* (Ala. Sup. Ct.), 38 Am. B. R. 613, 73 So. 448; *Brewer v. Brown* (Ill. Sup. Ct.), 38 Am. B. R. 890, 109 N. E. 264; *Fairbanks Steam Shovel Co. v. Wills*, 240 U. S. 642, 36 Am. B. R. 754, 60 L. Ed. 841, 36 Sup. Ct. 466, affg. *Matter of Federal Contracting Co.* (C. C. A., 7th Cir.), 32 Am. B. R. 381, 212 Fed. 688; *Bailey v. Baker Ice Machine Co.*, 239 U. S. 268, 35 Am. B. R. 814, 60 L. Ed. 275, 36 Sup. Ct. 50; *Everett v. Judson*, 228 U. S. 474, 479, 30 Am. B. R. 1, 57 L. Ed. 927, 33 Sup. Ct. 568; *Zavelo v. Reeves*, 227 U. S. 625, 29 Am. B. R. 493, 57 L. Ed. 676, 33 Sup. Ct. 365; *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 27 Am. B. R. 262, 56 L. Ed. 208, 32 Sup. Ct. 96.

Rights determined as of date of filing petition.—When not otherwise specially provided, the rights, remedies, and powers of the trustee are determined with reference to the conditions existing when the petition is filed. It is then that the bankruptcy proceeding is initiated, that the hands of the bankrupt and his creditors are stayed, and that his estate passes actually or potentially into the control of the court. *Bailey v. Baker Ice Machine Co.*, 239 U. S. 268, 35 Am. B. R. 814, 60 L. Ed. 275, 36 Sup. Ct. 50.

19. In *re* LaPlume Condensed Milk Co. (D. C., Pa.), 16 Am. B. R. 729, 145 Fed.

his option to accept within a reasonable time or he will be held to have waived his rights.²⁰

c. Bankrupt's title between petition filed and (1) adjudication and (2) appointment of trustee.—It follows that, under the present law, the title remains in the bankrupt at least to the date of adjudication; perhaps even to the date of the appointment of the trustee.²¹ Thus, the bankrupt is not divested of his title until the appointment and qualification of the trustee.²² A suit for the infringement of a copyright may be prosecuted,²³ and lands sold for taxes may be redeemed by the bankrupt after a petition has been filed and before the appointment of a trustee.²⁴ But after the adjudication the bankrupt has no standing in court as to his property which is not exempt.²⁵ Prior to adjudication, fraud being absent, it may be transferred; but, being liable to be divested, no permanent lien can attach to it.²⁶ When, however, the trustee is appointed, his title goes back by relation to the date of the adjudication,²⁷ although for jurisdictional purposes rights in the property will relate back to the date of the commencement of the proceeding.²⁸ Illustrative cases under the former

1,013; *American Trust Co. v. Wallis* (C. C. A., 3d Cir.), 11 Am. B. R. 360, 126 Fed. 464.

20. *Smith v. Gordon*, 6 Law Rep. 313. See Am. Bankr. Dig. § 413.

Estoppel to assert title.—Where a trustee in bankruptcy without asserting his claim thereto within a reasonable time, having knowledge of all the circumstances, allows third parties, in the prosecution of their legal rights, to acquire an interest in any part of the unclaimed assets of the bankrupt, he may be held to have waived his claim thereto. *Mesirov v. Innis Sperden & Co.* (N. J. Sup. Ct.), 37 Am. B. R. 201, 97 Atl. 160.

Failure of trustee to assert title.—The fact that a trustee in bankruptcy, after an attachment of property within four months of bankruptcy, fails to assert title for some time, does not estop him from subsequently asserting title or from interfering with a sale under the attachment. *Matter of Gilonite Mines Co.* (D. C., Pa.), 37 Am. B. R. 473.

21. Though the better view is that, after adjudication, it is *in custodia legis*. *Keegan v. King* (D. C., Ind.), 3 Am. B. R. 79, 96 Fed. 758; *March v. Heaton*, Fed. Cas. 9,061; *In re Rosenberg*, Fed. Cas. 12,055; *Reilly v. Insurance Co.* (N. Y. Sup. Ct., Spec. T.), 32 Am. B. R. 728, 86 N. Y. Misc. 69, 147 N. Y. Supp. 1086.

22. *Rand v. Iowa Central R. Co.*, 16 Am. B. R. 692, 186 N. Y. 58, 78 N. E. 574, rev'd. 12 Am. B. R. 164, 96 N. Y. App. Div. 413, 89 N. Y. Supp. 212; *Fuller v. New York Fire Ins. Co.*, 184 Mass. 12, 67 N. E. 879; *Gordon v. Mechanics & Traders' Ins. Co.*, 22 Am. B. R. 649, 120 La. Ann. 441, 45 So. 384; *In re Thomas* (D. C., N. Y.), 29 Am. B. R. 945, 199 Fed. 214; *In re Banks* (D. C., N. Y.), 31 Am. B. R. 270, 207 Fed. 662.

Cancellation of executory contract of sale to bankrupt between adjudication and appointment of trustee.—During the interval between the adjudication in bankruptcy and the appointment of a trustee, the vendor in an executory contract for the sale of land

to the bankrupt may serve notice upon the bankrupt for the termination and cancellation of the contract for default in payment of the purchase price, and the notice so served is valid and effectual unless the result of fraud or collusion with the bankrupt and for the purpose of defeating the rights of creditors. *Christopherson v. Harrington* (Minn. Sup. Ct.), 32 Am. B. R. 842, 136 N. W. 289.

23. *Myers v. Callaghan*, 5 Fed. 726.

24. *Hampton v. Rouse*, 22 Wall. 263, 22 L. Ed. 755.

25. *Pickens v. Roy*, 187 U. S. 177, 9 Am. B. R. 47, 47 L. Ed. 128, 23 Sup. Ct. 78, affg. *Pickens v. Dent* (C. C. A., 4th Cir.), 5 Am. B. R. 644, 106 Fed. 653.

26. *In re Engle* (D. C., Pa.), 5 Am. B. R. 372, 105 Fed. 893; *State Bank of Chicago v. Cox* (C. C. A., 7th Cir.), 16 Am. B. R. 32, 143 Fed. 91. Compare *In re Corbett* (D. C., Wis.), 5 Am. B. R. 224, 104 Fed. 872.

Purchasers in good faith.—Those acquiring rights to a bankrupt's property subsequent to his adjudication, who have knowledge of sufficient facts to put them on inquiry, are not *bona fide* purchasers. *Hull v. Burr* (Fla. Sup. Ct.), 26 Am. B. R. 897, 55 So. 852.

27. *Hiscock v. Varick Bank*, 206 U. S. 28, 18 Am. B. R. 1, 9, 51 L. Ed. 945, 27 Sup. Ct. 681, affg. 15 Am. B. R. 362, 142 Fed. 445; *French v. White*, 18 Am. B. R. 905, 78 Vt. 89, 62 Atl. 35; *Matter of Morse* (D. C., N. Y.), 32 Am. B. R. 207, 210 Fed. 900; *Christopherson v. Harrington* (Minn. Sup. Ct.), 32 Am. B. R. 842, 136 N. W. 289.

Upon the appointment and qualification of a trustee, his title relates back to the time of the adjudication, and his rights and remedies as to property previously disposed of are definitely defined and limited by the bankruptcy act. *In re Letson* (C. C. A., 8th Cir.), 19 Am. B. R. 506, 157 Fed. 78.

28. *In re Appel* (D. C., Neb.), 4 Am. B. R. 722, 103 Fed. 931. Compare *In re*

law, which, however, for reasons above stated, should be read with caution, will be found in the foot-note.²⁹

d. **What vests.**—(1) **IN GENERAL.**—In respect to the property which vests the present statute deals in particulars, where in the former general words were used.³⁰ It is not thought that they differ in meaning. The various subdivisions are considered *seriatim* later. Stated broadly, the rule is that the trustee takes all the property of the bankrupt, whether in possession or in action, at the time the petition was filed,³¹ subject, of course, to the new rule as to vesting just considered. Whether the bankrupt was in possession and the owner of the property at the time, must be determined by the circumstances; the determination of such question will depend upon the same facts as though bankruptcy had not intervened.³² The trustee does not take title to money and property in possession of third persons which did not belong to the bankrupt prior to his adjudication. The question of ownership is one

Cramond (D. C., N. Y.), 17 Am. B. R. 22, 145 Fed. 966, holding that the amount due to a bankrupt upon a paving contract with a city, when he files his petition, is properly paid to his trustee. Matter of Hooks Smelting Co. (D. C., Pa.), 15 Am. B. R. 83, 138 Fed. 954, holding that trustee is entitled to combination of safe belonging to bankrupt at time of filing petition; Whitesley v. Becker & Co., 25 Am. B. R. 672, 678, 142 N. Y. App. Div. 313, 126 N. Y. Supp. 1046, citing text; Corbett v. Riddle (C. C. A., 4th Cir.), 31 Am. B. R. 330, 209 Fed. 811. And see cases cited under preceding heading "*When title vests.*"

29. *Connor v. Long*, 104 U. S. 228, 26 L. Ed. 723; *Chapman v. Brewer*, 114 U. S. 158, 29 L. Ed. 83, 5 Sup. Ct. 799; *Howard v. Compton*, Fed. Cas. 6,753; *Babbett v. Burgess*, Fed. Cas. 693; *Miller v. O'Brien*, Fed. Cas. 9,586; *In re Lake*, Fed. Cas. 7,992; *Stevens v. Bank*, 101 Mass. 109.

30. Compare Act of 1867, § 14, R. S., § 5044.

31. *In re Pease* (Ref., N. Y.), 4 Am. B. R. 578; *In re Burka* (D. C., Md.), 5 Am. B. R. 12, 104 Fed. 326. For peculiar cases bearing on this general doctrine, see *In re Meyer* (D. C., N. Y.), 5 Am. B. R. 593, 106 Fed. 828; see also *McFarland Carriage Co. v. Solanas* (D. C., La.), 6 Am. B. R. 221, 108 Fed. 532; *Matter of Sherman Mfg. Co.* (Ref., Mass.), 15 Am. B. R. 740; *In re Driggs* (D. C., N. Y.), 22 Am. B. R. 621, 171 Fed. 897, holding that wages or salary due at the time of filing the petition belong to the trustee unless an exemption is claimed, and cannot be reached under an execution issued within the four months' period; *In re Peacock* (D. C., N. Car.), 24 Am. B. R. 159, 178 Fed. 851; *Toof v. City National Bank* (C. C. A., 6th Cir.), 30 Am. B. R. 79, 206 Fed. 250; *Matter of Commonwealth Lumber Co.* (D. C., Wash.), 35 Am. B. R. 202, 223 Fed. 667; *Matter of Place* (D. C., N. Y.), 35 Am. B. R. 426, 224 Fed. 778; *Bynum v. Scott* (D. C., N. Car.), 33 Am. B. R. 436, 217 Fed. 122; *Jackson v. Jetter* (Iowa Sup. Ct.), 32 Am. B. R. 667, 142 N. W. 431.

The effect of an adjudication in bank-

ruptcy is to transfer the title of the property of the bankrupt, whenever situated, and vest the same in the trustee, who has the right under the authority and control of the court to administer the same. *Robertson v. Howard*, 229 U. S. 254, 30 Am. B. R. 611, 57 L. Ed. 1174, 33 Sup. Ct. 854.

Extent of title.—The effect of the adjudication of bankruptcy to vest the trustee of the estate by operation of law with the title of the bankrupt, as of the date he was adjudicated a bankrupt, to all property not exempt, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process, is both expressly provided and well settled in meaning to this extent, that the estate is absolutely vested in the trustee until it has subverted the purpose of the bankruptcy proceedings, although the bankrupt is entitled to restoration of any residue which may remain when that purpose is fulfilled. *Matter of Scott* (C. C. A., 7th Cir.), 33 Am. B. R. 53.

32. Sufficiency of delivery of assets by bankrupt.—A written contract between the petitioner and the bankrupt, made more than a year before the adjudication, provided that petitioner was to purchase certain lumber sawed at the bankrupt's mills at designated prices, which when sawed was to be piled at the mills according to detailed specifications, twice each month the petitioner to cause the lumber so piled to be estimated and branded with petitioner's initials "O. C. & L. Co." and to make an advance payment thereon of \$10 per thousand, and that such acts should constitute a delivery of the same for all intents and purposes. *Held*, that, having regard to the situation and condition of the property, the customs of business men adapted thereto and the intent of the statute, such delivery was sufficient under a Missouri law providing that "every sale made by the vendor of goods and chattels in his possession or under his control, unless the same be accompanied by delivery in a reasonable time, regard being had to the situation of the property, and be followed by an actual and continued change of possession of

of fact.³³ The property which passes is not confined to that described in the bankrupt's schedule; any property owned by him passes to the trustee on adjudication.³⁴ Where, under a State statute, a stockholder's liability is enforceable only by creditors and not by the corporation, as for an overvaluation of property transferred in payment of a stock subscription, it is not property which passes to the trustee.³⁵ In those jurisdictions where tenancy by the entirety is recognized a trustee in bankruptcy of a husband or wife is clothed with the interest of the bankrupt in property held by the entirety, but his right to it must await the contingency of the bankrupt surviving his spouse.³⁶

(2) PROPERTY ACQUIRED AFTER FILING PETITION.—The trustee only acquires such property as belonged to the bankrupt at the time the petition was filed. Property not then owned but acquired before the adjudication,³⁷ and surely property acquired after it and before the discharge,³⁸ does not vest in the trustee, but becomes the bankrupt's, clear of the claims of creditors, save those after the commencement of the proceedings or those who, for statutory reasons, are not affected by the discharge.³⁹ This rule is especially applicable in case of earnings by labor and services performed subsequent to the filing of the petition.⁴⁰ And where land remains in the possession of the bankrupt after the adjudication because of an exemption or of a statutory provision giving such possession to the bankrupt as a special privilege, the crops growing thereon will be deemed "after acquired property," and do not pass to the trustee.⁴¹ Property acquired between the filing of the petition and the adjudication is subject to the same rule as after-acquired property and

the things sold, shall be held to be fraudulent and void as against the creditors of the vendor or subsequent purchasers in good faith," and that petitioner's claim of title to lumber so estimated and marked should be allowed. *In re Ozark Cooperage & Lumber Co.* (C. C. A., 8th Cir.), 24 Am. B. R. 835, 180 Fed. 105. See also *Lovell v. Newman & Son* (D. C., La.), 26 Am. B. R. 660, 188 Fed. 534.

33. *Clay v. Waters* (C. C. A., 8th Cir.), 20 Am. B. R. 561, 161 Fed. 815; *Matter of McCord* (C. C. A., 2d Cir.), 23 Am. B. R. 164, 174 Fed. 820.

When trustee may recover savings of wife from business earnings of husband.—Savings by a wife from the business earnings of her husband are a part of his estate in bankruptcy, and may be reached by his trustee, unless an absolute gift under proper circumstances, while the husband was solvent, can be shown. *Milkman v. Arthe* (D. C., N. Y.), 33 Am. B. R. 418, 221 Fed. 134.

34. *Jones v. Barnes* (Miss. Sup. Ct.), 35 Am. B. R. 64, 66 So. 212.

35. *Matter of Huffman-Salvar Roofing Paint Co.* (D. C., Ala.), 37 Am. B. R. 426, 234 Fed. 798.

36. *Frey v. McGraw* (Md. Ct. of App.), 35 Am. B. R. 822.

37. *In re Harris* (Ref., Ill.), 2 Am. B. R. 359.

Legacies.—Where testator died in the morning of the day on which a legatee filed a petition and was adjudicated a bankrupt, the legacy vests in his trustee. *In re McKenna* (D. C., N. Y.), 15 Am. B. R. 4, 137

Fed. 611. Otherwise where legacy takes effect after adjudication: *In re Woods* (D. C., Pa.), 13 Am. B. R. 240, 133 Fed. 82.

38. *In re Rennie* (Ref. Ind. Terr.), 2 Am. B. R. 182; *In re Stoner* (D. C., Pa.), 5 Am. B. R. 402, 105 Fed. 752; *In re West* (D. C., Ore.), 11 Am. B. R. 782, 128 Fed. 205; *Leitch v. Northern Pac. Ry. Co.*, 24 Am. B. R. 409, 103 N. W. 704.

39. See Bankr. Act, § 17. *In re West* (D. C., Ore.), 11 Am. B. R. 782, 128 Fed. 205. Text cited and approved in *Whitlock's License*, 22 Am. B. R. 262, 39 Pa. Super. Ct. 34, holding that a liquor license granted to a bankrupt after his adjudication belongs to him and not his trustee.

40. *In re Lineberry* (D. C., Ala.), 25 Am. B. R. 164, 183 Fed. 338; *Leitch v. Northern Pac. Ry. Co.* (Minn.), 14 Am. B. R. 409, 103 N. W. 704; *In re Home Discount Co.* (D. C., Ala.), 17 Am. B. R. 168, 147 Fed. 538; *Matter of O'Gillespie* (D. C., N. Y.), 32 Am. B. R. 434, 209 Fed. 1003; *Matter of Green* (D. C., N. Y.), 32 Am. B. R. 433, 213 Fed. 542; *Matter of Collins* (D. C., N. Y.), 32 Am. B. R. 431, 213 Fed. 543; *Progressive Bldg. & Loan Co. v. Hall* (C. C. A., 4th Cir.), 33 Am. B. R. 313, 220 Fed. 45.

41. *Matter of Miller* (D. C., Mont.), 34 Am. B. R. 614, 221 Fed. 690, holding that where a voluntary bankrupt at the date of his adjudication occupied a homestead upon public lands of the United States and had sown thereon 50 acres of winter wheat, which he harvested in due time, such growing crop did not vest in the trustee upon filing the petition in bankruptcy, and the bankrupt can-

belongs to the bankrupt.⁴² A claim for a reward for information given against smugglers, which is not allowed until after the claimant's adjudication, does not pass to his trustee; the reward belongs to the bankrupt and does not pass upon his bankruptcy, and his failure to oppose his bankruptcy does not estop him from insisting that the reward is his own property.⁴³

e. Subject to all claims, liens, and equities.—(1) **IN GENERAL.**—It is well settled that the trustee takes not as an innocent purchaser, but subject to all valid claims, liens, and equities.⁴⁴ The validity of such claims, liens, and equities is to be determined, in the absence of federal statutes, by the local

not be compelled to schedule the same; *Jackson v. Jetter* (Iowa Sup. Ct.), 32 Am. B. R. 667, 142 N. W. 431.

42. In re Harris (D. C., Ill.), 2 Am. B. R. 359, 99 Fed. 71; In re Pease (Ref., N. Y.), 4 Am. B. R. 578; In re Burka (D. C.), 5 Am. B. R. 12, 104 Fed. 326; In re Elmira Steel Co. (D. C., N. Y.), 5 Am. B. R. 487, 109 Fed. 456; *Sibley v. Nason*, 22 Am. B. R. 712, 196 Mass. 125, 81 N. E. 887, 12 L. R. A. (N. S.) 1173, 124 Am. St. Rep. 520; In re Judson (D. C., N. Y.), 26 Am. B. R. 775, 188 Fed. 702.

43. *Matter of Ghazal* (C. C. A., 2d Cir.), 23 Am. B. R. 178, 174 Fed. 809.

44. *Chattanooga Nat. Bank v. Rome Iron Co.* (C. C., Ga.), 4 Am. B. R. 441, 102 Fed. 755. The valid liens referred to are those valid as to creditors. In re Cramond (D. C., N. Y.), 17 Am. B. R. 22, 145 Fed. 966; *Receivers, etc., v. Staake* (C. C. A., 4th Cir.), 13 Am. B. R. 281, 133 Fed. 717. This case was affirmed in 202 U. S. 141, 15 Am. B. R. 639, 50 L. Ed. 967, 26 Sup. Ct. 580. Compare In re Standard Laundry Co. (D. C., Cal.), 7 Am. B. R. 254, 112 Fed. 126; *Crosby v. Miller* (C. A., D. Col.), 16 Am. B. R. 805, 25 R. I. 172; In re Kolin (C. C. A., 7th Cir.), 13 Am. B. R. 531, 134 Fed. 557; In re Platteville F. & M. Co. (D. C., Wis.), 17 Am. B. R. 291, 147 Fed. 828; *Godwin v. Murchison Nat. Bank*, 22 Am. B. R. 703, 145 N. C. 320, 59 S. E. 154; In re Scruggs (D. C., Ala.), 31 Am. B. R. 94, 205 Fed. 673, citing text; *Matter of Scofield Co.* (C. C. A., 2d Cir.), 32 Am. B. R. 817, 215 Fed. 45; *Matter of Hollins* (C. C. A., 2d Cir.), 32 Am. B. R. 812, 215 Fed. 41; *Matter of Elmore Cotton Mills* (D. C., Ala.), 33 Am. B. R. 544, 217 Fed. 810; *Matter of Johnson* (D. C., Conn.), 33 Am. B. R. 104, 215 Fed. 666; *Matter of Morse* (D. C., N. Y.), 32 Am. B. R. 207, 210 Fed. 900; *Hartman v. Singer* (D. C., W. Va.), 33 Am. B. R. 369, 215 Fed. 986; *Harris v. Luxury Fruit Co.* (Ga. Sup. Ct.), 32 Am. B. R. 652, 82 S. E. 447; *Williams v. Noyes & Nutter Mfg. Co.* (Maine Sup. Ct.), 33 Am. B. R. 865, 92 Atl. 482; *Leslie Paper Co. v. Wheeler* (N. Dak. Sup. Ct.), 32 Am. B. R. 688, 137 N. W. 412.

Trustee takes property subject to equities, etc.—The trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands

of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the act. *Thompson v. Fairbanks*, 196 U. S. 516, 13 Am. B. R. 437, 445, 49 L. Ed. 577, 25 Sup. Ct. 306. The trustee takes his interest of the bankrupt subject to such liens or incumbrances as would have affected it had no adjudication in bankruptcy been made. *Matter of Alden* (Ref., Ohio), 16 Am. B. R. 362, 370. A trustee takes not as a *bona fide* purchaser for value, but as the bankrupt held the property, subject to all valid claims, liens and equities. *Zartman v. First Nat. Bank*, 216 U. S. 134, 23 Am. B. R. 635, 54 L. Ed. 418, 30 Sup. Ct. 368, affg. 189 N. Y. 533, 82 N. E. 1126.

Same plight or condition.—In re *Gracewich* (C. C. A., 2d Cir.), 8 Am. B. R. 149, 115 Fed. 87–89, 53 C. C. A. 510, 512, the rule is thus stated:

"Under the present Bankruptcy Act, as under previous bankruptcy acts, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the Act."

In *First National Bank v. Staake*, 202 U. S. 141–149, 15 Am. B. R. 639, 26 Sup. Ct. 580, 50 L. Ed. 967, the Supreme Court approves the following language of the Circuit Court of Appeals for the Fourth Circuit:

"This rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held it is not applicable to liens which, although valid as to the bankrupt, are invalid as to creditors." See also In re *Hurley* (D. C., Mass.), 26 Am. B. R. 434, 185 Fed. 851.

Character of trustee's title.—Trustees and receivers in bankruptcy, in the absence of fraud, take the assets of a bankrupt, subject to all equitable liens in favor of third parties, to the extent that such assets have been augmented by the wrongful act of the bankrupt. In re *Dunn & Co.* (D. C., Ark.), 28 Am. B. R. 127, 193 Fed. 212.

Effect of attempt to enforce liens.—In *Pugh v. Loisel* (C. C. A., 5th Cir.), 33 Am. B. R. 580, 219 Fed. 417, the court said:

law as evidenced by the decisions of the State courts.⁴⁵ Thus, he has no better title than the bankrupt had,⁴⁶ and is affected with every equity which would affect the bankrupt himself if he were asserting the same rights and

"We think it is apparent that the bankruptcy act, as a whole, contemplates the taking possession and control of the bankrupt's estate by the court of bankruptcy acting through its trustee. The property is taken into custody in the condition in which it is found at the time of the filing of the petition, subject to all existing valid liens upon it. The filing of petition, of course, does not displace or disturb such liens; but neither the existence of such liens nor attempts of the lienors to enforce them without resorting to the court of bankruptcy for that purpose constitute obstacles to the exercise by that court of the right to take into custody the bankrupt's estate and to control the administration of it. The court is vested with ample power to protect the rights of lienholders otherwise than by permitting them to be enforced in some other court or courts."

45. *In re Wade* (D. C., Mo.), 26 Am. B. R. 169, 185 Fed. 664; *Thompson v. Fairbanks*, 196 U. S. 516, 15 Am. B. R. 633, 49 L. Ed. 577, 25 Sup. Ct. 306; *In re Standard Telephone & Elec. Co.*, 216 U. S. 545, 24 Am. B. R. 761, 767, 54 L. Ed. 610, 30 Sup. Ct. 412; *Matter of Fite* (D. C., Pa.), 31 Am. B. R. 308, 61 Pittsburgh Leg. J. 169.

46. *In re N. Y. Economical Pr. Co.* (C. C. A., 2d Cir.), 6 Am. B. R. 615, 110 Fed. 514; *In re Platteville Foundry & Machine Co.* (D. C., Wis.), 17 Am. B. R. 291, 293, 147 Fed. 828, holding that the trustee does not take property sold to the bankrupt by conditional sale with a reservation of title in the vendor; *Matter of Hamil* (D. C., N. Y.), 38 Am. B. R. 205, 236 Fed. 292, holding that a trustee occupies no different position as to a contract of conditional sale than the latter would have occupied if bankruptcy had not intervened. The property is subject to all equities impressed upon it in the hands of the bankrupt; *In re Snelling* (D. C., Mass.), 29 Am. B. R. 818, 202 Fed. 259.

In Pennsylvania the vendee under a contract for a sale of land is regarded as the real owner and the vendor has no lien thereon aside from his legal estate, or the remedy which he has by reason thereof; so where the vendee is adjudged a bankrupt before the purchase price is paid, the trustee succeeds to his interests and is entitled to the proceeds of the sale of certain removable fixtures erected thereon by the vendee. *In re Clark & Co.* (D. C., Pa.), 9 Am. B. R. 252, 118 Fed. 358; *Bush v. Export Storage Co.* (C. C., Tenn.), 14 Am. B. R. 138, 136 Fed. 918.

Covenant running with land: effect on title acquired by trustee, see *Hinchman v. Consolidated Arizona Smelting Co.* (D. C., Me.), 29 Am. B. R. 893, 198 Fed. 907.

Trade fixtures may be removed by trustee under a lease providing for surrender of premises in good order, with all improvements, etc. *Montello Brick Co. v. Trexler*

(C. C. A., 6th Cir.), 21 Am. B. R. 896, 167 Fed. 482. See rule in Pennsylvania as laid down in *Matter of Beeg* (D. C., Pa.), 25 Am. B. R. 572, 184 Fed. 522.

Title no better than that of bankruptcy.—Mr. Justice Peckham, speaking for the Supreme Court in *Security Warehousing Co. v. Hand*, 206 U. S. 415, 19 Am. B. R. 291, 51 L. Ed. 1117, 27 Sup. Ct. 720, affg. 16 Am. B. R. 49, 143 Fed. 32, said: "It is no new doctrine that the assignee or trustee in bankruptcy stands in the shoes of the bankrupt, and that the property in his hands, unless otherwise provided in the bankrupt act, is subject to all the equities impressed upon it in the hands of the bankrupt." This has been the rule under former acts and is now the rule."

The decision in this case received the attention of the Supreme Court in the case of *In re Standard Telephone & Elec. Co.*, 216 U. S. 545, 24 Am. B. R. 761, 767, 54 L. Ed. 610, 30 Sup. Ct. 412, where the court says: "But it is said the trustee in bankruptcy may not defend against these mortgages. It is contended that they are good as between the parties, and that as to them the trustee in bankruptcy occupies no better position than the bankrupt. This question was raised and decided in *Security Warehousing Co. v. Hand*, 206 U. S. 415, 19 Am. B. R. 291, 51 L. Ed. 1117, 27 Sup. Ct. 720. That case arose in Wisconsin, and it was therein held that, under the Wisconsin law, an attempted pledge of property, without change of possession, was void under the laws of that State. In that case, as in this one, the question was raised as to whether the trustee in bankruptcy could question the transaction, and it was contended that, being valid as between the parties, the trustee took only the right and title of the bankrupt. The question was fully considered therein, and the previous cases in this court were reviewed. The principle was recognized that the trustee in bankruptcy stands in the shoes of the bankrupt, and that the property in his hands is subject to the equities impressed upon it while in the hands of the bankrupt."

"But it was held that the attempt to create a lien upon the property of the bankrupt was void as to general creditors under the laws of Wisconsin. Applying § 70-a of the bankruptcy act, it was held that the trustee in bankruptcy was vested by operation of the bankruptcy law with the title of the property transferred by the bankrupt in fraud of creditors, and also that the trustee took the property which, prior to the filing of the petition, might have been levied upon and sold by judicial process against the bankrupt."

"It was therefore held that as there had been no valid pledge of the property, for want of change of possession, it could have been

interests.⁴⁷ A trustee in bankruptcy stands in the shoes of the bankrupt, and has no better title than he had at the time of the filing of the petition, except so far as the status is modified by fraud of the bankrupt,⁴⁸ or as conditions may have been changed by the amendment of 1910 of § 47-a (2), so far as the right of the trustee to attack fraudulent transfers or liens is concerned.⁴⁹ If special creditors have claims against specific property as against other creditors having alleged liens thereon, a trustee is clothed with the power and duty of protecting and preserving such claims.⁵⁰ Where a right of action passes to the trustee any defense, legal or equitable, which might have been raised against the bankrupt's claim may be raised against the trustee.⁵¹ Where

levied upon and sold under judicial process against the bankrupt, at the time of the adjudication in bankruptcy and passed to the trustee in bankruptcy." See also *In re Gebbie & Co.* (D. C., Pa.), 21 Am. B. R. 694, 167 Fed. 609; *Wood Co. v. Eubanks* (C. C. A., 4th Cir.), 22 Am. B. R. 307, 169 Fed. 929.

47. *In re Dow*, Fed. Cas. 4,036, 6 N. B. R. 10, quoting from *Bacon v. Heathcote*, 1 Atl. 160: "The ground that the court goes upon is this, that assignees of bankrupts, though they are trustees for creditors, yet stand in the place of the bankrupt, and they can take in no better manner than he could."

48. *In re Blake* (C. C. A., 8th Cir.), 17 Am. B. R. 668, 150 Fed. 279; *In re Great Western Mfg. Co.* (C. C. A., 8th Cir.), 18 Am. B. R. 259, 152 Fed. 123; *In re Dunlop* (C. C. A., 8th Cir.), 19 Am. B. R. 361, 367, 156 Fed. 945; *In re Chantler Cloak & Suit Co.* (D. C., R. I.), 18 Am. B. R. 498, 151 Fed. 952; *Drede v. Gilley* (N. Y. Sup. Ct.), 21 Am. B. R. 170, 61 N. Y. Misc. 530, revd. on other grounds 21 Am. B. R. 821, 132 N. Y. App. Div. 293, 47 N. Y. Supp. 5; *In re De Long Furniture Co.* (D. C., Pa.), 26 Am. B. R. 469; *In re Thompson* (D. C., N. J.), 30 Am. B. R. 64, 205 Fed. 556.

Character of trustee's title.—A trustee in bankruptcy takes the property of the bankrupt, not as an innocent purchaser, but as the debtor had it at the time of the petition, subject to all valid claims, liens and equities. *In re Interstate Paving Co.* (D. C., N. Y.), 28 Am. B. R. 573, 197 Fed. 371.

As to real estate held by the bankrupt as a tenant in common, the trustee takes the interest of the bankrupt, not as an innocent purchaser, but in the same plight and condition as the bankrupt held it and subject to all the equities that exist in favor of his cotenant. *In re McConnell* (D. C., N. Y.), 28 Am. B. R. 659, 197 Fed. 492.

Whatever rights a third party had against the property of a bankrupt before the adjudication, that party, in the absence of fraud, or fixed liens created by State statutes in favor of others, has against his estate in bankruptcy. *Atchison, etc., Ry. Co. v. Hurley* (C. C. A., 8th Cir.), 18 Am. B. R. 396, 153 Fed. 503; *Foerstner v. Citizens' Sav. & Trust Co.* (C. C. A., 6th Cir.), 26 Am. B. R. 177, 186 Fed. 1.

Stock bought by a bankrupt broker for a customer with the customer's money belong

to the customer and the certificates cannot be retained by the trustee of the bankrupt. *In re Meadow, Williams & Co.* (D. C., N. Y.), 23 Am. B. R. 124, 173 Fed. 694, affd. 24 Am. B. R. 251, 177 Fed. 1004; *Cummings v. Synnott* (C. C. A., 3d Cir.), 25 Am. B. R. 859, 184 Fed. 718; *Matter of McIntyre & Co.* (C. C. A., 2d Cir.), 24 Am. B. R. 626, 181 Fed. 955.

Trustee takes property in same condition as bankrupt.—It has been often declared by the Supreme Court of the United States that under the present bankrupt act the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt. The trustee in a certain sense is the bankrupt. The bankrupt's title is his title, whether it be to things in possession or to choses in action. This title cannot rise higher than that of the bankrupt, so as to infringe upon or destroy the interest in or title to the property, good as against the bankrupt himself. *Davis v. Compton* (C. C. A., 3d Cir.), 20 Am. B. R. 53, 158 Fed. 735.

Right of pledgee of mortgages on real property to collect rents.—A pledgee of mortgages on real property as collateral security is not entitled to collect the rents as against the trustee in bankruptcy of the pledgor, where he is not in possession, although he has given notice of an asserted right to collect the rents. *Matter of Sweeney* (C. C. A., 3d Cir.), 32 Am. B. R. 302, 212 Fed. 1.

49. See discussion under 47-a (2), *ante*.

50. *In re Martin* (C. C. A., 8th Cir.), 23 Am. B. R. 151, 173 Fed. 597.

51. *Jenkins v. Pierce*, 98 Ill. 646.

Fraud of bankrupt as defense.—Where the bankrupts agreed to build a locomotive for certain parties and notified them that it was completed and had been shipped, and thereupon were paid the price, it appearing that no engine existed at the time it was represented as having been shipped, but that subsequently two were built, either of which would answer the contract, it was held that the bankrupt and his assignee were both estopped by the fraud of the bankrupt from denying that one of the engines then in their possession was the property of the parties who had thus been defrauded. *In re McKay & Aldus*, 3 N. B. R. 50, 1 Lowell,

a bankrupt in due course of the transaction of its business, some time prior to bankruptcy, treats property as sold, and the proceeds thereof as due, and assigns the same as collateral security to a loan, the trustee will be bound by the bankrupt's acts and is estopped from asserting that there was no sale.⁵²

(2) **DISPOSITION OF PROPERTY SUBJECT TO LIEN OR INCUMBRANCE.**—A lien or other incumbrance on real property belonging to the bankrupt attaches to such property in the hands of his trustee, and is effectual against such property to the same extent as though bankruptcy had not intervened, and will attach to such fixtures as from their nature and the circumstances of the case become a part of the freehold.⁵³ But a judgment rendered in a State court

345. Compare *Kelly v. Scott*, 40 N. Y. 595, citing *Mitchell v. Winslow*, 2 Story, 630. Where a party fraudulently induces an owner to part with his title to goods, the defrauded party having the right to disaffirm the contract and to recover the goods, may assert that right against the trustee in bankruptcy as well as against the bankrupt himself. *Donaldson v. Farwell*, 15 N. B. R. 277, Fed. Cas. 3,983, 5 Biss. 451, affd. 93 U. S. 631, 23 L. Ed. 993; *In re Gany* (D. C., N. Y.), 4 Am. B. R. 576, 103 Fed. 930; *In re Spann* (D. C., Ga.), 25 Am. B. R. 551, 183 Fed. 819; *Gillespie v. Piles & Co.* (C. C. A., 8th Cir.), 24 Am. B. R. 502, 178 Fed. 986.

Where there was an action to foreclose a mortgage, and proceedings for the appointment of a receiver of the rents and profits were instituted before the adjudication of the mortgagor as bankrupt, and there was a deficiency on the sale of the mortgaged premises it was held that the assignee in bankruptcy could not claim the fund in the receiver's hands, as against the mortgagee. *Hayes v. Dickinson*, 15 N. B. R. 350, 9 Hun (N. Y.), 277.

52. Property vesting in trustee; estoppel.—A bankrupt corporation had, sometime prior to bankruptcy, agreed as subcontractors to furnish and set tile for several buildings then in course of construction and had delivered tile to each of the buildings, after which it borrowed money from a trust company giving its notes therefor and as collateral security for their payment executed assignments of the money due for material furnished. The assignments stated and it was orally represented to the trust company at the time of the loans, that the money was then due. Before the work of setting the tile had been begun, the corporation went into bankruptcy and the trustee claimed title to the tile. *Held*, that the bankrupt having treated the tile as sold to the contractors, and the proceeds thereof as due, and having assigned the same as collateral security to the loans, neither it nor its trustee will be heard to assert the contrary as against the trust company. *Aldine Trust Co. v. Smith* (C. C. A., 3d Cir.), 25 Am. B. R. 608, 182 Fed. 449, citing *Fourth Street Bank v. Yardley*, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855.

53. Lien of judgment creditor upon machinery in factory as part of the realty.—In Pennsylvania, as between judgment cred-

itors and the general creditors in bankruptcy, machinery of a factory, which is a necessary part of it, and without which it would not be a fully equipped establishment, is a fixture to be regarded as a part of the freehold, subject to the lien of a judgment creditor as part of the realty. *Held*, that as certain chattels, machinery, utensils, etc., used in a sausage factory owned and occupied by the bankrupt, whether fast or loose, were indispensable in carrying on the business as a sausage factory, they became a part of the realty and were subject to the lien of judgment entered long prior to the bankruptcy proceedings, and that the fact that there had been bills of sale of such machinery, etc., executed in some of the conveyances to the bankrupt and prior to his ownership thereof, did not alter the character of the property. *Matter of Beeg* (D. C., Pa.), 25 Am. B. R. 572, 184 Fed. 522.

After insolvency has taken the debtor's real estate out of his hands, its income or product belongs to the lien creditors, who have thus become its virtual owners; this rule applies to real estate in a court of bankruptcy. *In re Torchia* (C. C. A., 3d Cir.), 26 Am. B. R. 579, 188 Fed. 207; *In re Industrial Storage Co.* (D. C., Pa.), 20 Am. B. R. 904, 163 Fed. 390; *In re Hasie* (D. C., Tex.), 30 Am. B. R. 83, 206 Fed. 789; *Pugh v. Loisel* (C. C. A., 5th Cir.), 33 Am. B. R. 580, 219 Fed. 417.

Lien under unrecorded lease.—Under the law of Rhode Island a lease, giving the landlord a lien on personal property on the premises, although not recorded, gives to the lessor an equitable lien good against attaching creditors, and, hence, the trustee in bankruptcy of the lessee takes such property subject to the equitable lien, although the lease was not recorded until six days before bankruptcy, when the lessor had reasonable cause to believe that the lessee was insolvent, and that the lien claimed would constitute a preference. *Matter of Floyd-Scott Co.* (D. C., Mass.), 35 Am. B. R. 463, 224 Fed. 987.

Proceeds from fire insurance policy.—Money payable as the proceeds of a fire insurance policy taken out by the bankrupt prior to bankruptcy for his own benefit does not arise from real property, but from a personal contract, and upon distribution will be awarded to the trustee in bankruptcy and not to a judgment creditor of the bankrupt

during the pendency of the proceedings does not impose a lien on lands forming a part of the assets of the bankrupt.⁵⁴ Where the particular property is fully covered by liens, the trustee should not administer it, although he may do so with the consent of the lien holders.⁵⁵ In respect to the incumbered property the trustee may (1) take possession of the property, if, in his judgment, the unsecured creditors will profit thereby, and sell the property free of the liens, in which event the liens will attach to the proceeds; or (2) sell the equity of redemption.⁵⁶ In all such cases he will be guided, subject to the control of the court, by what, in his judgment, is for the best interests of the general creditors.⁵⁷ If a mortgage or other lien is invalid because not authorized by law, as where given to secure the payment of loans unlawfully made by municipal officers to a bankrupt corporation, the trustee takes the property of the bankrupt freed of the lien.⁵⁸

(3) **PROPERTY IN POSSESSION OF BANKRUPT.**—It is the plain purpose of the statute that the title and right to all things and rights which do not fall within the vesting words of § 70 shall remain in the bankrupt.⁵⁹ If property is in the bankrupt's hands as bailee or agent, the trustee holds it as such, and the bailor or principal may recover the proceeds,⁶⁰ or the property.⁶¹ The

whose judgment was a valid lien on the real property, for a judgment creditor of a bankrupt, claiming a preference by reason of its lien on the real estate of a bankrupt, has no more title to the proceeds of an insurance policy than any other creditor. *Matter of Balsier* (D. C., Pa.), 32 Am. B. R. 458, 215 Fed. 134.

Proceeds of fire insurance on property subject to mortgage.—When a receiver in bankruptcy insures buildings on the mortgaged property of the alleged bankrupt, and a loss by fire is adjusted and paid before the appointment and qualification of the receiver as trustee in bankruptcy, the proceeds of the insurance are impressed with an equitable lien in favor of the mortgagees of the property as their interest may appear. *Rielley v. Buffalo German Insurance Co.* (N. Y. Sup. Ct., Spec. T.), 32 Am. B. R. 728, 86 N. Y. Misc. 69, 147 N. Y. Supp. 1086.

54. *Chambers v. Kirk* (Okla. Sup. Ct.), 32 Am. B. R. 175, 139 Pac. 986.

55. *Matter of Hosmer* (D. C., Iowa), 37 Am. B. R. 464, 233 Fed. 318; *In re Rauch* (D. C., Va.), 36 Am. B. R. 75, 226 Fed. 982, holding that "estates" as used in the law means the unincumbered assets, properly administrable in bankruptcy, as distinguished from that of the property of a bankrupt dedicated by law to the payment of a particular obligation, or upon which there is a specific lien.

56. *Matter of Cutler v. John* (D. C., N. Car.), 36 Am. B. R. 420, 228 Fed. 771.

57. *Matter of Hosmer* (D. C., Iowa), 37 Am. B. R. 464, 233 Fed. 318.

58. *In re Manistee Watch Co.* (D. C., Mich.), 28 Am. B. R. 316, 197 Fed. 455, in which case it was held that where a contract between the incorporators of a bankrupt company and a municipality, under which the city turned over certain municipal bonds,

and a mortgage on its factory plant and premises, executed by bankrupt to secure the performance of its part of the contract, were invalid, they did not constitute a lien upon the factory property, and the trustee was entitled to have such property sold free from liens.

59. *In re Home Discount Co.* (D. C., Ala.), 17 Am. B. R. 168, 181, 147 Fed. 538.

60. *In re Reboulin Fils & Co.* (D. C., N. J.), 21 Am. B. R. 296, 165 Fed. 245; *Wood Co. v. Van Story* (C. C. A., 4th Cir.), 22 Am. B. R. 740, 171 Fed. 375.

Where the relation of bailor and bailee or principal and agent is terminated by a final settlement between the parties by which the obligation of the agent is accepted in lieu of the property or proceeds of property theretofore consigned to him the principal becomes a general creditor. *Matter of Handy* (D. C., Md.), 33 Am. B. R. 666, 218 Fed. 956.

Property held by bankrupt as agent; proceeds of accounts receivable.—A credit company purchased the accounts receivable of a corporation, making the latter its agent to collect the same and remit the proceeds. The corporation at the time of its bankruptcy held the proceeds of some of the accounts sold to the credit company. No notice was given to creditors. An order of the referee, holding that, there being no insolvency, fraud usury or intent to create a preference, the transfer should be declared valid and the trustee directed to turn over the proceeds of the accounts to the credit company, was reversed by the District Court. *Held*, that the decree of the District Court should be reversed and the order of the referee approved. *Hawley Down-draft Furnace Co. v. Chidsey* (C. C. A., 3d Cir.), 38 Am. B. R. 219, 238 Fed. 122.

61. *Thomas v. Field-Brundage Co.* (C. C. A., 8th Cir.), 32 Am. B. R. 569, 215 Fed. 891.

cases under the present law are already numerous,⁶² and have been classified and considered for the most part under subsequent headings.⁶³ They are, however, so dependent on their own facts as to make a scientific classification and summary difficult.

(4) EFFECT OF AMENDMENT OF 1910 TO § 47-A (2).—The rules laid down in this paragraph should be applied in view of the amendment of § 47-a (2) by the amendatory act of 1910 which vests the trustee with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings on property in the custody, or coming into the custody of the bankruptcy court; this amendment has extended the title of the trustee, so that he has more than the limited title of the bankrupt.⁶⁴ But it may not be invoked to deprive a creditor of the bankrupt of equities existing in his favor at the time of the bankruptcy, and was not intended to limit the general rule that a trustee takes the bankrupt estate subject to all valid claims, liens and equities.⁶⁵

III. TITLE TO SPECIFIC PROPERTY.

a. **In general.**—Subsection *a* specifies particularly the property the title to which vests in the trustee upon the adjudication of the bankrupt. It was intended to classify in the several subdivisions all the property of which the bankrupt might then be possessed, which should become a part of the bankrupt estate for administration and distribution as provided in the act. A careful consideration of these subdivisions will clearly indicate their comprehensiveness; everything belonging to the bankrupt which his creditors could reach by judicial process, everything which might be obtained by his creditors to aid in securing the payment of their claims, and all property rights which might have been subjected to such claims, become assets in the hands of the trustee; except such as are herein expressly saved.

b. **Documents relating to bankrupt's property.**—Subdivision 1 vests the trustee with title to all "documents relating to his property." Documents include deeds, contracts, securities, bills receivable, notes, bank books, bills of exchange, account books and all papers and books relating to the bankrupt's business.⁶⁶ Such books and papers may not be detained upon the ground that they contain evidence that might be used against him in a criminal prosecution.⁶⁷ Document is defined as including "any book, deed,

62. For instance *In re Goldman* (D. C., N. Y.), 4 Am. B. R. 100, 102 Fed. 122; *Morton v. Lumber Co.* (Ref., Ark.), 5 Am. B. R. 850; *Spencer v. Dunplan Co.* (C. C., Pa.), 7 Am. B. R. 563, 112 Fed. 638. Compare *Marden v. Phillips* (D. C., Mass.), 4 Am. B. R. 566, 103 Fed. 190. See also *sub nom.* "Reclamation Proceedings," *post*.

63. See particularly "*Property which might have been transferred or levied upon*," *post*, and subheadings thereunder.

64. *In re Hammond* (D. C., Ohio), 26 Am. B. R. 336, 188 Fed. 1020. See discussion under Section Forty-seven of this work.

65. *Marcus Shipping Assn. v. Barnes* (Iowa Sup. Ct.), 34 Am. B. R. 682, 151 N. W. 525, in which it was held that certificates of shares of a corporation issued upon the dissolution thereof, passed to the trustee subject to the equities of the corporation

based upon a claim against the bankrupt for money received by him as an officer of the corporation.

66. *In re Hess* (D. C., Pa.), 14 Am. B. R. 559, 134 Fed. 109. See Schedule B (6) in Form No. 1.

67. **Self-incriminating evidence; compelling bankrupt to turn over books.**—An order requiring bankrupt to deposit, in the office of the receiver, books of account which he claims contain matter that might tend to incriminate him, there to remain in the custody of bankrupt, the receiver to be permitted to inspect and use them for the civil administration of the estate, but not for any criminal proceeding, provision being made to give bankrupt an opportunity to assert the question of his constitutional privilege in case of process for their production, is a proper exercise of authority on

or instrument in writing.”⁶⁸ These documents are regarded as personal property, the title to which, by operation of law, is vested in the trustee.⁶⁹

c. Patents, copyrights, and trade-marks.—Subdivision 2 passes to the trustee all “interests in patents, patent rights, copyrights and trade-marks.” These, it would seem, should vest, irrespective of the statute. There can be no doubt about it now.⁷⁰ But where, though application has been made, the letters-patent have not yet been granted, the trustee takes no interest,⁷¹ although it has been held that rights accruing because of such an application may be deemed “property” within the meaning of subdivision 5, and that therefore the trustee would take the bankrupt’s interest in the patent subsequently obtained.⁷² A trustee is under no obligation to accept a license under a patent which was transferred to the bankrupt-burdened with executory obligations.⁷³ The similarity between these classes of property and those known as “personal privileges” should be noted.⁷⁴

d. Personal powers.—Subdivision 3 provides that powers which the bankrupt might have exercised in his own behalf pass to the trustee. This subdivision is expressive of a general rule of law. A power which is beneficial

the part of the bankruptcy court and not an infringement of his constitutional rights. In such case the question is not of forcing bankrupt to be a witness against himself in a criminal case, but of compelling him to yield possession of property to which he is no longer entitled. *Matter of Harris*, 221 U. S. 274, 26 Am. B. R. 302, 55 L. Ed. 732, 31 Sup. Ct. 557, affg. 20 Am. B. R. 911, 164 Fed. 292.

68. Bankr. Act, § 1 (13).

69. *In re Hess* (D. C., Pa.), 14 Am. B. R. 559, 134 Fed. 109; *In re Madden* (C. C. A., 2d Cir.), 6 Am. B. R. 614, 110 Fed. 348.

70. An assignment of a copyright vests title in the assignee which passes to his trustee in bankruptcy. *In re Howley-Dresser Co.* (D. C., N. Y.), 13 Am. B. R. 94, 132 Fed. 1002. Compare *In re McBride* (D. C., N. Y.), 12 Am. B. R. 81, 132 Fed. 285. See generally Am. Bankr. Dig. § 340.

A conveyance of a trade-mark, unaccompanied by any business whatever, gives no title to the assignee. *In re Jaysee Corset Co.* (D. C., N. Y.), 29 Am. B. R. 856, 201 Fed. 779.

71. *In re McDonnell* (D. C., Iowa), 4 Am. B. R. 92, 101 Fed. 239; *In re Dann* (D. C., Ill.), 12 Am. B. R. 27, 129 Fed. 495.

72. Rights accruing from application for patent.—In the case of *In re Cantelo Mfg. Co.* (D. C., Me.), 26 Am. B. R. 57, 185 Fed. 276, the court said: “In the case of *In re McDonnell* (D. C., Ia.), 4 Am. B. R. 92, 101 Fed. 239, Judge Shiras, of the Northern District of Iowa, in a clear and well considered opinion, held that section 70-a, subd. 2, can have reference only to letters patent actually issued at the date of the adjudication in bankruptcy; and that the trustee in bankruptcy takes no title to the patent granted to the bankrupt after the date of the adjudication in bankruptcy, although the application was made before bankruptcy, and was pend-

ing at the time of the adjudication. The case *In re Dann* (D. C., Ill.), 12 Am. B. R. 27, 129 Fed. 495, is to the same effect, but goes further, and discusses subdivision 5 of section 70-a.

“The case at bar is presented by the record in a somewhat stronger position for the trustee than is found in either of the cases which I have cited. It is for the court to say whether, under all the facts which the record discloses, it shall refuse to the trustee of the bankrupt corporation the use and benefit of the patent applications which had actually constituted a valuable asset to the corporation before bankruptcy. Clearly the trustee in bankruptcy should not be deprived of their benefit if, under a fair construction of the law, they may be held to be a part of the bankrupt estate. In spite of the well-considered opinion in the *McDonnell* case, I think it not altogether clear, but that the interest in the inventions which have become the subject of patent applications may fairly be held to be an ‘interest in patents’ within the meaning of the law; but, whether or not these inventions may be so held, it seems to me, under subdivision 5 of section 70-a, they may be held to be ‘property’ which could be transferred. It affirmatively appears that upon these inventions the credit of the company was obtained; and that part of the claims provable in bankruptcy against the estate of the bankrupt were based upon such credit.” See also s. c., 29 Am. B. R. 704, 201 Fed. 158.

See *In re Myers-Wolf Mfg. Co.* (C. C. A., 3d Cir.), 30 Am. B. R. 572, 205 Fed. 289.

73. *Matter of Wisconsin Engine Co.* (C. C. A., 7th Cir.), 37 Am. B. R. 106, 234 Fed. 281.

74. See discussion under this section, subtitle “*Licenses, Franchises and Personal Privileges*,” post.

to a bankrupt donee vests in his trustee; not so a power in trust.⁷⁵ The powers here referred to are probably those known to the common law,⁷⁶ although there may be some doubt about this. The English statute from which this clause was derived had reference to such technical powers, and it seems likely that the intent of congress was the same.

e. Property fraudulently transferred.—(1) **IN GENERAL.**—By subdivision 4 property transferred by the bankrupt in fraud of his creditors passes to his trustee. This is the converse of the doctrine that trustees take title subject to equities; they also take title to property which the bankrupt has fraudulently transferred,⁷⁷ and in which, therefore, the creditors have equities. The trustee's interest in such property is stronger than was that of the creditors in whose stead he stands, for he has a title. The trustee is vested not only with the title of the property, but also with the creditors' rights of action with respect to property of the bankrupt fraudulently transferred or incumbered by him, and he may assail in their behalf all of such transfers and incumbrances to the same extent as though the debtor had not been declared a bankrupt. The trustee's remedy when title is claimed adversely is, as has been seen, usually a suit in the proper court. This subdivision should be read in connection with § 22, § 67-e and § 70-e.⁷⁸

(2) **PROPERTY AFFECTED; CHARACTER OF TRANSFER.**—It is apparent that this provision applies to all property transferred by the bankrupt at any time in fraud of his creditors.⁷⁹ Where after the filing of an involuntary petition and before adjudication a creditor attaches the bankrupt's assets, the trustee may recover the proceeds of the attachment, even though they were less than the percentage to which the creditor would have been entitled in the bankruptcy proceedings.⁸⁰ Money procured on a policy of insurance on buildings on land, conveyed to the insured in fraud of the grantor's creditors, is not the proceeds of the property, and cannot be recovered by the grantor's trustee in bankruptcy.⁸¹

(3) **ACTUAL OR IMPLIED FRAUD.**—The fraud may be either actual or implied; if the creditor obtained undue advantage because of the transfer, within the four months' period, although no actual fraud be shown, the trustee is entitled to the title and possession of the property.⁸² If actual fraud be

^{75.} Compare discussion under this section, *post*, subtitle "*Property which might have been transferred or levied upon.*"

Power of bankrupt to appoint by will.—The bankruptcy act does not enable a trustee in bankruptcy to make an appointment under a power which was to be exercised by the bankrupt by will and by will only, whether the bankrupt is alive or dead. *Montague v. Silsbee* (Mass. Sup. Ct.), 32 Am. B. R. 873, 105 N. E. 611.

^{76.} *Fisher v. Cushman* (C. C. A., 1st Cir.), 4 Am. B. R. 646, 654, 103 Fed. 860.

^{77.} *In re Yukon Woolen Co.* (D. C., Conn.), 2 Am. B. R. 805, 96 Fed. 326; *In re McNamara* (Ref., N. Y.), 2 Am. B. R. 566; *English v. Ross* (D. C., Pa.), 15 Am. B. R. 370, 140 Fed. 630; *In re Holbrook Shoe & Leather Co.* (D. C., Mont.), 21 Am. B. R. 511, 165 Fed. 973; *Cowan v. Burchfield* (D. C., Ala.), 25 Am. B. R. 293, 180 Fed. 614; *Lovell v. Latham Co.* (D. C., Ala.), 32 Am. B. R. 191, 211 Fed. 374; *McMahon v. Pithan* (Sup. Ct., Iowa), 33 Am. B. R. 125, 147 N. W. 920.

^{78.} *In re Rodgers* (C. C. A., 7th Cir.), 11 Am. B. R. 79, 125 Fed. 169; *In re Butterwick* (D. C., Pa.), 12 Am. B. R. 536, 131 Fed. 371; *Thomas v. Roddy*, 9 Am. B. R. 873, 876, 122 N. Y. App. Div. 851, 107 N. Y. Supp. 473, holding that the fact that the complaint shows, or facts are alleged from which it may be fairly inferred, that at least some creditors who were in a position to attack the alleged fraudulent conveyance at the time of the filing of the petition in bankruptcy, had filed their claims in the bankruptcy proceedings does not prevent the trustee from maintaining the action.

^{79.} *In re Kohler* (C. C. A., 6th Cir.), 20 Am. B. R. 89, 159 Fed. 871; *Boyd v. Arnold* (Sup. Ct., Ark.), 32 Am. B. R. 859, 146 S. W. 118.

^{80.} *State Bank of Chicago v. Cox* (C. C. A., 7th Cir.), 16 Am. B. R. 32, 143 Fed. 91.

^{81.} *Trenholm v. Klinker* (Sup. Ct., Miss.), 33 Am. B. R. 562, 66 So. 738.

^{82.} *Matter of Webb Company* (D. C., Pa.), 34 Am. B. R. 785, 224 Fed. 258, holding that where a creditor, without notice or

shown, as where a bankrupt while insolvent transfers real estate to his brother for an inadequate consideration, and the transfer was not recorded, the transfer may be set aside.⁸³ A conveyance of real estate by a debtor to another to be held wholly or partly in trust for him is a fraud on creditors whether so intended or not, and may be void both as to existing and subsequent creditors, the fraud being a continuing one and the property may be recovered by his trustee in bankruptcy.⁸⁴

(4) VOLUNTARY TRANSFERS; TRANSFERS TO WIFE OR CHILDREN.—A voluntary transfer is at least presumptively fraudulent as against creditors; if made to a wife or child, however meritorious, it must be known to be in good faith and without intent to defraud or injure creditors.⁸⁵ Transactions between husband and wife to the prejudice of the husband's creditors will be closely scrutinized by the courts in New York, as elsewhere, to see that they are fair and honest and not mere contrivances resorted to for the purpose of placing the husband's property beyond the reach of creditors.⁸⁶ But a transfer by a bankrupt to his wife made in good faith more than two years before bankruptcy and while the bankrupt was solvent in payment of an antecedent debt is not fraudulent.⁸⁷ In a suit to set aside a transfer from a bankrupt husband to his wife, while the husband is insolvent, the burden is upon the wife to show good faith.⁸⁸

(5) EFFECT OF A GENERAL ASSIGNMENT.—A general assignment, within the four months' period, being not only a fraud on the act⁸⁹ but an act of bankruptcy, seems to stand on a different footing from fraudulent transfers *per se*. The assignment being void by operation of law,⁹⁰ no title passes, and

reason to suspect the insolvency of a debtor and more than four months prior to bankruptcy, received an assignment of all moneys due to the debtor under a contract for the sale of fire apparatus, and thereafter with knowledge of the debtor's insolvency and within the four months' period obtained from the debtor a transfer of the apparatus and took possession thereof, the trustee in bankruptcy of the debtor is entitled to the possession of the apparatus, as against the bank.

83. *Peterson v. Mettler* (D. C., Wash.), 29 Am. B. R. 158, 198 Fed. 938.

84. *McKey v. Cochran* (Sup. Ct., Ill.), 33 Am. B. R. 78, 104 N. E. 693, holding that although the general rule is that where the purchase money of land is paid by one person and the title taken in the name of another, such person holds the title in trust for him who paid the purchase money, the purchase by a husband in the name of his wife will *prima facie* be presumed to be an advancement or settlement and not a trust; but such presumption may be either supported or rebutted by proof of antecedent or contemporaneous act or facts so soon after the purchase as to be fairly considered a part of the transaction.

85. The law recognizes legal obligations to creditors as superior to the moral obligations one is under to a wife or child. That one engaged in hazardous pursuits owes a sacred duty to his wife and children to set apart a reasonable portion of his estate to secure them against the ills of poverty is not

denied. But in the discharge of moral obligation to wife and children one is not at liberty to forget that he is under legal as well as moral obligations to his creditors. The law will not allow him to hinder, delay or defraud the latter. It is not that the law is oblivious to the moral obligations due from the husband to his wife. It is only that in discharging them he must not be dishonest. *Klinger v. Hyman* (C. C. A., 2d Cir.), 34 Am. B. R. 338, 223 Fed. 257.

86. *Klinger v. Hyman* (C. C. A., 2d Cir.), 34 Am. B. R. 338, 223 Fed. 257. The rule in the New York courts that a voluntary conveyance by one indebted at the time is presumptively fraudulent as against existing creditors, is laid down in *Smith v. Reid*, 134 N. Y. 568, 31 N. E. 1082, and *Kerker v. Levy*, 206 N. Y. 109, 99 N. E. 181, the latter expressly overruling a contrary opinion expressed in *Kain v. Larkin*, 131 N. Y. 307, 30 N. E. 105.

87. *Johnson v. Wilson* (D. C., Ga.), 33 Am. B. R. 518, 217 Fed. 99.

88. *Stroecker v. Patterson* (C. C. A., 9th Cir.), 34 Am. B. R. 287, 220 Fed. 21.

89. See *In re Gray*, 3 Am. B. R. 647, 47 N. Y. App. Div. 554, 62 N. Y. Supp. 618; *Whittlesey v. Becker & Co.*, 25 Am. B. R. 672, 142 N. Y. App. Div. 313, 126 N. Y. Supp. 1046, quoting language of text. See also Section Twenty-three of this work.

90. *West Co. v. Lea*, 174 U. S. 590, 2 Am. B. R. 463, 43 L. Ed. 1098, 19 Sup. Ct. 836; *Pelton v. Sheridan* (Sup. Ct., Ore.), 33 Am. B. R. 472, 144 Pac. 410.

the general assignee does not become an adverse claimant, but at most but an agent of the assignor. Being such agent, his possession is that of his principal, and he, therefore, does not hold adversely to the bankrupt or to the latter's trustee by the mere fact that he held in his hands funds or property received by him under the assignment.⁹¹ Such funds or property may, therefore, be reached summarily by the method suggested in *Bryan v. Bernheimer*.⁹² Under such an assignment, the title of the trustee in bankruptcy relates back to the date of the adjudication, and the assignee is thereafter merely a custodian without title; after that time he may not lawfully sell the assets, and all his acts in relation thereto, other than custodial, are null and void.⁹³ If the assignment was made prior to the four months' period, the only interest or title retained by the bankrupt which passes to his trustee is an equitable interest in the surplus remaining after the payment of the assignor's debt.⁹⁴

(6) RECEIVERSHIP; DISSOLUTION OF CORPORATION.—Where dissolution or winding up proceedings are instituted in a State court, within the period of four months prior to bankruptcy, the trustee in bankruptcy is entitled to the assets in the hands of the receiver appointed in such proceedings.⁹⁵

(7) ASSIGNMENT OF CLAIMS AGAINST THE UNITED STATES.—Section 3477 of the Revised Statutes prohibits the assignment of a claim against the United States, prior to the allowance of such claim and the issuing of a warrant for the payment thereof. The voluntary assignment of such a claim by a bankrupt before bankruptcy, contrary to the provisions of this section, is absolutely void. Such claim remains an asset of the bankrupt estate, and

91. *Matter of Hays* (C. C. A., 6th Cir.), 24 Am. B. R. 691, 179 Fed. 222; *Matter of Williams* (D. C., Ohio), 38 Am. B. R. 762.

92. 181 U. S. 188, 5 Am. B. R. 623, 45 L. Ed. 814, 21 Sup. Ct. 557.

93. *Matter of Wellmade Gas Mantle Co.* (C. C. A., 1st Cir.), 37 Am. B. R. 7, 233 Fed. 250; *Matter of Neuburger* (D. C., N. Y.), 37 Am. B. R. 248, 233 Fed. 701. See Am. Bankr. Dig. § 379.

94. **Right to property conveyed by bankrupt to a trustee for benefit of creditors prior to four months' period.**—Where, prior to the four months' period before bankruptcy, a debtor conveyed his property to another in trust for the benefit of all his creditors, his trustee in bankruptcy, under section 70-e of the bankruptcy act and by reason of such conveyance, did not take the legal title to such property, but only an equitable interest in the surplus after payment of debts, no control over or interest in the property having been reserved by the debtor in the conveyance; and while, under section 70-e of the bankruptcy act, the trustee becomes subrogated to the rights of non-assenting creditors to avoid such conveyance by a plenary suit, in the absence of such suit he is not entitled to restrain a sale of the property conveyed under attachment proceedings. In *re Shinn* (D. C., N. J.), 25 Am. B. R. 833, 185 Fed. 990; In *re Bridge* (D. C., Wash.), 37 Am. B. R. 53, 230 Fed. 184; *Stern v. Truax* (D. C., Wash.), 38 Am. B. R. 418, 236 Fed. 1014.

Right to compel assignee for creditors to

account.—Where a voluntary bankrupt several months before filing his petition assigned the property in his store to a trustee under an agreement not constituting a general assignment, and the assignee in good faith more than four months before the bankruptcy sold the property and paid the proceeds pro rata to the assignor's creditors, except two who refused to consent to the agreement, such assignee is not liable to the trustee in bankruptcy for the shares of the non-assenting creditors, which he had paid to the assignor. *Matter of Martinez* (D. C., N. Y.), 35 Am. B. R. 166, 223 Fed. 433.

Common law assignment.—Where a general assignment has been made by a debtor of his property that would have been available at common law, or when made pursuant to a State statute, regulating the procedure, which enactment does not provide for the debtor's release, and hence is not an insolvency law, such transfer is upheld, if not attacked in federal bankruptcy proceedings within the time limited therefor. *Pelton v. Sheridan* (Sup. Ct., Ore.), 33 Am. B. R. 472, 144 Pac. 419.

95. *Matter of Mullings Clothing Co.* (C. C. A., 2d Cir.), 38 Am. B. R. 189, 238 Fed. 58; *Hooks v. Aldridge* (C. C. A., 5th Cir.), 16 Am. B. R. 658, 145 Fed. 865; In *re Hecox* (C. C. A., 8th Cir.), 21 Am. B. R. 314, 164 Fed. 823; *Mauran v. Crown Carpet Lining Co.*, 6 Am. B. R. 734, 23-R. I. 324, 50 Atl. 331.

may be collected by the trustee and administered for the benefit of creditors, with other assets.⁹⁶

f. Property which might have been transferred or levied upon.—(1) **IN GENERAL.**—Subdivision 5 passes to the trustee all “property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him.” It is the broadest and most comprehensive of all the subdivisions. It probably includes nearly, if not all, the kinds of property mentioned in the four that precede it, as well as that specified in subdivision 6. All of the other subdivisions are silent as to time. Here, however, there is a distinct reference to “the filing of the petition,” and the idea expressed in these words is, as to the enumerated kinds of property, doubtless implied. Thus, the doctrine that only property vested in the bankrupt at the time the petition is filed passes to the trustee, is emphasized. It will be noted that the words here are very general, and seem to include every vested right and interest attaching to or growing out of property.

(2) **TEST TO BE APPLIED.**—The test is simple and easily applied.⁹⁷ Could the property in question have been (1) transferred by, or (2) levied on and sold under judicial process against, the bankrupt? If so, it passes to the trustee; if not, it does not. Whether the property has a market value is immaterial.⁹⁸ It may be a right to acquire property, as for instance a desert entry under the public lands law of the United States, which confers a right to acquire title to lands upon compliance with certain conditions, is transferable and therefore passes to the entryman’s trustee in bankruptcy.⁹⁹ The “property which prior to the filing of the petition he [the bankrupt] could by any means have transferred” is property that he could by any means have transferred to another lawfully under the same terms that he transfers it by law to the trustee; that is to say, without consideration. If the property may have been transferred, it is immaterial that it could not have been levied on at the date of the bankrupt’s adjudication, although ordinarily what may be transferred may be levied upon for the debts of the owner.¹⁰⁰ Whether or not the property, prior to the filing of the petition

96. Claims against the United States.—In the case of *National Bank of Commerce v. Downie*, 218 U. S. 345, 25 Am. B. R. 199, 54 L. Ed. 1065, 31 Sup. Ct. 89, affg. 20 Am. B. R. 531, the court says: “The present cases are not assignments which, by operation of law, created an interest in the assignor’s claims against the United States. They are clean-cut cases of a voluntary transfer of claims against the United States, before their allowance, in direct opposition to the statute. If any regard whatever is to be had to the intention of Congress, as manifested by its words,—too clear, we think, to need construction,—we must hold such a transfer to be absolutely null and void, and as not, in itself, passing to the appellants any interest, present or remote, legal or equitable, in the claims transferred. The result is, that when Gamwell & Wheeler were adjudged bankrupts, they were *still in law the owners of these claims on the United States*, and all interest therein passed under the Bankruptcy Act to their general creditors, to be disposed of as directed by the Bankruptcy

Act, just as if there had been no attempt to transfer them to the banks. Any other holding will effect a repeal of the statute by mere judicial construction, in disregard of the plain, unequivocal intent of Congress, as indicated by the statute.” See also *Guarantee Title & Trust Co. v. First National Bank (C. C. A., 3d Cir.)*, 26 Am. B. R. 85, 185 Fed. 373.

97. Compare *In re Burka (D. C., Mo.)*, 5 Am. B. R. 12, 104 Fed. 326.

98. *Kinzsie v. Winston*, Fed. Cas. 7,835. Language of text quoted and applied, *Gillaspie v. International Harvester Co. (Miss. Sup. Ct.)*, 38 Am. B. R. 827, 67 So. 904. See as to marketability, *Pollack v. Meyer Bros. Drug Co. (C. C. A., 8th Cir.)*, 36 Am. B. R. 835, 845; *In re Wight (C. C. A., 2d Cir.)*, 19 Am. B. R. 454, 157 Fed. 544.

99. *Matter of Evans (D. C., Idaho)*, 38 Am. B. R. 361, 235 Fed. 956.

100. *Pollack v. Meyer Bros. Drug Co. (C. C. A., 8th Cir.)*, 36 Am. B. R. 835, in which the court says: “There are many equitable interests which if owned by the bankrupt

could have been levied upon and sold under judicial process against the bankrupt, must be determined by the local law.¹⁰¹ It must appear that the property in possession of the bankrupt is subject to claims or liens valid as against his creditors, otherwise it passes to his trustee.¹⁰² For instance, the validity of a chattel mortgage or contract of conditional sale depends upon State statutes; ordinarily the title of the property mortgaged or conditionally sold is retained by the mortgagee or vendor, but if there is a failure to comply with a State law which affects the validity of the transfer, the property passes to the trustee of the mortgagor or vendee in the same plight and subject to the claims of general creditors, as though bankruptcy had not intervened.¹⁰³ Unfiled chattel mortgages, in States where they are declared void as against creditors for want of filing, do not prevent creditors from levying judicial process upon the property therein described, and consequently such property responds to the text to be applied under subdivision 5 of this subsection.¹⁰⁴ So where the legal title of land is in the bankrupt, but the actual title and possession was in another, a conveyance having been inadvertently omitted, the trustee takes, subject to the equities of the third party.¹⁰⁵

(3). **PROPERTY PLEDGED.**—The title of a pledgee, under the ordinary contract of pledge, is, in the absence of fraud, good as against all the world, except creditors who have acquired enforceable liens against the property while it was in the possession of the pledgor, and upon his bankruptcy it passes to his trustee, subject to the superior title of the pledgee.¹⁰⁶ It is the

may be of value and increase the assets of the estate, and yet not be subject to seizure on execution. But being transferrable, they will pass to the trustee."

Growing crops as assets.—Since under the Law of Tennessee, the owner's interest in a growing crop is not exempt property but is property which he may sell or mortgage, title to such property passes to the owner's trustee in bankruptcy, although under the statutes of such State such a crop may not be levied upon prior to a certain date. In *re Burnett & Co.* (D. C., Tenn.), 29 Am. B. R. 872, 201 Fed. 162; *Olmsted-Stevenson Co. v. Miller* (C. C. A., 9th Cir.), 36 Am. B. R. 816, 231 Fed. 69.

101. *Matter of Barker* (Ref., Colo.), 20 Am. B. R. 674; *Godwin v. Murchison Nat. Bank*, 22 Am. B. R. 703, 145 N. C. 320, 59 S. E. 154; In *re Waite-Robbins Motor Co.* (D. C., Mass.), 27 Am. B. R. 541, 192 Fed. 47.

102. In *re Miller & Brown* (D. C., Pa.), 14 Am. B. R. 439, 135 Fed. 868. And see *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 11 Am. B. R. 709, 48 L. Ed. 986, 24 Sup. Ct. 690.

103. Failure to execute mortgage according to State statute; title of trustee of mortgagor.—Under sections 4106 and 4133 of the Revised Statutes of Ohio which provide that a mortgage of real property shall be executed in the presence of two witnesses and when so executed shall be recorded and shall take effect from the time the instrument is left for record, a mortgage delivered for record, which had been signed by the mortgagor, but not witnessed pursuant to statute, confers upon the mortgagee merely

a promise or agreement to give a mortgage which will create a lien, which to be effective must be followed by a suit in equity by the mortgagee for a reformation of the instrument; so that where property so mortgaged passes to a trustee in bankruptcy before any proceedings are taken to reform the instrument, the trustee, by virtue of section 70-a, of the bankruptcy act, takes it in the plight in which it then stood and the mortgage cannot be enforced against him. *Foerstner v. Citizens' Savings & Trust Co.* (C. C. A., 6th Cir.), 26 Am. B. R. 377, 186 Fed. 1.

104. *Foerstner v. Citizens' Savings & Trust Co.* (C. C. A., 6th Cir.), 26 Am. B. R. 377, 384, 186 Fed. 1; *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 11 Am. B. R. 709, 48 L. Ed. 986, 24 Sup. Ct. 690; *Security Warehousing Co. v. Hand*, 206 U. S. 415, 19 Am. B. R. 291, 51 L. Ed. 1117, 27 Sup. Ct. 720; In *re Standard Telephone & Elec. Co.*, 216 U. S. 545, 24 Am. B. R. 761, 54 L. Ed. 610, 30 Sup. Ct. 412; *Ritchie County Bank v. McFarland* (C. C. A., 4th Cir.), 24 Am. B. R. 893, 183 Fed. 715.

105. *Clark v. Snelling* (C. C. A., 1st Cir.), 30 Am. B. R. 50, 205 Fed. 240, affg. 29 Am. B. R. 818, 202 Fed. 259; *Young v. Allen* (C. C. A., 6th Cir.), 30 Am. B. R. 261, 207 Fed. 318.

106. *Matter of Harvey* (D. C., Ala.), 32 Am. B. R. 337, 212 Fed. 340, citing *Collier on Bankruptcy* (9th ed.), p. 1004. See 4m. Bankr. Dig. § 384.

Title of trustee of pledgor under valid pledge.—Bankrupt, an automobile dealer, had in his position when the petition was filed a demonstrating car which had been

duty of the bankruptcy court to turn over all property in the possession of the bankrupt to the lawful pledgee thereof.¹⁰⁷ The validity of a contract of pledge must be determined under the laws of the State where made.¹⁰⁸ The pledge is a lien, dependent upon possession of the pledged property by the pledgee, and if the lien is established the trustee in bankruptcy of the pledgee will succeed to the pledgee's title subject to terms of the pledge contract.¹⁰⁹

(4) STOCK BROKERAGE TRANSACTIONS.—Where a broker purchases stock for a customer and retains the stock as security for the amount due thereon, the relationship of pledgor and pledgee exists between the parties; if the broker is adjudicated a bankrupt the owner of the stock is entitled to a delivery thereof upon payment of the amount due.¹¹⁰ Where money is left with a stockbroker for the purchase of stock and is found in his possession, ear-marked for identification, upon his bankruptcy, the money should be returned to the depositor.¹¹¹ It is unnecessary for the customer to place his finger upon the identical certificates of stock purchased for him; it is sufficient if the broker had at the time of his bankruptcy shares of the same kind, which are legally subject to the demand of the customer.¹¹² Nor is it essential that the customer

pledged to the claimant bank to secure bankrupt's note, given pursuant to an arrangement whereby the claimant bank paid drafts, accompanied by bills of lading drawn on bankrupt for the purchase price of automobiles, and bankrupt, giving his collateral note pledging the specific cars by numbers, retained possession of the cars for the purpose of sale and was expected, though not bound, to pay \$1,000 on his note for each car sold. The pledge was free from fraud and under the Pennsylvania law valid between the parties. *Held*, that the trustee in bankruptcy under section 70-a (5) of the bankruptcy act took title subject to the superior right of the claimant bank. *In re Twining* (D. C., Pa.), 26 Am. B. R. 200, 185 Fed. 555.

Pledge of unmined coal.—Where the lessee of coal lands agreed to supply a railway company with all coal required on certain of its lines at stated prices, payment to be made upon the 15th of each month for all coal delivered during the preceding calendar month, and the lease, which was terminable by the railway company on the lessee's failure to comply with the contract, was, with the assent of the railway company, assigned to a coal company, and while the contract was still in force and being executed, the assignee, becoming embarrassed and unable to meet its pay-rolls, the railway company advanced the money therefor, under an oral agreement that it should be repaid by the subsequent delivery of coal at the contract price, and the coal company is adjudicated a bankrupt; the advances made by the railway company amount to a pledge of the unmined coal to the extent of the advancement, and the trustees in bankruptcy, upon assuming the contract and continuing its performance, are bound to furnish the railway company sufficient coal to cover the advances made by it. *Hurley v. Atchison, etc., R. Co.*, 213 U. S. 126, 22 Am. B. R. 17, 53 L. Ed. 729, 29 Sup. Ct. 466.

107. *Commercial Nat. Bank v. Hiller* (C.

C. A., 5th Cir.), 32 Am. B. R. 236, 211 Fed. 337.

108. *Matter of Harvey* (D. C., Ala.), 32 Am. B. R. 337, 212 Fed. 340.

109. *Guarantee Title & Trust Co. v. First Nat. Bank* (C. C. A., 3d Cir.), 26 Am. B. R. 85, 185 Fed. 373; *In re Elm Brewing Co.* (D. C., N. Y.), 12 Am. B. R. 623, 132 Fed. 299.

110. *Duel v. Hollins*, 241 U. S. 523, 37 Am. B. R. 1, 60 L. Ed. 1143, 36 Sup. Ct. 616, revg. 34 Am. B. R. 34, 219 Fed. 544; *In re Berry & Co.* (C. C. A., 2d Cir.), 17 Am. B. R. 467, 149 Fed. 176; *Richardson v. Shaw* (C. C. A., 2d Cir.), 16 Am. B. R. 42, 147 Fed. 659, affd. 209 U. S. 365, 19 Am. B. R. 717, 52 L. Ed. 835, 28 Sup. Ct. 512; *In re Bolling* (D. C., Va.), 17 Am. B. R. 399, 147 Fed. 786; *In re Swift* (C. C. A., 1st Cir.), 7 Am. B. R. 374, 112 Fed. 315; *Hutchinson v. Le Roy* (C. C. A., 1st Cir.), 8 Am. B. R. 20, 113 Fed. 212; *In re Meadows, Williams & Co.* (D. C., N. Y.), 23 Am. B. R. 124, 173 Fed. 694, affd. 24 Am. B. R. 251, 177 Fed. 1004; *In re Brown & Co.* (D. C., N. Y.), 22 Am. B. R. 659, 171 Fed. 254; *In re Brown & Co.* (D. C., N. Y.), 25 Am. B. R. 800, 183 Fed. 861; *In re McIntyre & Co.* (Petition of Pippey) (C. C. A. 2d Cir.), 24 Am. B. R. 626, 181 Fed. 955. See Am. Bankr. Dig. § 385.

Stock deposited as margin.—A customer of a firm of stockbrokers indebted to him is entitled upon their bankruptcy to receive back certificates of stock in their possession as margin on his account. *Boston Safe Deposit & Trust Co. v. Adams* (Mass. Sup. Ct.), 37 Am. B. R. 609, 113 N. E. 277.

111. *Matter of Wettengel* (C. C. A., 3d Cir.), 38 Am. B. R. 444, 238 Fed. 798.

112. *Gorman v. Littlefield*, 229 U. S. 19, 30 Am. B. R. 266, 57 L. Ed. 1047, 33 Sup. Ct. 690; *Sexton v. Kessler & Co.*, 225 U. S. 90, 28 Am. B. R. 85, 56 L. Ed. 995, 32 Sup. Ct. 657.

Sufficient stock to cover claims.—The rule in *Gorman v. Littlefield* (229 U. S. 19, 30 Am. B. R. 266), as to the identification of stock

show that at the time of the broker's bankruptcy he had in his possession a sufficient number of stock certificates of like kind to replace those purchased by the customer.¹¹³ Customers of bankrupt stockbrokers are entitled to a *pro rata* allotment of shares of stock of a corporation found in the possession of the bankrupt and purchased for them, although such shares are not the identical ones purchased, and are insufficient to fully satisfy all.¹¹⁴ The right of the customer will depend largely upon the possession by the broker of the shares of stock at the time of the adjudication; if at that time they have been transferred or disposed of by him, the customer has no superior claim against other securities of a different kind in the broker's possession.¹¹⁵ Where a broker repledges shares of stock deposited by customers, as security for a loan, and the shares are sold, the proceeds should be applied in payment of the loan, and the surplus be distributed *pro rata* among the customers, according to the value of their stock. If some of the stock is sold and part retained by the pledgee, there should be such a distribution of the proceeds as to make all of the owners share ratably in the burden of the loan.¹¹⁶ If the shares are repledged to different persons as security for separate loans made by each of them, and subsequently sold, each transaction must be taken separately, and the surplus proceeds in each case be paid to the owners of the shares deposited as collateral for each loan.¹¹⁷

(5) PROPERTY INCLUDED GENERALLY.—It was evidently intended by the word "property" as used in subdivision 5 to include in the term every vested right or interest attaching to or growing out of property. It is meant to embrace much of the property that is designated under the other subdi-

upon the bankruptcy of a broker, should not be restricted to stock actually in the box on the day of the failure. The rationale of the decision is that if the receiver has enough or more than enough of the particular stock to cover all customers who were long on the day of the failure, then the presumption that he intended to keep their stock on hand is a sufficient identification of the stock or of so much of it as is needed as theirs. If, however, the stock on hand, though sufficient to cover all actual claims, is not sufficient to cover all the long customers, no such presumption arises. The fact that some of the long customers make no specific claim for stock in the surplus cannot enlarge the rights of one who does. *Matter of Pierson and Fell* (C. C. A., 2d Cir.), 37 Am. B. R. 10, 233 Fed. 519.

113. *Duel v. Hollins*, 241 U. S. 523, 37 Am. B. R. 1, 60 L. Ed. 1143, 36 Sup. Ct. 615, revg. 34 Am. B. R. 34, 219 Fed. 544. As to necessity of identification. In re *McIntyre & Co.* (C. C. A., 2d Cir.), 25 Am. B. R. 93, 181 Fed. 960.

114. *Duel v. Hollins*, 241 U. S. 523, 37 Am. B. R. 1, 60 L. Ed. 1143, 36 Sup. Ct. 615, revg. 34 Am. B. R. 34, 219 Fed. 544; *Matter of McIntyre* (C. C. A., 2d Cir.), 34 Am. B. R. 487, 221 Fed. 232.

115. **Stock repledged by pledgee.**—Where shares of stock are pledged with a broker by his customers as collateral and the broker, without authority and without substituting other stock, hypothecates the customers' stock

and afterwards becomes bankrupt, and the stock is sold by his pledgee in the regular way, the sale conveys good title to the particular securities as against the customers of the bankrupt, although they might have claimed them from the bankrupt estate, if still in its possession, and the customers have only a general claim against the surplus paid to the trustee by the bankrupt's pledgee. *Matter of Stringer* (D. C., N. Y.), 37 Am. B. R. 44, 230 Fed. 177. See rule laid down in *Matter of Hollins & Co.* (C. C. A., 2d Cir.), 36 Am. B. R. 698.

Stock converted by bankrupt.—Where brokers wrongfully pledged securities belonging to their customers as collateral for a loan in their bank, and upon their bankruptcy the bank under the terms of a collateral note applied the deposit of the brokers upon the note and sold the securities, which left a balance, the owners of the securities are subrogated to the rights of the bank in the deposit and are entitled to the possession thereof as against the trustee in bankruptcy of the brokers. *Matter of Leavit & Grant* (C. C. A., 2d Cir.), 33 Am. B. R. 63, 215 Fed. 901.

116. *Jones on Collateral Securities*, § 512; *Matter of McIntyre* (C. C. A., 2d Cir.), 24 Am. B. R. 4, 176 Fed. 552; *Matter of Jamison Bros. & Co.* (C. C. A., 3d Cir.), 38 Am. B. R. 972, 209 Fed. 541.

117. *Matter of Jamison Bros. & Co.* (C. C. A., 3d Cir.), 38 Am. B. R. 972, 209 Fed. 541.

visions; it includes everything that can properly be the subject of a lawful transfer, whether it be corporeal or incorporeal.¹¹⁸ An estate in real property by the entirety, being without possibility of severance, may not be transferred by the husband without the consent of his wife and may not be levied upon by his creditors, and does not therefore pass to his trustee in bankruptcy.¹¹⁹ A Federal homestead for which a receipt had been issued entitling the bankrupt to a patent, does not pass to his trustee, since until a final patent had been issued, the homestead was not subject to levy for the collection of the homesteader's debts.¹²⁰

(6) PROPERTY IN WHICH OTHERS HAVE AN INTEREST.—Property, within the meaning of such subdivision, does not include the property of another, which the bankrupt is authorized to transfer only on the condition that he sells it for value, or sells it and holds its proceeds for its owner.¹²¹ Where under a State statute a plaintiff's interest in a pending action is assignable, and is of such a character as to enable his creditors to obtain a benefit therefrom upon an administration of his estate, such interest has been held to be property within the meaning of this subdivision rather than a "right of action," under subdivision 6.¹²² The language of clause 5 is sufficiently broad to include not only the property belonging to the bankrupt absolutely, but also such property the title to which is, under a State law, held to be in him, as to his creditors.¹²³ As for instance where, under a State statute, delivery of chattels is essential to pass title as against certain judgment or lien creditors,¹²⁴ or where it is provided that a trader who acquires and uses property in his business shall be deemed the owner of such property as against creditors, unless it appear by public declaration or notice that he is acting as agent, in which cases the property so retained or acquired passes to the trustee in bankruptcy.¹²⁵ Special property, by way of lien, in securities deposited with the bankrupt as a pledge, is not property within the meaning of the act which passes to the trustee.¹²⁶ But the title to stock, deposited by a bankrupt with a creditor as collateral, previous to his adjudication, vests in the trustee, as of the date of the adjudication.¹²⁷ Deposits in a bank to the credit of a bankrupt at the time of adjudication pass to the trustee, even as against a payee of a check who did not present it for payment until after such

118. *In re Cantelo Mfg. Co.* (D. C., Me.), 26 Am. B. R. 57, 185 Fed. 276, holding that an application for a patent constitutes property within the meaning of subdivision 5.

119. *In re Beihl* (D. C., Pa.), 28 Am. B. R. 310, 197 Fed. 870.

120. *In re Cohn* (D. C., N. D.), 22 Am. B. R. 761, 171 Fed. 568.

121. *In re Dunlop* (C. C. A., 8th Cir.), 19 Am. B. R. 361, 368, 156 Fed. 945. See *In re Reboulin Fils Co.* (D. C., N. J.), 21 Am. B. R. 296, 165 Fed. 245; *Wood Co. v. Van Story* (C. C. A., 4th Cir.), 22 Am. B. R. 740, 171 Fed. 375; *In re Marx Tailoring Co.* (D. C., Ala.), 28 Am. B. R. 147, 196 Fed. 243.

122. *Cleland v. Anderson* (Neb. Sup. Ct.), 10 Am. B. R. 429, 66 Neb. 273; *First Nat. Bank v. Staake*, 202 U. S. 141, 15 Am. B. R. 639, 50 L. Ed. 967, 26 Sup. Ct. 580.

123. *Chesapeake Shoe Co. v. Seldner* (C. C. A., 4th Cir.), 10 Am. B. R. 466, 122 Fed. 593; *In re Tweed* (D. C., Iowa), 12 Am. B. R. 648, 131 Fed. 355.

124. See cases digested in Am. Bankr. Dig. § 390.

Delivery of chattels is essential in Illinois to pass title or to create a lien as against execution or attaching creditors, except only when dispensed with by reason of the publicity of the transaction. Hence pictures sold by the bankrupt or exchanged for others, but not removed from the bankrupt's store or seen at the time by the purchaser, and remaining in the bankrupt's possession at the time of the bankruptcy, pass to the trustee and the purchaser is not entitled to reclaim them. *Matter of Ricketts* (C. C. A., 7th Cir.), 37 Am. B. R. 124, 234 Fed. 285.

125. *Gillaspay v. International Harvester Co.* (Miss. Sup. Ct.), 38 Am. B. R. 827, 67 So. 904.

126. *Matter of Berry & Co.* (D. C., N. Y.), 15 Am. B. R. 360, 146 Fed. 623.

127. *French v. White*, 18 Am. B. R. 905, 78 Vt. 89, 62 Atl. 35; *First Nat. Bank of Memphis v. Towner* (C. C. A., 6th Cir.), 38 Am. B. R. 576.

adjudication.¹²⁸ The title to grain and flour in the possession of a bankrupt corporation passes to its trustee in bankruptcy, though it had issued grain and flour certificates as security for loans, calling for delivery of a certain quantity of flour on demand of the holders of the certificates.¹²⁹

(7) **EQUITIES IN PROPERTY.**—The equity of an individual in copartnership property, which is his separate estate, passes to his trustee in bankruptcy.¹³⁰ The equity of redemption of mortgaged property passes to the trustee, and he may take and retain actual possession of the property.¹³¹ However, where the rule prevails that an equity of redemption, while assignable by the mortgagor, is not subject to sale and execution, such equity of redemption although passing to the trustee, is not saleable by him, so as to transfer to the purchaser the statutory right of redemption.¹³² Any further attempt to differentiate the cases would be useless. Those appropriate to the subjects discussed in the next paragraphs are there collated. Others of a miscellaneous character will be found in the foot-note.¹³³

128. Proceeds of check paid after adjudication of drawer.—Where a voluntary bankrupt, in good faith, two days before bankruptcy, delivers a check to a light company in payment for service, and the payee, in good faith without knowledge of the bankruptcy, deposits the check in another bank and it was not paid until after the adjudication of the drawer, the payee is not entitled as against the trustee in bankruptcy to retain the sum received on the check, because the bankrupt's deposit came into the complete custody of the bankruptcy court upon the adjudication. *Matter of Howe* (D. C., Mass.), 37 Am. B. R. 601, 235 Fed. 908.

129. In re Melbourne Mills Co. (D. C., Pa.), 20 Am. B. R. 746, 162 Fed. 988, *affd.* 22 Am. B. R. 442, 172 Fed. 177.

130. New York Institution for the Instruction of the Deaf and Dumb v. Crockett, 17 Am. B. R. 233, 242, 117 N. Y. App. Div. 269, 102 N. Y. Supp. 412.

131. In re Roger Brown & Co. (C. C. A., 8th Cir.), 28 Am. B. R. 336, 196 Fed. 758.

132. Luth v. Galloway Coal Co. (Ala. Sup. Ct.), 32 Am. B. R. 866.

133. As to property of a partnership: *In re Rudnick* (D. C., Wash.), 4 Am. B. R. 531, 102 Fed. 750; *In re Grotzinger* (D. C., Pa.), 6 Am. B. R. 399, 110 Fed. 366. As to mortgaged realty: *In re Kellogg* (D. C., N. Y.), 7 Am. B. R. 623, 113 Fed. 120, *affd.* 10 Am. B. R. 7, 121 Fed. 333.

As to the proceeds of a sale under a void execution still in the hands of the sheriff: *In re Easley* (D. C., Va.), 1 Am. B. R. 715, 93 Fed. 419; *In re Kenney* (D. C., N. Y.), 2 Am. B. R. 494, 95 Fed. 427; on reargument, 3 Am. B. R. 353, 97 Fed. 554, *affd.* 5 Am. B. R. 355, 105 Fed. 897. Compare also *In re Francis-Valentine Co.* (D. C., Cal.), 2 Am. B. R. 188, 93 Fed. 953; *In re Kimball* (D. C., Pa.), 3 Am. B. R. 161, 97 Fed. 29, and *Levor, Trustee v. Seiter*, 8 Am. B. R. 459, 69 N. Y. App. Div. 33, 74 N. Y. Supp. 499.

As to property vested in a receiver in the State court: *In re Meyers & Co.* (Ref.,

N. Y.), 1 Am. B. R. 347; *In re Tyler* (D. C., N. Y.), 5 Am. B. R. 152, 104 Fed. 778; *Hanson v. Stephens* (Sup. Ct., Ga.), 11 Am. B. R. 172, 116 Ga. 722.

As to exercise of right to redeem: *In re Goldman* (D. C., N. Y.), 4 Am. B. R. 100, 102 Fed. 122; *In re Novak* (D. C., Iowa), 7 Am. B. R. 27, 111 Fed. 161.

As to unpaid legacy: *In re May* (Ref., Minn.), 5 Am. B. R. 1.

As to rents: *In re Cass* (Ref., Ohio), 6 Am. B. R. 721; *In re Dole* (D. C., Vt.), 7 Am. B. R. 21, 110 Fed. 926; *In re Oleson* (D. C., Iowa), 7 Am. B. R. 22, 110 Fed. 796; *Matter of Clark Realty Co.* (C. C. A., 7th Cir.) 37 Am. B. R. 129, 234 Fed. 576.

Right of trustee of bankrupt tenant to crops under lease: *In re Luckenbill* (D. C., Pa.), 11 Am. B. R. 455, 127 Fed. 984.

As to property acquired by bankrupt's agent without authority: *Matter of Partidge Lumber Co.* (D. C., N. J.), 33 Am. B. R. 537, 215 Fed. 973.

As to a wife's interest in property vested in her husband: *In re Garner* (D. C., Ga.), 6 Am. B. R. 496, 110 Fed. 123. Compare *In re Rooney* (D. C., Vt.), 6 Am. B. R. 478, 109 Fed. 601.

As to title of stocks bought by broker for customer: *In re Swift* (C. C. A., 1st Cir.), 7 Am. B. R. 374, 112 Fed. 315. As to stocks pledged by bankrupt pledgee: *Hutchinson v. LeRoy* (C. C. A., 1st Cir.), 8 Am. B. R. 20, 113 Fed. 212.

As to shares of stock fraudulently carried in the name of the bankrupt as trustee, and in the names of other parties for the purpose of concealment: *Fowler v. Jenks* (Sup. Ct., Minn.), 11 Am. B. R. 255, 90 Minn. 74.

As to delivery sufficient to pass title as against debtor's trustee: *Allen v. Hollander* (C. C., Mass.), 11 Am. B. R. 753, 128 Fed. 159. As to delivery of locomotives remaining in possession of bankrupt vendor: *In re Pease Car & Locomotive Works* (D. C., Ill.), 14 Am. B. R. 331, 134 Fed. 919.

(8) **REMAINDERS AND CONTINGENT INTERESTS.**—Considerable difficulty is often experienced in applying the test fixed by subdivision 5 to contingent interests. Reference must usually be had to the State statutes and decisions. The following summary is, however, thought to be quite generally applicable: Remainders, either vested¹³⁴ or contingent, pass to a trustee;¹³⁵ but do not where the contingency is one both of time of vesting and of person.¹³⁶ Where the interest of the bankrupt depends on the exercise of a discretionary power in trust, it does not pass to his trustee.¹³⁷ It has been held, that a devise of an equitable life interest in property, "free from the interference or control of creditors," does not pass to the trustee, although such interest was assignable.¹³⁸ But where a remainder is created dependent upon a life estate as to which the life tenant is vested with "full power to sell and convey any real estate," the remainderman's interest, although contingent as to amount and value, passes to his trustee in bankruptcy.¹³⁹

(9) **TRUST INTERESTS AND PROPERTY IN TRUST.**—(I) *Resulting or constructive trusts.*—If property in the hands of the bankrupt is impressed with

As to proceeds of property belonging to another sold by a bankrupt: In re Wood & Malone (D. C., Ga.), 9 Am. B. R. 615, 121 Fed. 599.

As to money paid upon stocks subscription, to be returned on certain conditions: In re North Carolina Car Co. (D. C., N. Car.), 11 Am. B. R. 488, 127 Fed. 178. As to bankrupt's interest in an unadministered estate: Osmun v. Galbraith (Sup. Ct., Mich.), 9 Am. B. R. 339, 131 Mich. 577.

Money saved by the wife of a deceased bankrupt from a weekly allowance for maintenance and household expenses made to her by her husband and deposited in the bank in her own name, will not be ordered turned over to the trustees of a bankrupt partnership of which the deceased was a member, where the station in life of the parties, the solvency of the husband during the entire period, the economy of the wife in performing her household duties and dispensing with the assistance of servants, all point to the intention of the husband to relinquish possession, control and ownership of the various amounts and to vest her with title to the unexpended balance. In re Simon No. 2 (D. C., N. Y.), 28 Am. B. R. 616, 197 Fed. 102.

Miscellaneous: In re Cobb (D. C. N. Car.), 3 Am. B. R. 129, 96 Fed. 821; In re Hana & Kirk (D. C., Pa.), 5 Am. B. R. 127, 105 Fed. 587; In re Swift (Ref., Mass.), 5 Am. B. R. 232; Duplan Silk Co. v. Spencer (C. C. A., 3d Cir.), 8 Am. B. R. 367, 115 Fed. 689, revg. s. c., 7 Am. B. R. 563, 112 Fed. 638.

134. In re Woodard (D. C., N. Car.), 2 Am. B. R. 339, 95 Fed. 260; In re McHarry (C. C. A., 7th Cir.), 7 Am. B. R. 83, 111 Fed. 498. Compare In re Mosier (D. C., Vt.), 7 Am. B. R. 268, 112 Fed. 138.

135. In re Shenberger (D. C., Ohio), 4 Am. B. R. 487, 102 Fed. 978; In re St. John (D. C., N. Y.), 5 Am. B. R. 190, 105 Fed. 234; In re Twaddell (D. C., Del.), 6 Am. B. R.

539, 110 Fed. 145. As to when a contingent remainder in realty passes to the trustee, see Belcher v. Bernard, 106 Mass. 230.

Bankrupt's interest as remainderman; sale of interest.—By virtue of an adjudication in bankruptcy, the interest of bankrupt in a remainder in real property passes to his trustee by devolution of law, so that no conveyance by bankrupt is necessary to vest the trustee with his rights therein. Where it does not appear that a trustee in bankruptcy can obtain a sufficient amount for bankrupt's remainder interest in real property to justify a direction that he sell such interest and pay off the lien of a judgment creditor, an order restraining such creditor from proceeding to collect his judgment other than in bankruptcy proceedings will be vacated subject to the right of the trustee, for the protection of other creditors, to join in any action the judgment creditor might take. In re Arden (D. C., N. Y.), 26 Am. B. R. 684, 188 Fed. 475.

136. In re Hoadley (D. C., N. Y.), 3 Am. B. R. 780, 101 Fed. 233; In re Gardner (D. C., N. Y.), 5 Am. B. R. 432, 106 Fed. 670.

137. In re Wetmore (D. C., Pa.), 4 Am. B. R. 335, 102 Fed. 290; s. c., affd. 6 Am. B. R. 210, 108 Fed. 520. See also s. c., on application for discharge, 3 Am. B. R. 700, 99 Fed. 703. Compare In re Ehle (D. C., Vt.), 6 Am. B. R. 476, 109 Fed. 625.

138. Boston Safe Deposit & Trust Co. v. Luke, 34 Am. B. R. 321, 220 Mass. 484, 108 N. E. 64, affd. *sub nom.* Easton v. Boston Safe Deposit & Trust Co., 240 U. S. 427, 36 Am. B. R. 701, 60 L. Ed. 723, 36 Sup. Ct. 391.

139. Matter of Dorgan (D. C., Iowa), 38 Am. B. R. 157, 237 Fed. 507; Pollock v. Meyer Bros. (C. C. A., 8th Cir.), 36 Am. B. R. 835, 233 Fed. 861, in which the majority opinion holds that in a trust fund set apart for the support and maintenance of Mary Pollock, under which she had the use of the income and such portions of the principal as

a trust it passes to the trustee subject to the same trust.¹⁴⁰ Where, though title is in the bankrupt, another is the real party in interest under the doctrine of resulting trust, the trustee in bankruptcy will be directed to convey to the real owner.¹⁴¹ Money paid to the bankrupt before adjudication under a mistake of fact is impressed with a constructive trust, which follows it into the hands of the trustee.¹⁴² Where a banker received deposits knowing that he was insolvent and on the day following made an assignment of his property, a trust was impressed upon the funds deposited in favor of the depositors, which must be recognized by the banker's trustee in bankruptcy.¹⁴³ If property was consigned to a bankrupt for sale and the proceeds were used by the bankrupt in his business as his own, the relationship between the consignor and the bankrupt is that of debtor and creditor and not that of trustee and beneficiary.¹⁴⁴

(II) *Express trusts; interest of beneficiary.*—It is generally held that property devised in trust, so that it is inalienable by the *cestui que trust* and explicitly made not subject to the claims of his creditors, will not pass to his trustee.¹⁴⁵ Under the New York statute¹⁴⁶ the surplus income derived from

was reasonably necessary for her support and maintenance, the remainder going to certain persons, including the bankrupt, the interest of the bankrupt passed to the trustee.

140. *Taylor v. Plumer*, 3 Maule & Selw. 562. See, to the same effect, *Cook v. Tullis*, 18 Wall. 332; *Hawkins v. Blake*, 108 U. S. 422. Compare *Cummings v. Sennott* (C. C. A., 3d Cir.), 25 Am. B. R. 859, 184 Fed. 718.

Bankrupt's interest in real estate purchased with funds of another.—Petitioner under an arrangement with bankrupt advanced the money with which to purchase a vacant lot to be divided up into building lots and resold, and the deed was taken to petitioner and bankrupt. It was understood that the purchase was a speculation and agreed that when the lots were sold the surplus, after payment to petitioner of the money advanced by her, was to be divided equally between them. *Held*, that petitioner was entitled to show her real interest in the property, and the rights of general creditors not being harmed, since they had no lien or claim superior to petitioner, growing out of the form of the deed in failing to disclose the actual interests of the parties, bankrupt's trustee was only entitled to one-half the surplus remaining after reimbursing petitioner from the proceeds of a sale of the property. In re *McConnell* (D. C., N. Y.), 28 Am. B. R. 659, 197 Fed. 492; *Jones v. Dugan* (Md. Ct. of App.), 38 Am. B. R. 874, 92 Atl. 775.

141. In re *Davis* (D. C., Mass.), 7 Am. B. R. 258, 112 Fed. 129. See also In re *Coffin* (D. C., Conn.), 16 Am. B. R. 682, 146 Fed. 181; In re *Taft* (C. C. A., 6th Cir.), 13 Am. B. R. 417, 133 Fed. 511; *Young v. Allen* (C. C. A., 6th Cir.), 30 Am. B. R. 261, 207 Fed. 318.

142. *Matter of Berry & Co.* (C. C. A., 2d Cir.), 16 Am. B. R. 564, 146 Fed. 623.

143. *Matter of Silver* (D. C., Ohio), 31 Am. B. R. 106, 208 Fed. 797; In re *Stewart* (D. C., N. Y.), 24 Am. B. R. 474, 178 Fed. 463.

144. In re *Emerson, Marlow & Co.* (C. C. A., 7th Cir.), 29 Am. B. R. 173, 199 Fed. 95.

145. *Munroe v. Dewey*, 4 Am. B. R. 264, 176 Mass. 184, 57 N. E. 340; *Eaton v. Boston Safe Deposit & Trust Co.*, 240 U. S. 427, 36 Am. B. R. 701, 60 L. Ed. 723, 36 Sup. Ct. 391, in which it was held that the life interest of a beneficiary in trust, providing that the income to her is "to be free from the interference or control of her creditors," does not pass to her trustee in bankruptcy, where the State law treats such restrictions as limiting the character of the equitable property and as inherent in it.

Termination of trust by bankruptcy.—In the case of *Nicholas v. Eaton*, 91 U. S. 716, 23 L. Ed. 254, it appeared that real estate was devised to trustees who were directed to pay the income to one who was afterward adjudged a bankrupt, and the devise contained the condition and proviso that if the said beneficiary should become bankrupt, the trust should cease; and thereafter the trustees in their discretion were to apply the income to the support of the beneficiary and to his family, and the trustees were empowered in their discretion to transfer any portion of the trust fund to the beneficiary. The court held that the bankruptcy terminated all of the bankrupt's legal and vested rights in and to the estate and left nothing to which his assignee in bankruptcy could assert a claim, and that the discretionary power vested in the trustees to pay sums to the bankrupt could not be subjected to the control of the trustee in bankruptcy, the court saying: "No case is cited; none is known to us which goes so far as to hold that an absolute discretion in the trustee, a discretion which, by the express language of the will, he is under no obligation to exercise in favor of the bankrupt, confers such an interest on the latter that he or his assignee can successfully assert it in a court of equity or in any other court."

146. N. Y. Real Property Law, § 103.

a trust to receive and apply the rents and profits of real property is inalienable and does not pass to the trustee of the bankrupt beneficiary.¹⁴⁷ But if the beneficiary's interest is in the nature of an annuity it is subject to levy and will pass to the beneficiary's trustee in bankruptcy,¹⁴⁸ especially where it is in lieu and takes the place of the beneficiary's interest in her husband's estate.¹⁴⁹ It has been held that a trustee in bankruptcy may bring a suit in equity to obtain the surplus of income from a trust fund, if that income be more than sufficient for the support of the bankrupt,¹⁵⁰ and under the New York code a continuing execution in the nature of garnishment may be had against the income of a trust fund.¹⁵¹ Property allotted to an Indian under an act of Congress to be held in trust for such Indian by the United States for twenty-five years, after which a conveyance is to be made by the government to the Indian free and clear from all charges and incumbrances, is not during the twenty-five years an alienable estate and does not pass to the trustee.¹⁵²

(III) *Mingling trust funds; following such funds.*—It seems also that where the bankrupt mingles trust funds with his own so that their identity is lost, the beneficiaries must share *pari passu* with the creditors.¹⁵³ Persons, seeking to trace trust funds into a bank and thence into collateral which ultimately came into the hands of a trustee in bankruptcy, are under the burden of proving their title, and if their evidence leaves the matter of identification in doubt must be resolved in favor of the trustee in bankruptcy.¹⁵⁴ There can be no departure from the general principle that to follow trust funds there must be some identification of the property sought to be charged with

147. *McNaboe v. Marks*, 16 Am. B. R. 767, 51 N. Y. Misc. 207, 99 N. Y. Supp. 960; *Butler v. Baudoine*, 16 Am. B. R. 238 n., 84 N. Y. App. Div. 215, 82 N. Y. Supp. 773, affd. 177 N. Y. 530, 69 N. E. 1121. *Contra*: In re Baudoine (C. C. A., 2d Cir.), 3 Am. B. R. 651, 101 Fed. 574; *Brown v. Barker*, 8 Am. B. R. 450, 68 N. Y. App. Div. 592, 74 N. Y. Supp. 43. Compare *Smith v. Belden*, 6 Am. B. R. 432, 35 N. Y. Misc. 113, 71 N. Y. Supp. 246, for method of reaching such a surplus.

148. *Wetmore v. Wetmore*, 149 N. Y. 520, 44 N. E. 169, 33 L. R. A. 708, 52 Am. St. Rep. 752; *Mills v. Husson*, 140 N. Y. 99, 35 N. E. 422.

149. In re Burtis (D. C., N. Y.), 26 Am. B. R. 680, 188 Fed. 527.

150. In re Tiffany (D. C., N. Y.), 13 Am. B. R. 310, 133 Fed. 799; In re Baudoine (C. C. A., 2d Cir.), 3 Am. B. R. 651, 101 Fed. 574.

151. Code Civil Procedure, New York, § 1391, as amended by L. 1908, ch. 148.

152. In re Russie (D. C., Oreg.), 3 Am. B. R. 6, 96 Fed. 609.

153. In re Richard (D. C., Tenn.), 4 Am. B. R. 700, 104 Fed. 792; In re Marsh (D. C., Conn.), 8 Am. B. R. 576, 116 Fed. 396; In re Kurtz (D. C., Pa.), 11 Am. B. R. 129, 125 Fed. 992; In re Mulligan (D. C., Mass.), 9 Am. B. R. 8, 116 Fed. 715; *Matter of See* (C. C. A., 2d Cir.), 31 Am. B. R. 360, 209 Fed. 172; *Matter of Leigh* (D. C., Ill.), 31 Am. B. R. 379, 208 Fed. 486, holding that a trust fund must be clearly traced in order to charge a bankrupt's estate with liability therefor.

Mingling trust funds with general funds.

—Where trust funds have been unlawfully diverted and intermingled with the general funds of a bankrupt, so as to render their identification impossible, the bankruptcy court, acting as a court of equity, will follow them and decree restitution to the *cestui que trust*, if the unlawful appropriation of the trust funds resulted in swelling the assets and came into the possession of the trustee; but if after the misappropriation and mingling all the money is withdrawn, the equities are lost, although moneys from other sources are subsequently deposited in the same place; or if a part of the funds so mingled is withdrawn, so that the fund is reduced to a smaller sum than the trust fund, the latter must be regarded as dissipated, except as to the balance, and funds subsequently added from other sources cannot be subjected to the equitable claim of the *cestui que trust*. In re Dunn & Co. (D. C., Ark.), 28 Am. B. R. 127, 193 Fed. 212.

Where money is intrusted to the bankrupt for safe keeping, and is deposited by him to his credit, it may be claimed by the owner out of the balance of such deposit coming into the hands of the trustee, although it cannot be specifically identified, it appearing that at all times the bankrupt's account at the bank exceeded the amount intrusted to him. In re Rovea (D. C., Wash.), 16 Am. B. R. 141, 143 Fed. 182.

154. *Schuyler v. Littlefield*, 232 U. S. 707, 35 Am. B. R. 209, 58 L. Ed. 806, 34 Sup. Ct. 466, holding that where one has deposited trust funds in his individual bank account and the mingled fund is at any time wholly

the trust.¹⁵⁵ But if there has been no mingling, the trustee of a bankrupt estate takes no title, though he has the right to possession and a quasi-interest until the beneficiaries prove their right.¹⁵⁶

(10) **DOWER AND CURTESY RIGHTS.**—Here also the State law controls. It is the general rule that, if the dowress is the bankrupt and her estate is vested, the trustee takes her interest;¹⁵⁷ conversely, if her interest is still inchoate, it does not pass. So also of the husband's curtesy: if vested, it passes; if merely initiate, it does not.¹⁵⁸ Where, however, the husband, not the wife, is the bankrupt, her inchoate interest is, in most States, sufficiently vested to endure, and the husband's title passes to the trustee subject thereto;¹⁵⁹ if the husband dies after his bankruptcy, she is entitled to the same interest she would have taken had he died before it.¹⁶⁰ If a purchase-money mortgage has been given by a bankrupt husband, the contingent right of dower of his wife only attaches to the surplus remaining after the payment of the mortgage debt.¹⁶¹ If a bankrupt's wife consents to the sale by the trustee of the bankrupt's real property, and to accept a gross sum in lieu of her dower, such property may be sold free from her inchoate right of dower.¹⁶² On the other hand, where the wife is the bankrupt, the husband is not entitled to have his curtesy initiate admeasured. If the mortgage in which the wife has joined is declared void as a preference, the wife's right of dower is restored.¹⁶³ These doctrines flow from well-recognized principles of real-estate law. Cases collaterally valuable will be found in the foot-note.¹⁶⁴

depleted the trust fund is thereby dissipated, and cannot be treated as reappearing in sums subsequently deposited to the credit of the same account.

155. *In re McIntyre & Co.* (Petition of Grace) (C. C. A., 2d Cir.), 26 Am. B. R. 51, 185 Fed. 96; *Commings v. Synnott* (C. C. A., 3d Cir.), 25 Am. B. R. 859, 184 Fed. 718.

156. *In re Cobb* (D. C., N. C.), 3 Am. B. R. 129, 96 Fed. 821. If the trust is coupled with an interest, he becomes vested with the interest. *Walker v. Siegel*, Fed. Cas. 17,085.

157. Compare *In re Watterson*, 95 Pa. St. 312.

158. *Hesseltine v. Prince* (D. C., Mass.), 2 Am. B. R. 600, 95 Fed. 802; *Matter of Russell* (Ref., Ohio), 13 Am. B. R. 24.

Interest in property purchased for wife with money of husband; Virginia Rule. Where a husband causes property to be conveyed to his wife and pays a portion of the purchase price from his own funds, with the intent of giving the same outright to his wife, and subsequently pays the balance of the purchase price after her death, and thereafter becomes a voluntary bankrupt, his trustee cannot, under the law of Virginia, claim an interest of the bankrupt as tenant by curtesy in the property which belonged to his wife, for the rule in that State is that where a husband transfers, or causes to be transferred, real estate to his wife the presumption is that he transfers his entire interest, including all his marital rights. *Cox v. Wallace* (C. C. A., 4th Cir.), 33 Am. B. R. 186, 219 Fed. 126.

159. *In re Shaeffer* (D. C., Pa.), 5 Am. B. R. 248, 104 Fed. 973; *In re Forbes* (Ref.,

Ohio), 7 Am. B. R. 42; *Porter v. Lazear*, 109 U. S. 84, 27 L. Ed. 865, 3 Sup. Ct. 58; *Matter of Hawkins* (Ref., R. I.), 9 Am. B. R. 598; *Thomas v. Woods* (C. C. A., 8th Cir.), 23 Am. B. R. 132, 173 Fed. 585. But see *Kelly v. Strange*, Fed. Cas. 7,676. As to rule in Pennsylvania, see *In re Freedman* (Ref., Pa.), 29 Am. B. R. 135; *Matter of Chotiner* (D. C., Pa.), 32 Am. B. R. 760, 216 Fed. 916.

Computation of value of dower; effect of assent to compromise.—In Ohio the wife of a bankrupt is entitled to receive from the trustee out of the proceeds of the sale of the bankrupt's real property remaining after satisfaction of mortgage liens, the value of her contingent right of dower, computed upon the gross selling price of the property. The wife's right to dower is not barred by the compromise of a claim by the trustee to which she assented. *Matter of Strauch* (D. C., Ohio), 31 Am. B. R. 36, 208 Fed. 842.

160. *In re Hester*, Fed. Cas. 6,437. But see *Bosteck v. Jordan*, 54 Tenn. 370. The rule is different under the Arkansas statute, *In re McKenzie* (C. C. A., 8th Cir.), 15 Am. B. R. 679, 142 Fed. 383.

161. *Matter of Hays* (C. C. A., 6th Cir.), 24 Am. B. R. 669, 181 Fed. 674.

162. *Matter of Acretelli* (D. C., N. Y.), 21 Am. B. R. 537, 173 Fed. 121; *Savage v. Savage* (C. C. A., 4th Cir.), 15 Am. B. R. 599, 141 Fed. 346.

163. *Matter of Lingafelter* (C. C. A., 6th Cir.), 24 Am. B. R. 656.

164. *Hawk v. Hawk* (D. C., Ark.), 4 Am. B. R. 463, 102 Fed. 679; *In re Garner* (D. C., Ga.), 6 Am. B. R. 596, 110 Fed. 123;

(11) LICENSES, FRANCHISES, AND PERSONAL PRIVILEGES.—(I) *In general.*—Property rights which by their terms are either nonassignable or restricted to the person originally acquiring them, often furnish puzzling problems. Thus of nonassignable leases. The English and American rules seem to be different; the better American opinion is that a bankruptcy, even if voluntary, is not a breach of a covenant not to assign.¹⁶⁵ The trustee of a bankrupt tenant is, therefore, entitled to the leased premises for the remainder of the term.¹⁶⁶ Pensions or annuities payable to State or municipal employees after long and continued services are not in the nature of property rights, but are public bounties as awards for such services, granted as an encouragement for continuance in official positions; they are not subject to execution and are not transferable, and hence do not pass to trustees in bankruptcy.¹⁶⁷

(II) *Personal contracts.*—A contract between a publisher and an author, whereby the former undertakes to publish and market literary productions of the latter, is not assignable;¹⁶⁸ nor is a contract with a person for the manufacture by him of a particular commodity requiring special skill of the manufacturer.¹⁶⁹ But there is a difference between an absolute assignment of a contract and an assignment of rights under a contract. Thus, under a contract between an insurance company and its agent, commissions on renewal premiums on policies written prior to the agent's adjudication as a bankrupt, but unaccrued at that time, pass to his trustee as property which the bankrupt might have assigned without the consent of the company.¹⁷⁰ The "medical and surgical practice and good will" acquired by a bankrupt physician by contract with another physician does not pass to his trustee in bankruptcy.¹⁷¹

(III) *Franchises and licenses.*—Whether a franchise or a license passes to the trustee on the bankruptcy of its owner depends usually on the terms of the instrument creating it, or, if that is silent, on whether in its nature it calls for personal skill or discretion.¹⁷² It has been held that a franchise to construct a turnpike road, and to collect the tolls was a personal trust and did not pass to the assignee in bankruptcy since the person who had the franchise could not voluntarily assign it, the consent of the party conferring the franchise being necessary by reason of the personal character of the work to be performed.¹⁷³ But a franchise which gave to one the right to take tolls from persons crossing a certain bridge has been held to be assignable.¹⁷⁴ It is already well settled that a bankrupt's interest in a license to sell liquors

In re Rooney (D. C., Vt.); 6 Am. B. R. 478, 109 Fed. 601.

165. For the English rule, see Doe v. Bevan, 3 Maule & S. 353; Doe v. Smith, 5 Taunt. 795; Dommatt v. Bedford, 3 Ves. 148. For the American, Starkweather v. Cleveland Ins. Co., Fed. Cas. 13,308; Perry v. Lorillard, 61 N. Y. 214.

A tenant's covenant not to assign his lease without the landlord's permission in writing does not apply to an adjudication of the tenant's bankruptcy. In re Bush (D. C., R. I.), 11 Am. B. R. 415, 126 Fed. 878; Matter of Frazin & Oppenheim (D. C., N. Y.), 23 Am. B. R. 289, 174 Fed. 713.

166. In re Adams (D. C., Conn.), 14 Am. B. R. 23, 134 Fed. 142; In re Rubel (D. C., Wis.), 21 Am. B. R. 566, 166 Fed. 131.

167. Matter of Hoag (D. C., N. Y.), 36 Am. B. R. 142, 227 Fed. 478.

168. Matter of McBride & Co. (D. C., N. Y.), 12 Am. B. R. 81, 132 Fed. 285.

169. Jetter Brewing Co. v. Scollan, 15 Am. B. R. 300, 111 N. Y. App. Div. 925, 96 N. Y. Supp. 1130.

170. Matter of Wright (C. C. A., 2d Cir.), 19 Am. B. R. 454, 157 Fed. 544, affg. 18 Am. B. R. 198, 157 Fed. 544, revg. 16 Am. B. R. 778.

171. In re Myers (C. C. A., 7th Cir.), 31 Am. B. R. 24, 208 Fed. 407.

172. Parsons on Contracts, Part II, ch. 12, § 9; People v. Duncan, 41 Cal. 507; Stewart v. Hargrove, 23 Ala. 429.

173. People v. Duncan, 41 Cal. 507.

174. Stewart v. Hargrove, 23 Ala. 429.

175. In re Brodbine (D. C., Mass.), 2 Am. B. R. 53, 93 Fed. 643; In re Fisher (D. C., Mass.), 3 Am. B. R. 406, 98 Fed. 88, affd. as Fisher v. Cushman (C. C. A., 1st Cir.),

passes to his trustee;¹⁷⁵ but this question is dependent upon the statute under which the license is issued,¹⁷⁶ and whether it was granted before or after the bankrupt's adjudication.¹⁷⁷ If the law under which a liquor license is granted makes it a mere personal privilege and not a property right, it may not be mortgaged, and where it is attempted, the mortgagee's interest will not prevail as against that of the licensee's trustee in bankruptcy.¹⁷⁸ A license to occupy a city market is property passing upon the bankrupt licensee, and the court will order an assignment to the trustee of such property.¹⁷⁹ A trustee must conform in all respects to a license which comes to him upon the bankruptcy of a licensee; in respect to such license he occupies the same position as the bankrupt licensee.¹⁸⁰

(IV) *Seat in stock exchange.*—It has been held that the bankrupt may be ordered to transfer a seat in a stock exchange to his trustee.¹⁸¹ But the

4 Am. B. R. 646, 103 Fed. 860; *In re Becker* (D. C., Pa.), 3 Am. B. R. 412, 98 Fed. 407; *In re May* (Ref., Minn.), 5 Am. B. R. 1; *Matter of Weisel & Knaup* (D. C., Pa.), 23 Am. B. R. 59, 173 Fed. 718, holding that the right to apply for a renewal of a liquor license is an asset which passes to the trustee. Compare *In re Emrich* (D. C., Pa.), 4 Am. B. R. 89; 101 Fed. 231.

176. Assignability of liquor license under State law.—*In re McArdle* (D. C., Mass.), 11 Am. B. R. 358, 126 Fed. 442, in which case the court applied the case of *In re Fisher* (D. C., Mass.), 3 Am. B. R. 406, 98 Fed. 88, as limiting the right of a trustee to realize upon the value of a liquor license to a case where the granting authority gave its assent thereto; it was there held that a bankruptcy court should not enforce the claim of a mortgagee to the proceeds of the bankrupt's liquor license, where the granting power, on grounds of public policy and interest, declines to recognize any right in the licensee to mortgage his license, and any claim of the mortgagee therein. *In re Olewine* (D. C., Pa.), 11 Am. B. R. 40, 125 Fed. 840; *Tracy v. Ginsberg*, 16 Am. B. R. 792, 189 Mass. 260; *Snyder v. Bougher*, 16 Am. B. R. 792, 214 Pa. St. 453, holding that although a liquor license may not be sold by the trustee, yet the fixtures and furniture may be sold on condition that the license shall be transferred to the purchaser by the license court; *Matter of Keller* (Ref., Ga.), 16 Am. B. R. 727, arising under Georgia statute.

177. *Whitlock's License*, 22 Am. B. R. 262, 39 Pa. Super. Ct. 34.

Liquor license; unexpired term and right to renewal.—Where a bankrupt at the date of his adjudication holds an unexpired liquor license with the right to a renewal, the unexpired term and the right to a renewal pass to his trustee and upon their sale by the receiver the bankrupt may be ordered to join in proceedings for a renewal necessary to make the sale effective. *Matter of Doyle* (C. C. A., 3d Cir.), 31 Am. B. R. 571, 209 Fed. 1, revg. 30 Am. B. R. 58, 205 Fed. 543.

178. *Gilday v. Warren*, 60 Conn. 237, 37 Atl. 494; *Joyce on Intoxicating Liquors*, §

228. See also *Tracy v. Ginsberg*, 16 Am. B. R. 792 (note), 189 Mass. 260, 75 N. E. 637.

The statutes of Virginia provide that no license to traffic in liquors shall be granted to any person who is not a qualified voter of the county or city in which the business is to be conducted; that if the licensee is a corporation, its agent selling such liquor must be so qualified. The applicant must be a fit person and personally superintend the business. Every license is deemed to confer a personal privilege and may only be assigned to a person to whom it might originally have been granted, the validity of such assignment depending upon a certificate in favor of the assignee made by the court granting the original license. In case of the death of the licensee, his personal representative has like powers of assignment. Under such provisions, held that the trustee of a bankrupt licensee is entitled to the proceeds of such license as against a brewing company claiming the same by virtue of an attempted assignment thereof, given prior to the granting of the license, as security for a loan to the bankrupt of the greater part of the license fee. *In re Flaherty* (D. C., Va.), 25 Am. B. R. 943, 184 Fed. 962.

A stock of liquors held by a bankrupt, duly licensed under the statutes of a State, is property which passes to the trustee in bankruptcy, although under the State statute the trustee cannot sell or dispose of the same. *Strub v. Gamble* (C. C. A., 8th Cir.), 34 Am. B. R. 229, 221 Fed. 253.

179. *In re Emrich* (D. C., Pa.), 4 Am. B. R. 89, 101 Fed. 231.

180. *In re Spitzel & Co.* (D. C., N. Y.), 21 Am. B. R. 729, 168 Fed. 156.

Fountain pens under license agreement.—Where a fountain pen company, having delivered pens under a license agreement for sale at retail, fails to comply with the law of bailments of West Virginia, its patented articles pass absolutely without any limitation into the hands of the trustee in bankruptcy of the licensee. *Waterman Co. v. Kline* (C. C. A., 4th Cir.), 37 Am. B. R. 252, 234 Fed. 891.

181. *In re Page* (D. C., Pa.), 4 Am. B. R.

question as to whether a seat in a stock exchange belongs to a bankrupt and is, therefore, to be administered as part of his assets by the trustee depends upon the facts in each particular case.¹⁸² The fact that the sale of a seat in a stock exchange is hindered by conditions contained in the by-laws or constitution of the exchange would not affect the question; the court may direct the bankrupt member to take such action as may be required to pass title.¹⁸³ Although the seat passes to the member's trustee in bankruptcy, it is not available to him as an asset of the estate, until the claims of other members of the exchange have been settled by the sole tribunal entitled to pass upon the same according to the laws of the exchange.¹⁸⁴

(12) LIFE INSURANCE POLICIES.—(I) *In general*.—These rights are akin to those personal privileges just considered. The bankrupt is obliged to enumerate such policies in Schedule B (3) accompanying his petition. Here, also, the test is: Was the interest of the insured transferable or subject to levy? Where a policy has been pronounced valueless and turned over to the bankrupt, and the premiums thereof are paid either by himself or his wife, and the bankrupt dies soon after the policy is so turned over, the proceeds of the policy do not belong to his estate in bankruptcy.¹⁸⁵ The meaning and effect of the proviso clause in subdivision (5) is considered in a later paragraph.¹⁸⁶

(II) *Cash surrender value*.—If the policy has an expressed cash surrender value, payable to the bankrupt, and enforceable by him, it is, of course, within

467, 102 Fed. 747; In re Gaylord (D. C., Mo.), 7 Am. B. R. 195, 111 Fed. 717; Matter of Hurlbutt (C. C. A., 2d Cir.), 13 Am. B. R. 50, 68 C. C. A. 216. See Am. Bankr. Dig. § 356.

182. Burleigh v. Foreman (C. C. A., 1st Cir.), 12 Am. B. R. 88, 130 Fed. 13, revg. 9 Am. B. R. 237, 118 Fed. 348.

Seat in stock exchange as property.—In the case of Page v. Edmunds, 187 U. S. 596, 9 Am. B. R. 277, 47 L. Ed. 318, 23 Sup. Ct. 200, affg. 5 Am. B. R. 707, 107 Fed. 89, it was held that a seat or partnership in a stock exchange, which by its articles provided that a member may sell his partnership provided there is no unsettled contract or claim against him by any other member of the exchange, arising out of the business of the exchange, subject to the approval of the proper authorities, is property which prior to the filing of the petition the bankrupt might have transferred, and which, therefore, passes to and vests in his trustee. See also Cohen v. Budd, 17 Am. B. R. 329, 52 N. Y. Misc. 217, 103 N. Y. Supp. 45; Matter of Gregory (C. C. A., 2d Cir.), 23 Am. B. R. 270, 174 Fed. 629; Wrede v. Clark (Sup. Ct., N. Y.), 21 Am. B. R. 821, 132 App. Div. 293, 117 N. Y. Supp. 5, holding that a property right in a seat on the N. Y. Stock Exchange passes to a receiver in supplementary proceedings or to a trustee in bankruptcy as the case may be, but if an order in supplementary proceedings is served prior to the four months' period, the title of the receiver appointed in such proceedings relates back to the commencement thereof, and is superior to the title of the trustee.

183. O'Dell v. Boyden (C. C. A., 6th Cir.), 17 Am. B. R. 751, 758, 150 Fed. 731; In re Hurlbutt & Co. (C. C. A., 2d Cir.), 13 Am. B. R. 50, 135 Fed. 504.

184. In re Currie (C. C. A., 2d Cir.), 26 Am. B. R. 345, 185 Fed. 263.

Effect of rules of exchange.—A stock-brokerage firm loaned stock that it had purchased for a customer to another firm as security for a deposit. The rules of the stock exchange of which both firms were members, provide that on the insolvency of a member other members shall have a lien on his seat for debts due them, and also that other members holding securities of the insolvent must close them out under the rules of the exchange. Held, that the rules of the exchange became part of the contract between the members and that the firm holding the security was bound to sell it as provided by the rules before it could establish any claim to the proceeds of the sale of the seat if the amount realized from the stock was insufficient, and consequently they had but one security for their debts, and as this was sufficient they never became entitled to a lien on the stock exchange seat and therefore the creditor had no right of subrogation against such seat. Matter of Van Schaick & Co. (C. C. A., 2d Cir.), 37 Am. B. R. 59, 228 Fed. 465.

185. Meyers v. Josephson (C. C. A., 5th Cir.), 10 Am. B. R. 687, 124 Fed. 734; Benjamin v. Chandler (D. C., Pa.), 15 Am. B. R. 430, 142 Fed. 217.

186. See discussion under this section, *post*, subtitle "Exempt property."

the proviso, and unless the amount thereof is paid or secured as therein provided, it passes to the trustee.¹⁸⁷ A policy may have a cash surrender value, although none be expressed in the policy; if it have a value recognized by the practice of the company so that upon a surrender of it the insured would receive a financial benefit, it has a cash surrender value.¹⁸⁸ Cash surrender value means the amount which would have been paid by the company had the policy been surrendered, even though no amount was stipulated in the policy.¹⁸⁹ If it appear that the company will pay a prescribed amount upon the surrender of the policy, the effect is the same as though there was an expressed cash surrender value, and the bankrupt may retain the policy upon paying or securing the payment of such amount.¹⁹⁰ Such a policy so passes to the trustee, even without the consent or assignment of the beneficiary, and the bankrupt may be ordered to execute any necessary papers to accomplish the transfer.¹⁹¹ Where, however, there is no surrender value, as, for instance, in "ordinary life" policies,¹⁹² nothing passes to the trustee.¹⁹³ It is not the policy, but the cash surrender value thereof, which passes to the trustee.¹⁹⁴ So that if the cash surrender value is paid into the estate, by or in behalf of the bankrupt, the policy, and all other rights under it, revert to the bankrupt.¹⁹⁵ And if the bankrupt has borrowed upon his policy from the com-

187. *In re Boardman* (D. C., Mass.), 4 Am. B. R. 620, 103 Fed. 788; *In re Diack* (D. C., N. Y.), 3 Am. B. R. 723, 100 Fed. 770; *In re McDonnell* (D. C., Iowa), 4 Am. B. R. 92, 101 Fed. 239; *In re Moore* (D. C., Tenn.), 23 Am. B. R. 109, 173 Fed. 679; *In re Wolff* (D. C., N. Y.), 21 Am. B. R. 452, 165 Fed. 984.

188. *Malone v. Cohn* (C. C. A., 5th Cir.), 38 Am. B. R. 87, 236 Fed. 882.

189. *Hiscock v. Mertens*, 205 U. S. 202, 17 Am. B. R. 484, 51 L. Ed. 771, 27 Sup. Ct. 488, affg. 15 Am. B. R. 701, 142 Fed. 445, revg. 12 Am. B. R. 712, 131 Fed. 972; *Holden v. Stratton*, 198 U. S. 202, 14 Am. B. R. 94, 49 L. Ed. 1018, 25 Sup. Ct. 656, containing dicta to same effect.

190. *Matter of Phelps* (Ref., N. Y.), 15 Am. B. R. 170; *In re Coleman* (C. C. A., 2d Cir.), 14 Am. B. R. 461, 136 Fed. 818; *Clark v. Equitable Life Assur. Co.* (C. C., Pa.), 16 Am. B. R. 137, 143 Fed. 175; *Gould v. New York Life Ins. Co.* (D. C., Ark.), 13 Am. B. R. 233, 132 Fed. 927; *In re Buelow* (D. C., Wash.), 3 Am. B. R. 389, 98 Fed. 86; *In re White* (C. C. A., 2d Cir.), 23 Am. B. R. 90, 174 Fed. 333; *In re Hetting* (C. C. A., 2d Cir.), 23 Am. B. R. 161, 175 Fed. 65; *Equitable Life Assurance Co. v. Miller* (C. C. A., 8th Cir.), 25 Am. B. R. 560, 185 Fed. 98; *In re Herr* (D. C., Pa.), 25 Am. B. R. 141, 182 Fed. 715; *Contra: Van Kirk v. Slate Co.* (D. C., N. Y.), 15 Am. B. R. 239, 140 Fed. 38; *In re Welling* (C. C. A., 7th Cir.), 7 Am. B. R. 340, 113 Fed. 189; *In re Slingluff* (D. C., Md.), 5 Am. B. R. 76, 106 Fed. 154, repudiating *In re Hernick* (Ref., Md.), 1 Am. B. R. 713. See also *In re Becker* (D. C., N. Y.), 5 Am. B. R. 438, 106 Fed. 54.

191. *In re Diack* (D. C., N. Y.), 3 Am. B. R. 723, 100 Fed. 770; *In re Whelpley* (D. C., N. Y.), 22 Am. B. R. 433, 169 Fed. 1019.

For the duty of the trustee touching policies of life insurance, see *In re Welling* (C. C. A., 7th Cir.), 7 Am. B. R. 340, 113 Fed. 118.

192. *Gould v. New York Life Ins. Co.* (D. C., Ark.), 13 Am. B. R. 233, 132 Fed. 927.

A trustee cannot claim any more than the cash surrender value of a life insurance policy. He has no right whatever to a policy in which there is no cash surrender value. *King v. Miles* (Miss. Sup. Ct.), 34 Am. B. R. 93, 67 So. 182.

193. *In re Lange* (D. C., Iowa), 1 Am. B. R. 189, 91 Fed. 361; *In re Buelow* (D. C., Wash.), 3 Am. B. R. 389, 98 Fed. 86; *In re McDonnell* (D. C., Iowa), 4 Am. B. R. 92, 101 Fed. 239; *In re Judson* (C. C. A., 2d Cir.), 27 Am. B. R. 704, 192 Fed. 834, affd. 228 U. S. 459, 30 Am. B. R. 6, 57 L. Ed. 920, 33 Sup. Ct. 564.

Policy with optional benefits.—Where at the date of adjudication of a bankrupt his wife is the sole beneficiary under a life insurance policy upon which the premiums have all been paid and the bankrupt is only entitled to certain optional benefits at the maturity of the policy, such optional benefits do not pass to the trustee in bankruptcy under section 70-a. *Matter of Churchill* (C. C. A., 7th Cir.), 31 Am. B. R. 1, 209 Fed. 766, revg. 29 Am. B. R. 153, 198 Fed. 711.

194. *Burlingham v. Crouse* 228 U. S. 459, 30 Am. B. R. 6, 57 L. Ed. 920, 33 Sup. Ct. 564; *Everett v. Judson*, 228 U. S. 474, 30 Am. B. R. 1, 57 L. Ed. 927, 33 Sup. Ct. 8; *Matter of Hammel & Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 46, 221 Fed. 56; *Matter of Samuels* (C. C. A., 2d Cir.), 36 Am. B. R. 251, 237 Fed. 796; *Matter of Lyon* (Ref., Penn.), 32 Am. B. R. 483.

195. **Payment of cash surrender value to trustee.**—A policy of insurance, the cash surrender value of which has been paid by the bankrupt to his trustee, reverts to the

pany beyond the cash value thereof, the trustee of the bankrupt has no interest therein.¹⁹⁶ Where the bankrupt dies prior to adjudication, the trustee is only vested with the cash surrender value of the policy; the balance of the proceeds passes to his executor or administrator. This is so because the trustee is vested at the time of adjudication with the property owned by the bankrupt at the time of filing the petition, and at that time his interest in the policy was represented by its cash surrender value.¹⁹⁷ And where a trustee has obtained a judgment in an action to recover premiums paid by the insured while insolvent, such judgment does not preclude recovery by an executor or administrator of the proceeds of the policy, over and above the cash surrender value at the time of the filing of the petition against the decedent.¹⁹⁸ It is the purpose of the proviso clause of subdivision (5) to pass to the trustee that sum which was available to the bankrupt at the time of bankruptcy as a cash asset, otherwise to leave the insured the benefit of his life insurance.¹⁹⁹ But the loan value of a policy will not be treated as a cash surrender value so as to make it a cash asset which will pass to the trustee.²⁰⁰ The cash surrender value must be ascertained as of the date of adjudication, and where there are vested interests in the policy belonging to others, besides the bankrupt, such interests may be determined by the trustee, and distribution may be made accordingly.²⁰¹

(III) *Effect of assignment.*—Where a policy is assigned within the four months' period, in payment of an antecedent debt, it is, of course, subject to avoidance as in the case of an unlawful transfer of any other property. But if it be transferred or assigned in good faith for a present consideration, the trustee in bankruptcy is only entitled to what would have been the value of the policy at the time of the adjudication,²⁰² and if after the adjudication the bankrupt die the beneficiary may redeem the policy by paying the value of the policy, to be determined as of that time.²⁰³

(IV) *Payable to wife or designated beneficiaries.*—This subsection does not include policies payable to the wife or kindred of the insured, but only applies to policies payable to the insured or his personal representatives.²⁰⁴

bankrupt clear of the claims of all creditors who have proven their debts. *Matter of Flanigan* (D. C., Pa.), 35 Am. B. R. 807, 228 Fed. 339; *Fatter of Eddy* (D. C., Vt.), 36 Am. B. R. 294, in which the referee held that the right of the trustee is measured by the amount of the cash surrender value as of the date of the filing of the petition,—as to all other matters the policies remain under the control of the bankrupt.

196. *In re Judson* (D. C., N. Y.), 26 Am. B. R. 775, 188 Fed. 702; *Burlingham v. Crouse* (C. C. A., 2d Cir.), 24 Am. B. R. 632, 181 Fed. 479, 104 C. C. A., 227, affd. 228 U. S. 459, 30 Am. B. R. 6, 57 L. Ed. 920, 33 Sup. Ct. 564; *Matter of Eddy* (D. C., Vt.), 36 Am. B. R. 294.

197. *Everett v. Judson*, 228 U. S. 474, 30 Am. B. R. 1, 57 L. Ed. 927, 33 Sup. Ct. 568. See also *Andrews v. Partridge*, 228 U. S. 479, 30 Am. B. R. 4, 57 L. Ed. 929; *Burlingham v. Crouse*, 228 U. S. 459, 30 Am. B. R. 6, 57 L. Ed. 920, 33 Sup. Ct. 564.

198. *King v. Miles* (Miss. Sup. Ct.), 34 Am. B. R. 93, 67 So. 182.

199. *Burlingham v. Crouse*, 228 U. S. 459,

30 Am. B. R. 6, 57 L. Ed. 920, 33 Sup. Ct. 564, affg. 24 Am. B. R. 632, 181 Fed. 479, 104 C. C. A. 227. See also *Everett v. Judson*, 228 U. S. 474, 30 Am. B. R. 1, 57 L. Ed. 927, 33 Sup. Ct. 568; *Andrews v. Partridge*, 228 U. S. 479, 30 Am. B. R. 4, 57 L. Ed. 929; *Malone v. Cohn* (C. C. A., 5th Cir.), 38 Am. B. R. 87, 236 Fed. 882.

200. *Matter of Lyon* (Ref., Pa.), 32 Am. B. R. 483.

The loan value of a policy for the benefit of the bankrupt's wife, where the bankrupt has the right to change the beneficiary, will not be treated as a cash surrender value, and the bankrupt ordered to borrow the money and turn the proceeds over to the trustee. *Matter of Hammel & Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 46, 221 Fed. 56.

201. *Matter of Dreuil & Co.* (D. C., La.), 34 Am. B. R. 373, 221 Fed. 796.

202. *Matter of Levy* (D. C., N. Y.), 36 Am. B. R. 181, 227 Fed. 1011.

203. *Matter of Levy* (D. C., N. Y.), 36 Am. B. R. 181, 227 Fed. 1011.

204. *Miekman v. Arthe* (C. C. A., 2d Cir.), 34 Am. B. R. 536, 223 Fed. 507, revg. 32

Hence, where the cash surrender value of a policy on the life of a bankrupt is only payable upon the joint consent of the bankrupt and the beneficiary, his wife, it is not an asset passing to the trustee in bankruptcy.²⁰⁵ But where a wife's interest in the husband's policy is contingent upon her surviving him, and in case of her predecease is payable to his estate, and he may surrender at any time and take a paid-up policy or other value, the policy is property and passes to his trustee in bankruptcy.²⁰⁶ In Pennsylvania a policy of insurance upon a bankrupt's life, taken out for the benefit of, or *bona fide* assigned to, his wife or children, vests in them free of all claims of the creditors of the bankrupt.²⁰⁷ Where the policy permits the insured to change

Am. B. R. 519, 213 Fed. 642; *Matter of Hammel & Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 46, 221 Fed. 56; *Matter of Cohen* (D. C., Ga.), 37 Am. B. R. 189, 230 Fed. 733; *Matter of Arkin* (C. C. A., 2d Cir.), 36 Am. B. R. 694, 231 Fed. 947; *Matter of Lyon* (Ref., Pa.), 32 Am. B. R. 483; *Pulsifer v. Hussey*, 9 Am. B. R. 657, 97 Me. 434. See Am. Bankr. Dig. § 364.

Where a policy ran to a wife if she survived her husband, and in the event of her predecease then to him or his personal representatives it has been held that, subject to such contingent interest in (the husband) the policies and the money which became due under them belonged to (the wife), and it was beyond his power to transfer them to any other person or to surrender them. In *re Holden* (C. C. A., 9th Cir.), 7 Am. B. R. 615, 113 Fed. 143; 51 C. C. A. 99 (revd. on another point 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018).

And it has also been said that "a policy taken out by the insured on his own life and expressed to be for the benefit of his wife is, . . . in the absence of any statutory provision, in the nature of an executory trust for her benefit of which she could not be deprived without her consent." *Boyd v. Massachusetts, etc., Life Ins. Co.*, 153 Mass. 544, 27 N. E. 669. See also *In re Judson* (D. C., N. Y.), 26 Am. B. R. 775, 188 Fed. 702.

Wife beneficiary by designation or assignment; Georgia statute.—A bankrupt at the time of adjudication held three life insurance policies with cash surrender values. Several years before bankruptcy he had made his wife the beneficiary of all three policies, in the case of one by designation assented to by the company, and in the case of the others by assignment, and in both designation and assignment he had reserved the right to change his beneficiary. The Georgia statute (Code, § 2498) provides as follows: "The assured may direct the money to be paid to his personal representatives, or to his widow, or to his children, or . . . assignees; and upon such direction given, and assented to by the insurer, no other person can defeat the same. But the assignment is good without such assent." Held that under this statute construed in connection with section 70 (a) of the Bankruptcy Act the trustee did

not take title to the cash value of the policies. *Matter of Cohen* (D. C., Ga.), 37 Am. B. R. 189, 230 Fed. 733.

205. *Matter of Lyon* (Ref., Pa.), 32 Am. B. R. 483.

206. *Matter of White* (C. C. A., 2d Cir.), 23 Am. B. R. 40, 174 Fed. 333; *Matter of Hettling* (C. C. A., 2d Cir.), 23 Am. B. R. 161, 175 Fed. 65; *In re Loveland* (D. C., Mass.), 27 Am. B. R. 765, 192 Fed. 1005, holding that a policy payable to the wife of the insured, if he die prior to the period prescribed, or to him if he live for the period, and having a cash surrender value, passes to the trustee in bankruptcy of the insured; *Matter of Draper* (D. C., N. Y.), 32 Am. B. R. 203, 211 Fed. 230.

207. *In re Booss* (D. C., Pa.), 18 Am. B. R. 658, 154 Fed. 949; *Matter of Shoemaker* (D. C., Pa.), 35 Am. B. R. 22, 225 Fed. 329.

Assignment of life insurance policy without consideration while insolvent.—Where bankrupt holding a policy of insurance on his life payable to his own executors, administrators or assigns and having a cash surrender value then payable to him on demand, without changing the beneficiary as provided in the policy, at a time when insolvent, transferred the same by an assignment in writing to his wife who knew nothing of the transaction until after his bankruptcy and between the date of assignment and the time of bankruptcy, with the intent and effect of hindering, delaying and defrauding his creditors, unnecessarily paid the premiums on such policy two years in advance, the assignment cannot be sustained as against his trustee in bankruptcy, who may realize the surrender value of the policy for the benefit of the estate. *Kirkpatrick v. Johnson* (D. C., Pa.), 28 Am. B. R. 291, 197 Fed. 235.

Under the Pennsylvania act protecting insurance policies payable to the "wife or children or any dependent" upon the insured, it was held that a change of beneficiary, from the estate of the insured to his sister, within a month prior to his adjudication, did not operate to deprive the trustee of the proceeds of the policy since the sister was not shown to be dependent upon him. *South Side Trust Co. v. Wilmarth* (C. C. A., 3d Cir.), 29 Am. B. R. 29, 199 Fed. 418.

Nothing passes to the trustee where the wife, children or a dependant relative of the

the beneficiary at any time, his absolute dominion over the policy makes it property which passes to his trustee in bankruptcy, regardless of the fact that his wife is named as beneficiary in the first instance;²⁰⁸ but this principle is subject to the control of State statutes which protect the wife's interest in such a policy.²⁰⁹ Where a policy upon the expiration of the term gives the husband an annuity, and provides for payment of a specified sum to the wife

insured has been made the owner of the policy within the meaning of the Pennsylvania statutes, it having been taken out for them or bona fide assigned to them. *Matter of Jamison Bros. & Co.* (D. C., Pa.), 34 Am. B. R. 231, 222 Fed. 92.

208. *In re Dolan* (D. C., Pa.), 25 Am. B. R. 145, 182 Fed. 949.

Effect of right to change beneficiary.—In the case of *In re Herr* (D. C., Pa.), 25 Am. B. R. 142, 182 Fed. 716, the court said: "It is clear, under this showing, that the trustee is entitled to the policy or its surrender value. While the wife, as it stands, is the contingent beneficiary, the policy is under the complete control of the bankrupt, who may change the situation at any moment, and realize upon it, without regard to her, either giving it up and getting the surrender value, or continuing it with a newly designated beneficiary, just as he may choose. This absolute dominion over the policy makes it his, and it therefore passes with the rest of his property to his trustee, subject only to the right to redeem, as provided by the act, on paying the surrender value. This question has been considered in numerous cases, and by the decided weight of authority the right of the trustee has been sustained." See also *In re Diack* (D. C., N. Y.), 3 Am. B. R. 723, 100 Fed. 770; *In re Boardman* (D. C., Mass.), 4 Am. B. R. 620, 103 Fed. 783; *In re Coleman* (C. C. A., 2d Cir.), 14 Am. B. R. 461, 136 Fed. 818; *Matter of Phelps* (Ref., N. Y.), 15 Am. B. R. 170; *Clark v. Assur. Soc.* (C. C. A.), 16 Am. B. R. 137, 143 Fed. 175; *In re Wolff* (D. C., N. Y.), 21 Am. B. R. 452, 165 Fed. 984; *In re White* (C. C. A., 2d Cir.), 23 Am. B. R. 90, 174 Fed. 333; *In re Moore* (D. C., Tenn.), 23 Am. B. R. 109, 173 Fed. 609; *Matter of Hettling* (C. C. A., 2d Cir.), 23 Am. B. R. 161, 175 Fed. 65; *In re Orear* (C. C. A., 8th Cir.), 24 Am. B. R. 343, 178 Fed. 632; *Sanders v. Aetna Life Ins. Co.* (So. Car. Sup. Ct.), 31 Am. B. R. 854, 78 S. E. 532; *Matter of Young* (D. C., Ohio), 31 Am. B. R. 29, 208 Fed. 373, holding that under the Ohio statute (Code, § 9398), policies of insurance made payable to the wife of the insured do not pass to his trustee in bankruptcy, notwithstanding provisions in such policies authorizing him to change the beneficiary, or to receive a stipulated surrender value without her consent; *In re Orear* (C. C. A., 8th Cir.), 26 Am. B. R. 521, 189 Fed. 388; *Matter of Farrand* (D. C., Me.), 38 Am. B. R. 101, 235 Fed. 809; *Matter of Draper* (D. C., N. Y.), 32 Am. B. R. 203, 211 Fed. 230.

Where the bankrupt had insured his wife but had at any time the right to change the beneficiary and the policy had no cash surrender value, the loan value of the policy will not be treated as a cash surrender value, and the bankrupt compelled to make himself the beneficiary, borrow from the company the amount of the loan value and turn it over to his creditors. *Matter of Hammel & Co.* (C. C. A., 2d Cir.), 34 Am. B. R. 46, 221 Fed. 56.

209. **Policy payable to wife exempt.**—Under the statutes in some States where the wife is a beneficiary, the policy has been held to be exempt, being protected, as it is said, against the claims of creditors, by the law of the States where the cases respectively arose. *In re Booss* (D. C., Pa.), 18 Am. B. R. 658, 154 Fed. 594; *In re Pfaffinger* (D. C., Ky.), 21 Am. B. R. 255, 164 Fed. 526; *In re Whelpley* (D. C., N. H.), 22 Am. B. R. 433, 169 Fed. 1019; *In re Johnson* (D. C., Minn.), 24 Am. B. R. 277, 176 Fed. 591; *Holden v. Stratton*, 198 U. S. 202, 14 Am. B. R. 94, 49 L. Ed. 1018, 25 Sup. Ct. 656; *In re Carlson* (D. C., So. Dak.), 27 Am. B. R. 18, 189 Fed. 815.

Exemption under State statute.—At the end of a 20-year period, bankrupt, as insured, had exercised an option to withdraw in cash the accumulated surplus upon his life insurance policy and then made his wife instead of his executors, etc., the beneficiary thereof as a fully paid-up policy, reserving to himself, however, the right to change the beneficiary as provided in the policy. After withdrawing the accumulated surplus, the policy became entitled to certain annual dividends, payable to the beneficiary. Subsequently he was adjudicated a voluntary bankrupt. Held, that the policy was a strictly life insurance policy, the investment feature having been eliminated when the surplus was paid to the bankrupt, and being payable to the wife, it was exempt from the claims of the husband's creditors under the Wisconsin statute and not an asset of the bankrupt's estate; that even though the bankrupt had reserved the right to change the beneficiary, no such right passed to the trustee, as at the time of adjudication, the time when the trustee was vested with title, it was exempt by being then payable to the wife; and that the annual dividends, which were payable to the beneficiary and which were a mere incident of the policy, likely to vary in amount from year to year, depending upon interest rates and the cost of conducting the business, did not destroy its essential character as a purely life policy. *Allen v. Central Wisconsin Trust*

upon the husband's death, the trustee's interest is measured by the value of the annuity.²¹⁰ If a policy is payable to the husband at the expiration of the term, and the wife derives benefit therefrom only in case of the husband's death prior to such expiration, the husband's trustee in bankruptcy takes the cash surrender value of the policy.²¹¹

(V) *Bankrupt as beneficiary*.—Where a policy on the life of a person other than the bankrupt was in existence at the time of adjudication, and such policy named the bankrupt as beneficiary, subject to change by the insured, such bankrupt has no vested interest or property right in such policy during the life of the insured. If the insured dies subsequent to the adjudication, the proceeds of the policy should be paid to the bankrupt, and do not pass to his trustee.²¹²

(13) **FIRE INSURANCE POLICIES**.—Fire insurance policies are rarely assets, unless a fire loss has occurred just prior to the bankruptcy.²¹³ The bankruptcy of the insured is not such a transfer of title as to nullify a policy under a clause giving that effect to a change of ownership.²¹⁴ An assignment of a fire insurance policy is valid and the trustee does not take title thereto in the absence of any circumstance showing that the bankruptcy act had been violated.²¹⁵

Co. (Sup. Ct., Wis.), 26 Am. B. R. 126, 143 Wis. 381. See also *Matter of Churchill* (C. C. A., 7th Cir.), 31 Am. B. R. 1, 209 Fed. 766, rev'd 29 Am. B. R. 153, 198 Fed. 711.

Effect of divorce from bankrupt to give him right to change beneficiary; failure to exercise right prior to adjudication.—Where bankrupt at the date of his adjudication was insured for the benefit of his wife and the policy of insurance was, by a statute of Missouri, declared to be for the separate benefit of the wife and exempt from claims of the husband's creditors, the fact that subsequently the wife secured a divorce from bankrupt, thereby giving him the right, both under the statute and by the terms of the policy, which he did not exercise, to change the beneficiary, does not vest the title of the policy in his trustee, as a trustee in bankruptcy, under § 70-a of the bankruptcy act, can take nothing save of the date of the adjudication of bankruptcy. *In re Orear* (C. C. A., 8th Cir.), 26 Am. B. R. 521, 189 Fed. 888.

210. *In re Schaefer* (D. C., Ohio), 26 Am. B. R. 340, 188 Fed. 187.

211. Payment of policy to husband at maturity.—It is not essential that the policy of insurance should expressly provide for a cash surrender value, but it is sufficient to permit a recovery by the trustee if the company has a recognized rule of paying a surrender value, and where such a policy on the life of bankrupt was payable to bankrupt at maturity, the beneficiaries to derive no benefits except in case of his death before maturity of policy, his trustee in bankruptcy was entitled to receive the cash surrender value of the policy upon default in the payment of premiums which cut off all interest of the beneficiaries and rendered unnecessary the nominating of a new bene-

ficiary by the bankrupt or trustee. *Equitable Life Assurance Co. v. Miller* (C. C. A., 8th Cir.), 25 Am. B. R. 560, 185 Fed. 98.

When the designation of beneficiary is open to recall by the insured to whom belongs the right to cancel or surrender the policy, the beneficiary merely having been designated to receive the moneys payable on the death of the insured, the surrender value of the policy passes to the trustee upon the bankruptcy of the insured. *Matter of Jamison Bros. & Co.* (D. C., Pa.), 34 Am. B. R. 231, 222 Fed. 92.

212. *In re Hogan* (C. C. A., 7th Cir.), 28 Am. B. R. 166, 194 Fed. 846.

213. *In re Hamilton* (D. C., Ark.), 4 Am. B. R. 543, 102 Fed. 683, 2 N. B. N. 959. See also *Long v. Farmers' State Bank* (C. C. A., 8th Cir.), 17 Am. B. R. 103, 147 Fed. 360. As to proceeds of fire insurance policy on property sold to the bankrupt on condition, see *In re Zitron* (D. C., Wis.), 30 Am. B. R. 172, 203 Fed. 79.

214. *Starkweather v. Cleveland Ins. Co.*, Fed. Cas. 13,308. Compare *Gordon v. Mechanics & Traders' Ins. Co.*, 22 Am. B. R. 649, 120 La. Ann. 441, 45 So. 384; *Matter of Johnson* (D. C., Conn.), 33 Am. B. R. 104, 215 Fed. 666.

215. *Smith v. Retail Merchants' Fire Ins. Co.* (S. Dak. Sup. Ct.), 37 Am. B. R. 609, 158 N. W. 780; *Radford Grocery Co. v. Powell* (C. C. A., 5th Cir.), 35 Am. B. R. 790, 228 Fed. 1.

Misapplication of proceeds of policy.—Where a bankrupt immediately after a fire which occurred before bankruptcy, notified his creditors thereof by 'phone and letter and caused them to believe that as soon as he collected his fire insurance he would settle with them in full or in part at least, and after paying a creditor to whom he assigned

(14) **PROPERTY SOLD TO THE BANKRUPT ON CONDITION.**—(I) *In general.*—Property in the possession of the bankrupt, sold to him on condition that title thereto will remain in the vendor until the purchase price is paid, will or will not pass to the trustee in bankruptcy, dependent upon the effect of such conditional sale as to the bankrupt's creditors under the law of the State.²¹⁶ The conditional vendor's interest is in the nature of a lien, effectual as against the vendee's creditors, if the requirements prescribed by State statute, as to filing, recording or other notice, have been fully met.²¹⁷ Where a conditional sale has been kept from record by a fraudulent agreement, the trustee of the vendee takes title.²¹⁸ If the bankrupt was in possession under a contract invalid as to creditors, as, for instance, because not filed or recorded in accordance with that law, both possession and title pass to the trustee.²¹⁹

a policy as security, used the balance for the purchase of a homestead, the creditors are entitled to have the insurance moneys applied pursuant to the bankrupt's agreement, and may follow the moneys improperly invested. (Such an agreement constituted an equitable assignment or lien enforceable by the creditors. *Parlin & Orendorff Implement Co. v. Moulden* (C. C. A., 5th Cir.), 35 Am. B. R. 782, 228 Fed. 111.

216. *Potter Mfg. Co. v. Arthur* (C. C. A., 6th Cir.), 34 Am. B. R. 75, 220 Fed. 843; *John Deere Plow Co. v. Moury* (C. C. A., 6th Cir.), 34 Am. B. R. 384, 222 Fed. 1; *Matter of Pacific Elec. & Automobile Co.* (D. C., Wash.), 35 Am. B. R. 222, 224 Fed. 220; *Ward v. American Agricultural Co.* (C. C. A., 4th Cir.), 36 Am. B. R. 321; *Matter of Leflys* (C. C. A., 7th Cir.), 36 Am. B. R. 306, 229 Fed. 695; *Matter of Stoughton Wagon Co.* (C. C. A., 6th Cir.), 36 Am. B. R. 592, 231 Fed. 676; *Wood Mowing & Reaping Co. v. Croll* (C. C. A., 6th Cir.), 36 Am. B. R. 610, 231 Fed. 679; *Matter of Farmers Dairy Assn.* (D. C., Col.), 37 Am. B. R. 672, 234 Fed. 118; *Matter of Kruse* (D. C., Iowa), 37 Am. B. R. 687, 234 Fed. 470.

217. *In re Sheets Printing, etc., Co.* (D. C., Ohio), 14 Am. B. R. 668, 136 Fed. 989. A leading case is *In re Garcewich* (C. C. A., 2d Cir.), 8 Am. B. R. 149, 118 Fed. 87, holding that where goods were sold to the bankrupt on credit, and with the understanding that the title to such of them as should not be sold by them should remain in the vendor until the payment of the purchase price, the title thereto vests in the trustee. See also *In re Burkle* (D. C., Conn.), 8 Am. B. R. 542, 116 Fed. 766, and *In re Howland* (D. C., N. Y.), 6 Am. B. R. 495, 109 Fed. 869.

Under the law of Massachusetts, a chattel mortgage to be valid must be recorded, or the mortgagee must have taken and retained possession; and a bill of sale of personal property, unaccompanied by delivery, the grantor retaining possession, is invalid as against subsequent purchasers and attaching creditors. *In re Harrington* (Ref., Mass.), 29 Am. B. R. 690.

In Pennsylvania, property in the possession of a bankrupt on conditional sale can be levied upon and sold under judicial proceed-

ings, and comes clearly within the definition of property which passes to the trustee. *In re Burt* (D. C., Pa.), 19 Am. B. R. 123, 155 Fed. 267; *In re Rinker* (D. C., Pa.), 23 Am. B. R. 62, 174 Fed. 490.

In Nebraska, a contract of conditional sale whereby the parties agree that the title shall remain in the vendor until the purchase price is fully paid is voidable by purchasers, attaching creditors, and judgment creditors only, if not filed in the office of the county clerk. It is valid against all other creditors though unfiled, and hence against a trustee in bankruptcy who represents no attaching or judicial creditors. *In re Great Western Mfg. Co.* (C. C. A., 8th Cir.), 18 Am. B. R. 259, 152 Fed. 123.

The title reserved by a vendor in a contract of conditional sale, free from fraud, until payment of the purchase money, is good against all the world, except as to creditors of the vendee who had acquired a lien by levy or attachment, upon the property while it was in the possession of the vendee, and under § 70-a (5) his trustee takes title, subject to the superior title of the vendor. *Davis v. Crompton* (C. C. A., 3d Cir.), 20 Am. B. R. 53, 158 Fed. 735.

In Georgia, a contract of conditional sale executed in good faith prior to the four months' period, but recorded within said period and without knowledge of the vendee's insolvency is valid as against the trustee in bankruptcy of the vendee. *Matter of Brown Wagon Co.* (D. C., Ga.), 35 Am. B. R. 383, 224 Fed. 266.

218. *In re Perkins* (D. C., Me.), 19 Am. B. R. 134, 155 Fed. 237.

219. *In re Yukon, etc., Co.* (D. C., Conn.), 2 Am. B. R. 805, 96 Fed. 326; *In re Frazier* (D. C., Mo.), 9 Am. B. R. 21, 117 Fed. 575; *Chesapeake Shoe Co. v. Seldner* (C. C. A., 4th Cir.), 10 Am. B. R. 466, 122 Fed. 593; *In re Press-Post Publishing Co.* (D. C., Ohio), 13 Am. B. R. 797, 134 Fed. 998; *In re Smith & Shuck* (D. C., Iowa), 13 Am. B. R. 103, 132 Fed. 301; *McElvain v. Hardesty* (C. C. A., 8th Cir.), 22 Am. B. R. 320, 169 Fed. 31; *In re Zephyr Mercantile Co.* (D. C., Tex.), 30 Am. B. R. 203, 203 Fed. 576. Compare *In re Leigh Bros.*, 96 Fed. 806, affg. 2 Am. B. R. 606; *In re Howland*

But creditors are not purchasers or lienors.²²⁰ Independent of the statutory power conferred by § 47-a (2) as amended in 1910, the trustee in bankruptcy is neither a subsequent creditor without notice nor a purchaser or incumbrancer in good faith and for value.²²¹ In some jurisdictions the rule obtains that the delivery of goods, with the provision that the title shall not pass until the purchase price has been paid, is void as to the creditors of the party to whom they are delivered; in such case goods found in the bankrupt's possession, delivered under such conditions, pass to the trustee.²²² And where a statute provides that goods acquired or used by a trader in his business shall be deemed the property of such trader unless publicity is given to the fact that as to such goods he is an agent of the alleged owner, a failure to comply with such requirement as to publicity will cause the goods to pass to the trader's trustee in bankruptcy.²²³ Where it is impossible to identify articles purchased under a conditional sale contract, either from the terms of the contract or the records of the vendor, the contract is invalid and may

(D. C., N. Y.), 6 Am. B. R. 495, 109 Fed. 869.

Under the Connecticut statute (§§ 4864, 4865, Conn. Stats., 1902) property sold by the bankrupt, but retained in his possession, is subject to be taken by *bona fide* creditors as his property, and the good faith of the parties makes no difference. In re Fitzgerald (D. C., Conn.), 28 Am. B. R. 710, 188 Fed. 763.

220. In re Bozeman (Ref., Ga.), 2 Am. B. R. 809; In re Kellogg (D. C., N. Y.), 7 Am. B. R. 270, 112 Fed. 52; In re Hinsdale (D. C., Vt.), 7 Am. B. R. 85, 111 Fed. 502; Nauman Co. v. Bradshaw (C. C. A., 8th Cir.), 27 Am. B. R. 565, 193 Fed. 350. Compare In re McKay (Ref., Ohio), 1 Am. B. R. 292.

Reservation of title in vendor against intent of parties.—Where a government contractor engaged in constructing a tug procured certain boilers for use therein, and all the parties contemplated that title would pass to the United States, the vendor of the boilers has no lien thereon as against the trustee in bankruptcy of the contractor, and other creditors, although there was a clause in the body of the contract reserving title. In re Waters-Colver Co. (D. C., N. Y.), 30 Am. B. R. 763, 206 Fed. 845.

221. In re Pierce (C. C. A., 8th Cir.), 19 Am. B. R. 664, 157 Fed. 757.

222. This is the rule in Pennsylvania.—In re Tice (D. C., Pa.), 15 Am. B. R. 97, 139 Fed. 52; In re Rinker (D. C., Pa.), 23 Am. B. R. 62, 174 Fed. 490; In re Poore (D. C., Pa.), 15 Am. B. R. 174, 139 Fed. 862, s. c. 15 Am. B. R. 407, 140 Fed. 786; Matter of Rodgers & Hite (D. C., Pa.), 16 Am. B. R. 401, 143 Fed. 594; Matter of Hess (D. C., Pa.), 14 Am. B. R. 635, 136 Fed. 988; In re Beihl (D. C., Pa.), 23 Am. B. R. 905, 176 Fed. 583.

Also in other jurisdictions, see In re Franklin Lumber Co. (D. C., N. J.), 17 Am. B. R. 443, 147 Fed. 852; In re Builders Lumber Co. (D. C., N. Car.), 17 Am. B. R. 449, 148 Fed. 244; In re Bement (C. C. A., 7th Cir.), 22 Am. B. R. 615, 172 Fed. 98,

revg. Mishawaka Woolen Mfg. Co. v. Smith, 20 Am. B. R. 317, 158 Fed. 885; In re Burke (D. C., Ga.), 22 Am. B. R. 69, 168 Fed. 994; In re Priegle Paine Co. (D. C., Ala.), 23 Am. B. R. 385, 175 Fed. 586; In re Gilligan (C. C. A., 7th Cir.), 23 Am. B. R. 668, 152 Fed. 605; Becher Co. v. Gill (C. C. A., 8th Cir.), 30 Am. B. R. 429, 206 Fed. 36.

The trustee of a bankrupt in the State of Connecticut takes absolute title, under § 70-a (5) of the bankruptcy act, to property in possession of the bankrupt at the time of adjudication, said property having been delivered to the bankrupt by the vendor thereof under a conditional sale agreement, which provided that the title should remain in the vendor until the price agreed upon should be fully paid, where such contract was never executed and recorded as prescribed by the statutes of Connecticut, as construed by its Supreme Court, providing that such unrecorded sales are absolute sales as to the vendee's creditors, who may take the property by attachment or execution in payment of the vendee's debts. In re Faulkner (D. C., Conn.), 25 Am. B. R. 416, 181 Fed. 981.

223. Gillaspay v. International Harvester Co. (Miss. Sup. Ct.), 38 Am. B. R. 827, 67 So. 904.

Agency instead of conditional sales.—The financial condition of a manufacturer of shoes having become impaired, it made an agreement with a wholesale dealer which provided in part as follows: "We authorize you to purchase for us * * * leather, etc. * * * to be used in the manufacture of shoes for us, * * * all said leather, etc., to be billed to us and shipped to us in your care at Dubuque, Iowa. Title * * * to remain in us until the goods are delivered to us at Chicago." Thereafter the manufacturer was adjudged bankrupt and the wholesale dealer made a claim against the trustee. Held, that the agreement did not constitute a conditional sale but merely an agency. Smith Wallace Shoe Co. v. Ternes (C. C. A., 8th Cir.), 37 Am. B. R. 845, 235 Fed. 282.

be set aside by the trustee in bankruptcy of the purchaser.²²⁴ Under a statute providing that an unrecorded contract of conditional sale is void only as against subsequent purchasers, pledgees or mortgagees in good faith, a failure to record such a contract prior to the adjudication in bankruptcy of the vendee does not affect the title of the conditional vendor as against the vendee's trustee.²²⁵ Where property is sold to a vendee who subsequently becomes bankrupt upon condition that payment be made upon delivery, title does not pass to the trustee, since such payment is a condition precedent, and until made or waived the vendee had no title to such property.²²⁶ The subsequent acceptance of a note for the purchase price, by the conditional vendor, does not extinguish the original claim or debt, in the absence of an agreement to that effect.²²⁷

(II) *Lease with privilege of purchase.*—A statute requiring the filing of contracts for the conditional sale of property is not to be avoided by pretext; it will not be effectual to call a contract a "lease" which provides for the payment of rent for the use of an article for a prescribed time, with the right to pay the purchase price at the end of the term, all payments of rent to be applied thereon; such a contract is for a conditional sale and, unless duly filed, the property sold will vest in the vendee's trustee in bankruptcy for the benefit of his creditors.²²⁸ But if personal property was actually leased and

^{224.} *Meier & Frank Co. v. Sabin* (C. C. A., 9th Cir.), 32 Am. B. R. 595, 214 Fed. 231.

^{225.} *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 11 Am. B. R. 709, 43 L. Ed. 986, 24 Sup. Ct. 690; *Matter of Cavagnard* (D. C., N. H.), 16 Am. B. R. 320, 143 Fed. 668; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 15 Am. B. R. 633, 50 L. Ed. 782, 26 Sup. Ct. 481, revg. 14 Am. B. R. 52, 135 Fed. 52. Compare *In re Tweed* (D. C., Iowa), 12 Am. B. R. 648, 131 Fed. 355; *First Nat. Bank v. Staake*, 202 U. S. 141, 15 Am. B. R. 639, 50 L. Ed. 967, 26 Sup. Ct. 580; *In re Dunlop*, (C. C. A., 8th Cir.), 19 Am. B. R. 361, 156 Fed. 945, holding that § 70-a (5) was not applicable to such a contract, for a trustee in bankruptcy is not a purchaser for value; *Crucible Steel Co. v. Holt* (C. C. A., 6th Cir.), 23 Am. B. R. 302, 174 Fed. 127; *In re American Machine Works* (C. C. A., 9th Cir.), 23 Am. B. R. 483, 174 Fed. 805, holding that where a State statute makes a contract for the conditional sale of personal property void as to subsequent creditors, unless registered, both the possession and title to property so sold pass to the trustee in bankruptcy of the vendee, in the absence of registration; *Nauman Co. v. Bradshaw* (C. C. A., 8th Cir.), 27 Am. B. R. 565, 193 Fed. 350. *In re Walsh Bros.* (D. C., Iowa), 28 Am. B. R. 243, 195 Fed. 576; *Matter of Remsen Mfg. Co.* (C. C. A., 2d Cir.), 36 Am. B. R. 799; *Matter of Remsen Mfg. Co.* (D. C., N. Y.), 35 Am. B. R. 195, 227 Fed. 707; *Matter of White's Express Co.* (C. C. A., 2d Cir.), 33 Am. B. R. 74, 215 Fed. 894.

Unrecorded contract for sale of goods.—Where a bankrupt agreed in writing that certain plows and other articles purchased by him should be paid for by notes, but that title and ownership of said articles should continue and remain in the vendor until the

whole purchase price was paid in cash, and it was further agreed that in the event of death, failure, insolvency, loss by fire, or disposal of the business, all obligations arising under the contract should become due and payable at once, the contract, although unrecorded, is valid as against creditors, and the vendor may reclaim property unpaid for at the date of the adjudication, there being no fraud or dishonesty of purpose. *Matter of Hamil* (D. C., N. Y.), 38 Am. B. R. 205, 236 Fed. 292.

^{226.} *In re Pittsburgh Industrial Iron Works* (D. C., Pa.), 25 Am. B. R. 221, 179 Fed. 151.

^{227.} *Matter of Wegman Piano Co.* (D. C., N. Y.), 34 Am. B. R. 490, 221 Fed. 128.

^{228.} *Unitype Co. v. Long* (C. C. A., 6th Cir.), 16 Am. B. R. 282, 143 Fed. 315, affg. 14 Am. B. R. 668, 136 Fed. 989. But if the vendor, on finding that the vendee is in financial difficulties, refuses to deliver machinery unless it be agreed that it be held under a lease, the title remaining in the vendor, the title does not vest upon delivery. *In re Naylor Mfg. Co.* (D. C., Pa.), 14 Am. B. R. 284, 135 Fed. 206; *Corbett v. Riddle* (C. C. A., 4th Cir.), 31 Am. B. R. 330, 209 Fed. 811, in which case a contract, which was in terms a lease, for the sale of a steam shovel, was held void as against the trustee because not recorded as a contract of conditional sale. Compare *McEwen v. Totten* (C. C. A., 5th Cir.), 21 Am. B. R. 336, 164 Fed. 837.

Intent to return necessary to establish bailment.—To constitute a valid bailment, an intention to return the property must be evidenced by the agreement; and if such intention appears from the writing but it is otherwise conclusively shown that it was not so intended, a bailment is not to be presumed. Hence, where bankrupt and claim-

had not in any way been used as a basis of credit, the property should be surrendered to the lessor.²²⁹

(III) *Goods consigned for sale.*—Where consigned goods are found among the assets and identified by the consignor, but not otherwise, the trustee should apply for an order permitting him to release them to the real owner. In actual practice, this is frequently done. Care should be taken to distinguish between goods sold on condition and goods consigned, and positive identification of the latter should be required.²³⁰ If it is intended by the contract that the purchaser should be absolutely bound in all events to pay for the goods, the title being reserved in the vendor, then the contract is one of conditional sale; but if the vendor merely delivers the goods to be sold by the vendee with no obligation to pay for those unsold, the contract is merely a consignment for sale.²³¹ As to the avails of goods so consigned, but sold by him before the bankruptcy, the funds being mingled with his own, title thereto passes to the trustee.²³² The owner of the proceeds of the goods may recover them in full, to the extent of his ability to trace them into the hands of the bankrupt's trustee.²³³ Where seizure is necessary to establish the creditor's rights, title will not pass unless seizure is made before the bankruptcy.²³⁴ Where, however, the property is merely consigned for sale, the bankrupt is not a vendee on condition.²³⁵ If consigned for sale the bankrupt was a bailee

and entered into written agreements, purporting to lease certain machinery at a specified rental and containing an option to purchase the machinery for a further sum at the end of the rental period, which contracts were in terms bailments, but it appeared that at the same time the instruments were executed, claimant accepted from bankrupt negotiable notes, not only for the respective amounts provided as monthly rental accumulating, but for the amounts provided to be paid by bankrupt in case he exercised the options to purchase said machinery, the intention to return the property is denied by the acts of the parties, and the transaction constitutes, not a bailment or lease, but a sale. *In re Gaglione & Son* (D. C., Pa.), 28 Am. B. R. 694, 200 Fed. 81.

Contract in terms a bailment.—Although the mere use of the words "lease" and "rental" in a written agreement relating to personalty, will not convert into a bailment what must otherwise be construed as a conditional sale, yet, even in a contest in which execution creditors are concerned, if the contract by its terms is a bailment, it will be given that effect to the exclusion of the execution creditors. *Smith & Bro. Typewriter Co. v. Alleman* (C. C. A., 3d Cir.), 28 Am. B. R. 699, 199 Fed. 1.

229. *Nylin v. American Trust & Sav. Bank* (C. C. A., 7th Cir.), 21 Am. B. R. 533, 166 Fed. 276; *In re Boschelli* (D. C., Pa.), 25 Am. B. R. 528, 183 Fed. 864; *In re Daterson Pub. Co.*, (C. C. A., 3d Cir.), 26 Am. B. R. 582, 188 Fed. 64.

230. See Am. Bankr. Dig. § 398.

The delivery of property to be paid for when sold constitutes a consignment, and the consignor may recover such property from the trustee in bankruptcy of the consignee. *Mat-*

ter of Bondurant Hardware Co. (D. C., Ga.), 37 Am. B. R. 308, 231 Fed. 247. And see *Gray v. Martin & Co.* (Ga. Ct. of App.), 37 Am. B. R. 500, 89 S. E. 540; *Matter of National Home & Hotel Supply Co.* (D. C., Mich.), 35 Am. B. R. 139, 226 Fed. 840; *Adams v. Meyers*, Fed. Cas. 62. See *In re Levin* (D. C., Pa.), 11 Am. B. R. 446, 127 Fed. 886; *Matter of Leftys* (C. C. A., 7th Cir.), 36 Am. B. R. 306, 229 Fed. 695.

Goods mingled so as to be impossible of identification.—A rubber company by contract made bankrupt its agent, and consigned to him goods for sale upon certain terms. It was expressly stated that the goods should be and remain the property of the company until sold and delivered by the agent to its *bona fide* customers. The agent was not only permitted to mingle the consigned goods with his own stock, but the contract expressly provided that the consignor would furnish the consignee "free of charge all samples of tires and accessories and necessary advertising matter, imprinted with the name and address of the consignee." *Held*, that, as to the creditors of the bankrupt agent, title to the consigned goods should be held to have passed to the consignee, and that they cannot be reclaimed by the consignor. *Miller Rubber Co. v. Citizens' Trust and Savings Bank* (C. C. A., 9th Cir.), 37 Am. B. R. 542, 233 Fed. 488.

231. *Matter of Thomas* (D. C., Ga.), 36 Am. B. R. 600, 231 Fed. 513.

232. *Compare Bills v. Schliep* (C. C. A., 2d Cir.), 11 Am. B. R. 607, 127 Fed. 103.

233. *In re Acheson Co.*, (C. C. A., 9th Cir.), 22 Am. B. R. 338, 170 Fed. 427.

234. *In re Ohio, etc., Co.* (Ref., Ohio), 2 Am. B. R. 775.

235. *In re Columbus Buggy Co.*, (C. C. A.,

or agent, and had no title.²³⁶ And where a contract provides that the person to whom goods are consigned for sale shall hold the proceeds thereof in trust until all obligations of the consignee to the consignor are fully paid, the trustee in bankruptcy of the consignee does not acquire title to the proceeds of such sale in the hands of the bankrupt at the time of his adjudication.²³⁷ Such an agreement is not a contract of conditional sale and need not be recorded under statutes in a number of states.²³⁸ The contract under which

8th Cir.), 16 Am. B. R. 759, 143 Fed. 859; *Deere Plow Co. v. McDavid* (C. C. A., 8th Cir.), 14 Am. B. R. 653, 137 Fed. 802; *In re Miller* (D. C., Pa.), 14 Am. B. R. 439, 135 Fed. 868; *In re Flanders* (C. C. A., 7th Cir.), 14 Am. B. R. 27, 134 Fed. 560; *In re Galt* (C. C. A., 7th Cir.), 13 Am. B. R. 575, 120 Fed. 64, 56 C. C. A. 470; *Franklin v. Stoughton Wagon Co.* (C. C. A., 8th Cir.), 22 Am. B. R. 63, 168 Fed. 857; *In re Bailey* (D. C., So. Car.), 23 Am. B. R. 876, 176 Fed. 628; *Ludveigh v. American Woolen Co.*, 231 U. S. 522, 31 Am. B. R. 481, 58 L. Ed. 345, 34 Sup. Ct. 161; *Bransford v. Regal Shoe Co.* (C. C. A., 5th Cir.), 38 Am. B. R. 450, 237 Fed. 67; *Matter of Wright & Barron Drug Co.* (D. C., Ga.), 38 Am. B. R. 486, 237 Fed. 411.

Bailment for sale; right to reclaim.—A contract under which wagons were consigned to bankrupt for sale, as agent, considered and as to the goods not already sold thereunder, *held*, not to be a conditional sale but a bailment for sale, so that the vendor was entitled to reclaim such goods, from bankrupt's trustee. *In re Reynolds* (D. C., Ky.), 29 Am. B. R. 145, 203 Fed. 162.

Agency to sell.—Provisions of an agreement under which chattels were delivered to a bankrupt and circumstances examined and held, that the relation between the parties was that of principal and agent, and not of seller and buyer, that the agreement was an agency to sell and not a sale, and that, since at the date of the bankruptcy, the bankrupt had not become the purchaser of the chattels then on hand, shipped under the agreement in either of the contingencies contemplated thereby, they may be recovered from the trustee in bankruptcy. *Mitchell Wagon Co. v. Poole* (C. C. A., 6th Cir.), 37 Am. B. R. 656; *McKey v. Clark* (C. C. A., 9th Cir.), 37 Am. B. R. 699, 233 Fed. 928.

Sale to merchant in usual course of business.—Where property is delivered to the vendee for sale in the usual course of business as a merchant, and the various provisions relating to the ownership and possession are mere contrivances to secure the purchase price to the vendor, the transactions are fraudulent in law as against other creditors of the vendee, and the trustee in bankruptcy of the vendee is entitled to the goods as against the vendor. *Matter of Roellich* (D. C., Ore.), 35 Am. B. R. 164, 223 Fed. 687.

236. See Am. Bankr. Dig. § 395; *Matter of Wright-Dana Hardware Co.* (C. C. A., 2d Cir.), 31 Am. B. R. 763, 211 Fed. 908, affg. 30

Am. B. R. 582, 205 Fed. 335; *In re Chalmers* (D. C., Mont.), 30 Am. B. R. 521, 206 Fed. 143; *Roth v. Smith & Scheffer* (C. C. A., 3d Cir.), 32 Am. B. R. 772, 215 Fed. 82; *Ellet-Kendall Shoe Co. v. Martin* (C. C. A., 8th Cir.), 34 Am. B. R. 502, 222 Fed. 851; *Matter of Reeves* (D. C., N. Y.), 36 Am. B. R. 130, 227 Fed. 711.

Sale on commission; bailment.—Where a bankrupt acquires possession of property under an agreement for purpose of sale on commission, the title to remain in another until sale, the agreement is a bailment only, and is not required to be filed or recorded under section 2905 of the Iowa Code, and the trustee in bankruptcy of the bailee acquires no interest in property in the possession of the bankrupt under such agreement. *Matter of Kruse* (D. C., Ia.), 37 Am. B. R. 687, 234 Fed. 470; see under Kansas statute, *McElwain-Barton Shoe Co. v. Bassett* (C. C. A., 8th Cir.), 36 Am. B. R. 536, 231 Fed. 889.

In South Carolina, an unrecorded contract of assignment, creating the relation of bailor and bailee between the parties, is void as against the trustee in bankruptcy of the consignee. *Matter of Sturkey Co.* (D. C., So. Car.), 35 Am. B. R. 371, 224 Fed. 251.

In Michigan where goods are intended for resale, a reservation of title cannot stand (as a conditional sale), unless, taking the entire contract and circumstances together, it is clearly dominant over the right of resale and other inconsistent features of the contract; in other words, the facts as a whole must be consistent with the theory that the resale is made by the vendee as agent or consignee, and not as the owner. *Deere Plow Co. v. Mowry* (C. C. A., 6th Cir.), 34 Am. B. R. 384, 222 Fed. 1.

237. *Wood Co. v. Eubanks* (C. C. A., 4th Cir.), 22 Am. B. R. 307, 169 Fed. 929; *In re Reynolds* (D. C., Ky.), 29 Am. B. R. 145, 203 Fed. 162.

238. *Corbitt Buggy Co. v. Ricaud* (C. C. A., 4th Cir.), 22 Am. B. R. 316, 169 Fed. 936, holding that such contract constitutes a trust, valid as against the vendee's trustee in bankruptcy; even if it were a conditional sale it would be good between the parties, without registration, and the trustee occupies the same relation to the vendor that the vendee did prior to his adjudication: *John Deere Plow Co. v. Anderson* (C. C. A., 5th Cir.), 23 Am. B. R. 480, 174 Fed. 815; *Matter of Goldman* (C. C. A., 6th Cir.), 23 Am. B. R. 497, 174 Fed. 579; *Ellet-Kendall Shoe Co. v. Martin* (C. C. A., 8th Cir.), 34 Am. B. R. 502, 222 Fed. 851, where it appeared that after an

goods were sold to the bankrupt contained no limitation upon the right to sell and only prescribed the method of making payment, and contained a provision to the effect that the title and ownership of the goods purchased and the proceeds of the sale thereof should remain the property of the seller; such contract was held to create a secret lien constituting a fraud upon the creditors of the bankrupt, and was invalid as against his trustee in bankruptcy.²³⁹

(IV) *Option to purchase or return*.—Goods delivered with an option to purchase or return within thirty days from delivery constitutes a contract of sale and return, and the title to goods, delivered within the thirty days immediately preceding the bankruptcy of the vendee, does not pass to the trustee.²⁴⁰ Where machinery is sold on trial, and retained by the bankrupt vendee for a year without offer to return, expression of dissatisfaction, or demand by vendor, the sale is absolute and title is vested in the trustee.²⁴¹

(15) *PROPERTY AFFECTED BY FRAUDULENT REPRESENTATIONS*.—Since the trustee takes the bankrupt's property charged with all claims and equities

order for the purchase of shoes had been cancelled a contract was made whereby the shoes were consigned to the bankrupt for sale, and it was held (under Kansas statute) that contract was not required to be recorded to protect the rights of the consignor.

239. In re Galt (D. C., Ill.), 9 Am. B. R. 682, 120 Fed. 443; In re Carpenter (D. C., N. Y.), 11 Am. B. R. 147, 125 Fed. 831, in which case it was held that a similar agreement passed the title to the goods sold to the vendee, to which title the trustee in bankruptcy succeeded; that there was no purpose apparent therefrom to create an agency in the vendee, nor could such agreement be sustained as a conditional sale, a mortgage, or an instrument attempting to create a lien in behalf of the seller. See also In re Tweed (D. C., Iowa), 12 Am. B. R. 648, 131 Fed. 355; In re Butterwick (D. C., Pa.), 12 Am. B. R. 536, 131 Fed. 371; Matter of Rasmussen (D. C., Or.), 13 Am. B. R. 462, 136 Fed. 704; In re Martin-Vernon Music Co. (D. C., Mo.), 13 Am. B. R. 276, 132 Fed. 983; Matter of Penny & Anderson (D. C., N. Y.), 23 Am. B. R. 115, 176 Fed. 141; In re Waite-Robbins Motor Co., (D. C., Mass.), 27 Am. B. R. 541, 192 Fed. 47; Matter of Roellich (D. C., Ore.), 35 Am. B. R. 164, 223 Fed. 687; Flanders Motor Co. v. Reed (C. C. A., 1st Cir.), 33 Am. B. R. 842, 220 Fed. 642.

Contract in form a conditional sale.—Where claimant's assignor delivered certain automobile parts to the bankrupt for sale under a contract providing that title should not pass until the same were paid for in full, and that bankrupt on all orders for parts should be allowed a discount from the list prices, but it appeared from the subsequent correspondence of the parties that they dealt with each other as vendor and purchaser, the sale was not a conditional, but an absolute sale. In re Harrington (Ref., Mass.), 29 Am. B. R. 690.

Property intended for resale; reservation of title.—Where goods are intended for resale the reservation of title cannot be sustained

as a conditional sale unless, taking the entire contract and circumstances together, the reservation of title is clearly dominant over the right of resale and other inconsistent features of the contract. Such reservation of title can be sustained only on the theory that the resale is made by the vendee as the agent or consignee of the vendor, by an agency or consignment which underlies the executory sale and which is a continuing one until it is terminated either by the resale or the vendee's personal performance of the conditions, which, then, for the first time, vest title in him. Wood Mowing & Reaping Mach. Co. v. Crool (C. C. A., 6th Cir.), 36 Am. B. R. 610, 231 Fed. 679; Matter of Stoughton Wagon Co. (C. C. A., 6th Cir.), 36 Am. B. R. 592, 231 Fed. 676.

240. In re Schindler (D. C., N. Y.), 19 Am. B. R. 800, 153 Fed. 458.

Sale or return.—Where a bankrupt, during the month prior to his adjudication, bought a pair of horses, for which he was to pay a certain price if they proved satisfactory after a trial, and, if not, to return them, and they came into the possession of the receiver, the transaction presents a case of sale or return, and the title passes to the bankrupt, subject to the exercise of the option to return. In re Landis, (D. C., Pa.), 18 Am. B. R. 483, 151 Fed. 896; In re Allen (D. C., Ark.), 25 Am. B. R. 722, 183 Fed. 172; Parlett v. Blake (C. C. A., 5th Cir.), 26 Am. B. R. 25, 188 Fed. 200; Matter of Thomas (D. C., Ga.), 36 Am. B. R. 600, 231 Fed. 613.

241. In re Downing Paper Co. (D. C., Pa.), 17 Am. B. R. 121, 147 Fed. 858.

Where machinery sold for cash was delivered to the buyer, a corporation, at its request, and on its promise to send a check for the price, and on his failure so to do, the agent of the seller accepts in payment for the machinery negotiable vouchers, secured by bonds, the title to the machinery vests in the trustee in bankruptcy of the buyer. In re Cullman Assn. (D. C., Ala.), 19 Am. B. R. 259, 155 Fed. 372.

against it, his title to the same is inferior to that of one who was induced to sell on materially false representations. In such cases, the claimant usually proceeds as in replevin.²⁴² But, where the property is in the custody of the bankruptcy court, it is immune from replevin process in the State court.²⁴³ It has been held that the false representation need not be the sole and exclusive consideration for the credit, but only a material consideration;²⁴⁴ also, that false representations to a mercantile agency are enough.²⁴⁵ An insolvent buyer who knows when he purchases property that his financial condition is such that he cannot pay, it will be presumed that he bought the property with an intention not to pay for it.²⁴⁶ Other cases under the present law appear in the foot-note.²⁴⁸

g. Reclamation proceedings.—(1) **IN GENERAL.**—Reclamation proceedings may be in or out of the bankruptcy proceeding. A petition to reclaim consigned goods is an instance of the former;²⁴⁹ the proceeding in the nature of a bankruptcy replevin which, in most large trade centers, has of late been so common if not notorious, is an instance of the latter. The petition in such proceedings should contain allegations sufficient to sustain a complaint in trover and conversion, or such as are required by the strictest practice in an affidavit for replevin.²⁵⁰ The evils resulting from so-called "reclamation proceedings" are patent and hard to overcome.²⁵¹ In effect, estates are often dissipated by greedy and not over-scrupulous creditors, who apply for possession, after rescission, on the ground of alleged fraudulent representations, and are granted what they ask, without adequate judicial investigation of their right to it and before there is a court officer authorized to bond back the goods reclaimed.²⁵²

(2) **TIME WITHIN WHICH PETITIONS SHOULD BE FILED.**—Most of the evils resulting from reclamation proceedings will be avoided if the claiming creditor is at least required in the first instance, always after a short notice to the receiver or creditor, to prove identity strictly, either before the judge or a referee sitting as special master.²⁵³ The delay incident to such proof will

²⁴². See next paragraph of this section.

²⁴³. In re Russell (C. C. A., 2d Cir.), 3 Am. B. R. 658, 101 Fed. 248; In re Mertens (D. C., N. Y.), 12 Am. B. R. 698, 131 Fed. 507; Matter of Wellmade Gas Mantle Co., (D. C., Mass.), 36 Am. B. R. 354, 230 Fed. 502.

²⁴⁴. In re Gany (D. C., N. Y.), 4 Am. B. R. 576, 103 Fed. 930.

²⁴⁵. In re Epstein (D. C., Ark.), 6 Am. B. R. 60, 109 Fed. 878; In re Roalswick (D. C., Mont.), 6 Am. B. R. 752, 110 Fed. 639; In re Weil (D. C., N. Y.), 7 Am. B. R. 90, 111 Fed. 897; Matter of Berg (Ref., Mass.), 25 Am. B. R. 170.

²⁴⁶. Gillespie v. Piles & Co. (C. C. A., 8th Cir.) 24 Am. B. R. 502, 178 Fed. 886.

²⁴⁸. In re Davis (D. C., N. Y.), 7 Am. B. R. 276, 112 Fed. 294; In re O'Connor (D. C., Ga.), 7 Am. B. R. 428, 114 Fed. 777; Silvey v. Tift, 17 Am. B. R. 9, 123 Ga. 804, 51 S. E. 748; Knauth, Nachod & Kuhne v. Lovell (D. C., Ala.), 32 Am. B. R. 340, 212 Fed. 337.

²⁴⁹. See under this section, *ante*, subtitle "*Property Sold to the Bankrupt on Condition.*"

²⁵⁰. Levi v. Picard (D. C., N. Y.), 17

Am. B. R. 430, 148 Fed. 654. Compare In re Hinson Bros. (Ref., Ga.), 26 Am. B. R. 754.

²⁵¹. These are pointed out with great distinctness in an address delivered by Charles A. Hough, Esq., of New York, printed in the proceedings of the Fourth Annual Convention of the National Association of Referees in Bankruptcy, at Milwaukee, in August, 1902. See also address on "The Merits and Defects of the Bankrupt Law," by Mr. Referee Holt, before the American Social Science Association, at Washington, April, 1902.

²⁵². See Matter of Murphy, etc., Shoe Co. (Ref., Mo.), 11 Am. B. R. 428, holding that the right to reclaim goods should only be granted in cases where it clearly exists, and that the burden of proof is with the creditors to establish their right clearly and by a preponderance of evidence.

²⁵³. For cases where the claim was judicially investigated, see In re Weil (D. C., N. Y.), 7 Am. B. R. 90, 111 Fed. 897; In re Davis (D. C., N. Y.), 7 Am. B. R. 276, 112 Fed. 294; and Boomingdale v. Empire Rubber Mfg. Co. (D. C., N. Y.), 8 Am. B. R. 74, 114 Fed. 1,016. Read also In re O'Connor (D. C., Ga.), 7 Am. B. R. 428, 114 Fed. 777.

check at the outset a practice which, under the State system, has fostered perjury and made "diligence" a word at which lawyer and layman were wont to blush. Nor is it thought that such a practice will be against the well-recognized principle that adverse claims to the bankrupt's assets must be settled in a plenary suit.²⁵⁴ While promptness in rescission because of alleged fraud is essential, it is not so important where the bankruptcy precedes the discovery.²⁵⁵ The court or referee may, upon the request of the trustee fix a reasonable time within which petitions for reclamation may be filed.²⁵⁶ The filing of a petition before the debt is due is premature.²⁵⁷

(3) **SALE OR BAILMENT; AGENCY.**—Is the transaction whereby the bankrupt became possessed of the property, a sale or a bailment? This question enters into the determination of nearly every case.²⁵⁸ If the property is consigned to be sold under terms and at prices fixed by the consignor the contract is not one of sale, but is a bailment and the consignor may reclaim.²⁵⁹ Such

As to proof of ownership by claimant based on bankrupt's admissions, see *In re Thompson* (D. C., N. J.), 30 Am. B. R. 64, 205 Fed. 556; *Matter of Watmough* (D. C., Ohio), 32 Am. B. R. 59, 210 Fed. 539, holding that a failure to proceed for six months after notice of bankruptcy deprived the vendor of the right to rescind.

Reclamation of stock in possession of bankrupt broker.—In all cases where bankrupt stockbrokers did not have free and clear in their box an amount of stock equal to the claims of all customers, none of the customers may reclaim any part of what they did have on hand, nor any part of the equity in such loans as had among their collateral the remaining shares. No presumption of ownership of stock by a customer of a bankrupt stockbroker arises unless there are enough shares "in the box" or unless the customer can actually identify his shares by certificate number. *Matter of Pierson, Jr., & Co.* (D. C., N. Y.), 35 Am. B. R. 213, 225 Fed. 889.

254. *In re Russell & Birkett* (C. C. A., 2d Cir.), 3 Am. B. R. 658, 101 Fed. 248.

255. *Matter of Midland Motor Co.* (C. C. A., 7th Cir.), 37 Am. B. R. 364, 224 Fed. 368.

256. *Matter of Gay & Sturgis* (D. C., Mass.), 35 Am. B. R. 417, 224 Fed. 127.

257. *Matter of Wegman Piano Co.* (D. C., N. Y.), 34 Am. B. R. 490, 221 Fed. 128.

258. *Liquid Carbonic Co. v. Quick* (C. C. A., 3d Cir.), 24 Am. B. R. 394, 182 Fed. 603.

Bailment or sale.—In the case of *In re Gehris-Herbine Co.* (D. C., Pa.), 26 Am. B. R. 470, 188 Fed. 502, the court said: "Tested, therefore, by that law, what is the true character of the contract in question? Is it a bailment, or a conditional sale? If it is really and in good faith a bailment, it is valid not only between the parties but against creditors also; for a man does not lose the title to his property by hiring it to another, although he may have parted with the possession and the other may have acquired it. But, if he has really sold it and has also parted with the possession, he will

find in numerous jurisdictions—in Pennsylvania, for example—that he cannot enforce against execution creditors a condition that he is to retain the title until the price is paid. These rules are too well known to need the support of citation;" *In re Marx Tailoring Co.* (D. C., Ala.), 28 Am. B. R. 147, 196 Fed. 243.

Right of conditional vendor to reclaim.—Where under the State law the title to chattels sold may be retained by the seller pending full payment of the purchase price, and such reservation is good as against creditors, it is also good as against the trustee in bankruptcy of the buyer, and the seller is entitled to reclaim possession from the trustee. *Matter of Farmers' Dairy Association* (D. C., Cal.), 37 Am. B. R. 672, 234 Fed. 118.

Contract of agency and consignment; consignor permitted to reclaim.—Negotiations and dealings between a vendor of hand-painted china bearing the words "Kaiser Art China" and the bankrupt examined and held to constitute a contract of agency and consignment and not an actual sale to the bankrupt with a reservation of title by way of security, and that the vendor is entitled to reclaim the china unsold and in the possession of the trustee in bankruptcy. *Matter of National Home & Hotel Supply Co.* (D. C., Mich.), 35 Am. B. R. 139, 226 Fed. 840.

259. *In re Wells* (D. C., Pa.), 15 Am. B. R. 419, 140 Fed. 752; *In re Tice* (D. C., Pa.), 15 Am. B. R. 97, 139 Fed. 52; *In re Heckathorn* (D. C., Pa.), 16 Am. B. R. 467, 144 Fed. 499; *In re Wood* (D. C., Pa.), 15 Am. B. R. 411, 140 Fed. 964; *In re Galt* (C. C. A., 7th Cir.), 13 Am. B. R. 575, 120 Fed. 61, 56 C. C. A. 470; *In re Poore* (D. C., Pa.), 15 Am. B. R. 174, 139 Fed. 862; *Franklin v. Stoughton Wagon Co.*, (C. C. A., 8th Cir.), 22 Am. B. R. 63, 168 Fed. 857; *In re Susquehanna Roofing Co.* (D. C., Pa.), 23 Am. B. R. 5, 173 Fed. 150; *Ellet-Kendall Shoe Co. v. Martin* (C. C. A., 8th Cir.), 34 Am. B. R. 502, 222 Fed. 851; *Bransford v. Regal Shoe Co.* (C. C. A., 8th Cir.), 38 Am. B. R. 450, 237 Fed. 67.

proceedings will not lie to recover possession of personal property sold under a bill of sale, but retained by the bankrupt; in such a case the transaction was not a sale and was invalid as against execution creditors and the trustee because the title was separated from the possession and no notice thereof was given.²⁶⁰ If the contract expressly creates an agency, and the bankrupt was in possession of the property as an agent, the transaction is a bailment and the property does not pass as assets to the trustee. The transaction is not to be deemed a sale because of the agent's assumption of liability for loss, payment of certain expenses, and insurance; nor is it a contract of sale because it contained no provision that the agent should separate the proceeds of the sale and turn over such proceeds to the principal.²⁶¹ Where property is sold on condition that title thereto should remain in vendor, until paid for, the bankruptcy of the vendee does not affect the contract, if valid as against creditors, and the vendor may reclaim unless the trustee elects to complete the contract.²⁶²

(4) PURCHASE OF GOODS WITHOUT INTENT TO PAY.—(I) *Concealment of insolvency or false representation as to solvency.*—It is a general principle that when a person who is insolvent purchases goods with no intention of paying for the same, and conceals his insolvency and his intention not to pay, he is guilty of a fraud which entitles the vendor, if no innocent third

260. In *re Grozinger* (D. C., Pa.), 28 Am. B. R. 732, 199 Fed. 935; *Matter of Wegman Piano Co.* (D. C., N. Y.), 34 Am. B. R. 490, 221 Fed. 128.

261. *Contract of agency.*—In the case of *General Electric Co. v. Brower* (C. C. A., 9th Cir.), 34 Am. B. R. 642, 221 Fed. 597, the contract under consideration was termed "Appointment of Agent," and expressly appointed the bankrupt company its "agent to sell" and the company expressly accepted the agency. The court said: "It provides that the manufacturer shall maintain a stock of lamps in the custody of the agent; that the quantity of lamps and the length of time they shall remain in stock shall be determined by the manufacturer; that all the lamps shall be and remain the property of the manufacturer until sold; that the proceeds of all lamps sold shall be held for the benefit and for the account of the manufacturer; that the agent shall return to the manufacturer at any time, if directed, any and all lamps unsold. The agent is required to sell at prices and on terms fixed by the manufacturer, and on all bills and invoices for lamps sold he is required to state that he sells as agent. The agent guarantees to the manufacturer that all lamps sold by it will be paid for. These provisions, so far as they go, all clearly and unequivocally mark the contract as a contract strictly of agency. We will briefly consider the provisions herein that are said to indicate a contrary intention. Those provisions are the agent's assumption for liability for loss, and for the payment of certain expenses, and for insurance. Such provisions do not change a contract of agency into a contract of sale. Nor was the contract rendered a contract of sale by reason of the fact that it contained no

provision that the agent should keep the money separate and apart from its other moneys, or that it should turn over the money received from the sale to the manufacturer, but instead was to pay for the lamps sold each month, less 29 per cent. for making the sales."

In the case of *Sturm v. Baker*, 150 U. S. 312, 37 L. Ed. 1093, 14 Sup. Ct. 99, the court said: "A bailee may, however, enlarge his legal responsibilities by contract, express or fairly implied, and render himself liable for the loss or destruction of the goods committed to his care; the bailment or compensation to be received therefor being a sufficient consideration for such an undertaking."

In *re Flanders* (C. C. A., 7th Cir.), 14 Am. B. R. 27, 134 Fed. 560, the court said: "The objections that ordinary invoices accompanied the shipments, that such shipments were made direct to Flanders, that the leather was sold by him in his own name, that he allowed credit upon sales, that he guaranteed sales, and that he insured in his own name, do not change the nature of the transaction."

In *re Columbus Buggy Co.* (C. C. A., 8th Cir.), 16 Am. B. R. 759, 143 Fed. 859, it was held that a contract between a furnisher of goods and the receiver, that the latter may sell, and at such prices as he chooses, that he will account and pay for the goods sold at agreed prices, that he will bear the expenses of insurance, freight, storage, and handling, and that he will hold the merchandise unsold subject to the order of the furnisher, disclose only an agreement of bailment for sale, and does not evidence a conditional sale.

262. *Matter of Wegman Piano Co.* (D. C., N. Y.), 34 Am. B. R. 490, 221 Fed. 128.

party has acquired an interest in them, to disapprove the contract and recover the goods.²⁶³ A material misrepresentation as to financial ability relied on by the vendor justifies rescission and reclamation, even if not fraudulent.²⁶⁴ For instance, it is well settled that false representations as to the financial status of a buyer, made as a basis of credit, and but for which the sale would not have been made, was fraudulent, and entitled the seller to reclaim the goods thereby obtained.²⁶⁵ A depositor of a bankrupt bank may institute reclamation proceedings against the bankrupt's trustee to recover money deposited in the bank on the ground of fraud if he establishes the insolvency of the bankrupt at the time the deposit was made, and that the bankrupt knew that he was insolvent and the depositor did not.²⁶⁶

263. *Donaldson v. Farwell*, 93 U. S. 631, 23 L. Ed. 993; *Ash v. Putnam*, 1 Hill (N. Y.) 302; *Devoe v. Brandt*, 53 N. Y. 462; *Carter v. Lipsey*, 70 Ga. 417; *Matter of Marks & Co.* (C. C. A., 2d Cir.), 33 Am. B. R. 275, 218 Fed. 453.

Purchase on verge of bankruptcy; fraudulent concealment of financial condition.—Where, at the time of the delivery of goods purchased by a bankrupt, the bankrupt knew that he was insolvent but concealed his financial condition, and a few days after, while all the goods purchased were on hand and most of them in the original packages in which they had been delivered, the bankrupt filed his petition in bankruptcy, he was guilty of a fraud which authorized the vendors to ask for a rescission, and a delivery to them of the proceeds of the goods which had been sold by the trustee in bankruptcy. *In re Spann* (D. C., Ga.), 25 Am. B. R. 551, 183 Fed. 819.

264. *Matter of New York Commercial Co.* (C. C. A., 2d Cir.), 35 Am. B. R. 779, 228 Fed. 120.

265. *Matter of Patterson & Co.* (D. C., Tex.), 10 Am. B. R. 748, 125 Fed. 562; *In re Weil* (D. C., N. Y.), 7 Am. B. R. 90, 111 Fed. 897; *In re Epstein* (D. C., Ark.), 6 Am. B. R. 60, 109 Fed. 878; *Matter of Watmough* (D. C., Ohio), 32 Am. B. R. 59, 210 Fed. 539.

Goods obtained by fraud.—This follows from the rule that the trustee when appointed can have no greater title than the bankrupt had. The trustee holds the goods affected with the fraud of the bankrupt. Neither law nor morals will justify the trustee in holding goods obtained by the fraud of the bankrupt for the benefit of other creditors. Creditors have no right to profit by the fraud of the bankrupt to the wrong and injury of the party who has been deceived and defrauded. *In re Hamilton Furniture, etc., Co.* (D. S., Ind.), 9 Am. B. R. 65, 117 Fed. 774.

False representation as to solvency.—In the case of *In re Hamilton Furniture, etc., Co.* (D. C., Ind.), 9 Am. B. R. 65, 117 Fed. 774, the rule was laid down that where a party by fraudulently concealing his insolvency and his intent not to pay for goods, induces the owner to sell them to him on credit, the seller, if no innocent third party

has acquired an interest in them, is entitled to disaffirm the contract and recover the goods. *In re Hildebrandt* (D. C., N. Y.), 10 Am. B. R. 184, 120 Fed. 992; *In re O'Connor* (D. C., Ga.), 9 Am. B. R. 18, 114 Fed. 777; *Silvey v. Tift*, 17 Am. B. R. 9, 123 Ga. 804, 51 S. E. 748; *Matter of Levi* (D. C., N. Y.), 16 Am. B. R. 756, 148 Fed. 654, holding that in the absence of fraud in making the statement, reclamation should not be allowed; *In re Rose* (D. C., Pa.), 14 Am. B. R. 345, 135 Fed. 888, in which case it was held that the return of goods should not be permitted where the evidence is insufficient as to the making of a false verbal statement to a commercial agency; *Levi v. Picard* (D. C., N. Y.), 17 Am. B. R. 439, 148 Fed. 654; *Matter of Johnson* (D. C., Ohio), 30 Am. B. R. 787.

False financial statement inducing sale to bankrupt; intent not to pay.—In a proceeding by a creditor to reclaim from a trustee goods sold to the bankrupt as on a false and fraudulent financial statement on which the creditor relied, it is not necessary, in order to constitute fraud authorizing rescission of the sale, that the financial statement shall have been made by the bankrupt with intent not to pay, but it may be rescinded, regardless of his intent about paying if induced by his false and fraudulent representations. But where it appeared that the financial statement was incomplete rather than false and fraudulent, and the subsequent conduct of the bankrupt accorded with honesty and good faith, the bankrupt could not be said to have made a false or fraudulent financial statement upon which an action by the creditor relying thereon could be based. *Ellet-Kendall Shoe Co. v. Ward* (C. C. A., 8th Cir.), 26 Am. B. R. 114, 187 Fed. 982.

Right to recover goods obtained by false representations innocently made.—Where a bankrupt makes false statements inducing a sale of goods to him, it is not necessary that such statements should have been made with a fraudulent intent to entitle the vendor to reclaim the goods. *Matter of Underwood & Daniel* (D. C., Ga.), 32 Am. B. R. 779, 215 Fed. 279.

266. *In re Stewart* (D. C., N. Y.), 24 Am. B. R. 474, 178 Fed. 463; *In re Kenyon* (D. C., Ohio), 19 Am. B. R. 194, 156 Fed. 863, in which case the right to rescind a deposit

(II) *Intent not to pay.*—Knowledge of inability to pay when purchase is made is equivalent to purchase with intent not to pay, and such purchase is constructively fraudulent.²⁶⁷ If there was no concealment of the fact of insolvency indicating that the purchaser designed to acquire the goods without paying for them, there is no fraud justifying reclamation.²⁶⁸

(III) *When right exercised; who may defeat right.*—He should exercise this right before he has of his own volition placed himself in the position of a creditor, for if he joins in the election of a trustee, with knowledge of the fraud perpetrated against him, he is estopped from thereafter insisting on a return of the goods.²⁶⁹ The trustee may not prevent reclamation upon the assumption that he is in a favored position because of the amendment of 1910 to § 47-a (2) which places him in the position of a lien creditor; this amendment does not constitute the trustee a *bona fide* purchaser for value, and it is only such a purchaser of the article sought to be reclaimed who may defeat reclamation.²⁷⁰

(IV) *Proof of insolvency, or of intent not to pay.*—Whether or not proof of insolvency is essential depends upon the character of the representation which institutes the sale. If the representation consists of a statement as to solvency, it would be necessary to prove insolvency to justify a reclamation of the goods sold;²⁷¹ and also the concealment from the claimant of the fact of insolvency, and the intention on the part of the bankrupts at the time of the sale not to pay for the goods.²⁷² If, on the other hand, a solvent purchaser falsely represents the extent of his assets with the purpose of obtaining credit, and the seller, relying on this false representation, lets him have the goods when otherwise he would have declined the sale and insolvency thereafter

contract with a bank and recover the money deposited was recognized, but it was held that the depositor waived his right to rescind by retaining the certificate of deposit and making no offer to surrender it.

267. *Matter of Siegel Co.* (D. C., Mass.), 35 Am. B. R. 130, 223 Fed. 369.

268. *In re Marengo County Mercantile Co.* (D. C., Ala.), 29 Am. B. R. 46, 199 Fed. 474.

269. *Standard Varnish Works v. Haydock* (C. C. A., 6th Cir.), 16 Am. B. R. 286, 143 Fed. 318; *Matter of Kaplan & Myers* (D. C., Pa.), 37 Am. B. R. 630.

Waiver of fraud by creditor.—An intention of a creditor, holding a note to waive the fraud and rely on the contractual obligation for which the note was given, cannot be inferred from the presentation of the note, not yet due, after a petition in bankruptcy has been filed against the maker. The right of a vendor to reclaim property obtained by fraud is not waived by the fact that its attorney joined in a petition to set aside an order of sale, and, without authority described the vendor as a creditor, but at the hearing stated that his client had not decided what it "is going to do yet." *Matter of Midland Motor Car Co.* (C. C. A. 7th Cir.), 37 Am. B. R. 364, 224 Fed. 368.

270. *In re Appel Suit & Cloak Co.* (D. C., Colo.), 28 Am. B. R. 818, 198 Fed. 322, holding that the amendment of 1910 to Section 47a (2) does not put the trustee in the posi-

tion of a *bona fide* purchaser for value, but only gives him the right of a lien creditor, and therefore, where it appears that bankrupt made a false statement of its financial condition to a mercantile agency which communicated it to one who relying thereon extended credit to bankrupt, at a time when it was hopelessly insolvent, and it further appears that, in the circumstances, the vendor's right to rescind the sale and reclaim the property is, under the law of Colorado, superior to the lien of a judgment creditor and enforceable against all except *bona fide* purchasers for value, the vendor is entitled to reclaim the unsold part of its goods from bankrupt's trustee, notwithstanding the amendment. Compare *In re Whitley Bros.* (D. C., Ga.), 29 Am. B. R. 64, 199 Fed. 326.

Goods obtained by fraud; laches.—Where about five months before bankruptcy claimant sold to bankrupt a soda fountain and appurtenances under a conditional sale contract, but made no rescission of the contract or effort at reclamation before bankruptcy intervened, it could not reclaim the property on the ground that the sale had been induced by fraud. *Becker Co. v. Gill* (C. C. A., 8th Cir.), 30 Am. B. R. 429, 206 Fed. 36.

271. *Matter of Marks & Co.* (C. C. A., 2d Cir.), 33 Am. B. R. 275, 218 Fed. 453; *Matter of N. Y. Commercial Co.* (C. C. A., 2d Cir.), 35 Am. B. R. 779, 228 Fed. 120.

272. *Matter of Marks & Co.* (C. C. A., 2d Cir.), 33 Am. B. R. 275, 218 Fed. 453.

ensues causing loss to the seller, proof of insolvency at the time of the sale is not essential.²⁷³ The petitioner has the burden of showing the alleged fraud, and in the absence of affirmative proof of such fraud the property may not be reclaimed, although the buyer was insolvent and the seller was ignorant of it.²⁷⁴

(5) **PROPERTY SOLD SUBJECT TO APPROVAL; RENTAL CONTRACTS.**—Where machinery or other articles are sold upon the condition that if they are not satisfactory the purchaser may return them and such purchaser prior to his bankruptcy expressed himself as dissatisfied and declared that he would not accept such machinery or articles, the seller may reclaim them, and the receiver or trustee of the bankrupt purchaser will not be heard to say that the refusal of the bankrupt to accept was arbitrary or capricious, fraudulent and in bad faith.²⁷⁵ Where goods were shipped with the proviso that they were to be paid for as soon as the goods were received provided they were satisfactory, reclamation will only be allowed where it is claimed without delay.²⁷⁶

273. *In re Bendell* (D. C., Ala.), 25 Am. B. R. 698, 183 Fed. 816; *Matter of New York Commercial Co.* (C. C. A., 2d Cir.), 35 Am. B. R. 779, 228 Fed. 120.

Reasonable expectation of ability to pay.—In case of *Matter of Berg* (Ref., Mass.), 25 Am. B. R. 170, the court dismissed the petition of reclamation upon the proof that the bankrupt, when he purchased the goods, had reasonable expectations that he would be able to pay for them and did not know that he was insolvent. See also *In re Roalswick* (D. C., Mont.), 6 Am. B. R. 752, 110 Fed. 639; *In re Davis* (D. C., N. Y.), 7 Am. B. R. 276, 112 Fed. 294.

274. *Schroth v. Monarch Fence Co.* (C. C. A., 6th Cir.), 36 Am. B. R. 258, 229 Fed. 549; *Matter of Farmers' Dairy Association* (D. C., Cal.), 37 Am. B. R. 672, 234 Fed. 118.

Proof of fraud.—To entitle a vendor to recover possession of the goods from a third person, to whom they had been assigned, the vendor must show that bankrupt was insolvent at the time of the purchase of the goods, that it concealed its insolvency from the vendor, and that it intended not to pay for the goods. *In re Aarons & Co.* (C. C. A., 2d Cir.), 28 Am. B. R. 399, 193 Fed. 646.

In order to entitle a vendor to rescind a sale and reclaim from bankrupt's trustee goods sold to the bankrupt, upon the ground that the sale was induced by fraud, it must appear that the bankrupt was insolvent at the time of the purchase of the goods, that he concealed from the vendor his insolvency which was known to him at the time of the purchase, and that false and fraudulent representations were made by bankrupt with intent to deceive and defraud the vendor and to induce the latter to deliver to him the goods in question, with the intent and design not to pay for them. *In re Marengo County Mercantile Co.* (D. C., Ala.), 29 Am. B. R. 46, 199 Fed. 474.

Evidence of fraudulent purchase.—In a proceeding to reclaim certain property on the ground that the purchase was fraudulent in that the purchaser, now bankrupt, was insolvent and had no reasonable expectation of

being able to make payment when due, it appeared that at the time of the purchase and delivery the bankrupt was doing a large and active business; that although insolvent, in fact, it had excellent credit at a bank which was its principal creditor; that by the bank's failure, which was not anticipated, the purchaser was forced into bankruptcy. *Held*, on all the evidence, that the bankrupt was not without reasonable expectation of paying for the property in question. *Schroth v. Monarch Fence Co.* (C. C. A., 6th Cir.), 36 Am. B. R. 258, 229 Fed. 549.

Judicial notice will be taken of the papers on record in a bankruptcy case in a proceeding to reclaim property in the possession of the trustee in bankruptcy. *Matter of Siegel Co.* (D. C., Mass.), 35 Am. B. R. 130, 223 Fed. 369.

275. *In re Hill Co.* (C. C. A., 7th Cir.), 12 Am. B. R. 221, note, 123 Fed. 866. Compare *In re Simpson Mfg. Co.* (C. C. A., 7th Cir.), 12 Am. B. R. 212, 130 Fed. 307, in which case the evidence was considered, and it was held that there being no complaint made that the machinery was unsatisfactory, a sale of the machinery was completed, and that the vendor upon the bankruptcy of the purchaser was not entitled to a return of the machinery upon a claim that it was never accepted; *In re Froelich Rubber Refining Co.* (D. C., Pa.), 15 Am. B. R. 72, 139 Fed. 201, holding that where the contract contained an option to purchase within a prescribed time, the title to the property only passed to the bankrupt after such time expired.

Lease with option to purchase.—Where a bankrupt failed to purchase machinery at the end of the term for which he had leased it with the option to purchase, but continued to pay rent therefor, the lessor may reclaim the property from the lessee's trustee. *McEwen v. Totten* (C. C. A., 5th Cir.), 21 Am. B. R. 336, 164 Fed. 837.

276. *In re O'Callaghan* (Ref., Mass.), 30 Am. B. R. 97; *Becker Co. v. Gill* (C. C. A., 8th Cir.), 30 Am. B. R. 429, 206 Fed. 36.

So also reclamation should be permitted where the bankrupt was in possession of articles being manufactured by him under contracts requiring payments at stated periods which had been regularly made, it appearing that the trustee did not intend to complete the contract and deliver the completed articles.²⁷⁷ The question frequently arises where title passes to the purchaser under a contract whereby it is agreed to pay a stipulated amount as rental for the article sold, such amount to be applied upon the purchase price. It is generally held that if the agreement provides for the surrender of the property at the expiration of a designated term, or the purchase of such article at such time, it does not operate as a conditional sale but is a bailment and therefore the "lessor" may reclaim the article upon the bankruptcy of the lessee, prior to the exercise of the option to purchase.²⁷⁸

(6) PAYMENT ON DELIVERY; STOPPAGE IN TRANSIT.—Goods shipped to a person who, prior to the shipment, had gone into bankruptcy, may be stopped in transit and reclaimed by the shipper; but if the goods have arrived at their destination and the charges have been paid by the receiver in bankruptcy, it is too late for the shipper to reclaim the goods.²⁷⁹ If personal property be sold upon the express condition that payment be made on delivery, and delivery is made on the faith that the condition will be immediately performed, and payment is refused upon demand, title does not pass, and the seller may properly be permitted to reclaim the property.²⁸⁰ If a contract of sale under which the bankrupt was in possession reserved title in the vendor and permitted him to retake the property upon failure of the vendee to pay the purchase price, the vendor may reclaim the property, provided, of course, the contract is valid as against creditors under the laws of the State where made.²⁸¹ If the claimant insists upon a latent or undisclosed title to the goods claimed, in the possession of the bankrupt, the burden is on him to show his title.²⁸² All of such cases will depend for their determination upon principles already declared as to the validity of contracts for the conditional sale of

²⁷⁷ In re McDonald (D. C., Conn.), 14 Am. B. R. 797, 138 Fed. 463.

²⁷⁸ Liquid Carbonic Co. v. Quick (C. C. A., 3d Cir.), 25 Am. B. R. 394, 182 Fed. 603. The provision in the agreement that the article should be "leased" to the bankrupt for a specified term and a specified rental and that at the expiration of the term it should be surrendered to the lessor, are the *indicia* of a bailment. In re Tice (D. C., Pa.), 15 Am. B. R. 97, 139 Fed. 52; In re Morris (D. C., Pa.), 19 Am. B. R. 422, 156 Fed. 597; In re Norton (D. C., Pa.), 24 Am. B. R. 794, 181 Fed. 901.

Agreement to execute conditional sale contract.—Where a creditor delivered certain property to a bankrupt on the express understanding at the time of the delivery that a lease conditional sale contract should later be executed, such creditor is entitled to reclaim such property from the bankrupt estate, as it is of no importance that the conditional sale contract was signed by the bankrupt about six months after the property was delivered or that the sale was under a secret understanding with him, if it is true that such understanding at the time of delivery was that the property should be in-

cumbered by the conditional contract. In re Hutchins Co. (D. C., N. Y.), 24 Am. B. R. 647, 179 Fed. 864.

²⁷⁹ In re Allen (D. C., Pa.), 24 Am. B. R. 574, 178 Fed. 879; Matter of Johnson (D. C., Ohio), 30 Am. B. R. 787; Matter of Nicol (D. C., N. Y.), 34 Am. B. R. 465, 221 Fed. 82, holding that where goods shipped after adjudication are received by trustee, and shipper did not attempt to stop them *in transitu* or to reclaim them, he is not entitled to payment in full but must be treated as other creditors.

²⁸⁰ Southern Pine Co. v. Savannah Trust Co. (C. C. A., 5th Cir.), 15 Am. B. R. 618, 141 Fed. 802; In re Cattus (C. C. A., 2d Cir.), 26 Am. B. R. 348, 183 Fed. 733.

²⁸¹ Reardon v. Rock Island Plow Co. (C. C. A., 7th Cir.), 22 Am. B. R. 26, 168 Fed. 654; In re Burke (D. C., Ga.), 22 Am. B. R. 69, 168 Fed. 994; Franklin v. Stoughton Wagon Co. (C. C. A., 6th Cir.), 22 Am. B. R. 63, 168 Fed. 857; In re Agnew (D. C., Miss.), 23 Am. B. R. 360, 178 Fed. 478; In re King Motor Car Co. (Ref., Mich.), 31 Am. B. R. 172.

²⁸² In re Burke (D. C., Ga.), 22 Am. B. R. 69, 168 Fed. 994.

personal property.²⁸³ If delivery is made without insistence upon payment and the purchaser retains possession without payment for a considerable time, title to the property will vest in the bankrupt, the right of payment as a condition precedent having been waived.²⁸⁴ If partial payment is made upon the contract the court may, as a condition to a decree in reclamation proceedings, direct the vendor to pay the trustee of the bankrupt vendee the amount of such payment, less the expense of repossessing and the cost of deterioration.²⁸⁵

(7) PROOF OF IDENTITY.—Identity is the *sine qua non* of the right of possession. Proof of it is insisted on even in the far less important proceeding when a consignor creditor claims goods in the hands of the trustee. The court whose right to possession is questioned can, it is thought, nay, in the interest of that pro-rating which the bankruptcy law commands, should, insist on the claimant establishing identity by proof in open court, with right to cross-examination by the adverse party, before yielding that which in bankruptcy cases is often more than "nine points of the law." This practice is outlined in the case cited in the foot-note.²⁸⁶ In such proceedings it is only recovery of the identified articles which may be had; as to the articles which have been sold or disposed of by the bankrupt, the vendor is left to his remedy as a general creditor.²⁸⁷

(8) PRACTICE.—The practice has been to refer a petition for reclamation to a special master and not to the referee in bankruptcy, although the referee may have jurisdiction of such proceedings. This practice of reference to a special master should be followed until the Supreme Court especially rules that a reference may be made to the referee.²⁸⁸

h. Rights of action.—(1) IN GENERAL.—Under subdivision 6 all "rights of actions arising upon contracts or from the unlawful taking or detention of, or injury to," the bankrupt's property pass to the trustee. This subdivision is declaratory of the law. It has been held that a person who has been adjudged a bankrupt and obtained his discharge cannot sue upon a claim for services upon a *quantum meruit*, which arose prior to the filing of his petition, where it appears that he did not disclose the existence of the claim or any other asset, in the bankruptcy proceedings, because of which no trustee was appointed.²⁸⁹ It seems that, after being vested in the trustee, such rights of action may be carried to judgment by the bankrupt for his own benefit after a composition is confirmed.²⁹⁰ It has been held that a trustee in bankruptcy does not succeed to the right which a bankrupt has under a State law to bring an action for the partition of real property held in common.²⁹¹

283. See discussion under sub-title "*Property sold to bankrupt on condition*," ante, pp. 1145-1147, and notes thereunder.

284. Guarantee Title & Trust Co. v. First Nat. Bank (C. C. A., 3d Cir.), 26 Am. B. R. 65, 185 Fed. 373.

285. In re Hooven-Owens-Rentschler Co. (C. C. A., 6th Cir.), 28 Am. B. R. 135, 195 Fed. 424.

Set-off.—Where a vendor receives a check from his vendee, shortly before the latter's bankruptcy, in payment for more property than actually delivered, such vendor in a proceeding to reclaim from the trustee in bankruptcy the proceeds of the sale of such of the property as had not been resold by the bankrupt, need not credit to the trustee, the payment received from the bankrupt,

where the amount of its claim for goods sold by the bankrupt exceeds the amount of the latter's payment. Matter of Midland Motor Car Co. (C. C. A., 7th Cir.), 37 Am. B. R. 364, 224 Fed. 368.

286. In re Coleman v. Sherman (Ref., N. Y.), 8 Am. B. R. 763.

287. In re Eliowich (D. C., N. Y.), 17 Am. B. R. 419, 148 Fed. 464.

288. In re Tracy (C. C. A., 2d Cir.), 24 Am. B. R. 539, 179 Fed. 366.

289. Rand v. Iowa Central Ry. Co., 12 Am. B. R. 164, 96 N. Y. App. Div. 413, 89 N. Y. Supp. 212.

290. See Stone v. Morris (Sup. Jud. Ct., Mass.), 4 Am. B. R. 568, 57 N. E. 1,002.

291. Hobbs v. Frazier (Sup. Ct., Fla.), 22 Am. B. R. 684, 56 Fla. 796.

(2) ACTIONS FOR PERSONAL INJURIES; TORTS AFFECTING PROPERTY OF BANKRUPT.—Causes of actions for personal injuries, such as assault and battery, slander, seduction and the like, are usually not assignable.²⁹² Where the suit is to recover usurious interest paid by the bankrupt,²⁹³ and money lost in gaming,²⁹⁴ and perhaps where the gravamen is deceit or fraud;²⁹⁵ so long as the suit pertains to the property of the bankrupt, the right of action vests in the trustee. This subdivision is limited to rights of action arising upon contract or respecting property and does not include an action of tort for personal injuries.²⁹⁶ The cases are by no means uniform. The safe rule is that stated in the text: that the trustee is vested with the bankrupt's rights of action on contract and for the unlawful taking or detention of or injury to his property.²⁹⁷ A trustee may sue for tortuous injuries inflicted upon the property of the bankrupt between the date of the filing of the petition and the date of the adjudication.²⁹⁸ An action for conspiracy, whereby the

Suit by trustee for partition of real estate.—Where a bankrupt had an undivided interest with others in land, his trustee in bankruptcy may convey such interest to a purchaser who may thus become a tenant in common with the other owners; but the trustee is not a tenant in common as recognized in partition proceedings, but is a trustee of a tenant in common, and may not bring and maintain a suit for the partition of real estate in which such bankrupt was tenant in common. *Lindsay v. Runkle* (Sup. Ct., Ohio), 24 Am. B. R. 612, 92 N. E. 439.

292. *Noonan v. Orton*, 12 N. B. R. 405; *Beckham v. Drake*, 8 Mees. & W. 845; *Howard v. Crowther*, 8 Mees. & W. 601; *Brewer v. Dew*, 11 Mees. & W. 625.

Cause of action for injury to person or reputation.—Under clause six of this section a trustee in bankruptcy cannot be substituted as plaintiff and continue the prosecution in a suit to recover damages for libel which had been commenced by the bankrupt prior to his bankruptcy, although the injuries to the bankrupt resulting from such libel may have been the cause of his bankruptcy. *Epstein v. Handwerker* (Sup. Ct., Okl.), 26 Am. B. R. 712, 116 Pac. 769.

293. *Tiffany v. Boatmen's Sav. Inst.*, 18 Wal. 375; *Moore v. Jones*, 23 Vt. 739.

Recovery of usury.—In *Wheelock v. Lee*, 64 N. Y. 242, the trustee in bankruptcy was held to have the right to recover money exacted usuriously, but the court based its decision upon the fact that independent of the statutory right to recovery there existed a right to recover upon principles of the common law. In the case of *Wright v. First Nat. Bank of Greensburg*, 18 N. B. R. 87, Fed. Cas. 18,078, it was held that the right of action given by the banking act of the United States to recover back usurious interest was a claim or debt passing to the assignee in bankruptcy; that while the right of action given by that act was final, yet the exacting of the usurious interest was in its nature an injury to the property rights of the bankrupt, and that the sections of the bankrupt law must be construed as giving the trustee the right to sue for and recover

such usurious interest. But in *Bromley v. Smith*, Fed. Cas. 1,922, 5 N. B. R. 152, 2 Biss. 511, and in *Nichols v. Bellows*, 22 Vt. 581, both commented upon in *Wright v. First Nat. Bank of Greensburg*, the right of a trustee in bankruptcy to recover usurious interest was denied upon the ground that the right given by the statute was in the nature of a right to redress a personal injury done to the borrower himself, and that, like rights of action for personal torts, it does not pass to the trustee.

294. *Meech v. Stoner*, 19 N. Y. 26.

295. Thus, in *re Crockett*, Fed. Cas. 3,402, 2 Ben. 514, it was held that a suit brought for fraudulently recommending a person as worthy of trust and confidence is not a claim which vests as an asset in the assignee. But in *Hyde v. Tufts*, 45 N. Y. Super. Ct. 56, where one who afterward became a bankrupt was induced by false representations to engage in a business venture in which, by reason of the false representations, he incurred great loss, it was held that the cause of action for the fraud vested in his assignee in bankruptcy.

296. *Sibley v. Nason*, 22 Am. B. R. 712, 196 Mass. 125, 81 N. E. 887, 44 L. R. A. 180, note.

297. *Hansen Mercantile Co. v. Wyman, Partridge & Co.*, 22 Am. B. R. 877, 105 Minn. 491, 117 N. W. 926; in *re Harper* (D. C., N. Y.), 23 Am. B. R. 918, 175 Fed. 412; in *re Gay* (D. C., Mass.), 25 Am. B. R. 111, 182 Fed. 260, in which case it was held that where, at the time of bankruptcy, an action of tort was pending, which the bankrupts, who were dealers in stocks and bonds, had brought to recover damages for losses resulting from the purchase of certain bonds, which they alleged they had been induced to buy by false representations materially affecting the value of the bonds, the bankrupt's right of action was one "arising from injury of the bankrupt's property" so as to pass to the trustee under clause six of this section.

298. *Arnold v. Horrigan* (C. C. A., 6th Cir.), 38 Am. B. R. 174, 238 Fed. 39.

plaintiff was "driven out of business as a dealer in lumber," is an action in tort and is not included within the rule; even though such an action is pending at the time of the plaintiff's bankruptcy, the right of action does not pass to his trustee.²⁹⁹ But it has been held otherwise as to a right of action for injuries causing the death of the bankrupt's son.³⁰⁰ A claim for a breach of warranty by the bankrupt against a third person passes to the trustee as a part of the assets of the estate.³⁰¹

(3) **ACTIONS BY CORPORATIONS, AND AGAINST STOCKHOLDERS, DIRECTORS, AND OFFICERS.**—The right of a trustee of a bankrupt corporation to sue on a contract is co-extensive with that of the corporation. So that a right of action of a corporation to recover damages accruing because of the misconduct or neglect of duty of a corporate officer passes to the trustee of the bankrupt corporation;³⁰² and so also as to recovery of unpaid stock subscriptions.³⁰³ If

299. *Cleland v. Anderson*, 11 Am. B. R. 605, 66 Neb. 276.

Actions for conspiracy.—A trustee in bankruptcy cannot maintain an action in tort for conspiracy in assisting a bankrupt to place his property beyond the reach of his creditors against persons who are alleged to have performed their acts of conspiracy during the pendency of the bankruptcy proceedings, but before the adjudication therein, where no allegation is made that any of the defendants received any portion of the bankrupt's estate, and the sole result of the conspiracy is to turn the bankrupt's property into money in his hands, for which he, himself, failed to account to the trustee. *Friedman v. Meyers*, 19 Am. B. R. 883, 30 Ohio Cir. Ct. 303.

300. *In re Burnstine* (D. C., Mich.), 12 Am. B. R. 506, 131 Fed. 828.

301. *Crouch v. Fahl* (Ind. App. Ct.), 38 Am. B. R. 929, 113 N. E. 1009.

302. *Brent v. Simpson* (C. C. A., 5th Cir.), 38 Am. B. R. 813, 238 Fed. 285; *Floyd v. Layton* (No. Car. Sup. Ct.), 38 Am. B. R. 366, 89 S. E. 998.

Right of action by corporation against directors for neglect of duty.—The right of action by a corporation against its directors for negligence or neglect of duty resulting in a loss of assets, passes to its trustee in bankruptcy. Evidence in such an action examined and held sufficient to establish the liability of directors of a mercantile or supply store who were its managing officers. *Bynum v. Scott* (D. C., N. C.), 33 Am. B. R. 436, 217 Fed. 122.

303. *Courtney v. Croxton* (C. C. A., 6th Cir.), 38 Am. B. R. 560; *Matter of Commonwealth Lumber Co.* (D. C., Wash.), 35 Am. B. R. 202, 223 Fed. 667; *Allen v. Grant*, 14 Am. B. R. 349, 122 Ga. 552; *Thrall v. Union Maid Tobacco Co.*, 22 Am. B. R. 287, 54 Ohio Law Bull. 732; *In re Eureka Furniture Co.* (D. C., Pa.), 22 Am. B. R. 395, 170 Fed. 485; *Babbitt v. Read* (C. C., N. Y.), 23 Am. B. R. 254, 173 Fed. 712; *Roney v. Crawford* (Sup. Ct., Ga.), 24 Am. B. R. 638, 68 S. E. 701.

Under the Missouri statute the right of action against officers of a corporation to compel payment by them to the corporation

which they represent and to its creditors, of all property which they have acquired to themselves, or transferred to others, or lost or wasted by any violation of their duties or abuse of their powers, is a right which vests in the trustee of bankruptcy of such corporation, and which may be dealt with, disposed of, sold or compromised by him under the direction of the court. *In re Swofford Bros. Dry Goods Co.* (D. C., Miss.), 24 Am. B. R. 282, 180 Fed. 549.

Right of trustee to levy assessment on unpaid stock under New Jersey statute.—Section 21 of the New Jersey Corporation Act provides that "where the whole capital of a corporation shall not have been paid in, and the capital paid shall be insufficient to satisfy its debts and obligations, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share, as fixed by the charter of the corporation, or such proportion of that sum as shall be required to satisfy such debts and obligations." Section 22 empowers the directors from time to time to make assessments upon the shares of stock subscribed for, not exceeding, in the whole, the par value thereof. *Held*, that upon the adjudication in bankruptcy of a New Jersey corporation, not only the title to its property vests in the trustee, but also the right to exercise the powers of the directors, under the statute, to cause an assessment to be made on all its unpaid shares of stock. *In re Newfoundland Syndicate* (D. C., N. J.), 28 Am. B. R. 119, 196 Fed. 443, *affd.* 29 Am. B. R. 858, 201 Fed. 917.

Under the law of Ohio, where a corporation upon its formation purchases the property, business and good will of a partnership and assumes its liabilities, turning over to the partners in consideration therefor shares of its capital stock, each partner will be regarded as an original subscriber for so much of the stock as is issued to him, and credited on his subscription for only the actual value of his interest in the partnership property transferred to the corporation in payment of his subscription, and the balance left, after applying this credit, will be deemed a debt due from him to the corporation, and, there-

a right of action exists against the directors of a bankrupt corporation, and one of the three trustees is a director, the remaining trustees may sue all the directors.³⁰⁴ The statutory right of a creditor or stockholder to sue the directors and officers for excessive indebtedness or other statutory liability does not pass as an asset to the trustee in bankruptcy of the corporation; such right is enforceable as a secondary security of the creditors or stockholders independently of the bankruptcy proceedings.³⁰⁵ Where the right of action against officers or stockholders inures to a creditor under conditions prescribed in the statute giving such right, the trustee of the bankrupt corporation does not succeed to such right.³⁰⁶ But where under a state statute a stockholder's liability for the unlawful issue of stock may be enforced by the corporation, its trustee in bankruptcy may sue to enforce such liability.³⁰⁷ Where dividends were paid to stockholders out of the assets of a corporation to the impairment of its capital, a trustee in bankruptcy may recover such dividends for the benefit of the creditors who became such after the payment of such dividends.³⁰⁸ While a corporation may not sue on a purely personal tort, it may recover damages for a malicious attachment of corporate property, and the right of action passes to the trustee in bankruptcy of the corporation.³⁰⁹ If the corporation is a foreign corporation and because of failure to comply with the laws of a State where it was transacting business, its contracts in such State are void, the trustee of such corporation cannot sue on such contracts in the Federal courts.³¹⁰

fore, corporate assets, recoverable by the corporation's trustee in bankruptcy in an appropriate suit brought for the benefit of the bankrupt estate. *Kiskadden v. Steinle* (C. C. A., 6th Cir.), 29 Am. B. R. 346, 203 Fed. 375.

Assessment of stock.—The district court has power to make a preliminary inquiry concerning the need to assess unpaid subscriptions, and may authorize the trustee to make such assessment. A mere order to assess, however, does not conclusively determine that the stockholder must pay; it does not take away his right to prove that he has already discharged the obligation, although it does prevent him from attacking the need for an assessment or the amount assessed. *Matter of Stipp Construction Co.* (C. C. A., 3d Cir.), 34 Am. B. R. 333, 221 Fed. 372.

304. *In re Syracuse Paper & Pulp Co.* (D. C., N. Y.), 21 Am. B. R. 174, 164 Fed. 275.

305. *In re Beachy & Co.* (D. C., Wis.), 22 Am. B. R. 538, 170 Fed. 825.

306. *Courtney v. Georger* (D. C., N. Y.), 34 Am. B. R. 517, 221 Fed. 502, *affd.* 36 Am. B. R. 20, 228 Fed. 859, arising under a Minnesota statute prohibiting the issue of stock for a less amount to be actually paid in than the par value of the stock first issued, and it was held, applying decisions under the statute, that it was for the purpose of providing a remedy against stockholders for creditors who had been misled by the issue and such remedy was not for the benefit of the creditors generally, giving to the trustee of the bankrupt corporation the right to sue.

Rule under New York statute.—*In re Jassoy* (C. C. A., 2d Cir.), 23 Am. B. R.

622, 178 Fed. 515, 101 C. C. A. 641, it was held by Judge Lacombe that under the stock corporation law of New York, which substantially provides that holders of stock in a corporation for which par value has not been paid shall be personally liable to certain classes of creditors to the extent of the balance due on their stock, no claim or right of action is given to the corporation against such stockholder, and furthermore that under such circumstances no right of action inures to the trustee in bankruptcy of the corporation on behalf of its general creditors to compel stockholders to make payment equal to the par value of the stock.

307. *Babbitt v. Read* (C. C. A., 2d Cir.), 38 Am. B. R. 303, 236 Fed. 42.

308. *Mackall v. Pocock* (Minn. Sup. Ct.), 38 Am. B. R. 680, 161 N. W. 228. But see *Ratcliff v. Clendenih* (C. C. A., 8th Cir.), 36 Am. B. R. 561, holding in effect that if the corporation was solvent when the dividends were paid and the stockholders received them in good faith, the creditors are not entitled to recover such dividends.

309. *Hanson Mercantile Co. v. Wyman, Partridge & Co.*, 22 Am. B. R. 877, 105 Minn. 491, 117 N. W. 926.

310. *Thomas v. Birmingham Ry., L. & P. Co.* (D. C., Ala.), 28 Am. B. R. 152, 195 Fed. 340, holding that in such case, since the statutory prohibition is directed against the performance, as well as the making of the contracts, no action can be maintained upon implied contract or upon a quantum meruit; nor does the fact that the contracts had been performed by bankrupt, prevent the interposition of the defense of illegality.

IV. BURDENSOME AND EXEMPT PROPERTY.

a. Burdensome property and contracts.—(1) **IN GENERAL.**—The statute is silent respecting burdensome property. The English law goes into this subject with considerable particularity, the trustee there being given twelve months in which to elect to claim or disclaim onerous property.³¹¹ The general rules phrased into that law are, however, doubtless also the law in this country. Thus, it is well settled that trustees in bankruptcy are not bound to accept property which is onerous and unprofitable, and which will burden, rather than benefit, the estate.³¹² A trustee is not obliged nor is it his duty to accept title to property that he considers worthless, and his opinion may be based on the fact that assertion of ownership may involve a lawsuit of uncertain outcome.³¹³ The doctrine has been applied where property is mortgaged beyond its value, in which case the court may direct that the property be released and surrendered to the mortgagee upon such conditions as it may deem just.³¹⁴ The question is not one of jurisdiction or of right, but of discretion.³¹⁵ The doctrine has no application to property which the bankrupt has concealed, and of the existence of which the trustee has no knowledge, and has not therefore had the opportunity to make an election.³¹⁶ If the trustee files a disclaimer, and the property is rejected, the bankrupt may reassert his title to the property and take possession thereof.³¹⁷

(2) **EXECUTORY CONTRACTS AND LEASES.**—Trustees in bankruptcy are not bound to adopt the executory contracts and the leases, or otherwise step into the shoes of the bankrupt, if, in their opinion, it would be unprofitable and undesirable to do so; and they are entitled to a reasonable time to elect whether to accept such contracts and leases or to repudiate them.³¹⁸ In the execution of their trust they are confronted at the outset with the duty of electing whether to assume an existing executory contract, continue its performance, and ultimately dispose of it for the benefit of the estate or to renounce it and leave the injured party to such legal remedies for the breach, as the case affords. If they elect to assume such a contract, they are required to take it *cum onere*, as the bankrupt enjoyed it, subject to all its provisions and conditions, in the same plight and condition that the bankrupt held it.³¹⁹

^{311.} Eng. Act of 1883, § 55, as amended by Act of 1890, § 13.

^{312.} *McCarty v. Light*, 155 N. Y. App. Div. 36, 33 Am. B. R. 883, 139 N. Y. Supp. 853; *People's Nat'l Bank v. Maxson* (Sup. Ct., Iowa), 33 Am. B. R. 765, 150 N. W. 601.

^{313.} *Greenall v. Hersum* (Mass. Sup. Ct.), 34 Am. B. R. 20, 107 N. E. 941; *Harcastle v. National Clothing Co.* (Tenn. Sup. Ct.), 38 Am. B. R. 719, 191 S. W. 524.

^{314.} *Equitable Loan & Security Co. v. Moss & Co.* (C. C. A., 5th Cir.), 11 Am. B. R. 111, 125 Fed. 609; *In re Jersey Island Packing Co.* (C. C. A., 9th Cir.), 14 Am. B. R. 689, 138 Fed. 625; *In re Zehner* (D. C., La.), 27 Am. B. R. 536, 193 Fed. 787; *Matthews & Sons v. Webre Co.* (D. C., La.), 32 Am. B. R. 180, 213 Fed. 396.

^{315.} *In re Cogley* (D. C., Iowa), 5 Am. B. R. 731, 107 Fed. 73; *In re Dillard*, Fed. Cas. 3,912.

^{316.} *First Nat. Bank v. Lasater*, 196 U. S. 115, 13 Am. B. R. 698, 49 L. Ed. 408, 25 Sup. Ct. 206.

^{317.} *Smith v. Wahl* (N. J. Ct. of Errors & App.), 37 Am. B. R. 157, 97 Atl. 261.

Rejection by trustee; title reverts in bankrupt.—When a trustee in bankruptcy rejects any part of the bankrupt's assets because their acceptance would be a burden to the estate, such action is final, and the title thereto remains in the bankrupt, unless the Federal court shall compel another course, and the trustee, having rejected any part of the bankrupt's estate, is divested of any sufficient title upon which to rest an action in trover for the conversion of such assets by the bankrupt or his assigns. *Mesirov v. Innis Speiden & Co.* (N. J. Sup. Ct.), 37 Am. B. R. 201, 97 Atl. 160.

^{318.} *United States Trust Co. v. Wabash Ry.*, 150 U. S. 287, 37 L. Ed. 1085, 14 Sup. Ct. 86; *Matter of Otis*, 101 N. Y. 580, 5 N. E. 571.

^{319.} *Atchison, etc., Railway Co. v. Hurley* (C. C. A., 8th Cir.), 18 Am. B. R. 396, 153 Fed. 503. Compare *Glenny v. Langdon*, 98 U. S. 20, 25 L. Ed. 43; *Sparhawk v.*

This doctrine is frequently applied in case of leases.³²⁰ The trustee takes title to a lease only in case he elects to accept it; the property, therefore, which may be said to pass immediately to the trustee is not the lease itself but the option of accepting it.³²¹ If a lease is accepted by the trustee, he is not prevented from selling the same under an order of the court, by a clause contained in the lease providing that the tenant shall not sublet or assign without the consent of the landlord.³²² Where a bankrupt is vendee under an executory contract for the sale of land the referee has power at the instance of the bankrupt's creditors to direct the trustee to execute a formal release and surrender of the bankrupt's right to performance of such contract.³²³ But it has been ruled that a referee under the bankruptcy act is not vested with power to order the trustee to specifically perform a contract of the bankrupt. Hence, he has no power to make an order directing the trustee to make a deed of the interest of the bankrupt in certain property now in the possession of the proposed devisee.³²⁴

(3) PRACTICE.—This is simple. The trustee, if satisfied, after appraisal or even on an independent investigation, that some or all of the property which has vested in him is of no value or will be a charge on the estate, should file a report to that effect and ask for instruction. The referee may, it is thought, act without calling a meeting of creditors or even submitting the application to a pending meeting; but safe practice suggests that the creditors be consulted and their wishes observed. If the trustee is instructed to disclaim the property as onerous, an order should be entered to that effect. This in effect revests the title in the bankrupt.³²⁵ Leases should be accepted or disclaimed promptly,³²⁶ but a continuance in possession will not usually be

Yerkes, 142 U. S. 1, 35 L. Ed. 915, 12 Sup. Ct. 104; In re Scheermann, 2 N. B. N. Rep. 118, and cases cited. See also "Supplementary Forms," *post*.

The trustee is not bound to take property which may involve him in litigation. *Oldmixon v. Severance*, 18 Am. B. R. 823, 117 N. Y. App. Div. 921, 104 N. Y. Supp. 1042. A trustee is not bound to accept and complete contracts made by the bankrupt, but, if he undertakes to do so, he is subject to all the conditions imposed by the contract upon the bankrupt. In re Delong Furniture Co. (D. C., Pa.), 26 Am. B. R. 469; In re Davis (D. C., N. Y.), 25 Am. B. R. 1, 180 Fed. 148.

320. For instance see Baldwin on Bankruptcy (8th ed.), pp. 281-291, and General Rule (Eng.), 320; also numerous cases in this country; *Matter of Frazin & Oppenheim* (D. C., N. Y.), 23 Am. B. R. 289, 174 Fed. 713; In re Rubel (D. C., Wis.), 21 Am. B. R. 566, 166 Fed. 131; holding that a trustee has a reasonable time after his appointment to determine whether he will adopt a lease as an asset of the estate, and offer the same for sale, or whether he will ignore it entirely.

Title of trustee as against landlord of bankrupt farmer.—Where the owner of a farm and the stock thereon rented the same for a term of years at a cash rent, expressly reserving title to the earnings of the stock and to the hay and fodder, not as security for the payment of the rent, but to insure the preservation of the stock, and the tenant went into bankruptcy before the expiration

of the lease, having paid the rent up to said date, and surrendered possession to the owner, who sold the stock, hay and fodder, the trustee in bankruptcy, not having assumed the lease, cannot recover the proceeds of the sale from the owner. *Matter of Place* (D. C., N. Y.), 35 Am. B. R. 426, 224 Fed. 778.

321. *Matter of Frazin & Oppenheim* (C. C. A., 2d Cir.), 24 Am. B. R. 903, 183 Fed. 28; *Matter of Roth & Appel* (C. C. A., 2d Cir.), 24 Am. B. R. 588, 181 Fed. 667; *Matter of Sherwoods, Inc.* (C. C. A., 2d Cir.), 31 Am. B. R. 769, 210 Fed. 754; In re Sapinsky (D. C., Ky.), 30 Am. B. R. 416, 206 Fed. 523.

322. *Gazlay v. Williams*, 210 U. S. 41, 20 Am. B. R. 18, 28 Sup. Ct. 687, 52 L. Ed. 950; In re Gutman (D. C., Ga.), 28 Am. B. R. 643, 197 Fed. 472, holding that although such a lease contains the ordinary covenant against subletting or assignment, its transfer from the tenant to his trustee in bankruptcy, by operation of the bankruptcy law, does not avoid the lease, but it may be sold for the benefit of creditors.

323. *Kenyon v. Mulert* (C. C. A., 3d Cir.), 26 Am. B. R. 184, 184 Fed. 825.

324. *Dreyer v. Perkins* (C. C. A., 5th Cir.), 33 Am. B. R. 232, 217 Fed. 889.

325. *Sessions v. Romandka*, 145 U. S. 29, 36 L. Ed. 609, 12 Sup. Ct. 799.

326. *Kenyon v. Mulert* (C. C. A., 3d Cir.), 26 Am. B. R. 184, 184 Fed. 825; *Matter of Sherwoods, Inc.* (C. C. A., 2d Cir.), 31 Am. B. R. 769, 210 Fed. 754.

construed an election to accept the burdens and obligations of the lease.³²⁷ Another method of disposing of burdensome property is to sell it at a meeting of creditors called for that purpose. This is often done at final meetings, and sometimes at the instance of lien creditors, who thereby get title without the usual delays and costs attending foreclosures and judicial sales.

b. Exempt property.—(1) **IN GENERAL.**—The trustee does not take title to property exempt by the law of the State, but, until the exempt property is set off, has possession.³²⁸ The reference to exemptions in this section does not show an intent to require a claim for an exemption to be made prior to adjudication.³²⁹ The trustee takes no title to exempt property; the right to exemption is to be determined as of the date of the adjudication.³³⁰ This subject has been fully considered elsewhere.³³¹

(2) **CONFLICT BETWEEN § 6 AND § 70-A (5) AS TO RIGHTS OF BENEFICIARIES UNDER LIFE INSURANCE POLICIES.**—The proviso clause in subdivision (5) has already been often considered by the courts. It was doubtless inserted to prevent the hardship which might result to beneficiaries of life insurance policies did the latter pass to the insured's trustee absolutely. In effect, the bankrupt may retain the advantage which years of premiums may have given him, provided he pays or secures to the estate the cash surrender value of the policy.³³² The practice is sufficiently indicated by the words of the statute. But the question generally discussed is whether, since most of the States declare life insurance policies exempt, the clause here is subject to § 6, or a limitation on it. The Supreme Court has now declared that the provisions of this section do not apply to life insurance policies which are exempt under a State law; as to such policies the State law must control regardless of whether they had a cash surrender value.³³³ A bankrupt does not waive his

^{327.} See discussion under Section Seventeen of this work. In *Matter of Frazin & Oppenheim* (C. C. A., 2d Cir.), 24 Am. B. R. 903, 183 Fed. 28.

^{328.} *McKenney v. Cheney* (Sup. Ct., Ga.), 11 Am. B. R. 54, 45 S. E. 433; In re *Castleberry* (D. C., Ga.), 16 Am. B. R. 159, 143 Fed. 1018; In re *Sullivan* (D. C., Iowa), 16 Am. B. R. 87, 142 Fed. 620; In re *Bender* (Ref., Ohio), 17 Am. B. R. 895; In re *Bailey* (D. C., Utah), 24 Am. B. R. 201, 176 Fed. 628; *Pincus v. Meinhard & Bro.* (Sup. Ct., Ga.), 32 Am. B. R. 123, 77 S. E. 82, citing *Collier on Bankruptcy* (9th ed.), 1029.

^{329.} In re *Fisher* (D. C., Va.), 15 Am. B. R. 652, 142 Fed. 205.

^{330.} In re *Seydel* (D. C., Iowa), 9 Am. B. R. 255, 118 Fed. 207; *Chicago, B. & Q. R. Co. v. Hall*, 229 U. S. 511, 30 Am. B. R. 619, 57 L. Ed. 1306, 33 Sup. Ct. 885; *Matter of Fletcher* (Ref., Ohio), 16 Am. B. R. 491; In re *Letson* (C. C. A., 8th Cir.), 19 Am. B. R. 506, 157 Fed. 78; In re *Judson* (C. C. A., 2d Cir.), 27 Am. B. R. 704, 192 Fed. 834; *Matter of Vouhee* (D. C., Wash.), 38 Am. B. R. 799, 238 Fed. 422; *Drees v. Armstrong* (Iowa Sup. Ct.), 38 Am. B. R. 737, 161 N. E. 40; *Waters v. Hedgpeth* (No. Car. Sup. Ct.), 38 Am. B. R. 707, 90 S. E. 314.

^{331.} See in § 6, *ante*. And compare §§ 2 (11) and 47-a (11); also General Order XVII.

^{332.} In re *Moore* (D. C., Tenn.), 23 Am. B. R. 109, 173 Fed. 679.

Necessity for notice to bankrupt.—Notice to a bankrupt to redeem life insurance policies after ascertaining their cash surrender value, is not required by section 70-a of the Bankruptcy Act, but the burden of taking advantage of the privilege therein granted is upon the bankrupt himself. *Pittsburg, etc., Packing Co. v. Shrope* (D. C., Pa.), 33 Am. B. R. 122.

^{333.} *Holden v. Stratton*, 198 U. S. 209, 14 Am. B. R. 94, 49 L. Ed. 1018, 25 Sup. Ct. 656, revg. 7 Am. B. R. 615, 113 Fed. 141; *Steele v. Buel* (C. C. A., 8th Cir.), 5 Am. B. R. 165, 104 Fed. 968, revg. 3 Am. B. R. 549, 98 Fed. 78. See also explaining effect of proviso, *Hiscock v. Mertens*, 205 U. S. 202, 17 Am. B. R. 484, 51 L. Ed. 771, 27 Sup. Ct. 488. The following cases are opposed to this doctrine: In re *Lange* (D. C., Iowa), 1 Am. B. R. 189, 91 Fed. 361; In re *Scheld* (C. C. A., 9th Cir.), 5 Am. B. R. 102, 104 Fed. 870; In re *Welling* (C. C. A., 7th Cir.), 7 Am. B. R. 340, 113 Fed. 189.

The Tennessee statute which provides that life insurance effected by a husband on his own life shall inure to the benefit of his widow and next of kin, does not affect the title of his trustee in bankruptcy to the surrender value; such statute does not give an exemption to the bankrupt. In re *Moore* (D. C., Tenn.), 23 Am. B. R. 109, 173 Fed. 679.

right to exemptions of life insurance policies by listing them in his schedules, and showing that they have been assigned as security for an amount greater than their surrender value.³³⁴ To policies which are so exempt § 6 applies; this is so since the opening clause of the section vests the trustee with the bankrupt's title except as to "property which is exempt." This qualification necessarily controls all the enumerations, and therefore excludes exempt property from all the provisions contained in the respective enumerations. It controls the proviso as well as other parts of the section and makes the life insurance policies which are exempt by State statute subject in all respects to the provisions of § 6.

(3) **TITLE VESTS SUBJECT TO CHARGE FOR SUPPORT OF WIDOW AND MINOR CHILDREN.**—The trustee's title is also subject to the condition that if the bankrupt dies during the pendency of the proceedings, the widow and children are entitled to receive the allowance given them by the laws of the State of the bankrupt's residence.³³⁵

V. APPRAISERS AND APPRAISAL.

a. In general.—The only reference to appraisers occurs in subsection *b*. The words seem to require the appointment of appraisers in every case.³³⁶ At the same time, it is not thought that this is so far jurisdictional as to make defective a title sold by a trustee without appraisal. Three appraisers, not two or one, must be appointed. They must be disinterested; this excludes creditors and all other persons having an interest in the proceeding.³³⁷ The appointment may be, in fact, usually is, made by the referee. Their fees are discretionary, the statute being silent, and are fixed in some districts by general rule, in others by order in each case. They are usually in the form of a *per diem*, and are moderate rather than large.³³⁸ Inasmuch as the appraisal is often the key to the administration of asset cases and knowledge of the percentage of cost price used in getting at values essential to bidders and court alike, one of the appraisers should be selected and serve as the representative of the referee. Such a practice will, it is thought, check collusive bidding and inadequate prices at subsequent sales. It has been held that the prevailing cost to the trade should be adopted as the actual value.³³⁹ An official appraiser of a bankrupt estate is, as a matter of law, incapable of purchasing the property of the estate prior to the filing of his appraisal.³⁴⁰

334. *King v. Miles* (Miss. Sup. Ct.), 34 Am. B. R. 93, 67 So. 182.

335. *Hull v. Dicks*, 235 U. S. 584, 34 Am. B. R. 1, 59 L. Ed. 372, 35 Sup. Ct. 152.

336. **Necessity of appraisal.**—While the want of an appraisal does not necessarily invalidate a sale by trustee of property of a bankrupt's estate, and a sale for a reasonable price without appraisal may be confirmed, yet, if the price is wholly inadequate the sale will not be allowed to stand. In such a case, the purchaser may return the property and recover the purchase price with interest. *Matter of Monsarrat* (D. C., Hawaii), 25 Am. B. R. 820, 3 U. S. Dist. Ct. Hawaii, 641.

337. *Matter of Columbia Iron Works* (D. C., Mich.), 14 Am. B. R. 526, 142 Fed. 234, in which case it was held that the appointment of an appraiser upon the suggestion of a creditor was not necessarily void.

Lessee of bankrupt as appraiser.—A lessee of a portion of the property of a bankrupt under a mining lease, executed more than four months before the petition in bankruptcy was filed, and requiring work to be done and royalties to be paid, not shown to have an interest in the bankruptcy proceedings or in the sale of the property, is not disqualified as an appraiser under section 70-b of the Bankruptcy Act. *Clark Hardware Co. v. Sauve* (C. C. A., 8th Cir.), 33 Am. B. R. 674, 220 Fed. 102.

338. *In re Fiddler & Son* (D. C., Pa.), 23 Am. B. R. 16, 172 Fed. 632, holding that the trustee must justify by special circumstances the payment of more than \$5 per day as fees to appraisers.

339. *In re Prager* (Ref., Col.), 8 Am. B. R. 356.

340. *Matter of Frazin & Oppenheim* (C. C. A., 2d Cir.), 24 Am. B. R. 598, 181 Fed. 307,

b. Practice.—In no-asset cases appraisers are not needed, or often appointed. In asset cases, their appointment should be moved at the first meeting of creditors. Where possible, the wishes of the creditors should be consulted as to their choice. The appointment is evidenced by an order.³⁴¹ An oath of office must be taken.³⁴² The appraisal should be made as soon as possible; no notice to creditors or parties in interest is required. It has been said that an appraisal should be general rather than special, only such particularity being given as will be sufficient to reasonably identify the property in character and quantity, and give a fair idea of its value.³⁴³ When made, it is reduced to writing,³⁴⁴ signed by the appraisers, and filed with the referee. With it, should be filed affidavits of the number of days actually spent by each appraiser; this for the guidance of the referee in fixing the fees.³⁴⁵

VI. SALES OF PROPERTY.

a. In general.—Subsection *b* also provides for the sale by the trustee of the bankrupt's real and personal property. The subject of sales is largely controlled either by rules or by the order of the court in each case. Here the present law differs materially from that of 1867. The latter, especially after the amendments of 1874, regulated sales with much particularity.³⁴⁶ Subject to the statute and General Orders XXI and XXIII interpreting it, the assignee (trustee) then had a large discretion as to sales. Cases under that law should, therefore, be cited with caution. The present statute, after, in general words,³⁴⁷ conferring jurisdiction on courts of bankruptcy to convert estates into money and distribute them, and charging this duty on the trustee,³⁴⁸ limits the latter's powers by the words "under the direction of the court," in § 70-b, and then, as to sales, provides that the same, when practicable, shall be made subject to the approval of the court; indeed, that no sale at less than 75 per cent. of the appraised value shall be made without such approval.³⁴⁹ This subsection and the one that follows are, other than those in § 58-a (4), the only words of the present statute having to do with the reduction of a bankrupt's property into money. Thus, the only statutory check on absolute discretion is that creditors are entitled to notice of all proposed sales. This latter restriction is, as we have seen, unfortunate. The subject is, however, one of practice rather than law. This is recognized in General Order XVIII and the numerous special rules regulating sales in the different districts.

b. Practice on sales; conduct of sales.—(1) **IN GENERAL.**—It will be seen that a trustee has the option (1) of disclaiming the bankrupt's property, or (2) of selling it. If the latter, (*a*) he may sell it immediately without notice,

holding that under the rule of equity that no person can be permitted to purchase an interest in property and hold it for his own benefit where he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account and for his own individual use, an official appraiser of a bankrupt is incapable of purchasing the property which he has appraised.

341. Form No. 13.

342. *Id.*

343. *In re Gordon Supply, etc., Co. (D. C., Pa.)*, 13 Am. B. R. 352, 133 Fed. 798.

344. Form No. 13.

345. See generally 1 N. B. N. 179, and Rule 13, Erie Co. (N. Y.) District in 1 N. B. N. 114. Compare also *In re Grimes (D. C., N. Car.)*, 2 Am. B. R. 730, 96 Fed. 529; *In re Jamieson (Ref., R. I.)*, 6 Am. B. R. 601.

346. See "Analogous Provisions" at head of this section.

347. Bankr. Act, § 2 (7).

348. Bankr. Act, § 47-a (2).

349. *Matter of Monsarrat (D. C., Hawaii)*, 25 Am. B. R. 820, 3 U. S. Dist. Ct., Hawaii, 641.

if it be perishable, in which case the practice is indicated in Form No. 46;³⁵⁰ (b) he may sell it at public auction on notice using Form No. 42;³⁵¹ or (c) he may sell it at private sale³⁵² under General Order XVIII (2) with or without notice, as the court shall direct,³⁵³ in which case Form No. 45, modified to fit the facts, should be used; or (d) he may sell it subject to liens, when the practice is not unlike that on a sale of unincumbered property, though Form No. 44 should be used; or (e) he may sell it clear of liens, for which no form is provided but to which Form No. 44, with the additional recitals and directions indicated in the last paragraph, may be adapted, or (f) he may redeem it from liens, as provided in General Order XXVIII, in which event Form No. 43 should be used; or (g) he may sell unconverted assets as a part of the final meeting of creditors.³⁵⁴ The bankruptcy court may order how a sale of the bankrupt's property shall be made and may order the property sold either in parcels or as a whole.³⁵⁵

(2) JURISDICTION OF REFEREE AS TO SALES.—A referee has power to order and confirm a sale;³⁵⁶ but not before the adjudication.³⁵⁷

(3) BY WHOM CONDUCTED.—The act does not require the sale to be made by the trustee; the court may direct that the sale be conducted by an officer appointed by it;³⁵⁸ in some districts official auctioneers are designated to conduct the sales.³⁵⁹ It has been held that the act of March 3, 1893 (27 Stat. 75; U. S. Comp. Stats. 1901, p. 710), requiring judicial sales of land to be made upon the land itself, or at the court house in the county where it lies, and upon not less than four weeks' notice, does not apply to bankruptcy sales.³⁶⁰

350. This form is erroneous in so far as it recites a notice.

351. For a form of notice, see 1 N. B. N. 117.

352. The court may, under its broad powers, order a private sale of either real or personal property belonging to the estate. In re Edes (D. C., Me.), 14 Am. B. R. 382, 135 Fed. 595. See also McKay v. Hamill (C. C. A., 3d Cir.), 26 Am. B. R. 164, 185 Fed. 11; In re Britannia Mining Co. (D. C., Wis.), 28 Am. B. R. 651, 197 Fed. 459.

353. As to when notice to creditors and lienors of a private sale should be given, see Allgair v. Fisher (C. C. A., 3d Cir.), 16 Am. B. R. 278, 143 Fed. 962.

Notice.—A sale by a trustee in bankruptcy, or an offer to sell at public auction, may be made on ten days' notice. Matter of Progressive Wall Paper Corporation (D. S., N. Y.), 35 Am. B. R. 508, 222 Fed. 87.

354. See "Supplementary Forms," *post*; and also Hagar & Alexander's Bankruptcy Forms (2d ed.).

355. Matter of Haywood Wagon Co. (C. C. A., 2d Cir.), 33 Am. B. R. 618, 219 Fed. 655.

356. In re Matthews (D. C., Ark.), 6 Am. B. R. 96, 109 Fed. 603; In re Fisher & Co. (D. C., N. J.), 14 Am. B. R. 366, 135 Fed. 223.

357. In re Styer (D. C., Pa.), 3 Am. B. R. 424, 98 Fed. 290. Compare In re Kelly

Dry Goods Co. (D. C., Wis.), 4 Am. B. R. 528, 102 Fed. 747.

358. Sturgis v. Corbin (C. C. A., 4th Cir.), 15 Am. B. R. 543, 141 Fed. 1, 72 C. C. A. 179.

359. In re Benjamin (C. C. A., 2d Cir.), 14 Am. B. R. 481, 136 Fed. 175, affg. 13 Am. B. R. 18.

Sale by auctioneer.—An order directing a sale is not invalid, which dispenses with the requirements of a local rule providing that sale of a bankrupt's property shall be made by the official auctioneer, and that a conspicuous notice shall be posted, at least two days before the sale, in front of the premises where the property is to be sold, since such matters are not jurisdictional. In re Nevada-Utah Mines & Smelters Corporation (D. C., N. Y.), 28 Am. B. R. 409, 198 Fed. 497, affd. 29 Am. B. R. 754, 202 Fed. 126.

360. In re Britannia Mining Co. (C. C. A., 7th Cir.), 29 Am. B. R. 472, 203 Fed. 450, revg. 28 Am. B. R. 651, 197 Fed. 459.

Act March 3, 1893, providing that all sales of real estate or any interest in land, made under any order or decree of any United States court, shall be upon the property itself or at the court house of the county in which it is situated and upon at least four weeks' notice by publication, has no application to sales in bankruptcy. In re La France Copper Co. (D. C., Mont.), 30 Am. B. R. 381, 205 Fed. 207.

(4) **PROPERTY TO BE SOLD.**—Only perishable property should be sold before adjudication, even by the court,³⁶¹ though, if ordered, the trustee, when appointed, may doubtless be directed to ratify a receiver's sale, and thus perfect the purchaser's title. A contingent interest in an estate may be sold under certain circumstances, there being some foundation in fact upon which the trustee's claim to such interest is based.³⁶² Where a negotiable promissory note is sold by a trustee in bankruptcy, delivery without endorsement will transfer title.³⁶³ A promissory note, inventoried as in the hands of an attorney for collection, and which was never appraised for the purpose of the sale and which was never in the possession of the trustee or the auctioneer, cannot be construed as being included in a bankruptcy sale of "open accounts and claims."³⁶⁴ The question whether the State has the title to lands under water, sold by the trustee in bankruptcy as part of the bankrupt's estate, should be determined by suit in a proper court and cannot be decided upon affidavits.³⁶⁵

(5) **CONDUCT OF SALE; BIDS; RIGHTS AND OBLIGATIONS OF BIDDERS.**—The sale must be fairly conducted without discrimination as against any bidder; all persons who, in good faith and with capacity to comply with the terms of the sale, were present at the sale may make offers or bids; the person who proposes to pay the greatest amount is entitled to have his bid or offer accepted and reported to the court, upon complying with the terms of the sale.³⁶⁶ When the sale is completed by the acceptance of the bid and a partial performance by the trustee it becomes a contract, and the bidder cannot insist before confirmation that the money paid be returned.³⁶⁷ A sealed bid, submitted under an order of the referee directing that sealed bids be received and that the trustee report the same to the court with his recommendations, is received subject to the approval of the court, and may be withdrawn by the bidder at any time prior to its acceptance by the court.³⁶⁸ A purchaser at the sale is not entitled to be relieved from his bid because a by-bidder or "puffer" was the only other bidder, where there is no allegation that such by-bidder made fictitious bids while believing that he was secure from personal liability or had assurance of immunity.³⁶⁹ The bid itself does not confer a legal right upon the bidder, prior to its acceptance by the trustee and confirmation by the court.³⁷⁰ If a creditor is present at the sale and bids on the property sold, he cannot afterward complain that he received no notice of the sale.³⁷¹ If a

361. *In re Kelly Dry Goods Co.* (D. C., Wis.), 4 Am. B. R. 528, 102 Fed. 747.

Sales by receivers in bankruptcy are justified only when property is perishable or is rapidly depreciating in value on the falling market or for other reasons. *In re Desrochers* (D. C., N. Y.), 25 Am. B. R. 703, 183 Fed. 991.

362. *In re Gutterson* (D. C., Mass.), 14 Am. B. R. 495, 136 Fed. 698.

363. *Wade v. Elliott* (Ga. Ct. of App.), 28 Am. B. R. 888, 75 S. E. 989.

364. *Seger v. Fabacher* (La. Sup. Ct.), 34 Am. B. R. 89, 67 So. 369.

365. *Matter of Williams v. Bailey* (D. C., N. Y.), 19 Am. B. R. 470, 156 Fed. 691.

366. **Duty of trustee to accept bids.**—In the absence of any controlling reason to the contrary, such as fraud or manifest inability to comply with the terms of the sale, the

trustee is bound to accept all bids made at a public sale of a bankrupt's real estate and to report the same to the court; and he has no right to demand of a bidder that he disclose the names of the persons for whom he is acting. *Coal City House Furnishing Co. v. Hogue* (C. C. A., 4th Cir.), 28 Am. B. R. 258, 197 Fed. 1.

367. *In re Lane Lumber Co.* (C. C. A., 9th Cir.), 31 Am. B. R. 148, 207 Fed. 762.

368. *Matter of Glas-shipt Dairy Co.* (C. C. A., 7th Cir.), 38 Am. B. R. 554, 239 Fed. 122.

369. *Williams v. Hogue* (C. C. A., 4th Cir.), 34 Am. B. R. 40, 219 Fed. 182.

370. *Untereiner v. Connors* (C. C. A., 5th Cir.), 36 Am. B. R. 122, 228 Fed. 890.

371. *In re Caldwell* (D. C., Ga.), 24 Am. B. R. 495, 178 Fed. 377.

bidder has received every reasonable opportunity to submit a bid in competition with other bidders, his objection to confirmation of a sale to a bidder who, subsequent to the time set for submitting bids, offered a higher bid, which the former bidder refused to raise, should not be sustained.³⁷² Sales regularly and fairly made will not, as a rule, be disturbed on the ground of mere inadequacy of price, unless for fraud or the stifling of bids, or the like.³⁷³ It is sufficient, at an auction sale of a bankrupt's property, if all parties desiring to bid have a fair chance, the announcement by the auctioneer, from time to time, of the amount bid disclosing to each just how the sale is going, and bids in good faith, from responsible parties alone being entertained.³⁷⁴ An error as to the basis of value, made in the trustee's circular inviting bids, will not warrant a resale, where the purchaser had opportunity to ascertain the value, independently of the circular.³⁷⁵ Where a sale of a lease was made by a trustee and the purchaser knew that a question had arisen as to the validity of the title and the right of the trustee to sell, and the trustee stated at the sale that he assumed no personal responsibility and did not warrant the lease or its salability, such sale will not be set aside after it appears that the value was less than he supposed.³⁷⁶ A sale of the bankrupt's equity of redemption in certain real estate will be set aside where the trustee failed to give notice of the sale to an intending bidder, according to promise, and the petitioner filed an agreement to bid three times the amount bid at the first sale.³⁷⁷ After the bids are received and acted upon the circumstances must be unusual to permit a re-opening of the bidding before confirmation, for the reception of additional or increased bids. If the sale is unsatisfactory the remedy is to set it aside and order a resale, when application is made for confirmation.³⁷⁸

372. *In re Chandler* (C. C. A., 7th Cir.), 28 Am. B. R. 89, 194 Fed. 944.

373. *In re Thompson* (Ref., Pa.), 2 Am. B. R. 216; *In re Groves*, 2 N. B. N. Rep. 30; *In re Ethier* (D. C., Wis.), 9 Am. B. R. 160, 118 Fed. 107; *Sturgis v. Corbin* (C. C. A., 4th Cir.), 15 Am. B. R. 543, 141 Fed. 1, 72 C. C. A. 179. Compare *In re Finday Bros.* (D. C., N. Y.), 4 Am. B. R. 745, 104 Fed. 675, for case where application was made to set aside unfair sale made by a general assignee before bankruptcy.

374. *In re Ketterer Manufacturing Co.* (D. C., Pa.), 19 Am. B. R. 638, 156 Fed. 719, holding that the fact that the attorney of the purchaser at an auction sale of a bankrupt's property by the trustee had a private arrangement with the auctioneer that the bid of any other person should be raised \$50 each time until a sign was given by the attorney to stop, does not render the sale invalid or prevent its confirmation.

375. *Owens v. Bruce* (C. C. A., 4th Cir.), 6 Am. B. R. 322, 109 Fed. 72; *In re Fisher* (D. C., N. J.), 17 Am. B. R. 404, 148 Fed. 907, holding that where a resale is had, the expenses should be paid out of the estate.

376. *Matter of Frazin and Oppenheim* (C. C. A., 2d Cir.), 29 Am. B. R. 212, 201 Fed. 343.

377. *In re Shea* (D. C., Mass.), 10 Am. B. R. 481, 122 Fed. 742. Compare *In re Belden* (D. C., N. Y.), 9 Am. B. R. 679, 120 Fed. 524, where the court refused to

set aside a sale of the bankrupt's interest in his father's estate, on the motion of one who has no interest in the matter except a desire to become a bidder and purchaser at a higher figure, especially where all the creditors oppose the motion, and protest in writing against a resale.

378. Re-opening bids before confirmation.—Under the old English practice before a sale had been confirmed courts would open the biddings and direct a resale of the property in case a person was ready to offer a larger price than the property brought at the first sale. But this practice in England was abolished by statute. St. 30 and 31 Vict. c. 48, sec. 7. And now in that country to entitle the parties to open the bidding it appears to be necessary to show either fraud or such misconduct as borders on fraud. *Delves v. Delves*, L. R. 20 Eq. 77. In the courts of this country there seems to be some difference of opinion whether before confirmation it is proper to open the biddings to obtain a greater bid and the practice of doing so has been widely condemned in our courts as making judicial sales unstable and as tending to chill the bidding. In a number of cases it has been held that there must be some further reason arising out of the circumstances of the sale sufficient to cause a refusal of confirmation or the application to reopen the bids will be denied. If courts are strongly inclined to decline to open biddings even in cases where the advanced bid

Where the property sold was destroyed by "Act of God," for and without the negligence of the purchaser, prior to confirmation, the purchaser may not be compelled to complete the purchase. It would be inequitable to require the purchaser to stand the loss. In such a case the court, in the exercise of a fair discretion, should refuse to confirm the sale.³⁷⁹

(6) **CONFIRMATION OR APPROVAL OF SALES.**—Upon a true construction of this subsection, a sale of the bankrupt's property is in all circumstances subject to the approval of the court when practicable, and any sale for which an approval was unquestionably practicable, conveys no title until it is confirmed, and a setting aside of the sale is equivalent to a refusal to confirm.³⁸⁰ The confirmation is a matter of discretion; it should not be refused where the sale was properly conducted, although one of the bidders, upon a hearing of the objections to confirmation, offers considerable more than the amount for which the property was sold.³⁸¹ Confirmation of a sale will depend upon the sufficiency of notice and a compliance with proper requirements as to the conduct of the sale in respect to the treatment of bidders, and honesty and fair dealing.³⁸² Before confirmation a sale is not in a technical and legal sense a sale. But a confirmation has the effect of completing the sale, and while it does not pass the legal title it vests the full equitable title to the property in the purchaser, even though the deed executed in pursuance thereof is irregular, and even if no deed is given.³⁸³ Although the terms of sale state plainly that the trustee is selling only the right, title and interest of the bankrupt in real estate, a person who bids off a parcel that has been sold by the bankrupt a long time before bankruptcy should be relieved from his obligation to carry out the bid.³⁸⁴ The order of confirmation takes effect as of the date of its

is actually brought into court, or a bond or guarantee of a higher bid is furnished, *a fortiori* the biddings cannot be opened where no such bid is offered and no such guarantee is produced. *Matter of Haywood Wagon Co.* (C. C. A., 2d Cir.), 33 Am. B. R. 618, 219 Fed. 655.

379. *Matter of Finks* (C. C. A., 6th Cir.), 34 Am. B. R. 749, 224 Fed. 92.

380. *In re Shea* (C. C. A., 1st Cir.), 11 Am. B. R. 207, 123 Fed. 153; s. c., 10 Am. B. R. 481, 122 Fed. 743.

Validity of private sale.—A sale of bankrupt's property at private sale by trustee without appraisal and without the order of the court, and which has not been approved by the court, vests no title in the buyer. *Matter of Monsarrat* (D. C., Hawaii), 25 Am. B. R. 815.

Sale without leave of bankruptcy court.—Where a bankrupt more than four months prior to his bankruptcy executed a security deed upon lands which remained in his possession through tenants, and several months after the appointment of the trustee in bankruptcy the holders of the deed, with the knowledge of the bankruptcy, but without notice to the trustee or permission from the bankruptcy court, or State court, duly exercised the power of sale contained in the deed and offered the lands at public sale, purchasing them themselves, both the Bankruptcy Act and public policy require that such sale should be set aside, although the holders of

the deed acted in good faith. *Cohen v. Nixon & Wright* (D. C., Ga.), 37 Am. B. R. 646.

381. *Matter of Mitchell* (Ref., Mass.), 15 Am. B. R. 735.

382. Confirmation of sale.—While a sale of the assets of a bankrupt's estate at public auction is subject in all things to the confirmation of the court, that confirmation must depend upon the sufficiency of the notice, the complying with all the necessary or proper requirements in holding the sale, honesty and fair dealing and a proper treatment of the bidder in considering his right after the property is knocked down to him, which generally involves merely the possibility of his completing the purchase and of the adequacy of his bid. *In re Kronrot* (D. C., N. Y.), 25 Am. B. R. 738, 183 Fed. 653. See also *Sturgiss v. Corbin* (C. C. A., 4th Cir.), 15 Am. B. R. 543, 41 Fed. 1. As to notice of application to confirm, see *in re Nevada Utah Mines and Smelters Corporation* (D. C., N. Y.), 28 Am. B. R. 409, 198 Fed. 497, *affd.* (C. C. A., 2d Cir.), 29 Am. B. R. 754, 202 Fed. 126. If the property has increased greatly in price since the sale and there was only one bidder, the sale should not be confirmed. *Matter of Ohio Copper Mining Co.* (D. C., N. Y.), 38 Am. B. R. 548, 237 Fed. 490.

383. *Matter of Burr Mfg. Co.* (C. C. A., 2d Cir.), 32 Am. B. R. 708, 217 Fed. 16.

384. *Matter of Capengri* (C. C. A., 2d Cir.), 32 Am. B. R. 158, 210 Fed. 897.

entry, and cannot be treated as in effect on the day of the sale.³⁸⁵ The fact that all the secured and most of the unsecured creditors of a bankrupt are satisfied with a judicial sale of the assets subject to incumbrances affords some indication that the good faith of the trustee ought not to be impugned. But a single objecting creditor, 'if actually wronged by a sale of the assets, is entitled to protection by the court.'³⁸⁶

c. **Sales at public auction or by private sale under General Order XVIII.**—General Order XVIII limits the discretion of the district and the referee courts. Its third paragraph applies the same rules to perishable property as were stated in the statute under the former law;³⁸⁷ and the cases then decided are thought still applicable; those under the present law are considered elsewhere.³⁸⁸ Its first paragraph compels sales at public auction, unless otherwise ordered by the court.³⁸⁹ The term "perishable property" includes property which may deteriorate in value and price if not sold at a certain time, as well as property which deteriorates physically.³⁹⁰ The second paragraph is by far the most important. In seeming to dispense with notice to creditors, it is of doubtful validity, yet, as a way out of many an awkward situation, it is very generally availed of where the interests of creditors will be best subserved by an immediate sale at a specified bid. By its means, much larger prices are often obtained than could be at public auction. At the same time, in the face of the mandatory provision of § 58-a (4), this rule will be cautiously applied, and only where the moving papers show clearly either a necessity for immediate sale or a fair and adequate offer.³⁹¹

d. **Sales of incumbered property.**—(1) **IN GENERAL.**—Sales free of incumbrances were authorized by the statute of 1867.³⁹² The present law has no such provision. This has cast doubt on the power of the court to authorize such a sale. The cases are quite uniform, however, in declaring that such sales can be authorized, and by the referee³⁹³ as well as by the judge.³⁹⁴ But

^{385.} *Matter of Finks* (C. C. A., 6th Cir.), 34 Am. B. R. 749, 224 Fed. 92.

^{386.} *Matter of Haywood Wagon Co.* (C. C. A., 2d Cir.), 33 Am. B. R. 618, 219 Fed. 655.

^{387.} Act of 1867, § 25, R. S., § 5065.

^{388.} See discussion under Section Fifty-eight of this work.

^{389.} **Public sale.**—A sale of bankrupt's assets is not a public sale, when it is made at a meeting advertised by a notice addressed only to "creditors, stockholders and other parties in interest," wherein the meeting to be held was stated to be a meeting of such persons, since the essential feature of a public sale is lacking, viz., that the public be invited to attend and bid. In re Nevada-Utah Mines & Smelters Corporation (C. C. A., 2d Cir.), 29 Am. B. R. 754, 202 Fed. 6, affg. 28 Am. B. R. 409, 98 Fed. 497.

^{390.} *Matter of Pedlow* (C. C. A., 2d Cir.), 31 Am. B. R. 761, 209 Fed. 841.

^{391.} **Facts justifying sale of entire plant.**—Where prior to adjudication, a sale at private sale of the entire plant of an alleged bankrupt corporation, a bid of 75 per cent. of the appraised value having been received therefor, but one-tenth in amount of the stockholders objecting and of the creditors all but one-twelfth or less in value either openly

advocating the sale or by silence, acquiescing therein, is justified. In re Peerless Finishing Company (D. C., N. Y.), 2 Am. B. R. 429, 199 Fed. 350.

^{392.} Act of 1867, § 20, R. S., § 5075.

^{393.} As to sale free of liens by order of referee, see In re Waterloo Organ Co. (D. C., N. Y.), 9 Am. B. R. 427, 118 Fed. 904; *Citizens' Savings Bank v. Paducah* (Ct. of App. Ky.), 32 Am. B. R. 508, 167 S. W. 870; *Shinn v. Kemp & Herbert* (Sup. Ct., Wash.), 32 Am. B. R. 852, 131 Pac. 822.

^{394.} In re Pittelkow (D. C., Wis.), 1 Am. B. R. 472, 92 Fed. 901; In re Etheridge Furniture Co. (D. C., Ky.), 1 Am. B. R. 112, 92 Fed. 329; In re Worland (D. C., Iowa), 1 Am. B. R. 450, 92 Fed. 893; In re Sanborn (D. C., Vt.), 3 Am. B. R. 54, 96 Fed. 507; In re Southern, etc., Co. v. Benbow (D. C., N. Car.), 3 Am. B. R. 9, 96 Fed. 514; *Matter of New England Piano Co.* (C. C. A., 1st Cir.), 9 Am. B. R. 767, 122 Fed. 937; In re Keet (D. C., Pa.), 11 Am. B. R. 117, 128 Fed. 651; In re Shoe & Leather Reporter (C. C. A., 1st Cir.), 12 Am. B. R. 248, 129 Fed. 588; In re Prince & Walter (D. C., Pa.), 12 Am. B. R. 675, 131 Fed. 546. See also In re Barber (D. C., Minn.), 3 Am. B. R. 306, 97 Fed. 547; In re Utt (C. C. A., 7th Cir.), 5 Am. B. R.

they should not be ordered where it does not appear that they will be to the advantage of the bankrupt's estate,³⁹⁵ as where there is no equity of redemption, or a State court has already been invoked to foreclose the lien,³⁹⁶ or the lien of a conditional sale is void as against the trustee as the representative of the creditors.³⁹⁷ An order merely directing the sale of property, without mentioning liens, will be taken as a sale subject to any existing liens.³⁹⁸ A sale of assets may be directed free of liens without regard to the objections of lienors,³⁹⁹ provided such liens are amply protected by being transferred to the proceeds of the sale.⁴⁰⁰

383, 105 Fed. 754; *In re Keller* (D. C., Iowa), 6 Am. B. R. 351, 109 Fed. 131. See *In re Wilka* (D. C., Iowa), 12 Am. B. R. 727, 131 Fed. 1004, where it was held that a referee may order personal property to be sold free of liens, upon notice to lienor, although the property, and a creditor having a mortgage thereon, are without the territorial jurisdiction of the court; *In re Zehner* (D. C., La.), 27 Am. B. R. 536, 193 Fed. 787; *In re Freedman* (D. C., Pa.), 31 Am. B. R. 53; *Citizens' Sav. Bank v. Paducah* (Ky. Ct. of App.), 32 Am. B. R. 508, 167 S. W. 870; *Matter of Haywood Wagon Co.* (C. C. A., 2d Cir.), 33 Am. B. R. 618, 219 Fed. 655; *Matter of Progressive Wall Paper Corp.* (D. C., N. Y.), 35 Am. B. R. 508, 222 Fed. 87; *Matter of West* (D. C., Pa.), 37 Am. B. R. 421, 232 Fed. 903. See Am. Bank. Dig. § 602.

395. *In re Styer* (D. C., Pa.), 3 Am. B. R. 424, 98 Fed. 290; *In re Shaeffer*, 5 Am. B. R. 248, 105 Fed. 352; *In re Goldsmith* (D. C., Tex.), 9 Am. B. R. 419, 118 Fed. 763; *In re Alden* (Ref., Ohio), 16 Am. B. R. 362; *In re Holmes Lumber Co.* (D. C., Ala.), 26 Am. B. R. 119, 189 Fed. 178; *Matter of Progressive Wall Paper Corp.* (D. C. N. Y.), 35 Am. B. R. 508, 222 Fed. 87; *Citizens' Sav. Bank v. Paducah* (Ky. Ct. of App.), 32 Am. B. R. 508, 167 S. W. 870.

Free of lien of mortgage; when not justified.—Property of a bankrupt, inumbered by mortgage liens given in good faith and duly recorded more than four months before the filing of the petition in bankruptcy, which, by virtue of section 67-d of the bankruptcy act, are not affected by the act, should not be ordered sold free of such liens unless it appears that such liens will not be affected by the sale and that the bankrupt estate will be benefited thereby. *In re Foster* (D. C., Vt.), 25 Am. B. R. 96, 181 Fed. 703; *Matter of Huggins* (C. C. A., 8th Cir.), 24 Am. B. R. 715, 179 Fed. 490.

When sale free from liens not ordered.—The holder and legal owner of bonds secured by a mortgage on the real estate and machinery of a bankrupt corporation should, if such obligations are legal, be permitted to use them in the purchase of the property at a sale thereof; and where it appears that the holder of such bonds has brought suit in a State court to foreclose the mortgage, wherein the ownership and validity of the bonds and mortgage are being contested by

bankrupt's trustee, so that its right to so use them depends on the result of the foreclosure suit, and it further appears that the mortgaged property will not bring enough to pay the bonds, a sale of such property free from liens will not be ordered. *In re Fayetteville Wagon-Wood & Lumber Co.* (D. C., Ark.), 28 Am. B. R. 307, 197 Fed. 180. A trustee in bankruptcy may be authorized to sell mortgaged property of the bankrupt free from liens, if there are reasonable grounds for believing that more can be realized from such sale than the amount of the incumbrance. *In re Brown & Company* (C. C. A., 8th Cir.), 28 Am. B. R. 336, 196 Fed. 758.

Consideration of estimate of appraisers in determining advisability of sale of encumbered property.—The bankruptcy court may consider the sworn estimate of the appraisers in bankruptcy, although at variance with the opinions of value given by witnesses, in determining whether the estate of a bankrupt will be benefited by a sale of encumbered property. *Clark Hardware Co. v. Sauve* (C. C. A., 8th Cir.), 33 Am. B. R. 674, 220 Fed. 102.

396. Compare *In re Gerdes* (D. C., Ohio), 4 Am. B. R. 346, 102 Fed. 318.

397. **Sale free from lien of conditional sale.** Where a bankrupt, while in the possession of certain property but before the execution and record of a conditional bill of sale thereof, is indebted to certain creditors, the trustee in bankruptcy may sell the property free from the lien of the conditional sale, which is void as to the trustee under section 47-a (2) of the Bankruptcy Act, as amended in 1910. *Matter of Thompson* (Ref., N. J.), 37 Am. B. R. 434.

398. *In re Platteville Foundry & Machine Co.* (D. C., Wis.), 17 Am. B. R. 291, 147 Fed. 828.

399. But see *Matter of Fite* (D. C., Pa.), 31 Am. B. R. 308, 61 Pittsburgh Leg. J. 169, holding that in Pennsylvania a trustee in bankruptcy should not be ordered to sell a bankrupt's real property so as to divest or in any way affect the lien of a first mortgage without the consent of the mortgagee.

400. *Matter of The American Architects' Tube Co.* (C. C. A., 6th Cir.), 25 Am. B. R. 651, 184 Fed. 694, in which the text is quoted with approval; *Citizens' Sav. Bank v. Paducah* (Ky. Ct. of App.), 32 Am. B. R.

(2) **SALES FREE OF DOWER.**—It is appropriate to sell the bankrupt's real estate free from the wife's inchoate right of dower, if she consents, in which case compensation to her should be made from the proceeds of the sale.⁴⁰¹ But in the absence of such consent, a sale of a bankrupt's property under an order that it be sold free and discharged of liens, does not free the real property from the wife's inchoate right of dower.⁴⁰²

(3) **PROCEEDS OF SALE SUBJECT TO LIENS; RIGHTS OF LIENORS.**—The effect of a sale free of incumbrances is to vest a purchaser with good title and to transfer all existing liens to the fund derived from the sale to which a lien holder must resort.⁴⁰³ Provisions should be made for the protection of the rights of the several lien creditors in the fund derived from the sale, and such creditors may prosecute their claims to preference against such fund, even if they did not file exceptions to the return of sale.⁴⁰⁴ Upon the confirmation of a sale of a bankrupt's property free of liens, the court may allow a credit to the purchaser, if the holder of a valid lien, of the amount that

508, 167 S. W. 870; *Matter of Dick Co.* (D. C., Pa.), 33 Am. B. R. 341, 62 Pittsburgh Leg. J. 522.

^{401.} *Savage v. Savage* (C. C. A., 4th Cir.), 15 Am. B. R. 599, 141 Fed. 346, 72 C. C. A., 494; *Matter of Acretelli* (D. C., N. Y.), 21 Am. B. R. 537, 173 Fed. 121.

In Ohio, where a trustee in bankruptcy sold the bankrupt's real property, and out of the proceeds paid a purchase-money mortgage, the contingent right of dower of the bankrupt's wife extends merely to the surplus remaining after the payment of such mortgage indebtedness and not to the whole proceeds, as against the husband's creditors, except such mortgagee and his privies. *Matter of Hays* (C. C. A., 6th Cir.), 24 Am. B. R. 669, 181 Fed. 674.

Where a bankrupt, a resident of Ohio, before marriage, executed mortgages upon his real estate in that State, and judgment liens were secured thereon subsequent to his marriage, and the property is afterwards sold by his trustee in bankruptcy, his wife is dowerable only in the surplus of the proceeds of the sale, after payment of such claims as preclude her right to dower therein. *In re Forbes* (Ref., Ohio), 7 Am. B. R. 42.

In Pennsylvania a trustee in bankruptcy may sell the real estate of a bankrupt free from his wife's dower, and thereby divest her of such right without her consent. *Matter of Freedman* (D. C., Pa.), 31 Am. B. R. 53. See also *In re Codori* (D. C., Pa.), 30 Am. B. R. 43, 207 Fed. 784; *Matter of Strauch* (D. C., Pa.), 31 Am. B. R. 36, 208 Fed. 892.

^{402.} *Matter of Chotiner* (D. C., Pa.), 32 Am. B. R. 760, 216 Fed. 916.

^{403.} *Shinn v. Kemp & Herbert* (Sup. Ct., Wash.), 32 Am. B. R. 852, 131 Pac. 822.

Substitute for property sold.—A fund derived from the sale of property free of liens will stand as a substitute for the property sold, and will be held by the trustee in bankruptcy for the benefit of those holding *bona fide* claims and liens to the extent of

their respective interests. *Matter of National Boat & Engine Co.* (D. C., Maine), 33 Am. B. R. 154, 216 Fed. 208.

^{404.} *In re Benz* (D. C., Pa.), 33 Am. B. R. 357, 62 Pittsburgh Leg. J. 529; *Matter of National Boat & Engine Co.* (D. C., Maine), 33 Am. B. R. 154, 216 Fed. 208, citing *Collier on Bankruptcy* (9th ed.), 1034; *Matter of Schou* (D. C., Conn.), 32 Am. B. R. 494, 213 Fed. 514; *Carroll & Bro. Co. v. Young* (C. C. A., 3d Cir.), 9 Am. B. R. 643, 119 Fed. 576. Compare *Chauncey v. Dyke Bros.* (C. C. A., 8th Cir.), 9 Am. B. R. 444, 119 Fed. 1; *In re Goldsmith* (D. C., Tex.), 9 Am. B. R. 419, 118 Fed. 763; *In re Shoe & Leather Reporter* (C. C. A., 1st Cir.), 12 Am. B. R. 248, 129 Fed. 588; *In re Prince & Walter* (D. C., Minn.), 12 Am. B. R. 675, 131 Fed. 546; *In re Saxton Furnace Co.* (D. C., Pa.), 14 Am. B. R. 483, 136 Fed. 697; *In re Forse & Roseboom* (D. C., N. Y.), 25 Am. B. R. 134, 182 Fed. 212. As to right of judgment creditor, whose judgment is unaffected by the bankruptcy, to have his lien satisfied out of the proceeds of the sale, see *In re Vastbinder* (D. C., Pa.), 13 Am. B. R. 148, 132 Fed. 718.

Bankrupt's remainder interest in real property.—A court of bankruptcy has power, by virtue of section 2 of the bankruptcy act, to sell a bankrupt's remainder interest in real estate and pay off a judgment or mortgage lien on said interest, if the proceeds be sufficient for that purpose, so as to preserve the equity in the property for the benefit of general creditors, but the lien and all rights accruing therefrom must be respected by the court. *In re Arden* (D. C., N. Y.), 26 Am. B. R. 684, 188 Fed. 475.

Exercise of equity power to protect lien holders.—In the case of *McKay v. Hamill* (C. C. A., 3d Cir.), 26 Am. B. R. 164, 185 Fed. 11, the court said: "Undoubtedly, the general rule is that the property of the bankrupt is taken by the trustee in the situation in which it was held by the bankrupt, and that any disposition of said property made

otherwise would accrue to him by reason of his lien.⁴⁰⁵ Where a trustee sells mortgaged property of the bankrupt free of the mortgage, and the proceeds thereof are sufficient for that purpose, the mortgagee is entitled to the payment of the interest upon his mortgage debt as well as the principal, out of the proceeds in accordance with the terms of the note and mortgage.⁴⁰⁶ The proceeds stand in place of the property mortgaged, and the mortgagee is entitled to distribution in full, without deduction of expenses of the sale or of administration of the bankrupt estate.⁴⁰⁷

(4) **PAYMENT OF TAXES.**—Where the trustee is directed to sell real property free from incumbrances, taxes which became a lien subsequent to the order directing the sale may not be paid out of the proceeds of the sale;⁴⁰⁸ but accrued taxes due when the sale takes place are liens and transferred by the sale to the proceeds thereof.⁴⁰⁹ If taxes are liens against the property, perfected by authoritative levy, at the time of the sale, the property must be sold subject to such taxes, unless divested by order of the court, in which case the taxes should be paid out of the proceeds of the sale.⁴¹⁰

(5) **PAYMENT OF EXPENSES OF SALE.**—The sale of incumbered property is for the benefit of the estate and the general creditors interested therein. The lien creditor is not usually benefited by the sale. It is therefore equitable to charge the expenses of the sale to the estate and not to the proceeds of the sale.⁴¹¹ Where, however, the sale was had at the instance of the lien creditors,

by the trustee must be made with reference to the superior rights of lien holders when legally ascertained. But the court of bankruptcy, in the exercise of its equitable powers, in selling and disposing of the proceeds of the bankrupt's estate, will take care of and protect the legal and equitable interests of third parties attaching thereto. It is true, that ordinarily a sale made without any specific reference to liens on the property to be sold will be considered a sale subject to such liens. So a direction to sell free from specific liens will be considered ordinarily subject to a superior lien not mentioned. But it does not follow that in case of a direction to sell free from first or superior liens, without mentioning inferior liens, the latter would not be also protected in accordance with the ordinary rule governing judicial sales. No instance of such a direction has been brought to our attention, and it would seem that the result of such a sale must depend upon the circumstances of the case, the intention of the parties, and the equities arising therefrom."

Claim by lienor for deficiency; estoppel.—The failure of a mortgage creditor to respond to a referee's order to show cause why the property of the bankrupt should not be sold free, clear, and discharged of all encumbrances thereon, does not erop him from making a claim for deficiency, which had only a potential existence at the date of said order. *Matter of McAusland* (D. C., N. J.), 37 Am. B. R. 519, 235 Fed. 173.

^{405.} *Clark Hardware Co. v. Sauve* (C. C. A., 8th Cir.), 33 Am. B. R. 674, 220 Fed. 102.

^{406.} *Coder v. Arts* (C. C. A., 8th Cir.), 18 Am. B. R. 513, 152 Fed. 943, modg. 16 Am.

B. R. 583, 145 Fed. 202, affd. 213 U. S. 223, 22 Am. B. R. 1, 53 L. Ed. 772, 29 Sup. Ct. 436; *In re Stevens* (D. C., Oreg.), 23 Am. B. R. 239, 173 Fed. 842; *In re Allert* (D. C., N. Y.), 23 Am. B. R. 101, 173 Fed. 691.

^{407.} *In re Clark Coal & Coke Co.* (D. C., Pa.), 23 Am. B. R. 273, 173 Fed. 658; *In re Brown & Co.* (C. C. A., 8th Cir.), 28 Am. B. R. 336, 196 Fed. 758.

Payment of commission of trustee and referee out of proceeds.—Where a bankrupt owns property which was subject to a mortgage securing a note for \$1,640, the validity of which was unquestioned and the property was sold by the trustee free of the mortgage, the mortgagee, who purchased the incumbered property at such sale for \$1,500, was entitled to have the purchase price credited on his allowed claim without deduction for the commissions of the trustee and referee, there being a general estate of the bankrupt out of which the commissions could be paid. *Matter of Huggins* (C. C. A., 8th Cir.), 24 Am. B. R. 715, 179 Fed. 490; *In re Howard* (D. C., N. Y.), 31 Am. B. R. 251, 207 Fed. 402.

^{408.} *In re Crowell* (D. C., Mass.), 29 Am. B. R. 308, 199 Fed. 659.

^{409.} *Matter of New York and Philadelphia Package Co.* (D. C., N. J.), 35 Am. B. R. 94, 225 Fed. 219.

^{410.} *Matter of Reading Hat Mfg. Co.* (D. C., Pa.), 34 Am. B. R. 884, 224 Fed. 786.

^{411.} *In re Vulcan Foundry & Machine Co.* (C. C. A., 3d Cir.), 24 Am. B. R. 825, 180 Fed. 671; *Matter of Elmore Cotton Mills*, (D. C., Ala.), 33 Am. B. R. 426, 217 Fed. 808.

Sale where trustee had no equity.—Where a trustee sold property free from liens, in

who invoked the aid of the bankruptcy court to secure a sale of the incumbered property without the expense and delay of foreclosure proceedings, the costs of the sale may be charged against the proceeds.⁴¹² Where a sale is had free from incumbrances, and the appraisal of the property and the proceeds of the sale were less than the amount of the incumbrances, it will nevertheless be assumed on petition to revise that the court in ordering the sale expected some benefit to accrue to the estate.⁴¹³

(6) DETERMINATION OF VALIDITY, PRIORITIES OR AMOUNTS OF LIENS.—A court of bankruptcy has jurisdiction to order a sale of the property of a bankrupt upon which a lien is asserted, without first determining either the validity or amount of the lien,⁴¹⁴ and where the petition to sell does not attack the validity of a mortgage, and the mortgagee has no notice that such an attack would be made, the referee has no authority, in the proceedings for the sale, to declare the mortgage invalid.⁴¹⁵ The property being sold free of all liens, the court having lawful custody of the property to which liens attached may determine the relative priorities of conflicting claims to the fund realized from the sale.⁴¹⁶ The trustee should appear and protect the rights

which he had no equity, without the consent of the lien holder, and the proceeds of the sale fell far short of the amount of the lien, there is *prima facie* evidence that there should have been no sale by the trustee, and the commissions for services upon such sale of the referee and trustee should be paid out of the estate and not out of the proceeds of the sale. *In re Holmes Lumber Co.* (D. C., Ala.), 26 Am. B. R. 119, 189 Fed. 178; *In re Howard* (D. C., N. Y.), 31 Am. B. R. 251, 207 Fed. 402; *Matter of New York and Philadelphia Package Co.* (D. C., N. J.), 35 Am. B. R. 94, 225 Fed. 219.

412. *In re Chambersburg Mfg. Co.* (D. C., Pa.), 26 Am. B. R. 107, 190 Fed. 411; *In re Barber* (D. C., Minn.), 3 Am. B. R. 306, 97 Fed. 547; *Matter of Mais* (Ref., Ky.), 18 Am. B. R. 104.

Implied consent to payment of expenses out of proceeds.—Where creditors having liens upon the real estate of a bankrupt have received notice of an application for an order to sell such real estate free from liens but make no objection thereto and permit the referee to go on with the execution of the order and the distribution of the proceeds of such sale, they will be deemed to have consented by "necessary implication" to all that was done, and cannot thereafter object to allowances, made for expenses incurred in the administration of the estate, because payable out of the funds derived from the sale. *In re Torchia* (C. C. A., 3d Cir.), 26 Am. B. R. 579, 188 Fed. 207, revg. 26 Am. B. R. 188, 185 Fed. 576; *Matter of Elmore Cotton Mills* (D. C., Ala.), 33 Am. B. R. 426, 217 Fed. 808.

Where lienors become the purchasers of a bankrupt's property discharged of liens, it will be presumed that they intended that reasonable and necessary costs incurred in the sale should be paid out of the proceeds realized, even though their liens be postponed thereby; but costs incurred by a receiver

should be disallowed, in the absence of good reason why the lienors should bear the same. *Matter of West* (D. C., Pa.), 37 Am. B. R. 421, 232 Fed. 903.

413. *In re Throckmorton* (C. C. A., 6th Cir.), 28 Am. B. R. 487, 196 Fed. 656.

414. *In re Littlefield* (C. C. A., 1st Cir.), 19 Am. B. R. 18, 155 Fed. 838.

415. *Matter of Martin* (C. C. A., 3d Cir.), 32 Am. B. R. 29, 210 Fed. 620.

416. *Chauncey v. Dyke Bros.* (C. C. A., 8th Cir.), 9 Am. B. R. 444, 119 Fed. 1; *In re Goldsmith* (D. C., N. Y.), 21 Am. B. R. 845, 168 Fed. 779; *Matter of National Boat & Engine Co.* (D. C., Maine), 33 Am. B. R. 154, 216 Fed. 208.

Bids on property as evidence of value.—Where the amount of bids for property sold free from liens is the only direct evidence of value, the referee may rely thereon in distributing the proceeds among the lienors. *Matter of Benz* (C. C. A., 3d Cir.), 33 Am. B. R. 363, 218 Fed. 50.

Enforcement of liens originating prior to bankruptcy.—Bankruptcy courts are invested with power to adjust and ultimately to allow and enforce liens, originating prior to bankruptcy and presented within the proving period, according to their merits and at any time before but not after the estates have been closed. *Courtney v. Fidelity Trust Co.* (C. C. A., 6th Cir.), 33 Am. B. R. 400, 219 Fed. 57.

Rights of lienors after sale of assets as an entirety.—Where creditors claim liens on separate portions of a bankrupt's property and the property, against their objection, is sold as an entirety, they are entitled to show what portion of the purchase price represents the value of the property on which they had their respective liens. *Matter of Benz* (D. C., Pa.), 33 Am. B. R. 114, 62 Pittsburgh Leg. J. 305.

Effect of approval of court.—A bankruptcy court, by approving a trustee's sale of claims

of the estate in proceedings for the distribution of the fund derived from such sale.⁴¹⁷ There was doubt as to the jurisdiction of the court, prior to the amendatory act of 1903, to determine the validity or priority of a lien.⁴¹⁸

(7) **SALES SUBJECT TO INCUMBRANCES.**—Sales can, of course, be made subject to incumbrances, and the purchaser then takes the property charged therewith.⁴¹⁹ The practice is not different from that on sales of unincumbered property, and is sometimes regulated by local rules. If the order of sale contains no special direction as to incumbrances, the purchaser under the rule of *caveat emptor* acquires only the rights of the bankrupt in the property, and the rights of those claiming an adverse interest therein are not affected.⁴²⁰ Unless it is directed that the property be sold divested of liens, the purchaser takes title subject to all existing liens, and must pay such liens or otherwise arrange with the lien creditors in order to retain the property.⁴²¹

(8) **PRACTICE ON SALES OF INCUMBERED PROPERTY.**—Equity requires that the order should provide that the notice to the lienors be ample, and personal rather than by mail,⁴²² and that a lienor, if the purchaser at the sale, may give a receipt to the amount of his lien in lieu of cash. It is proper for the court to bring in a creditor claiming a lien on the property by a rule to show cause.⁴²³ It has been held that where real property of the bankrupt is sold under a mortgage foreclosure in a State court, such court has jurisdiction to appoint an auditor to distribute the fund realized upon the sale.⁴²⁴

e. Resale; when granted.—After the confirmation of a judicial sale neither mere inadequacy of price, nor offers of better prices, nor anything but fraud, accident, mistake or some other cause for which equity would void a like sale between private parties will warrant a court in avoiding the confirmation of a sale between private parties will warrant a court in avoiding the confirmation of the sale, or in opening the latter and receiving subsequent bids.⁴²⁵ However where the inadequacy is so great as in itself to raise a presumption

belonging to the bankrupt, does not thereby warrant the priority of the claims over adverse claims so as to make it judicial bad faith for the same court to afterwards, in another case, decide against the priority of the claims. *Taylor v. Kiminerle* (C. C. A., 6th Cir.), 37 Am. B. R. 34, 232 Fed. 134.

417. *Matter of National Boat & Engine Co.* (D. C., Maine), 33 Am. B. R. 154, 216 Fed. 208.

418. *Compare* *In re San Gabriel, etc., Co.* (C. C. A., 9th Cir.), 7 Am. B. R. 206, 111 Fed. 892. On reconsideration of s. c., 4 Am. B. R. 197, 102 Fed. 310; *In re Muhlhauser* (C. C. A., 6th Cir.), 10 Am. B. R. 236, 121 Fed. 669. And see also in §§ 11 and 23, *ante*.

419. *In re Gerry* (D. C., Pa.), 7 Am. B. R. 459, 112 Fed. 597, 595.

420. *In re Muhlhauser Co.* (C. C. A., 6th Cir.), 10 Am. B. R. 236, 121 Fed. 669; *In re Platteville F. & M. Co.* (D. C., Wis.), 17 Am. B. R. 291, 147 Fed. 828; *Citizens' Savings Bank v. Paducah* (Ky. Ct. of App.), 32 Am. B. R. 508, 167 S. W. 870.

421. *Matter of Reading Hat Mfg. Co.* (D. C., Pa.), 34 Am. B. R. 884, 224 Fed. 786.

422. *Ray v. Norseworthy*, 90 U. S. 128, 23 L. Ed. 116; *In re Taliafero*, Fed. Cas. 13,736; *In re Drewry*, Fed. Cas. 4,081. The record should disclose affirmatively that every

creditor whose lien will be discharged by the sale has received due notice of the application for an order of sale. *In re Saxton Furnace Co.* (D. C., Pa.), 14 Am. B. R. 483, 136 Fed. 697.

Notice.—It seems to be settled that notice to the lien creditors of the application for sale must not only be given, but the record must disclose affirmatively that every creditor whose lien will be discharged by the sale has received due notice of the application. *In re Platteville Foundry & Machine Co.* (D. C., Wis.), 17 Am. B. R. 291, 147 Fed. 828.

Necessity of notice where sale subject to liens.—Where a bankrupt's property is sold subject to any liens which may be on the property, mortgagees are not entitled to have the sale vacated because they were not given notice of the sale or its confirmation, or because the order of sale was not correct in form. *Matter of Burr Mfg. Co.* (C. C. A., 2d Cir.), 32 Am. B. R. 708, 217 Fed. 16.

423. *Matter of American Architects' Tube Co.* (C. C. A., 6th Cir.), 25 Am. B. R. 651, 184 Fed. 694.

424. *Furth v. Stahl*, 10 Am. B. R. 442, 205 Pa. St. 439.

425. *Matter of Burr Mfg. Co.* (C. C. A., 2d Cir.), 32 Am. B. R. 708, 217 Fed. 16.

of fraud or to shock the conscience of the court the sale may be set aside.⁴²⁶ Where a trustee himself is a purchaser, and the land subsequent to the sale increases in value, the sale should be set aside and resold, compensation to be made to the trustee for the price paid by him for the land and for the cost of improvements made thereon.⁴²⁷ A sale of property may be set aside where it appears that there were irregularities which prejudiced the rights of interested parties.⁴²⁸ A sale which has been confirmed, the purchaser having been permitted to take possession of the goods and sell part of them, should not be summarily set aside, for inadequacy or alleged collusion; the creditors remedy in such case, if any, is by suit against the purchaser and the guilty parties for an accounting.⁴²⁹

VII. TRANSFER OF TRUSTEE'S TITLE TO PURCHASER.

Subsection *c*, relative to the transfer of title to the purchaser, is expressive of the law. On the report of sale being confirmed, an order is usually entered directing the trustee to make the transfer on receipt of the consideration. The instrument of transfer should always recite what interest, as, for instance, the bankrupt's or the latter's free of liens, is transferred, and as to covenants, should be adapted to the forms used by the assignee or receivers under State laws.⁴³⁰ Where a business corporation has been adjudged a bankrupt and its assets, including its goodwill and corporate name, has been sold by order of the court, the purchaser will be protected in the ownership of the property purchased, and the former bankrupt will not be permitted by using the old corporation name to interfere with the good will of the business.⁴³¹ A sale by a trustee under order of the court, of a note payable to the bankrupt, passes the legal title to the purchaser, who may sue thereon with all the right the trustee had.⁴³²

VIII. TITLE OF TRUSTEE WHERE COMPOSITION IS SET ASIDE, DISCHARGED OR REVOKED; EFFECT OF CONFIRMATION.

a. Setting aside discharging or revoking composition.—Subsection *d*, relative to vesting title of bankrupt's property in the trustee upon a composition being

426. *Matter of Burr Mfg. Co.* (C. C. A., 2d Cir.), 32 Am. B. R. 708, 217 Fed. 16; *In re Shapiro* (D. C., Pa.), 19 Am. B. R. 125, 154 Fed. 673, holding that where \$3,400 has been realized upon the sale of a stock of goods appraised at \$5,000, an offer to pay \$3,800 is not enough to warrant setting aside the sale and ordering a resale. As to the construction of an order of resale, see *In re Wylie* (C. C. A., 3d Cir.), 18 Am. B. R. 503, 153 Fed. 281, affg. 17 Am. B. R. 404, 148 Fed. 907.

Refusal of bid; right to resale.—A bidder at a public sale of bankrupt's real estate who, upon being told that his bid in a representative capacity would not be accepted, announces that he will thereafter bid for himself upon his own responsibility, is entitled to have a bid made in his own behalf accepted; and where the trustee directs the bidding to be closed upon the receipt of the bid of a third person, after the refusal of a bid made by such bidder in his own behalf, which is twenty-five dollars higher than the bid of such third person, the referee has no right to impose as a condition precedent to

reopening the bidding that such bidder make an "upset bid" greater by three thousand dollars than the amount at which the bidding was closed, but a resale should be ordered, starting the bidding at the amount of the rejected bid. *Coal City House Furnishing Co. v. Hogue* (C. C. A., 4th Cir.), 28 Am. B. R. 258, 197 Fed. 1; *Matter of Ohio Copper Mining Co.* (D. C., N. Y.), 38 Am. B. R. 548, 237 Fed. 490.

427. *In re Hawley* (D. C., Iowa), 9 Am. B. R. 61, 117 Fed. 364.

428. *Matter of Burr Mfg. Co.* (D. C., N. Y.), 32 Am. B. R. 686, 209 Fed. 138.

429. *In re Knosher & Co.* (C. C. A., 9th Cir.), 28 Am. B. R. 747, 197 Fed. 136.

430. Section 15, act of 1841, required the insertion in the deed of a copy of the adjudication and order appointing trustee. The dates of these steps in the proceedings should be inserted now. Compare also section 47-c, added by the amendatory act of 1903.

431. *Myers Co. v. Tuttle* (C. C., N. Y.), 26 Am. B. R. 541, 188 Fed. 532.

432. *Bailey v. Anderson* (Ga. Sup. Ct.), 32 Am. B. R. 863, 82 S. E. 290.

set aside or a discharge being revoked, has been considered in appropriate places, *ante*. It constitutes the single exception to the American doctrine that the cleavage day as to a bankrupt's property shall be the day the petition is filed by or against him. When a composition is set aside or a discharge revoked, property of the bankrupt which would otherwise be "after-acquired," vests in the trustee as of the date of the decree so setting aside or revoking. Thus far there are no cases construing this subsection.⁴³³

b. **Effect of confirmation of composition.**—Subsection *f* of this section declares that "upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revert in him."⁴³⁴ The result of the confirmation is to take the estate out of the jurisdiction of the bankruptcy court and restore it to the bankrupt.⁴³⁵

IX. TRANSFERS FRAUDULENT UNDER STATE LAWS MAY BE AVOIDED BY TRUSTEE.

a. **In general.**—Subsection *e*, relative to the powers of the trustee in respect to fraudulent transfers, has been referred to elsewhere.⁴³⁶ It is the corollary of § 67-b, and means simply that if a creditor could have avoided any transfer (not merely a lien) under the laws of the State, the trustee can do the same,⁴³⁷ and it is immaterial that the creditors of the bankrupt were not in a position to attack the transfer.⁴³⁸ The trustee is subrogated to the rights of creditors, and may sue to avoid any conveyance, which a creditor could have avoided, although made more than four months prior to the adjudication of bankruptcy.⁴³⁹ Such trustee may proceed for such purpose by bill in equity, and

433. See discussion under Sections Thirteen and Fifteen of this work.

434. See Bankr. Act, § 21-g, *ante*, as to evidence of order of confirmation, and the recording thereof.

435. *Matter of Hollins* (C. C. A., 2d Cir.), 36 Am. B. R. 168, 229 Fed. 349.

Effect of confirmation.—Upon the confirmation of a composition the title of a bankrupt to his property "shall thereupon revert in him," and his receiver has no right thereafter to receive any property as the property of the bankrupt, and, hence, a bank has no right to turn over stocks, bonds or other property which the bankrupt had pledged with it prior to bankruptcy, and the bankruptcy court is without jurisdiction to pass upon claims made by third parties to such property turned over to the receiver. *Matter of Hollins* (C. C. A., 2d Cir.), 38 Am. B. R. 432, 238 Fed. 787.

436. See discussion under Sections Sixty and Sixty-seven of this work. Compare also in this section, subtitle "*Property Fraudulently Transferred*."

437. *Mueller v. Bruss*, 8 Am. B. R. 442, 112 Wis. 406; *McMahon v. Pitman* (Iowa Sup. Ct.), 33 Am. B. R. 125, 147 N. W. 920.

A trustee on behalf of creditors, may attack bills of sale or trust agreements which are void as to the bankrupt's creditors because they have not been filed, and because possession of the property has not been changed. *Matter of Gerstman and Bandman* (C. C. A., 2d Cir.), 19 Am. B. R. 145, 157 Fed. 550. In *Manning v. Evans* (D. C., N. Y.), 19 Am.

B. R. 217, 223, 156 Fed. 106, Judge Lanning said: "It will be observed that in this section there is no four months' limitation as in the other sections above referred to (60 and 70). Its effect is to subrogate the trustee to the rights of creditors. Its distinguishing feature is that it authorizes a trustee in bankruptcy to invoke the relief furnished by State laws to creditors for annulling transfers of property by their debtors."

438. *Sheldon v. Parker*, 11 Am. B. R. 152, 66 Neb. 610; *McKey v. Emanuel* (Ill. Sup. Ct.), 32 Am. B. R. 350, 104 N. E. 1051.

439. In *re Mullen* (D. C., Mass.), 4 Am. B. R. 224, 101 Fed. 413; *Lewis v. Bishop*, 47 N. Y. App. Div. 554, 62 N. Y. Supp. 618; *Beasley v. Coggins*, 12 Am. B. R. 355, 48 Fla. 215, 57 So. 213; *Bush v. Export Storage Co.* (C. C., Tenn.), 14 Am. B. R. 138, 136 Fed. 918; In *re Gray*, 3 Am. B. R. 647, 47 N. Y. App. Div. 554, 62 N. Y. Supp. 618; *Ruhl-Koblegard Co. v. Giles*, 22 Am. B. R. 643, 61 W. Va. 554, 56 S. E. 898, *Hull v. Hudson* (Ch. Ct., Del.), 26 Am. B. R. 725, 80 Atl. 674; *Hobbs v. Frazier* (Fla. Sup. Ct.), 26 Am. B. R. 887, 55 So. 848; *Blick v. Nimmo* (Md. Ct. of App.), 30 Am. B. R. 770, 88 Atl. 116; *Holbrook v. International Trust Co.* (Mass. Sup. Ct.), 33 Am. B. R. 808, 107 N. E. 665; *Manders v. Wilson* (D. C., Cal.), 36 Am. B. R. 739, 230 Fed. 536.

Trustee as representative of creditors.—In a suit to set aside a conveyance made by the bankrupt in fraud of his creditors, the trustee in bankruptcy represents the interests of the creditors alone; in an action to recover

will not be required to seek his remedy at law.⁴⁴⁰ Such a suit may be maintained, although neither the trustee nor any creditor has reduced the claim against the bankrupt to a judgment.⁴⁴¹ The fact that the transfer was made by the husband to his wife does not prevent it from being genuine and free from fraud.⁴⁴² To hold that a trustee cannot attack a fraudulent conveyance made by the bankrupt more than four months before the filing of the petition, without showing that some creditor had obtained a judgment and issued execution thereon, so that he could maintain a similar action, would be simply to provide an easy and convenient method for a dishonest debtor to dispose of his property.⁴⁴³ The presumption is that the trustee has complied with the provisions of the bankruptcy act, and is qualified to act.⁴⁴⁴ When a trustee seeks to enforce rights or to recover property in another district outside of the territorial jurisdiction of the court which appointed him, he stands in

property fraudulently conveyed the defendants may allege that any recovery had in the action would not be for the benefit of creditors but for the benefit of the bankrupt himself. *Cartwright v. West* (Sup. Ct., Ala.), 26 Am. B. R. 831, 55 So. 917.

Purchase by corporation of its own stock while insolvent.—A trustee in bankruptcy of a corporation may bring a suit in equity against stockholders to set aside as fraudulent and void transactions whereby said stockholders sold their stocks to the corporations and received payment therefor from the funds of the corporation with knowledge of its insolvency. *Sherrill v. Hutson* (Ala. Sup. Ct.), 32 Am. B. R. 532, 65 So. 538.

440. *Wall v. Cox* (C. C. A., 4th Cir.), 4 Am. B. R. 659, 101 Fed. 403; *Beasley v. Coggins*, 12 Am. B. R. 355, 48 Fla. 215, 57 So. 213; *Davis v. Gates* (D. C., Pa.), 37 Am. B. R. 818, 235 Fed. 192.

441. *Mueller v. Bruss*, 8 Am. B. R. 442, 11 Wis. 406; *Beasley v. Coggins*, 12 Am. B. R. 355, 48 Fla. 215, 57 So. 213; *Thomas v. Roddy*, 19 Am. B. R. 873, 122 N. Y. App. Div. 851, 107 N. Y. Supp. 473; *Ryker v. Gwynne* (N. Y., Sp. T. Sup. Ct.), 21 Am. B. R. 95. The trustee in bankruptcy of a mortgagor may attack the validity of a chattel mortgage although the claims of creditors are not in judgment. *Mitchell v. Mitchell* (D. C., N. Car.), 17 Am. B. R. 382, 147 Fed. 280.

Unfiled chattel mortgage.—The Court of Appeals of New York have held that the present bankruptcy act arms the trustee in bankruptcy with the right to assert the invalidity of an unfiled chattel mortgage in favor of the creditors of the mortgagor, even though their claims are not in judgment. *Skilton v. Coddington*, 15 Am. B. R. 810, 185 N. Y. 80, 77 N. E. 790, cited in *Dunn Salmon Co. v. Pillmore*, 19 Am. B. R. 172, 55 N. Y. Misc. 546, 106 N. Y. Supp. 88.

Effect of discharge.—The discharge of a debtor in bankruptcy is personal to the bankrupt and does not release his fraudulent grantees from liability for the fraud committed by them nor in any way preclude the trustee from recovering property of the estate which has been fraudulently trans-

ferred. *Stephenson v. Bird* (Ala. Sup. Ct.), 25 Am. B. R. 909, 53 So. 92.

Judgment not required.—A trustee in bankruptcy, before bringing suit to set aside an alleged fraudulent transfer by the bankrupt, need not procure judgment, issue execution thereon, and have it returned unsatisfied. A trustee in bankruptcy may under section 70e of the Bankruptcy Act recover all the property transferred by the bankrupt in fraud of creditors, although such recovery may result in the possession by the trustee of property in excess of the entire indebtedness of the bankrupt. *Davis v. Gates* (D. C., Pa.), 37 Am. B. R. 818, 235 Fed. 192.

442. *Lyon v. Wallace* (Mass. Sup. Ct.), 35 Am. B. R. 688, 108 N. E. 1075.

Mere relationship not a badge of fraud.—In considering an alleged fraudulent conveyance by a debtor to his wife, their relationship is not a badge of fraud, but is a mere circumstance, dependent for its value upon other circumstances. *McCrory v. Donald* (Ala. Sup. Ct.), 35 Am. B. R. 696, 68 So. 306.

In Kentucky a conveyance by a bankrupt to his wife, without consideration but not actually fraudulent, is voidable only as against debts which the bankrupt owed at the time of the conveyance. *Pace's Trustee v. Pace* (Ky. Ct. of App.), 33 Am. B. R. 834, 172 S. W. 925.

443. *Thomas v. Roddy*, 19 Am. B. R. 873, 122 N. Y. App. Div. 851, 107 N. Y. Supp. 473; *McKey v. Emanuel* (Ill. Sup. Ct.), 32 Am. B. R. 350, 104 N. E. 1051.

Property transferred more than four months prior to bankruptcy.—A District Court has jurisdiction, under section 70e of the Bankruptcy Act, without the consent of the defendant, of an action by a trustee in bankruptcy to recover property fraudulently transferred by the bankrupt more than four months prior to the filing of the petition in bankruptcy. An objection that there is an adequate remedy at law is without merit. *Davis v. Gates* (D. C., Pa.), 37 Am. B. R. 818, 235 Fed. 192.

444. *Breckons v. Snyder*, 15 Am. B. R. 112, 211 Pa. St. 176, 60 Atl. 575.

the position of those whose rights he has acquired and can resort only to the same courts, State or Federal, and is confined to the same remedies.⁴⁴⁵ In many cases, the trustee will be able to sue under § 67-e or § 70-e. If under the latter, he must bring himself within the elements of pleading and proof recognized by the statutes and decisions of his State.⁴⁴⁶ The important difference is that, if the suit is based on the State law, the State statute of limitation applies. Thus, many fraudulent transactions, which could not be brought under § 67-e, will be timely if resting on § 70-e. The trustee should allege that the property of the bankrupt is not sufficient to pay his creditors in full.⁴⁴⁷ A mortgagee who knows that the mortgagor is selling mortgaged chattels for his own use, and who consents to his doing so, is not a *bona fide* holder and the mortgagor's trustee in bankruptcy may avoid the chattel mortgage, and recover the property transferred thereby or its value.⁴⁴⁸ A trustee in bankruptcy of a mortgagor has the same rights as a creditor armed with an attachment or execution.⁴⁴⁹ Where the alleged fraudulent transfer is a mortgage, the bill, upon the issue of its priority of lien, should alleged the names of the bankrupt's creditors other than the defendant, the amount of their debts, the character of the same and when created.⁴⁵⁰ A trustee in bankruptcy may sue in trover for a conversion of goods occurring either before or after bankruptcy, and in a declaration may join a count upon the bankrupt's title, and a count upon the trustee's title.⁴⁵¹ The complaint in an action by a trustee is not demurrable as being multifarious and inconsistent because it alleges an unlawful preference and a fraudulent transfer.⁴⁵² In a suit by a trustee in bankruptcy to set aside a conveyance of land by a bankrupt alleged to have been made in fraud of creditors, the grantee may invoke the statute of limitations in respect of the antecedent liabilities of the grantor, as a defense.⁴⁵³ The cases turn on the law of the State and a summary of their doctrines would be useless; they are, therefore, merely cited in the foot-note.⁴⁵⁴

^{445.} *Hull v. Burr* (C. C. A., 5th Cir.), 18 Am. B. R. 541, 550, 153 Fed. 945; *Prescott v. Galluccio* (D. C., N. Y.), 21 Am. B. R. 229, 235, 164 Fed. 618.

Suit by trustee in equity.—The bankruptcy act does not prescribe the form of action by which the trustee is to set aside a transfer alleged to have been made by the bankrupt in fraud of his creditors prior to the four months' period. The bankrupt is therefore limited to the form of action by which creditors are entitled to enforce such right, and as a creditors' suit avoiding the transfer would have been in equity, so the suit of a trustee is in equity and he is not entitled to a trial by jury. *Allen v. Gray*, 24 Am. B. R. 642, 139 N. Y. App. Div. 428, 124 N. Y. Supp. 137.

^{446.} *In re Gray*, 3 Am. B. R. 647, 47 N. Y. App. Div. 554, 62 N. Y. Supp. 618; *Muel-ler v. Bruss*, 8 Am. B. R. 442, 112 Wis. 406; *Halbert v. Pranke*, 11 Am. B. R. 629, 91 Minn. 204, 97 N. W. 976. See Am. Bankr. Dig. § 673.

Complaint in an action by a trustee in bankruptcy to set aside a deed for fraud, to recover the possession of land, and to partition the land, examined and held good on motion to compel plaintiff to separately and distinctly state what he wanted the court

to exact from the defendants. *O'Farrell v. Poston* (S. Car. Sup. Ct.), 37 Am. B. R. 470, 89 S. E. 483.

^{447.} *Prescott v. Galluccio* (D. C., N. Y.), Am. B. R. 229, 235, 164 Fed. 618.

^{448.} *Skillen v. Endelman*, 11 Am. B. R. 766, 39 N. Y. Misc. 261, 79 N. Y. Supp. 413.

^{449.} *Zartman v. First Nat. Bank*, 19 Am. B. R. 27, 189 N. Y. 267, 82 N. E. 127.

^{450.} *Teague v. Anderson Hardware Co* (D. C., Ga.), 20 Am. B. R. 424, 161 Fed. 765.

^{451.} *Burns v. O'Gorman*, (Cir. Ct., R. I.), 17 Am. B. R. 815, 150 Fed. 226.

^{452.} *Kraver v. Abrahams* (D. C., Pa.) 29 Am. B. R. 365, 203 Fed. 782.

^{453.} *Pace's Trustee v. Pace* (Ky. Ct. of App.), 33 Am. B. R. 334, 172 S. W. 925.

^{454.} *In re Brown* (D. C., Oreg.), 1 Am. B. R. 107, 91 Fed. 358; *In re Grahs* (Ref., Ohio), 1 Am. B. R. 465; *In re Phelps* (Ref., N. Y.), 3 Am. B. R. 396; *In re Mullen* (D. C., Mass.), 4 Am. B. R. 224, 101 Fed. 413; *Muel-ler v. Bruss*, 8 Am. B. R. 442, 112 Wis. 406; *Barber v. Coit* (C. C. A., 6th Cir.), 16 Am. B. R. 419, 144 Fed. 381, holding that under the Ohio statute declaring that a creditor may sue to set aside fraudulent transfers, actual fraud need not be shown; *Cohen v. Wagar*, 16 Am. B. R. 381, 183 N. Y. 33, 75 N. E. 691; *Lesser*

b. **The saving clause.**—That clause in this subsection is similar to those found in § 67-e and § 67-f, and is for the same purpose. What has already been said of them will not be repeated here. This saving of the rights of *bona fide* holders for value is also merely expressive of the law.⁴⁵⁵ But, after adjudication, the filing of the petition amounting to constructive notice, there can be no *bona fide* holder.⁴⁵⁶

c. **The amendment of 1903.**—Here the words added are the same as those added to § 60-b and § 67-e.⁴⁵⁷ Their purpose and effect have been considered in the discussion of those sections.⁴⁵⁸ The effect of the omission from § 23-b of all reference to § 70-e has been questioned. It has been held, however, that such omission operates to bring actions under § 70-e within the general rule as laid down in § 23-b, and that while a bankruptcy court has general jurisdiction over the subject-matter it can only be exercised under the conditions imposed by § 23-b, that is, by the consent of the proposed defendants.⁴⁵⁹ The effect of this omission has been nullified by the amendment of § 23-b by the amendatory act of 1910, which enlarged the jurisdiction of the bankruptcy court to entertain suits under § 70-e as well as under §§ 60-b and 67-e.⁴⁶⁰

v. Bradford Realty Co., 15 Am. B. R. 123, 47 N. Y. Misc. 463, 95 N. Y. Supp. 933, as to sufficiency of complaint in action to set aside chattel mortgage made within four months' period; Breckons v. Snyder, 15 Am. B. R. 112, 211 Pa. St. 176, as to sufficiency of evidence in action to recover preferential payment; Durham v. Wick, 14 Am. B. R. 385, 210 Pa. St. 128; Wright v. Skinner (D. C., N. Y.), 14 Am. B. R. 500, 136 Fed. 694, as to allegations as to citizenship in bill where jurisdiction depends upon diverse citizenship; Horskins v. Sanderson (D. C., Vt.), 13 Am. B. R. 101, 132 Fed. 415, as to jurisdiction over property within the district where the defendant resides elsewhere; Union Trust Co. v. Amery (Wash. Sup. Ct.), 27 Am. B. R. 499, 120 Pac. 539; Holbrook v. International Trust Co. (Mass. Sup. Ct.), 33 Am. B. R. 808, 107 N. T. 665, citing text.

In New Jersey an insolvent debtor may prefer any creditor either by a mortgage securing an antecedent debt or by a conveyance of property in satisfaction of such indebtedness, provided the transaction is in good faith and for an adequate consideration, and the trustee in bankruptcy of the debtor may not avoid such transfer under section 70-e. Manning v. Evans (D. C., N. Y.), 19 Am. B. R. 217, 223, 156 Fed. 106.

455. In re Mullen (D. C., Mass.), 4 Am. B. R. 224, 101 Fed. 413.

456. Harrell v. Beale, 17 Wall, 590. Compare In re Lake, Fed. Cas. 7,002.

457. For the time when this amendment became operative, see "Supplementary Section to Amendatory Act," *post*.

458. See in sections 60 and 67.

459. Gregory v. Atkinson (D. C., Mo.), 11 Am. B. R. 495, 127 Fed. 183, disapproved in Hurley v. Devlin (D. C., Kan.), 17 Am. B. R. 793, 149 Fed. 263, holding that the bankruptcy court, without the consent of the defendant, has jurisdiction of a suit by the trustee to set aside an alleged fraudulent transfer of property made by the bankrupt anterior to the four months' period. Sheppard v. Lincoln (D. C., N. Y.), 25 Am. B. R. 804, 184 Fed. 182.

A suit by the trustee cannot be brought under section 70-e without the consent of the defendant. Skewis v. Barthell (D. C., Iowa), 18 Am. B. R. 429, 152 Fed. 534.

Consent of defendant.—"Construing section 70-e in connection with section 23-b, it appears that the former conferred jurisdiction on courts of bankruptcy of suits to avoid transfers of his property made by the bankrupt which any creditor of the bankrupt might have avoided, but that, although jurisdiction of the subject-matter is conferred, it can only be exercised over the persons of the defendants by their consent." Hull v. Burr (C. C. A., 5th Cir.), 18 Am. B. R. 541, 547, 153 Fed. 945.

460. See discussion under section 23 of this work; and see Milkman v. Arthe (C. C. A., 2d Cir.), 34 Am. B. R. 536, 223 Fed. 507, revg. 32 Am. B. R. 519, 213 Fed. 642.

SECTION SEVENTY-ONE.

INDEXES AND SEARCHES OF CLERKS.

§ 71. That the clerks of the several district courts of the United States shall prepare and keep in their respective offices complete and convenient indexes of all petitions and discharges in bankruptcy heretofore or hereafter filed in the said courts, and shall, when requested so to do, issue certificates of search certifying as to whether or not any such petitions or discharges have been filed; and said clerks shall be entitled to receive for such certificates the same fees as now allowed by law for certificates as to judgments in said courts: Provided, that said bankruptcy indexes and dockets shall at all times be open to inspection and examination by all persons or corporations without any fee or charge therefor.*

I. ADDITIONAL DUTIES OF CLERKS.

This section was added by the amendatory act of 1903. It was not in the bill as introduced, but was originally inserted by the Judiciary Committee of the House of Representatives. The only explanation of it is found in the report¹ accompanying the bill. The Senate Judiciary Committee modified it, but not in any important particulars. Clearly the section should be a subdivision of § 51. Indeed, its necessity may be doubted. The chief purpose seems to be to require clerks to keep bankruptcy indices; this was already the practice in most of the districts. The provisions for certificates as to petitions and discharges seem to duplicate general provisions of law long enforced. The proviso clause is perhaps aimed at the practice of excluding the public from the clerk's files and records in vogue in some quarters. The provisions of the section are all new. They are carefully phrased, and do not require further comment. Under the rule phrased in § 19 of the amendatory act of 1903, this section affects only cases begun on or after February 5, 1903.

This section was added by the amendatory act of 1903.

1. See House Report, No. 1,698, 57th Congress, first session.

The last amendment is one generally demanded, and is in the interest of all persons who deal with property. It requires the clerks to prepare and keep indexes of all petitions and discharges in bankruptcy and

to issue certificates in relation thereto when required. It also requires that these be kept open to inspection and examination. It is frequently desirable to know whether a person has filed a petition in bankruptcy, and also whether he has been discharged, and it is many times impossible within a reasonable time to ascertain these facts in the absence of convenient indexes.

SECTION SEVENTY-TWO.

LIMITATION ON FEES OF CERTAIN OFFICERS.

§ 72. That neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this act.*

Analogous provisions: In U. S.: As to property in general passing to the trustee, Act of 1867, § 14, R. S., § 5044; Act of 1841, § 3; Act of 1800, §§ 10, 11, 17, 27, 50; As to patents, copyrights, rights of action and the like, Act of 1867, § 14, R. S., § 5046; Act of 1841, § 3; Act of 1800, §§ 13, 17; As to sales by the trustee, Act of 1867, §§ 15, 25, R. S., §§ 5062, 5062B, 5063, 5064, 5065, 5066; As to sales of incumbered property, Act of 1867, § 20, R. S., § 5075.

In Eng.: As to property passing to the trustee, Act of 1883, §§ 43, 44, 59; As to burdensome property, Act of 1883, § 55; Act of 1890, § 13; As to sales by the trustee, Act of 1883, §§ 56(1), 70.

Cross-references: To the law: §§ 1(13), 2(3) (7) (15), 3-e, 7(4) (5), 12, 13, 14, 15, 47-a(2), 48, 60-b, 67-e, 69.

To the General Orders: XVIII, XXVIII.

To the Forms: Nos. 13, 43, 44, 45, 46.

SYNOPSIS OF SECTION.

I. Limitation on Referees' and Trustees' Fees, 1183.

- a. *Scope of section*, 1183.
 - b. *Its effect*, 1184.
 - c. *Additional compensation for conducting business*, 1184.
 - d. *Fees of special masters*, 1184.
-

LIMITATION ON REFEREES' AND TRUSTEES' FEES.

a. **Scope of section.**—This section was added by the amendatory bill of 1903. It should be read in connection with §§ 40 and 48, and General Order XXXV (2) (3). It is a statutory ratification of the rule promulgated by the Supreme Court in the General Order just mentioned, which was perhaps too liberally interpreted in some districts and in others ran counter with antagonistic rules already in force at the time and Supreme Court orders became operative.

* This section was added by the amendatory act of 1903, and amended by the Amendatory Act of 1910.

b. Its effect.—The purpose of the law-making power in enacting this section was to forestall any of those scandals due to the fee system for compensating the officers mentioned which first made the law of 1867 odorous and then pointed the way to its repeal. Under the present law, the practice had grown up, and even in certain districts been ratified by rules, of permitting the referee to charge for specified services, as, for instance, a small sum for mailing each notice or a *per diem* for hearings and continuances, in addition to the fees allowed by the law; while devices to increase the trustee's compensation, either through larger allowance to his attorney or by a *per diem* for extra work, as, for instance, in managing a going business, were often resorted to and have been frequently defended as essential to the proper administration of the law. Doubtless with knowledge of these practices, and surely of the reasons for them, the law-making power has both increased the compensation of these officers¹ and to guard against similar local rules in the future, has, in this section, riveted the rule that the same shall be full compensation. Clearly, hereafter, neither a referee nor a trustee can receive any compensation as such, save that "expressly authorized and prescribed in this act." Thus, the court is without power to allow special compensation to the referee, where a contested application for a discharge is refused under General Order 12,² or to the trustee for services in investigating the bankrupt's disposition of property and the loss of his stock by fire.³

c. Additional compensation for conducting business.—"Additional compensation" can only be construed in relation to the fact that where a trustee is authorized to conduct the bankrupt business as a going concern he thereby receives extra compensation because he receives the commissions on all moneys disbursed by him in the conduct of such going concern, which includes moneys paid out for salaries and material necessary to the conduct of such business. This was not allowed to trustees previous to the amendment of 1903, the trustees then being only allowed compensations on sums paid out as dividends and commissions. It, therefore, appears that Congress, in the amendment referred to, by allowing commissions on all moneys disbursed, intended to provide additional compensation to a trustee for conducting the bankrupt business as a going concern.⁴

d. Fees of special masters.—Although this section does not allow the referee to receive any further compensation for his services than as expressly authorized in the act, yet it has been the practice to allow compensation for services in the nature of masters' services outside of the duties of the referee.⁵ Here

1. See Bankr. Act, §§ 40 and 48, also § 2 (3), all as amended by the Act of 1903.

2. In re Wilcox (D. C., Mich.), 19 Am. B. R. 241, 156 Fed. 685; In re Coventry-Evans Furniture Co. (D. C., N. Y.), 22 Am. B. R. 623, 171 Fed. 673.

A contract for extra compensation has been held void as against public policy. Devries v. Orem (Ct. Appeals, Md.), 17 Am. B. R. 876, 65 Atl. 430.

3. In re Screws (D. C., Ga.), 17 Am. B. R. 269, 147 Fed. 989.

4. Matter of Hart & Co. (D. C., Hawaii), 17 Am. B. R. 480.

Compensation of referee for conduct of business.—A referee who, without the express

sanction of the court, authorizes the trustees, by order, to continue the bankrupt's business, for the purpose of completing partly executed contracts of the bankrupt, is not entitled to a commission of one per cent. upon all funds paid out by the trustees in the conduct and administration of the business ordered to be continued, though in all that he did the referee was supported by the creditors and trustees and their counsel, and expended much time and performed great labor, showing the utmost fidelity to his trust throughout. Bray v. Johnson, 21 Am. B. R. 383, 166 Fed. 57.

5. Matter of Hart & Co. (D. C., Hawaii), 18 Am. B. R. 137.

the rule of *Fellows v. Freudenthal*⁶ still pertains. References to the referee as such may, of course, be made under the authority of General Order XII (3). Such references are rare, for the reason that, the judicial service performed being by the statute limited to the judge, there is no provision for compensating the junior officer. References are, therefore, usually made, not under this order, but under the general power of the court to call to its assistance a master in chancery. While serving as such, the referee does not sit as referee, and would seem to have the same right to compensation as when appointed by the judge while sitting on any of the other sides of his court. The referee is in this simply an individual practitioner, who from experience and training is best qualified to pass on bankruptcy questions. The cases under the original law are, therefore, most of them still in point.⁷

6. *Fellows v. Freudenthal*, 4 Am. B. R. 490, 102 Fed. 731.

7. *Fellows v. Freudenthal*, *supra*; *In re McDuff*, 4 Am. B. R. 110, 101 Fed. 241;

Bragassa v. St. Louis Cycle, 5 Am. B. R. 700, 107 Fed. 77; *In re Grossman*, 6 Am. B. R. 510, 111 Fed. 507. See also *In re Todd*, 6 Am. B. R. 88, 109 Fed. 265.

TIME OF TAKING EFFECT

The Time When Act of 1898 Went into Effect.—*a* This act shall go into full force and effect upon its passage: Provided, however, that no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof.

b Proceedings commenced under State insolvency laws before the passage of this act shall not be affected by it.

The Time When Amendatory Act of 1903 Took Effect.—(§ 19 of Amendatory Act of 1903.—That the provisions of this amendatory act shall not apply to bankruptcy cases pending when this act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of the said act of July first, eighteen hundred and ninety-eight.

The Time When Amendatory Act of 1910 Took Effect.—(§ 14 of Amendatory Act of 1910).—That the provisions of this amendatory act shall not apply to bankruptcy cases pending when this act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of said act approved July first, eighteen hundred and ninety-eight, as amended by said act approved February fifth, nineteen hundred and three, and as further amended by said act approved June fifteenth, nineteen hundred and six.

WHEN THE ACT OF 1898 WENT INTO EFFECT.

Subsection *a* is different from the corresponding provisions of previous laws. The operation of each was postponed to a day certain some time after the approval of the act. Not so of the present statute.¹ It went into full operation on July 1, 1898—which means the whole of that day²—save that no petitions could be filed until August 1, 1898, if voluntary; or until November 1, 1898, if involuntary. “Passage” here means the same as “approval.” Thus, the courts had power on July 1, 1898, to appoint referees and promulgate rules, and from and including that day all State insolvency laws were suspended.³ It has even been held that the rights of

1. For the reason, see cases like: In re Horton, Fed. Cas. 6,708; Day v. Bardwell, 97 Mass. 246, and Judd v. Ives, 4 Metc. 401, are no longer of value.

2. Compare Leidigh Carriage Co. v. Stengel, 2 Am. B. R. 383, 95 Fed. 637. And see In re Tonawanda St. Pl. Mill, 6 Am. B. R. 38.

3. Palmenter Mfg. Co. v. Hamilton, 1 Am. B. R. 39; re Bruss-Ritter Co., 1 Am. B. R. 58, 90 Fed. 651; In re Etheridge Furniture Co., 1 Am. B. R. 112, 92 Fed. 329; In re Curtis, 1 Am. B. R. 440, 91 Fed. 737; Littlefield v. Gray, 8 Am. B. R. 409. Also cases cited in foot-note 13, *post*.

creditors fixed by the law accrued on that day, the exercise of them only being suspended until a petition could be filed.⁴ On the other hand, a State court sustained a demurrer to a bill in equity, the apparent purpose of which was to keep the debtor's property intact until a bankruptcy petition could be filed.⁵ The amendatory act of 1903 went into effect February 5, 1903, that of 1910 went into effect June 25, 1910.

4. *Westcott v. Berry*, 4 Am. B. R. 264.
Compare *Kosches v. Libowitz*, 4-Am. B. R.
265, in note; *Blake v. Valentine Co.*, 1 Am.
B. R. 372, 89 Fed. 691.

5. *Ideal Clo. Co. v. Hazle*, 6 Am. B. R. 265.
See also *Ellis v. Hays, etc., Co.*, 8 Am. B. R.
109.

GENERAL ORDERS IN BANKRUPTCY

ADOPTED BY THE

SUPREME COURT OF THE UNITED STATES

At the October Term, 1898.

PREFATORY NOTE.—The General Orders in Bankruptcy were adopted by the Supreme Court of the United States in conformity with the power conferred by section 30 of the bankruptcy act. The cross-references inserted after each General Order are to sections of the act, to the official and supplementary forms, and to the equity rules. Cases construing and applying the several orders are digested and classified. These orders are supposed to explain, amplify and apply the provisions of the bankruptcy act, and have the full force of law except as they conflict with that act. They are, therefore, an essential part of the law of bankruptcy.

PREAMBLE.

Gen. Order

- I. Docket, 1190.*
- II. Filing of papers, 1191.*
- III. Process, 1191.*
- IV. Conduct of proceedings, 1191.*
- V. Frame of petitions, 1192.*
- VI. Petitions in different districts, 1192.*
- VII. Priority of petitions, 1194.*
- VIII. Proceedings in partnership cases, 1194.*
- IX. Schedule in involuntary bankruptcy, 1196.*
- X. Indemnity for expenses, 1196.*
- XI. Amendments, 1197.*
- XII. Duties of referee, 1198.*
- XIII. Appointment and removal of trustees, 1200.*
- XIV. No official or general trustee, 1202.*
- XV. Trustee not appointed in certain cases, 1202.*
- XVI. Notice to trustee of his appointment, 1203.*
- XVII. Duties of trustee, 1203.*
- XVIII. Sale of property, 1205.*
- XIX. Accounts of marshal, 1206.*
- XX. Papers filed after reference, 1206.*
- XXI. Proof of debts, 1206.*
- XXII. Taking of testimony, 1210.*
- XXIII. Orders of referee, 1211.*
- XXIV. Transmission of proved claims to clerk, 1212.*
- XXV. Special meeting of creditors, 1212.*
- XXVI. Accounts of referee, 1212.*
- XXVII. Review by judge, 1212.*
- XXVIII. Redemption of property and compounding of claims, 1214.*
- XXIX. Payment of moneys deposited, 1215.*
- XXX. Imprisoned debtor, 1216.*
- XXXI. Petition for discharge, 1217.*
- XXXII. Opposition to discharge or composition, 1217.*
- XXXIII. Arbitration, 1218.*
- XXXIV. Costs in contested adjudications, 1218.*
- XXXV. Compensation of clerks, referees, and trustees, 1219.*
- XXXVI. Appeals, 1221.*
- XXXVII. General provisions, 1222.*
- XXXVIII. Forms, 1223.*

PREAMBLE.

In pursuance of the powers conferred by the Constitution and laws upon the Supreme Court of the United States, and particularly by the act of Congress approved July 1, 1898, entitled "An act to establish a uniform system of bankruptcy throughout the United States, it is ordered, on this 28th day of November, 1898, that the following rules be adopted and established as general orders in bankruptcy, to take effect on the first Monday, being the second day, of January, 1899. And it is further ordered that all proceedings in bankruptcy had before that day, in accordance with the act last aforesaid, and being in substantial conformity either with the provisions of these general orders, or else with the general orders established by this court under the bankrupt act of 1867 and with any general rules or special orders of the courts in bankruptcy, stand good, subject, however, to such further regulation by rule or order of those courts as may be necessary or proper to carry into force and effect the bankrupt act of 1898 and the general orders of this court.

Cross-references: To the law: § 30.

To the General Orders: XXXVII, XXXVIII.

To the Equity Rules: LXXXIX, XC. (See also Revised Statutes, §§ 913, 914.)

Effect and construction of the general orders.—The general orders of the Supreme Court and the rules of the district courts in accordance therewith are as obligatory on officers of the court as the bankruptcy act itself. In *re Cobb* (D. C., N. C.), 7 Am. B. R. 202, 112 Fed. 655. These general orders have the same force as a provision of the statute. They are made under an express delegation of power, both constitutional and statutory. In *re Hoyt & Mitchell* (D. C., N. Car.), 11 Am. B. R. 784, 127 Fed. 968. Though controlling, so far as not inconsistent with the act, they must yield to the act and cannot operate to prevent or alter its operation. *Matter of Ingalls Bros.* (C. C. A., 2d Cir.), 13 Am. B. R. 512, 137 Fed. 517. The Supreme Court, when it made the general orders, intended to direct a much simpler mode of procedure. *Matter of Daugherty* (D. C., Ky.), 26 Am. B. R. 550, 553, 189 Fed. 239.

The general orders are an amplification of the law with respect to procedure. *Orcutt Co. v. Green*, 17 Am. B. R. 72, 204 U. S. 96, revg. 13 Am. B. R. 512; *West Co. v. Lea*, 174 U. S. 590, 2 Am. B. R. 463. As has been stated in respect to the use and application of the general orders: "Seek the meaning and intent of the law first and follow that rather than the order or the form; and if the latter are not harmonious each with the other, seek the meaning and intent of the order and follow it rather than the form." In *re Soper and Slada* (Ref., N. Y.), 1 Am. B. R. 193, 196. The rules and forms so prescribed by the Supreme Court under and by virtue of the bankruptcy act have the force and effect of law. In *re Gerber* (C. C. A., 9th Cir.), 26 Am. B. R. 608, 617, 186 Fed. 693.

As to the furnishing and delivering of subpoenas, see In *re Hemstreet* (D. C., Ia.), 8 Am. B. R. 760, 117 Fed. 568; *Matter of the Abbey Press* (C. C. A., 2d Cir.), 13 Am. B. R. 11, 134 Fed. 51.

I. DOCKET.

The clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall contain a memorandum of the filing of the petition and of the action of the court thereon, of the reference of the case to the referee, and of the transmission by him to the clerk of his certified record of the proceedings, with the dates thereof, and a memorandum of all proceedings in the case except those duly entered on the referee's certified record aforesaid. The docket shall be arranged in a manner convenient for reference, and shall at all times be open to public inspection.

[Latter part of General Order I, 1867, with changes specifying more fully the entries to be made in the docket.]

Cross-references: To the law: As to commencement of proceedings, § 1(10); As to duties of the clerk, §§ 51, 71; As to duties of the referee, §§ 29-c, 30-a(7), 42; As to duties of the trustees, §§ 29-c, 49.

To the General Orders: II, IV.

To the Equity Rules: I-VI, inclusive.

II. FILING OF PAPERS.

The clerk or the referee shall indorse on each paper filed with him the day and hour of filing, and a brief statement of its character.

[Part of General Order I, 1867, but not so full.]

Cross-references: To the law: §§ 18-a, 59-a-b.

To the General Orders: VI, IX, XX.

To the Official Forms: None, both the clerk and the referee usually have filing stamps.

Cases citing this order: Matter of Lacey & Company, (Sup. Ct., D. C.) 35 Am. B. R. 231, 43 Wash. Law Rep. 434.

III. PROCESS.

All process, summons and subpoenas shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees.

[General Order II, 1867, except the word "referees" is substituted herein for the word "registers."]

Cross-references: To the law: As to process in involuntary proceedings, § 18-a (and also under §§ 4 and 5); As to process to witnesses, § 21-a.

To the General Orders: VIII.

To the Official Forms: Nos. 5, 30.

To the Equity Rules: VII to XVI, inclusive.

Illustrative cases: Matter of the Abbey Press (C. C. A.), 13 Am. B. R. 11, 134 Fed. 51; In re Norton (D. C., N. Y.), 17 Am. B. R. 504, 148 Fed. 301. See those cited under Sections Eighteen and Twenty-one of this work.

IV. CONDUCT OF PROCEEDINGS.

Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counselor authorized to practice in the circuit court or district court. The name of the attorney or counselor, with his place of business, shall be entered upon the docket, with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be indorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the act or by these general orders, required to be served on the party personally may be served upon his attorney.

[General Order III, 1867, without substantial change, except that the old rule required the entry of the attorney's place of residence as well as his place of business.]

Cross-references: To the law: As to who may file voluntary petitions, §§ 4-a, 59-a; As to who may file involuntary petitions, § 59-b; As to partnership petitions, § 5; As to petitions against corporations, § 4-b; As to where petitions must be filed, § 2(1); As to appearances, §§ 18-b, 59-f; As to answer and other pleas, §§ 18-d, 59; As to notices, § 58.

To the Equity Rules: IV, XVII, and, as to pleadings, generally

The Supplementary Forms: For those in involuntary cases, Nos. 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130; for appearances Nos. 99, 110, 120, 121. See also, generally "Supplementary Forms." *post*.

To the Equity Rules: IV, XVII, and, as to pleadings, generally.

Power of bankrupt to represent himself.—This general order gives the bankrupt the right to represent himself, and being an attorney he may raise any question of law which could have

been raised had he been represented by another. In re Shaffer (D. C., N. Car.), 4 Am. B. R. 728, 104 Fed. 982.

Powers of attorneys.—This order seems to give to the attorney of a bankrupt or creditor power to do any act in the bankruptcy matter which the bankrupt or creditor might do personally, and requires no other evidence of his authority than the fact of his admission to practice in the circuit or district court. Matter of Herzikopf (D. C., Col.), 9 Am. B. R. 90, 118 Fed. 1016; In re Gasser (C. C. A., 8th Cir.), 5 Am. B. R. 32, 104 Fed. 537. "The petition in an involuntary bankruptcy proceeding may be made by the attorney in fact of the petitioning creditors." Rogers v. De Sota Placer Mining Co. (C. C. A., 9th Cir.), 14 Am. B. R. 252, 136 Fed. 407. But it has been held that this power of an attorney does not extend to the creditor's choice of a trustee nor to the making of an affidavit to the schedules of a petitioning creditor. In re Blankgein (D. C., N. Y.), 3 Am. B. R. 165, 97 Fed. 191.

V. FRAME OF PETITIONS.

All petitions and the schedules filed therewith shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference.

[First part of General Order XIV, 1867, without change.]

Cross-references: To the law: As to petitions, § 18-a-c; As to schedules, § 7(8); As to referee's duty to examine schedules, etc., § 39-a(2); As to referee's duty to prepare schedules in certain cases, § 39-a(6).

To the General Orders: IX, XI.

To the Official Forms: Nos. 1, 2, 3, with the schedules.

To the Supplementary Forms: Nos. 117, 118.

To the Equity Rules: XX to XXV.

Use of ditto marks and abbreviations.—This order precludes the use of dots to indicate anything necessary to be stated. In re Orne, Fed. Cas. 10,582. And the use of ditto marks, in attempting to indicate a creditor's residence, is in violation of this order. Haach v. Theise, 16 Am. B. R. 699, 5 N. Y. Misc. 3, 99 N. Y. Supp. 905. The abbreviation of the residence of a creditor as "135 Bway" violates this rule. Sutherland v. Lasher, 11 Am. B. R. 780, 41 N. Y. Misc. 249.

Use of printed blanks.—In the eastern district of North Carolina a written or typewritten schedule will not be accepted. The printed blank containing forms prescribed by the rules of the court must be used, otherwise the schedules will be returned to the parties without action. Mahoney v. Ward (D. C., N. Car.), 3 Am. B. R. 770, 100 Fed. 278.

A mistake as to a creditor's name in the schedules will prevent the discharge of a debt. Liesum v. Kraus, 35 N. Y. Misc. 376, 71 N. Y. Supp. 1022. If a petition in involuntary bankruptcy contains the name of the judge such name must be given correctly. Anon., Fed. Cas. 459.

See, generally, Matter of Harrell (D. C., N. Car.), 34 Am. B. R. 829, 222 Fed. 160.

VI. PETITIONS IN DIFFERENT DISTRICTS.

In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions shall be filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceed-

ings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.

[General Order XVI, 1867, without change, except that the last sentence of Rule VI under consideration, is new.]

Cross-references: To the law: As to where petitions may be filed, § 1(2); As to partnership petitions, § 5; As to transfer of cases, §§ 2(19), 32; Also generally to §§ 2(19), 18.

To the General Orders: IV, VII, VIII.

The true meaning of this general order is that where petitions are filed in different districts, the court whose ground of jurisdiction is that the bankrupt's domicile has been in that district during the greater portion of the six months next preceding the filing of the petitions is the court in which the first hearing should be had. In *re Isaacson* (D. C., N. Y.), 20 Am. B. R. 437, 161 Fed. 777. This rule contemplates a case in which each court has jurisdiction of the cause, and that question, when raised, must be first determined. In *re Waxelbaum* (D. C., N. Y.), 3 Am. B. R. 392, 395, 98 Fed. 589. The letter as well as the spirit of this general order confers exclusive jurisdiction upon that court in which the petition is first filed, subject to the provision for the transfer of cases from one to another district court where the convenience of parties in interest demands it. As between two district courts of United States, it is the duty of the other court to yield jurisdiction and the control and direction of the entire proceeding to the one whose jurisdiction was first invoked. In *re Sterne & Levi* (D. C., Tex.), 26 Am. B. R. 259.

It may be assumed that General Order No. 6 is subject to the provisions of section 32 of the bankruptcy law, and that the case may be transferred and consolidated for the convenience of the parties, if brought within the provisions of section 32, in spite of the direction in the general order that the court first adjudicating shall retain jurisdiction until the proceedings are closed. In *re Isaacson* (D. C., N. Y.), 20 Am. B. R. 430, 161 Fed. 779. This order leaves no room for doubt, but that the court taking and retaining jurisdiction shall have exclusive jurisdiction to determine the question of a transfer under section 32, for it expressly provides that the court "so retaining jurisdiction (because the petition was first filed therein) shall, if satisfied that it is for the greatest convenience of parties in interest, that another of said courts shall proceed with the case, order them transferred to that court." In *re Sterne & Levi* (D. C., Tex.), 26 Am. B. R. 259, 262.

Under this general order, in the case of petitions against an individual, the first hearing shall be in the district of the domicile, while in the case of petitions filed against a partnership that first filed shall have priority of hearing, and the court acquiring the whole jurisdiction shall determine whether the greater convenience of parties requires that one of the other courts should proceed with the cases. *Matter of United Button Co.* (D. C., N. Y.), 12 Am. B. R. 761, 132 Fed. 378.

General Orders VI and VII are designed to relate simply to the consideration of proceedings. In *re Strait* (Ref., N. Y.), 2 Am. B. R. 308.

"Greatest convenience" of "parties in interest" meaning of terms.—Neither the act nor the general order attempts to define the terms "greatest convenience" of "parties in interest." The interpretation placed upon them by the court in the *Matter of United Button Co.*, 13 Am. B. R. 454, 132 Fed. 378—that the term "parties in interest," covers every party having any interest in or connection with the case, including priority, secured and unsecured creditors, as well as the bankrupts themselves, and that the term "greatest convenience," depends upon all the circumstances—proximity of a majority of creditors and the place of business of the bankrupts to the court, proximity of witnesses whose attendance is desired in any hearing, and perhaps numerous other factors—would seem to be the correct view. In *re Sterne & Levi* (D. C., Tex.), 26 Am. B. R. 259, 263.

Corporations are within the provisions of this order.—In *re Elmira Steel Co.* (D. C., N. Y.), 5 Am. B. R. 484, 109 Fed. 456. The word "individual," as used in the clause providing that "in case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile," is equivalent to "person," and as such includes a corporation. *Matter of United Button Co.* (D. C., Del.), 13 Am. B. R. 454, 132 Fed. 378.

District of bankrupt's domicile definition.—The district in which an alleged bankrupt has resided during the greater portion of the six months next preceding the filing of a petition against him is the "district of his domicile" within the meaning of this general order, and the first hearing should be had therein unless, under the provisions of section 32 of the bankruptcy law, the proceeding is transferred and consolidated with a proceeding instituted in a district to which the alleged bankrupt had recently removed and established a residence. In *re Isaacson* (D. C., N. Y.), 20 Am. B. R. 430, 161 Fed. 779.

An application for the transfer of a case under this order may be denied in the discretion of the court. In re Sears (D. C., N. Y.), 7 Am. B. R. 279, 112 Fed. 58. Thus, where a petition has been filed against a corporation in the district of its domicile, and thereafter a petition is filed against it in a district in another State, the court in which the first petition is filed, unless satisfied that it is for the greatest convenience of all parties in interest that the case should be transferred, is required, under the provisions of this order, to retain jurisdiction until the proceedings are closed. In re Tybo Mining & Reduction Co. (D. C., Me.), 13 Am. B. R. 68, 72, 132 Fed. 697.

Power of amendment; limitation of.—The provisions of this order by implication limit the power of amendment to the single case in which an earlier act of bankruptcy has been sought to be incorporated into the petition. In re Sears (C. C. A., 2d Cir.), 8 Am. B. R. 713, 117 Fed. 294; Wilder v. Watts (D. C., S. C.), 15 Am. B. R. 57, 68, 138 Fed. 426; Gleason v. Smith, Perkins & Co. (C. C. A., 3d Cir.), 16 Am. B. R. 602, 145 Fed. 895; Matter of Riggs Restaurant Co. (C. C. A., 2d Cir.), 11 Am. B. R. 508, 130 Fed. 691. A bankruptcy petition may be amended so as to allege grounds of bankruptcy subsequently occurring notwithstanding the provisions of this order. In re Hamrick (D. C., Ga.), 23 Am. B. R. 721, 175 Fed. 279.

Other cases citing this order.—Bradley Timber Co. v. White (C. C. A., 5th Cir.), 10 Am. B. R. 329, 332, 121 Fed. 779, affg. 9 Am. B. R. 441; Matter of R. H. Pennington & Co. (D. C., Ky.), 35 Am. B. R. 832, 228 Fed. 388; Matter of Vanascope Co. (C. C. A., 2d Cir.), 36 Am. B. R. 778.

VII. PRIORITY OF PETITIONS.

Whenever two or more petitions shall be filed by creditors against a common debtor, alleging separate acts of bankruptcy committed by said debtor on different days within four months prior to the filing of said petitions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions, that petition shall be first heard and tried which alleges the commission of the earliest act of bankruptcy; and in case the several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated, and proceed to a hearing as upon one petition; and if an adjudication of bankruptcy be made upon either petition, or for the commission of a single act of bankruptcy, it shall not be necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.

[General Order XV, 1867, without change other than that "four months" appears in the new rule in place of "six months."]

Cross-reference: See those to General Order VI, immediately *ante*.

Meaning and construction of order.—This order contemplates independent proceedings and provides for their disposition. Matter of Haff (C. C. A., 2d Cir.), 13 Am. B. R. 362, 135 Fed. 742. It must be strictly construed, and can be put in motion only by acts of the creditors and debtors combined. The mere filing of two or more petitions, one of which avers a prior act of bankruptcy, cannot put in action the enforcement of this rule. There are two things absolutely necessary.

First. Two or more petitions must be filed by creditors against a common debtor alleging several acts of bankruptcy committed by said debtor; and

Second. The debtor shall appear and show cause against an adjudication in bankruptcy against him on the petitions.

Thus, where two petitions are filed, each alleging different acts of bankruptcy, and the debtor answers only the one which alleges the earlier act of bankruptcy, this rule has no application. Had there been three petitions, it would have been equally necessary for the debtor to have answered all three. In re G. W. Harris (D. C., Ala.), 19 Am. B. R. 204, 155 Fed. 216.

Other cases citing this order.—In re Strait (Ref., N. Y.), 2 Am. B. R. 308; In re Elmira Steel Co. (D. C., N. Y.), 5 Am. B. R. 484, 109 Fed. 456; Bradley Timber Co. v. White (C. C. A., 5th Cir.), 10 Am. B. R. 329, 333, 121 Fed. 779, affg. 9 Am. B. R. 441.

VIII. PROCEEDINGS IN PARTNERSHIP CASES.

Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor

of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made.

[General Order XVIII, 1867, with no substantial change.]

Cross-references: To the law: §§ 5, 18.

To the General Orders: VI, VII.

To the Official Forms: Nos. 2, 30.

To the Supplementary Forms: No. 117.

Meaning and application of order.—This order provides the only method of procedure in partnership cases. Its provisions are plain, specific and easily understood. They mean that whenever a person who is a member of an existing partnership, or who was a member of a defunct partnership, desires to go into a court of bankruptcy, he must bring the firm and the other partners into court with him. *Matter of Freund* (Ref., Ia.), 1 Am. B. R. 25. It has no other purpose than to prescribe the practice for the class of cases where less than all the partners file a petition to have the partnership adjudged bankrupt. In *re Ceballos* (D. C., N. Y.), 20 Am. B. R. 459, 464, 161 Fed. 445. Although the bankruptcy law contains no provision expressly authorizing a partner to file a petition against his copartners, such power must be implied from this general order and § 8 of the act. In *re Caballos & Co.* (D. C., N. Y.), 20 Am. B. R. 459, 465, 161 Fed. 445.

It is manifest that this order has no application to a petition by an individual who is a member of a firm to have himself and not the firm adjudicated a bankrupt. *N. Y. Deaf and Dumb Institute v. Crockett*, 17 Am. B. R. 233, 240, 117 App. Div. 269, 102 N. Y. Supp. 412. Since there should only be partnership bankruptcies in cases which show assets, this order refers only to such cases. In *re Altman* (Ref., N. Y.), 1 Am. B. R. 689.

The Supreme Court in this general order seems to recognize the same distinction as it does in the prescribed forms, between an adjudication of a bankrupt and of an individual partner. In *re Barden* (D. C., N. Car.), 4 Am. B. R. 31, 101 Fed. 553. See, generally, In *re Carleton* (D. C., Mass.), 8 Am. B. R. 270, 115 Fed. 246.

Notice of hearing how given.—Under the provisions of this order due notice must be given of the time fixed for a hearing upon a petition to declare a partnership a bankrupt. If the non-joining member or members of the firm can be found, in the district or out of it, personal service must be made; but if personal service cannot be had, then, upon filing before the judge (or the referee, if the case has been referred by the clerk) an affidavit showing that personal service cannot be made, an order of publication will be granted. In *re Murray* (D. C., Ia.), 3 Am. B. R. 601, 96 Fed. 600; In *re Murray and Winters* (D. C., Ia.), 3 Am. B. R. 90.

Where one of the members of a copartnership petitions for an adjudication of bankruptcy against the firm as well as the members of it, this must be clearly shown in the petition and notice of the hearing of the petition must be given to the non-joining partners before the firm can be adjudged bankrupt. In *re Russell* (D. C., Ia.), 3 Am. B. R. 91, 97 Fed. 32.

Objecting partners; filing schedules.—The objecting partners, though they have committed no act of bankruptcy and cannot be adjudicated individual bankrupts, must file a schedule of their individual debts and inventory their property, upon the adjudication of the partnership and the petitioning partner. In *re Ceballos & Co.* (D. C., N. Y.), 20 Am. B. R. 467, 161 Fed. 451; *Matter of Lenoir-Cross Co.* (D. C., Tenn.), 35 Am. B. R. 774, 226 Fed. 227. This general order provides for the filing of schedules on the part of a solvent partner. *Matter of Solomon & Carvel* (D. C., N. Y.), 20 Am. B. R. 488, 163 Fed. 140. The non-assenting partner must file schedules of his individual estate and debts, as any surplus remaining after the discharge of his individual liabilities is an asset of the firm applicable to the payment of the liabilities of the partnership. In *re Junk & Balthazard* (D. C., Wis.), 22 Am. B. R. 298, 169 Fed. 481; *Armstrong v. Fisher* (C. C. A., 8th Cir.), 34 Am. B. R. 701, 224 Fed. 97.

The fact that, without complying with general order 23, a referee made an order on an unadjudicated member of a partnership, after it, and the other member had been adjudicated bankrupt, to file a schedule of his debts and an inventory of his property on or before nineteen days after the adjudication, was not fatal to the order of the court confirming such an order, because the unadjudicated member was required by the bankruptcy law and

general order 8 to make these finding within ten days after that adjudication. *Armstrong v. Fisher* (C. C. A., 8th Cir.), 34 Am. B. R. 701, 224 Fed. 97.

Defense of non-joining partners.—All that a non-joining partner may do under this general order is to resist adjudication against the partnership as a separate entity. In doing so he can defend only against the allegations contained in the petition. If he considers the petition demurrable, he may demur. If not, he may answer. In *re Ceballos & Co.* (D. C., N. Y.), 20 Am. B. R. 459, 465, 161 Fed. 455. The non-assenting partner cannot set up the want of an act of bankruptcy as a defense to the petition, but he may set up the defense of solvency, and upon that issue he is entitled to a jury trial. In *re Forbes* (D. C., Mass.), 11 Am. B. R. 787, 128 Fed. 137.

Under the provisions of this general order, it is open to any one of the partners to contest an adjudication against the firm, and to defeat it by showing that the firm is not insolvent, or, if insolvent, that it has not committed an act of bankruptcy. In *re Laughlin* (D. C., Ia.), 3 Am. B. R. 1, 96 Fed. 589.

Assets of individual partners.—The individual assets of each partner are subject to the payment of partnership liabilities, and an order may be made that the trustee of the partnership take possession of such assets and administer them, unless, upon proper procedure, such partner is declared a bankrupt, and his creditors elect a trustee. General order 8 provides for this. *Matter of Hansley & Adams* (D. C., Cal.), 36 Am. B. R. 1, 228 Fed. 564.

IX. SCHEDULE IN INVOLUNTARY BANKRUPTCY.

In all cases of involuntary bankruptcy in which the bankrupt is absent or cannot be found, it shall be the duty of the petitioning creditor to file, within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor. If the debtor is found, and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, or may himself furnish such schedule as aforesaid.

[This general order is new.]

Cross-references: To the law: As to bankrupt's duty to file schedules, § 7(8); As to referee's, § 39-a(6).

To the General Orders: V.

To the Official Forms: No. 1, with the schedules.

To the Supplementary Forms: No. 84; and by analogy, No. 117.

Filing schedules by bankrupt.—After an adjudication in bankruptcy all the creditors have a vested interest in the proceeding, and, pursuant to this order, the bankrupt can be compelled to file a schedule of his creditors, or if he is absent or cannot be found, it is the duty of the petitioning creditors to do so. The petition cannot be dismissed except with the consent of all the creditors. *Matter of Levi & Klauber* (C. C. A., 2d Cir.), 15 Am. B. R. 294, 142 Fed. 962.

X. INDEMNITY FOR EXPENSES.

Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal or referee may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purposes by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.

[This general order is new.]

Cross-references: To the law: As to publishing and mailing notices, § 58; As to examinations of the bankrupt or others, §§ 7(9), 21-a; As to marshal's expenses, § 52; As to clerk's expenses, §§ 24, 25, 52, 71; In general, §§ 62, 64-b(3).

To the General Orders: IX, XII, XXII, XXVI, XXXV.

To the Supplementary Forms: By analogy, No. 169.

Purpose and application of order.—The provisions of this order are intended to cover money which the bankrupt or some third party may be called upon to furnish after the initiation of the proceedings in order to meet expenses incurred by the officer for the purposes specially recited in the order, which purposes do not include the money deposited with the clerk to meet the fees (not expenses) of the clerk, referee and trustee. The purpose of the order is to protect the officers from personal loss in the performance of their duties under the

bankrupt act, but it is not the intent of the order that the bankrupt shall be repaid the money which presumably he took out of his estate to pay the fees of officers before he filed his petition in bankruptcy. In re Matthews (D. C., Iowa), 3 Am. B. R. 265, 97 Fed. 772.

Under this order a bankrupt is entitled to be reimbursed for the amount advanced by him for the issuance, publication and mailing of necessary notices to creditors of an application for his discharge. In re Hatcher (D. C., Tex.), 16 Am. B. R. 722, 145 Fed. 658.

The referee is not authorized to require the bankrupt to pay the statutory fee before he is given his discharge where such bankrupt has filed an affidavit of inability. In re Plimpton (D. C., Va.), 4 Am. B. R. 614, 103 Fed. 775. See, generally, *Sellers v. Bell* (C. C. A., 5th Cir.), 2 Am. B. R. 529, 552, 94 Fed. 801.

In reimbursing the bankrupt or a creditor for money advanced under this general order to defray the expenses of the referee, marshal or clerk, such reimbursement has the same priority that the expenses themselves would have had; the one making the advancement being subrogated to the rights of the officer whose expenses are advanced. *Matter of Burke* (D. C., Ohio), 6 Am. B. R. 502, 155 Fed. 703.

Other cases citing this order.—In re Smith (D. C., N. Car.), 5 Am. B. R. 559, 564, 108 Fed. 39; *Matter of McCubbin Co.* (Sup. Ct., D. C.), 33 Am. B. R. 277, 42 Wash. Law Rep. 774; *Matter of Longhney* (D. C., Wash.), 34 Am. B. R. 206, 218 Fed. 980.

XI. AMENDMENTS.

The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed.

[The last sentence is new. The rest of the general order is substantially the same as a part of General Order XIV, 1867.]

Cross-references: To the law: §§ 2(6) (15), 39-a(2).

To the Supplementary Forms: Nos. 81, 82, 83.

To the Equity Rules: XXVIII to XXX.

As to amendments to petitions, see discussion under § 18; as to amendments of schedules, see under § 7; and as to intervention by other creditors, see under § 59.

Purpose and application of order.—The purpose of this order is to authorize the court to allow corrections to be made of errors, insufficiencies and uncertainty in the petition or schedules, but not practically to repeal the legislative declarations that petitions must be filed in duplicate within the four months specified. In re Stevenson (D. C., Del.), 2 Am. B. R. 66, 94 Fed. 110. This power of amendment is substantial and conferred for effecting the broad purposes of the act, and is not confined to niceties of diction or other immaterial or merely formal matters. To hold that it does not embrace the insertion of material and essential averments in any stage of the proceedings before judgment would reduce it to a shadow. In re Mackey (D. C., Del.), 6 Am. B. R. 577, 586, 110 Fed. 355. It deals with amendments to a petition and schedules, but was not intended to abrogate or restrict the general power of amendment in other respects vested in the court. In re Bellah (D. C., Del.), 8 Am. B. R. 310, 116 Fed. 49. See also *Gleason v. Smith, Perkins & Co.* (C. C. A., 3d Cir.), 16 Am. B. R. 602, 145 Fed. 895.

An application for leave to amend matters must set forth the allegations required by this order, and if such allegations are not set forth time may be granted to insert the same. In re Portner (D. C., Pa.), 18 Am. B. R. 89, 149 Fed. 799. See also In re Pure Milk Co., of Mobile (D. C., Ala.), 18 Am. B. R. 735, 154 Fed. 682. No time is specified within which amendments may be allowed under this order. *Columbia Bank v. Birkett* (Ct. App., N. Y.), 9 Am. B. R. 481, 486, affg. 65 App. Div. 615. The application must state the cause of the error in the paper originally filed. *Matter of Brincat* (D. C., Ala.), 37 Am. B. R. 587, 233 Fed. 811.

Amendment of exemption claim.—A bankrupt, making an imperfect claim to exemptions in his schedules, may be allowed to amend, but such amendment must relate to conditions existing at the time the imperfect claim was formulated. *Matter of Crum* (D. C., Ohio), 34 Am. B. R. 586, 221 Fed. 729.

Verification of amendment.—Failure to verify an amendment to an involuntary petition, as required by this general order, may be subsequently corrected. *International Silver Co. v. N. Y. Jewelry Co.* (C. C. A., 6th Cir.), 37 Am. B. R. 91, 233 Fed. 945.

Other cases citing this order.—In re Strait (Ref., N. Y.), 2 Am. B. R. 308; In re Meyers (D. C., N. Y.), 3 Am. B. R. 260, 97 Fed. 757; In re Shaffer (D. C., N. Car.), 4 Am. B. R. 728, 104 Fed. 982; *White v. Bradley Timber Co.* (D. C., Ala.), 8 Am. B. R. 671, 116 Fed. 768; In re Duffy (D. C., Pa.), 9 Am. B. R. 358, 118 Fed. 926; *Matter of Haff* (C. C. A., 2d Cir.), 13 Am. B. R. 362, 366, 135 Fed. 742; *Burke v. Guarantee Title & Trust Co.* (C. C. A., 3d Cir.),

14 Am. B. R. 31, 134 Fed. 562; *In re Fisher* (D. C., Va.), 15 Am. B. R. 652, 654, 142 Fed. 205; *In re Goodman* (C. C. A., 5th Cir.), 23 Am. B. R. 504, 174 Fed. 644; *Brandt v. Mayhew* (C. C. A., 9th Cir.), 33 Am. B. R. 845, 218 Fed. 422.

XII. DUTIES OF REFEREE.

1. The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee.

2. The time when and the place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; and at such times and places the referees may perform the duties which they are empowered by the act to perform.

3. Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States, or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.

[Paragraph 1, except the last sentence, is the second paragraph of General Order IV, 1867, with slight changes. Paragraph 2 is derived from General Order V, 1867. Paragraph 3 is new; its validity as a limitation on the power of the referee to grant stays is doubted (see p. 25), especially where the district judge has conferred such power on the referee by § 38-a(4).]

Cross-references: To the law: As to general jurisdiction and powers of referee, §§ 38, 39; - As to orders of reference; §§ 18-f-g, 22; As to time and place when duties of referee will be performed, § 55; As to limitations on powers of referee, §§ 12-d, 14-b, 38-a(4), 39-b; As to allowance of claims, § 57; As to bankrupt's subjection to orders of court, § 7(2) As to orders of protection, § 9-a.

To the General Orders: IX, XI, XVI, XXI, XXII, XXIII, XXIV, XXV, XXVI, XXVII, XXIX, XXX, XXXIII, XXXV.

To the Official Forms: Nos. 14, 15.

Duties generally of referees after reference are discussed under sections 2, 9, 18, 38, 39, 55 and 57. For duties and compensation of special masters, see sections 12, 14, 18 and 72.

Jurisdiction and authority of referee; in general.—The authority of the referee dates from the time the order of reference is placed in his hands, not from the time of its signing or filing. The phrase "forthwith be sent by mail to the referee" includes delivery as well as mailing, so that, whether the copy of order of reference be sent by mail or delivered personally, the jurisdiction of the referee attaches only from the time of its receipt by him. *In re Floerken* (D. C., Cal.), 5 Am. B. R. 802, 107 Fed. 241. The last sentence of subdivision 1 is new and was evidently intended by the justices of the Supreme Court to apply to the new and enlarged jurisdiction of the referee under the present act. *In re Scott* (Ref., Mass.), 7 Am. B. R. 35. This order, together with § 38(4), confine a referee strictly within the limits of the order of reference, all original and ultimate power being vested in the judge. *In re Quackenbush*, (D. C., N. Y.), 4 Am. B. R. 274, 102 Fed. 282. Section 9-a and Gen. Ord. Nos. 12 and 30 are *in pari materia* and should be construed together. *United States ex rel. Kelly v. Peters*, 22 Am. B. R. 177, 166 Fed. 613.

The general authority of a referee in bankruptcy extends to the consideration of an intervening petitioner's claim to property or its proceeds in the hands of the trustee, alleged to be the property of the petitioner, and not of the bankrupt estate. *In re Drayton* (D. C., Wis.), 13 Am. B. R. 602, 135 Fed. 883.

Reference to special master.—Upon petition for reclamation from bankrupt's trustee of property, the title to which is claimed by petitioners, the practice has been to refer the matter to a special master and not to the referee in bankruptcy; and although the referee may have jurisdiction to determine such questions and thus save the expense of a reference,

a change should be made by the Supreme Court, in order that the practice may be uniform throughout the United States. In *re Tracy* (C. C. A., 2d Cir.), 24 Am. B. R. 539, 179 Fed. 366. The referee has no jurisdiction to hear applications for discharge except upon reference to him, as special master. In *re Taylor* (D. C., Ala.), 26 Am. B. R. 143.

The proceedings required by the act to be had before the judge are applications for discharge, for approval of compositions, for punishment for contempt, contested involuntary petitions in bankruptcy, and all petitions for adjudication when the judge is in the district. The proceedings other than those required by the general orders to be had before the judge are applications for injunctions to stay proceedings of a court or officer of the United States. Matter of the Abbey Press (C. C. A., 2d Cir.), 13 Am. B. R. 11, 14, 134 Fed. 51; *United States v. Liberman* (D. C., N. Y.), 23 Am. B. R. 734, 176 Fed. 161. In the following words from this general order, "and thereafter all the proceedings. . . shall be had before the referee," the word "shall" is directory, and the jurisdiction of the judge over such of the said proceedings as may be brought before him in the first instance is not thereby ousted. Matter of Monsarrat (D. C., Hawaii), 25 Am. B. R. 815.

Protection of bankrupt from arrest.—Section 9-a, subd. 2, providing that the bankrupt shall not be exempt from arrest where a debt or claim would not be released by his discharge, except when he is "in attendance upon a Court of Bankruptcy or engaged in the performance of a duty imposed by the act," as construed by this general order, suspends the exercise of the right of arrest pending the bankrupt's application for discharge. In *re Lewensohn* (D. C., N. Y.), 3 Am. B. R. 594, 99 Fed. 73.

Reference to special master.—The purpose of a reference under this order is to give to the court every aid which the referee can afford, to relieve the congested condition of the business which may be before the judge, and, when the report is filed, the court's attention must be directed to such parts thereof to which objection can be made, by exceptions filed within twenty days as provided by rule 66 of the Equity Rules. Matter of Pierce, Jr. (D. C., Wash.), 32 Am. B. R. 96, 210 Fed. 389.

Discharge; jurisdiction of referee.—The referee has no jurisdiction to determine the question as to discharge, but the court may refer the case to him generally for a report. He aids the court like a master in chancery. He cannot finally determine the question of discharge or non-discharge, but he may be ordered to report the facts and his recommendation or conclusion as to the matter. *International Harvester Co. v. Carlson* (C. C. A., 8th Cir.), 33 Am. B. R. 178, 217 Fed. 736; Matter of Amer (D. C., Pa.), 35 Am. B. R. 627, 228 Fed. 576; Matter of C. H. Kendrick & Co. (D. C., Vt.), 35 Am. B. R. 630, 226 Fed. 980; In *re Rauchenplat* (D. C., Porto Rico), 9 Am. B. R. 763. But where an application for discharge must be heard and decided by the judge, such application or any specified issue arising thereon may be sent to the referee to ascertain and report the facts, and no one is prejudiced thereby. In *re McDuff* (C. C. A., 5th Cir.), 4 Am. B. R. 110, 101 Fed. 241.

In the western district of Kentucky, where specifications of objections to a bankrupt's discharge have been filed, the practice is to refer the application for discharge to a referee to ascertain and report the facts under the third clause of this general order. Matter of Daugherty (D. C., Ky.) 26 Am. B. R. 550.

Confirmation of a composition.—It seems that the judge may require the referee to report the facts concerning an application for confirmation of a composition. *Adler v. Jones* (C. C. A., 6th Cir.), 6 Am. B. R. 245, 109 Fed. 967.

Claims of intervening petitioners.—No provision of the bankruptcy act or of the general orders requires the claim of an intervening petitioner, to property in the hands of the trustee, to be heard before the judge. In *re Drayton* (D. C., Wis.), 13 Am. B. R. 602, 135 Fed. 883.

Injunctions.—The reason for this provision is obvious; "the supreme court had in mind the dignity of other courts, Federal and State, and of other officers, and provided that they might only be interfered with by a tribunal of equal rank, and not by a subordinate official, unless for definitely described reasons action by the latter should be unavoidable." In *re Berkowitz* (D. C., Pa.), 16 Am. B. R. 251, 143 Fed. 598.

Archibald, District Judge, in *Re Benjamin* (D. C., Pa.), 15 Am. B. R. 351, 140 Fed. 320, says: "The right of a referee to award an injunction cannot be regarded as finally settled. For while it is sustained by some of the leading works on bankruptcy . . . it is denied by rule in certain jurisdictions . . . and limited in others. . . and is materially restricted, if not taken away, by the general orders of the supreme court. General Orders XII."

Judge Lowell discussed the subject to some extent in *Re Steuer* (D. C., Mass.), 5 Am. B. R. 214, but declined to decide the point. He says there, however, that "it is strongly implied that the referee has some jurisdiction to issue injunctions to any party not an officer of the United States or of a State, unless the injunction stays the proceedings of the court." This opinion is approved in *re Berkowitz* (D. C., Pa.), 16 Am. B. R. 251, 255, 143 Fed. 598.

Under this general order, it seems, that a petition to stay pending suits should be filed in the bankruptcy court. *Continental Nat. Bank v. Katz* (Super. Ct., Ill.), 1 Am. B. R. 19.

If, by consent of the parties in a case, the referee acquires jurisdiction to hear a motion for injunction, he may hear it, and advise the judge of his decision by filing it with the clerk of the court. But only the judge can issue the order. In *re Siebert* (D. C., N. J.), 13 Am. B. R. 348, 133 Fed. 781.

When power of referee to grant injunction immaterial.—Where the District Court upon its own motion broadens and issues anew an injunction restraining the prosecution of a suit in the State court, it is immaterial whether the referee had power to order a stay in the first instance. *In re Brown & Company* (C. C. A., 8th Cir.), 28 Am. B. R. 336.

Compensation of referee.—Where a contested application for a discharge is refused as authorized by General Order 12, the court since the amendment to § 72 is without power to allow special compensation to the referee for his services in the matter. *In re Wilcox* (D. C., Mich.), 19 Am. B. R. 241, 156 Fed. 685. Where a case is referred to a referee to ascertain and report the facts upon an application for discharge, the referee is not entitled to any other compensation than that prescribed by the act itself. *In re Troth* (D. C., Ohio), 4 Am. B. R. 780, 104 Fed. 291. A referee is not entitled to special compensation for services on the reference of a petition to vacate an order of adjudication where the reference was made to him as "referee in bankruptcy." *Matter of Langford, Felts & Myers* (D. C., Cal.), 35 Am. B. R. 519, 225 Fed. 311.

Other cases citing this order.—*In re Huddleston* (Ref., Ala.), 1 Am. B. R. 572; *In re Parker* (Ref., Kan.), 1 Am. B. R. 615; *In re Logan* (D. C., Ky.), 4 Am. B. R. 525, 102 Fed. 876; *In re McGill* (C. C. A., 6th Cir.), 5 Am. B. R. 155, 160, 106 Fed. 57; *In re Lesser Bros.* (C. C. A., 2d Cir.), 5 Am. B. R. 320; *Mueller v. Nugent*, 7 Am. B. R. 224, 232, 184 U. S. 1, 46 L. Ed. 405; *In re Gutman & Wenk* (D. C., N. Y.), 8 Am. B. R. 252, 255, 114 Fed. 1009; *Metcalf v. Barker*, 9 Am. B. R. 36, 46, 187 U. S. 165; *In re Rochford* (C. C. A., 8th Cir.), 10 Am. B. R. 608, 611, 124 Fed. 182; *Kentucky Nat. Bank of Louisville v. Carley* (C. C. A., 3d Cir.), 12 Am. B. R. 119, 127 Fed. 686; *Moulton v. Coburn* (C. S. A., 1st Cir.), 12 Am. B. R. 533, 131 Fed. 201, affg. 11 Am. B. R. 212; *In re Romine* (D. C., W. Va.), 14 Am. B. R. 785, 138 Fed. 837; *Matter of Matthews Consolidated Slate Co.* (Ref. Mass.), 15 Am. B. R. 779; *Matter of Adler* (C. C. A., 2d Cir.), 16 Am. B. R. 414, 144 Fed. 659; *In re Knopf* (D. C., S. Car.), 16 Am. B. R. 432, 439, 144 Fed. 245; *Matter of Sonnabend* (Ref., Mass.), 18 Am. B. R. 117; *Matter of Cohn* (Ref., Cal.), 18 Am. B. R. 786, 792; *Matter of Back Bay Automobile Co.* (D. C., Mass.), 19 Am. B. R. 33, 36, 158 Fed. 679; *Knapp v. Spencer Co. v. Drew* (C. C. A., 8th Cir.), 20 Am. B. R. 355, 160 Fed. 413; *Matter of Berkowitz* (D. C., N. J.), 22 Am. B. R. 227, 173 Fed. 1013; *Norton v. Bielby* (N. Y., Oneida County Court), 33 Am. B. R. 295, 86 Misc. 644; *Matter of Komar* (D. C., N. Y.), 37 Am. B. R. 683, 234 Fed. 378.

XIII. APPOINTMENT AND REMOVAL OF TRUSTEE.

The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only.

[As a rule of bankruptcy, this general order is new; but the former bankruptcy law itself contained similar provisions as to the approval of the choice of a trustee (Act of 1867, § 13, R. S., § 5034). Under that act a trustee could be removed not only by order of the court, but in some cases by a vote of the creditors with the approval of the court (Act of 1867, § 18, R. S., § 5039).]

Cross-references: To the law: As to appointment of trustees, §§ 2(17), 44, 45, 56; As to removal of trustees, § 46.

To the General Orders: XIV, XV, XVI, XVII, XXV.

To the Official Forms: Nos. 22, 23, 24, 27, 52, 53, 54, 55.

To the Supplementary Forms: No. 160.

Meaning and application of order.—This provision means that a supervisory power is vested in the court to meet contingencies which could not be definitely provided for in the act, and which must appeal to the good judgment and conscience of the court, and whereby the court would be armed with the power to prevent the selection of a person, who, in its judgment, and notwithstanding the expressed desire of the majority in number and amount of the creditors, or even of all the creditors, would not be a proper selection, and whose appointment might result in a defeat of the proper, just and equitable administration of the bankrupt law in that particular case. But the emergency should not be a trivial one; it should be one of grave character and due weight, and unless such an emergency appears, it is the duty of the referee to approve the selection, always subject, of course to a review of such action by the district judge. *In re Henschel* (Ref., N. Y.), 6 Am. B. R. 25.

The approval by the referee and district judge of the appointment of a trustee by the creditors is a matter of discretion, depending upon the circumstances of each case. The choice of the creditors should not be overruled by the referee or district judge except for substantial reasons, and the confirmation of such appointment should not be disturbed by the Circuit Court of Appeals unless an abuse of discretion appears. *Matter of Merrit Construction Co.* (C. C. A., 2d Cir.), 33 B. R. 616, 219 Fed. 555; *Wilson v. Continental Building & Loan Assoc.* (C. C. A., 9th Cir.), 37 Am. B. R. 444, 232 Fed. 824.

"This general order confers no power on a referee to announce that he will not appoint the trustee already appointed by the creditors. It does authorize him to disapprove such

appointment by order, and should this be done at the time the appointment is made by the creditors it is probable that the creditors may proceed at once to appoint some other person . . . ; but should they do this the matter should be reported to the judge, who may remove the trustee appointed by the creditors, and order another appointment by the creditors. In no event can the referee ignore the appointment made by the creditors, and proceed summarily to appoint the trustee without holding another election." In *re Hare* (D. C., N. Y.), 9 Am. B. R. 520, 119 Fed. 246.

Approval or disapproval of elections.—It is evident that the Supreme Court intended by this order to establish a rule concerning the approval or disapproval of elections by creditors similar to that which existed under the act of 1867. The decisions under the present law on this point show that such has been the understanding of our Federal courts. In *re Eastlack* (D. C., N. J.), 16 Am. B. R. 529, 145 Fed. 68.

Whenever a referee disapproves of a choice of trustee made by creditors, it is a good rule to permit them another opportunity to make a selection of one who is free from any "entangling alliances" that might interfere with the proper discharge of the duties devolving upon him. In *re Van De Mark* (D. C., N. Y.), 23 Am. B. R. 760, 175 Fed. 287.

The following cases establish the rule that the election of a trustee by the creditors is not to be disapproved, unless there is good reason for believing that the election has been directed, managed, or controlled by the bankrupt, or his attorney, or by some influence opposed to the creditor's interest. In *Falter v. Reinhard* (D. C., Ohio), 4 Am. B. R. 782, 104 Fed. 292, the votes of certain creditors were challenged on the ground that the letters of attorney to the person representing them had been procured through the influence and efforts of the bankrupts for the purpose of controlling the election of the trustee. After hearing the evidence in the matter, the referee sustained the challenge. The opinion in that case shows that a plan for the election of the bankrupts' candidate was conceived and carried out in the bankrupts' place of business, and that the bankrupts themselves had, by preparing the proofs of claims for creditors without expense to them, and by the solicitation of creditors at their place of business to give their proxies to one of the bankrupts' clerks, attempted to direct and control the proceedings looking to the election of a trustee. The referee disapproved this action, and, on petition for review, the court affirmed the order of the referee. This decision was affirmed by the circuit court of appeals. In *re McGill* (C. C. A., 6th Cir.), 5 Am. B. R. 155, 106 Fed. 57.

Where the person appointed trustee of a bankrupt estate receives his appointment, in part, at least, as a result of the active efforts in the solicitation and voting of claims by a creditor which is his corporate employer and in which he is a stockholder; and such creditor holds security for a part of its debt and is charged with having received preferences, such person's appointment will be disapproved. *Matter of Anson Mercantile Co.* (D. C., Tex.), 25 Am. B. R. 429, 185 Fed. 993.

In the case of *In re Rekersdres* (D. C., N. Y.), 5 Am. B. R. 811, 108 Fed. 206, an attorney representing the bankrupt and her regularly appointed attorney, who also held letters of attorney from three creditors, nominated a certain person for the trusteeship of the bankrupt. Objection being made in behalf of another creditor to the nomination, the referee sustained the objection, because the business association of the proposed trustee with the regularly appointed attorney of the bankrupt raised a presumption that the person nominated for trustee was nominated in fact by the bankrupt or her attorney, and was therefore not a suitable person to act in the interest of creditors. The district court approved the referee's action.

Bankrupt had an estate of only \$3,500, to be divided, after paying expenses among creditors having claims aggregating \$9,000, over \$7,000 of which claims were said to be owing to near relatives of the bankrupt or members of the family. One of the bankrupt's attorneys presented the claims of and had powers of attorney from about 80 per cent. of these claimants at the first meeting of creditors, thus controlling the appointment of the trustee and he insisted, over the objection of the other creditors, upon the selection of an attorney as trustee, who had an office in the building occupied by the bankrupt's attorneys. It was held that under this general order the appointment of a trustee by the majority of the creditors being subject to the approval or disapproval of the referee, the referee was justified in disapproving, as contrary to public policy, a selection which would allow the bankrupt and his relatives to administer the estate. In *re Sitting* (D. C., N. Y.), 25 Am. B. R. 682, 182 Fed. 917.

In the case of *In re Henschel* (Ref., N. Y.), 6 Am. B. R. 25, upon the election of a trustee, it was objected that the attorney by whose vote the trustees were elected held proxies obtained from creditors who were acting in combination with the bankrupt, and that the trustee was in fact the choice of the bankrupt and had announced in advance that if elected he would not prosecute certain actions which some of the creditors thought should be prosecuted. On a trial of the merits of the objection, the attorney refused to answer certain relevant questions, and this fact, together with the fact that a large number of the claims represented by the attorney were proven, and that the letters of attorney to him were executed before adjudication in bankruptcy, led to the disapproval of the election of the trustee.

In the case *In re Dayville Woolen Co.* (D. C., Conn.), 8 Am. B. R. 85, 114 Fed. 674, the attorney of certain creditors was asked whether any of the claims intended to be voted by him had been assigned to any person or corporation in the interest of the bankrupt. He refused to answer the question. Notwithstanding this refusal, and the fact that he had acted as counsel for the bankrupt during the proceedings in insolvency, the referee permitted him to vote and

approved the election. On these facts the court set aside the order of approval made by the referee.

In the case of *In re Blue Ridge Packing Co.* (D. C., Pa.), 11 Am. B. R. 36, 125 Fed. 620, there were objections that the trustee elected by the creditors had previously advised the assignment for the benefit of creditors under the State law, which was the act of bankruptcy complained of, he being also the assignee, and that he was intimately associated with the attorney of certain stockholders of the bankrupt corporation who claimed also to be creditors. But the court held that these mere facts did not make the election an improper one, but called only for a close scrutiny of it. In passing on the point, the court said:

"It is to be remembered in all such cases that the choice of a trustee is lodged by the law with the creditors constituting a majority in number and amount, and that their selection is not to be interfered with, unless it clearly imperils the fair and efficient administration of the estate."

In the case of *In re Machin* (D. C., Pa.), 11 Am. B. R. 409, 128 Fed. 316, it was held that votes of creditors for a trustee could not be rejected, on the mere ground that the candidate voted for had formerly been the attorney of the bankrupts.

In the case of *In re Gordon Supply & Manufacturing Co.* (D. C., Pa.), 12 Am. B. R. 94, 129 Fed. 622, the trustee elected was only a stockholder in the bankrupt corporation, but had been associated closely as attorney and legal adviser with those who had theretofore been in control of the corporation. Inasmuch as their management appeared not only to be the subject of criticism, but might call for action on the part of the trustee to hold them personally responsible, it was held that the election could not be approved.

In the case of *In re Cooper* (D. C. Pa.,) 14 Am. B. R. 320, 135 Fed. 196, it was held that the attorney who had been employed by the bankrupt to file his petition and whose obligation as attorney ceased at that point, and who had received no fee therefor, was not disqualified from voting on claims afterward received from creditors without his own solicitation or the procurement of the bankrupt.

Review by district judge.—An order of a referee approving the creditors' appointment of a trustee is subject to review by the district judge. In *re Hanson* (D. C., Minn.), 19 Am. B. R. 235, 156 Fed. 717. The proper way to take a review of the proceedings in the election of a trustee is by a petition for review of the order of the referee approving the appointment of the trustee by the creditors. *Matter of Arti-Stain Company* (D. C., Mass.), 32 Am. B. R. 643, 216 Fed. 942.

Other cases citing this order.—In *re McGill* (C. C. A., 6th Cir.), 5 Am. B. R. 155, 106 Fed. 57; *Matter of Cohen* (D. C., Mass.), 11 Am. B. R. 439, 442, 131 Fed. 391; In *re Kenny & Co.* (D. C., Ind.), 14 Am. B. R. 611, 617, 136 Fed. 451; In *re Allert* (D. C., N. Y.), 23 Am. B. R. 101, 105, 173 Fed. 691; *Vulcan Metal Co. v. North Platte Valley Irrigation Co.* (C. C. A., 8th Cir.), 33 Am. B. R. 686, 220 Fed. 106.

XIV. NO OFFICIAL OR GENERAL TRUSTEE.

No official trustee shall be appointed by the court, nor any general trustee act in classes of cases.

[Part of General Order IX, as amended in 1874, without substantial change.]

XV. TRUSTEE NOT APPOINTED IN CERTAIN CASES.

If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called.

[This general order is new. Its validity has been doubted. See cross-references below.]

Cross-references: To the law: §§ 2(17), 44, 45, 56. See also §§ 6 and 47-a(11), and read § 2 (11).

To the General Orders: XIII, XIV

To the Official Forms: No 27

To the Supplementary Forms: No 77

After the lapse of one year.—The court may appoint a trustee under this order, upon the petition of the assignee of a creditor alleging that the bankrupt died leaving property which he had fraudulently disposed of to defraud creditors. *Clark v. Pidcock* (C. C. A., 3d Cir.), 12 Am. B. R. 309, 129 Fed. 745.

Exemptions may be set apart by the court where no trustee has been appointed, as provided in this order. *Smalley v. Langenour*, 196 U. S. 93, 13 Am. B. R. 692, 695.

Other cases citing this order.—In *re Soper and Slada* (Ref., N. Y.), 1 Am. B. R. 193; In *re Rung Bros.* (Ref., N. Y.), 2 Am. B. R. 620, 622.

XVI. NOTICE TO TRUSTEE OF HIS APPOINTMENT.

It shall be the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond.

[General Order IX, 1867, with some slight additions as to the contents of the notice and with other minor changes.]

Cross-references: To the law: §§ 44, 50-a-j-k.

To the General Orders: XIII

To the Official Forms: Nos. 24, 25, 26.

To the Supplementary Forms: Nos. 167, 168.

XVII. DUTIES OF TRUSTEE.

The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession. The trustee shall make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the act, or by any general order in bankruptcy, within five days after the same shall be due, it shall be the duty of the referee to make an order requiring the trustee to show cause before the judge, at a time specified in the order, why he should not be removed from office. The referee shall cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk. All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court.

[General Order XIX, 1867, with several slight changes.]

Cross-references: To the law: Duty of trustees, in general, §§ 47, 49; As to filing bonds, § 50; As to exemptions, §§ 6, 7 (8), 47-a (11), as perhaps limited by § 2 (11); As to appraisals and sales, § 70-b.

To the General Orders: XXIII, XXI(6), XXV, XXVIII, XXIX, XXXIII, XXXV.

To the Official Forms: Nos. 40, 41, 47, 48, 49, 50, 51, and generally to the forms for sales, Nos. 42 to 46, inclusive.

To the Supplementary Forms: Nos. 77, 78, 79, 80 on exemptions, and Nos. 161, 162, 163, 164, 165 as to reports and distribution; also generally.

Meaning of order.—Remington, referee, in *Re Ellis* (Ref., Ohio), 10 Am. B. R. 754, 756, distinguishing *In re White* (D. C., Vt.), 4 Am. B. R. 613, 103 Fed. 774, says: "What the supreme court's General Order really means is, as it seems to me, simply this: the trustee must, within twenty days after his appointment, set apart the exemptions claimed by the bankrupt, provided and so far as they are correct; the bankrupt may except as of course to his determination; and the creditors shall not be bound in this particular by their trustee's acts, although they usually are bound by their trustee's acts, but may themselves also take exceptions. . . . Were it not for the rule creditors would perhaps have no right to object at all, except for fraud or collusion; but, that they did have the right, would have an indefinite time within which to except to the trustee's report, and thus tie up the question of exception indefinitely. By this rule the trustee is free from all exceptions on the part of any fault-finding creditors after twenty days. Of course there is no need of any such limitation in regard to the bankrupt's filing exceptions, for he is right on the spot when the exemptions are thus set off and will act without delay anyway if he wants to get more; and his delay, for that matter, would tie up nobody. . . . Simply because the supreme court's General Order says

that creditors have twenty days' time within which they may file exceptions, does not mean that only creditors may file exceptions, but means simply what it says, namely that when creditors wish to file exceptions to the trustee's report they must file them within twenty days."

Exemptions; setting apart.—It is provided by this order that the trustees shall set apart the exemptions and make report of his action, and that thereafter the creditor's will file exceptions, if they wish, to such report. In re Allen & Co. (D. C., Va.), 13 Am. B. R. 518; 521, 134 Fed. 620. The language of this order "and Form 47, as to the trustee's report of exempted property, indicates quite clearly that, without reference to any prior allowance of exemption by State officials, it is the duty of the trustee to set apart the bankrupt's exemption." In re Camp (D. C., Ga.), 1 Am. B. R. 165, 91 Fed. 745. See also In re Rung Bros. (Ref., N. Y.), 2 Am. B. R. 620.

The trustee is to set apart bankrupt's exemptions and report the items and estimated value thereof, to the court as soon as practicable after his appointment. Sec. 47-a, cl. 11. And General Order XVII requires such report to be made within twenty days after receiving the notice of his appointment. In re Wishniefsky (D. C., N. J.), 24 Am. B. R. 798, 181 Fed. 896.

It is the duty of the trustee under this order within twenty days after his appointment to set off to the bankrupt the property selected or such part of it as in his judgment the bankrupt is entitled to, and file an itemized report thereof with the referee. For the purpose of determining the correct amount of such exemptions and setting them apart the trustee is entitled to the possession of the property although he does not take title thereto. Matter of McClintock (Ref., Ohio), 13 Am. B. R. 606.

In order that the trustee may be able to report the article set off to the bankrupt by him, the bankrupt must comply with § 7, clause 8, of the bankruptcy act, requiring him to file a claim for his exemption within ten days. In re Wunder (D. C., Pa.), 13 Am. B. R. 701, 133 Fed. 821.

The duties of a trustee to set apart the bankrupt's exemptions and report the items and value thereof to the court may not be neglected, or their discharge postponed, until an issue of fraud in regard to the disposition of property is tried. Matter of Harrell (D. C., N. Car.), 34 Am. B. R. 809, 222 Fed. 160.

Selection of exemptions by bankrupt's assignee.—Section 2(11) of the bankruptcy act which authorizes courts of bankruptcy to "determine all claims of bankrupts to their exemptions" and this general order, which requires a trustee to report to the court "the articles set off to the bankrupt by him," cannot be construed as denying the power of the court to recognize the right of a party other than the bankrupt, hold under a valid and effective assignment, conferring in express terms authority to make the selection in the name of the assignor. In re Hastings (C. C. A., 6th Cir.), 24 Am. B. R. 360, 181 Fed. 33.

Valuation of property.—This order requires that each article shall have an estimated value placed upon it, and thus requires a specification of items and a separate appraisal. This explicit direction cannot be neglected. In re Manning (D. C., Pa.), 7 Am. B. R. 571, 112 Fed. 948.

Filing exceptions.—When the trustee has made his report to the referee the dissatisfied party may except thereto in the manner prescribed by this order, and at the request of either party it is made the duty of the referee to certify the exceptions for the final determination of the judge. But if no trustee has been appointed the record and findings certified by the referee will be returned with instructions to take the proper steps to secure the appointment of a trustee. In re Smith (D. C., Tex.), 2 Am. B. R. 190, 93 Fed. 791.

General Order XVII clearly allows any creditor to make objections by filing exceptions to the trustee's report. Considering the source of the general orders, the familiarity of the Supreme Court with the practice as to taking exceptions to reports of master in chancery, it seems very probable that the intent was that exceptions to a trustee's report should be in the familiar form of exceptions to the master's report. In re Campbell (D. C., Va.), 10 Am. B. R. 723, 124 Fed. 417.

A creditor, desiring to object to the trustee's report setting apart the bankrupt's exemptions, should file all of his objections within twenty days after the filing of said report as prescribed by this general order, and cannot come in after the expiration of that time and file objections or add new and additional grounds to his objections already on file. In re Cotton & Preston (D. C., Ga.), 25 Am. B. R. 532, 183 Fed. 190.

A fraudulent concealment of property is not a sufficient ground of exception, under this order, to deprive a bankrupt of his right to exemptions guaranteed by the law of his domicile. In re Rothschild (Ref., Ga.), 6 Am. B. R. 43.

A trustee is a "creditor" within the meaning of the provisions of General Order No. 17, that "any creditor may except to the determination of the trustee," etc., in allowing a claim of exemption, on the ground of the bankrupt's fraud. In re Rice (D. C., Pa.), 21 Am. B. R. 202, 164 Fed. 589.

Time for filing exceptions.—The provision in this order allowing twenty days for filing exceptions to the trustee's report, applies only to creditors, and not to the bankrupt. In re White (D. C., Vt.), 4 Am. B. R. 613; In re Turnbull (Ref., Mass.), 5 Am. B. R. 231. Exceptions filed more than twenty days after the filing of the report must be dismissed. Matter of Amos (Ref., Ga.), 19 Am. B. R. 804; Matter of Cotton & Preston (D. C., Ga.),

23 Am. B. R. 586, 588. The provision that any creditor may take exceptions to the determination of the trustee as to articles set off to the bankrupt as exempt within twenty days after the filing of the report is mandatory and the District Court has no discretion to extend the time for presenting such exemptions. *Matter of Krecun* (C. C. A., 7th Cir.), 36 Am. B. R. 172, 229 Fed. 711.

Allowance for auditing trustee's account.—It being the duty of the referee under this order to audit all of the accounts of the trustees, he should not be allowed extra compensation therefor. *Matter of McCubbin Co.* (Sup. Ct., D. C.), 33 Am. B. R. 277; *Matter of Lacey & Company* (Sup. Ct., D. C.), 35 Am. B. R. 231.

Other cases citing this order.—*In re White* (D. C., Mo.), 6 Am. B. R. 451, 454, 109 Fed. 635; *McGahan v. Anderson* (C. C. A., 4th Cir.), 7 Am. B. R. 641, 643, 113 Fed. 115; *Matter of Ingalls Bros.* (C. C. A., 2d Cir.), 13 Am. B. R. 512, 137 Fed. 517; *In re Soper* (D. C., Neb.), 22 Am. B. R. 868, 173 Fed. 116; *In re Gerber* (C. C. A., 9th Cir.), 26 Am. B. R. 608, 617; *Gregory Co. v. Bristol* (C. C. A., 8th Cir.), 26 Am. B. R. 938, 191 Fed. 31; *Sheridan State Bank v. Rowell* (D. C., Ore.), 32 Am. B. R. 747, 212 Fed. 529; *United States v. Sondheim* (D. C., Mass.), 33 Am. B. R. 217, 188 Fed. 378; *Matter of Dean* (D. C., Cal., Ref.), 34 Am. B. R. 156; *Matter of Humphreys* (D. C., N. Car.), 34 Am. B. R. 655, 221 Fed. 997; *Matter of Coles* (D. C., Iowa), 35 Am. B. R. 339, 224 Fed. 170; *Matter of Shriner* (D. C., N. Car.), 35 Am. B. R. 404, 228 Fed. 794; *Matter of French* (D. C., N. Y.), 37 Am. B. R. 289, 231 Fed. 255; *Wilson v. Continental Building & Loan Assoc.* (C. C. A., 9th Cir.), 37 Am. B. R. 444, 232 Fed. 824.

XVIII. SALE OF PROPERTY.

1. All sales shall be by public auction unless otherwise ordered by the court.

2. Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold; which account he shall file at once with the referee.

3. Upon petition by a bankrupt, creditor, receiver, or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court.

[Paragraph 1 is new; paragraph 2 is part of General Order XXI, 1867, without change; paragraph 3 is General Order XXII, 1867, with various changes.]

Cross-references: To the law: § 70-b, and as to notices, § 58-a(4).

To the General Orders: None.

To the Official Forms: Nos. 42, 43, 44, 45, 46.

To the Supplementary Forms: Nos. 182, 183, 184, 190, 191, 192.

Petition for sale.—A sale should not be directed under this order upon a petition which simply alleges that the cost and expenses of keeping the property will be accumulative if a sale is not ordered. *In re Harris* (D. C., Ala.), 19 Am. B. R. 635, 155 Fed. 216.

Appointment of appraisers.—A referee has generally authority to order a sale of the bankrupt's property and to appoint appraisers, but, when the property is in the hands of a receiver before adjudication, the district court is the only tribunal that can appoint appraisers or order a sale. *In re Styer* (D. C., Pa.), 3 Am. B. R. 424, 98 Fed. 290.

Private sale.—"The discretionary power of the referee directing a private sale of a bankrupt estate ought not to be disturbed, unless it clearly appears to have been improvidently exercised." *In re Hawkins* (D. C., N. Y.), 11 Am. B. R. 49, 125 Fed. 633. But a sale of bankrupt's property at private sale, by a trustee without its appraisal and without the order of the court and which has not been approved by the court, vests no title in the buyer. *Matter of Monsarrat* (D. C., Hawaii), 25 Am. B. R. 815, 819.

While the want of an appraisal does not necessarily invalidate a sale by a trustee of property of a bankrupt's estate, and a sale for a reasonable price, without appraisal, may be confirmed, a private sale without appraisal for one hundred dollars, though ordered by the referee, of property which was worth five hundred dollars and which would probably have brought that sum at public auction, not allowed to stand unless the purchaser pays to the trustee the difference in value, with interest. As the alternative, the purchaser may return the property and have back the purchase price with interest, the property to be sold by the trustee at public auction after due advertisement; provided, that if the funds of the estate shall be sufficient to pay the claims allowed and proper costs and expenses of

administration, the property to be returned to the bankrupt. *Matter of Monsarrat* (D. C., Hawaii), 25 Am. B. R. 820.

The words of this order, authorizing a private sale of "any specified portion of the bankrupt's estate," have been taken to mean such portion thereof as is specified in the petition and order for sale, and do not prohibit an order authorizing the sale of the entire estate at private sale. *Matter of Knox Automobile Co.* (D. C., Mass.), 32 Am. B. R. 67, 210 Fed. 569.

Perishable property may be sold under this order, even without notice to the creditors, and the courts have been very liberal in their construction of what is "perishable." This order cannot be held to be in derogation of the statute. *In re Edes* (D. C., Me.), 14 Am. B. R. 382, 384, 135 Fed. 595.

Perishability within the meaning of the term in bankruptcy involves physical deterioration of the property itself. Mere depreciation in value is not enough. A stock of hardware cannot be sold without notice to creditors as "perishable property," although by delay it is becoming unseasonable. *Matter of Beutel's Sons* (Ref., Ohio), 7 Am. B. R. 768.

Sales by receivers in bankruptcy are justified only when property is perishable or is rapidly depreciating in value on a falling market or for other reasons. *In re Desbrochers* (D. C., N. Y.), 25 Am. B. R. 703, 183 Fed. 991.

Real estate may be considered perishable within the meaning and intent of this order, when it consists of buildings, rapidly deteriorating and in a dilapidating condition and requiring immediate expenditure of a large sum of money by the trustee to prevent absolute loss. *In re Milne Mfg. Co.* (D. C., N. Y.), 21 Am. B. R. 468.

Sale of property discharged of liens.—Assuming that a court has power to sell a bankrupt's real property discharged of liens, the court will not order such a sale unless it is satisfied that the interests of the general creditors would thus be advanced and the interests of the lien creditors not injuriously affected. *In re Styer* (D. C., Pa.), 3 Am. B. R. 424, 98 Fed. 290.

XIX. ACCOUNTS OF MARSHAL.

The marshal shall make return, under oath, of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of property, and other services, and other actual and necessary expenses paid by him, with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.

[Latter part of General Order XII, 1867, without any substantial change.]

Cross-references: To the law: §§ 2(3) (5), 3-e, 52, 69.

To the General Orders: X.

To the Official Forms: Nos. 8, 9, 10.

XX. PAPERS FILED AFTER REFERENCE.

Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk.

[This general order is new.]

Cross-references: To the law: As to the duty of referees concerning papers filed with them, § 39-a; As to clerk's duties concerning same, § 51(3). See also § 42-b.

To the General Orders: XXIV.

XXI. PROOF OF DEBTS.

1. Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received

for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.

2. Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the post-office box or street number, as he may appoint; and thereafter, and until some other designation shall be made by such creditor, all notices shall be so addressed; and in other cases notices shall be addressed as specified in the proof of debt.

3. Claims, which have been assigned before proof shall be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt, and that it is entirely unsecured, or if secured, the security as is required in proving secured claims. Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter.

4. The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish *pro tanto* the original debt.

5. The execution of any letter of attorney to represent a creditor, or of an assignment of claim after proof, may be proved or acknowledged before a referee, or a United States commissioner, or a notary public. When executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof.

6. When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witness that may be called by either party and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly.

[General Order XXXIV, 1874, with slight changes.]

Cross-references: To the law: As to proof of debts, generally, §§ 2(2), 57; As to provable debts, § 63; As to set-off of debts, §§ 60-c, 68.

To the General Orders: XXIV, XXVIII, XXXIII.

To the Official Forms: Nos. 20, 21, 31, 32, 33, 34, 35, 36, 37, 38, 39.

To the Supplementary Forms: Nos. 170, 171, 172, 173, 174, 175.

Title of court, necessity for.—A proof of claim otherwise good is not vitiated because the title of the court is not given in accordance with this general order and Form 31. In re Blue Ridge Packing Co. (D. C., Pa.), 11 Am. B. R. 36, 125 Fed. 619.

Acknowledgments by justices of peace.—In States where justices of the peace are expressly authorized to take oaths the Supreme Court did not intend by subdivision 5 of this general order to exclude such officials from taking acknowledgments. In re Roy (D. C., N. Y.), 26 Am. B. R. 4.

A function of the oath required upon proof of a debt due to a partnership is to guard against

mistake or fraud in the proof of the claim itself and does not refer to the question of the letter of the attorney. In *re Finlay* (Ref., N. Y.), 3 Am. B. R. 738. The very fact that in subdivision 5 an oath is required in the case of a letter of attorney is evidence that it was the intention that the oath required by subdivision 1 should not be taken in place of the oath required by subdivision 5.

Proof of claim by agent; sufficient reason.—It seems that a corporation may make proof in its claim by agent or attorney in fact when there is sufficient reason why it should not be made by the officer designated. In the case of a French corporation the mere fact that the treasurer or proper officer was in France is not a sufficient reason why he should not have verified the proof of claim. *Matter of Reboulin Fils & Co.* (Ref., N. J.), 19 Am. B. R. 215.

This order provides that a proof of claim made by an agent should state the reason the deposition was not made by the claimants in person; it would seem as if the provision was for some purpose and that the reason must be a good and valid and sufficient reason. *Matter of Reboulin Fils & Co.* (Ref., N. J.), 19 Am. B. R. 215.

The verification by an attorney which fails to assign a reason why the claimants have not personally made it, although defective, may be amended. In *re Medina Quarry Co.* (D. C., N. Y.), 24 Am. B. R. 769, 179 Fed. 929.

Itemizing accounts.—While Order XXI does not directly provide that accounts made up of items shall be itemized, and would seem to relate to the fixing of an average due date where items fall due at different dates, and provides a penalty for failure to fix the average due date by the forfeiture of interest on said account, yet the order is predicated on the theory that accounts consisting of items will be itemized. It is conforming to the simplest business method to set forth the items which make up the account which is to be presented to the debtor. It is very necessary that this should be done when the debtor's property has become a common fund for application ratably in the payment of his debts, for then all creditors have an interest in each account presented, and they can know nothing of the nature of the account except through the disclosures of the proof of debt. The statement of consideration should be sufficiently specific and full to enable creditors to pursue proper and legitimate inquiry as to the fairness and legality of the claim, and, if it is so meager and general in character as not to do this, it must be held insufficient. In *re Scott* (D. C., Tex.), 1 Am. B. R. 553, 93 Fed. 418.

Filing claims.—Where proofs of a claim have been received by the trustee within a year, as provided in the last sentence of this subdivision, it has been held that the claim was sufficiently filed. *Orcutt Co. v. Green*, 17 Am. B. R. 72, 204 U. S. 96, revg. 13 Am. B. R. 512.

The provision that "proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred," does not confer jurisdiction to file a claim *nunc pro tunc* after the expiration of a year. *Matter of Ingalls Bros.* (C. C. A., 2d Cir.), 13 Am. B. R. 512, 137 Fed. 517.

It seems that a trustee cannot file with himself his proof of his own claim against the estate of the bankrupt. *Orcutt Co. v. Green*, 17 Am. B. R. 72, 204 U. S. 96, revg. 13 Am. B. R. 512.

Assigned claims.—Subd. 3, relating to the proof of assigned claims, applies to assignees of proven claims. *Matter of Breakwater Co.* (D. C., Pa.), 36 Am. B. R. 752. A proof of claim by a surety which is in the form of a petition for the establishment of its subrogated rights, and which very elaborately sets forth a history of the entire transaction, substantially complies with subd. 3 of this general order. *Kilpatrick v. U. S. Fidelity & Guaranty Co.* (C. C. A., 5th Cir.), 37 Am. B. R. 36, 228 Fed. 587.

As to what constitutes an assigned claim, see In *re Finlay* (Ref., N. Y.), 3 Am. B. R. 738.

Claims of sureties.—Subdivision 4 is limited to persons who may be contingently liable for some debt or default of the bankrupt. *Phenix Nat. Bank v. Waterbury* (App. Div., N. Y.), 20 Am. B. R. 140, 145, affd. 23 Am. B. R. 250, 197 N. Y. 161. That is, it deals only with the claims of sureties. In *re Ells* (D. C., Mass.), 3 Am. B. R. 564, 568, 98 Fed. 967.

The liability of the guarantor of the payment of rent under a lease to a partnership for the balance of the term at the date of the bankruptcy of the lessee, the lessors having taken no proceedings, is contingent, but the claim may, under this general order, subd. 4, be proven in the name of the lessors, for the amount for which the guarantor is contingently liable. *Matter of Baker & Edwards* (D. C., N. Car.), 35 Am. B. R. 469, 224 Fed. 611.

Power of attorney for individual or corporation; distinction.—A very clear distinction is made between a letter of an attorney executed on behalf of an individual and one executed on behalf of a partnership or of a corporation. The former may be *proved* or *acknowledged*. But in the case of the latter two cases the person executing the instrument shall make *oath*. In *re Finlay* (Ref., N. Y.), 3 Am. B. R. 738.

Oath contained in proof of debt.—The requirement of this order that the person executing a partnership letter of an attorney must make oath that he is a member of the firm, is sufficiently complied with where the oath is contained in the proof of debt which accompanied and was executed the same day as the letter, and the attorney is entitled to represent the creditor at the election of a trustee. In *re Blue Ridge Packing Co.* (D. C., Pa.), 11 Am. B. R. 36, 125 Fed. 619.

Proof of claims of foreign creditors.—The language of this subdivision is not exclusive and the different clauses taken together seem to indicate that the proof of claims of foreign creditors was not within the contemplation of the court in affirming the order; thus a power of the attorney acknowledged before a foreign counsel is sufficient to authorize proof of the claim of a foreign creditor. In *re Sugenheimer* (D. C., N. Y.), 1 Am. B. R. 425, 91 Fed. 744.

Notice to creditors of proposed sale.—Under the law requiring that notices to creditors “shall be addressed as specified in the proof of debt,” notice sent to a creditor whose name and address appear in the bankrupt’s schedules of liabilities, is not notice to an assignee of the creditor, whose proof of claim, containing his address, was duly filed with the referee; unless the notice sent to the assignor reaches the assignee. *Matter of Monsarrat* (D. C., Hawaii), 25 Am. B. R. 820.

Re-examination; who may procure.—The use of the word “creditor” in subd. 6 of this order, as one who has the right to take a review, should be confined to a review or appeal in case a creditor’s individual claim is decided adversely; where the body of creditors is affected, the review must be taken by the trustee solely as their representative. *Matter of Arti-Stain Company* (D. C., Mass.), 32 Am. B. R. 640, *affd.* 32 Am. B. R. 643, 216 Fed. 942.

If any creditor or interested person desires a review he should request the trustee to take such action. In case of refusal by the trustee, the suitor’s remedy is by motion or petition filed with the court, asking that the trustee be ordered to take a review as to any questions of procedure or allowance. *Matter of Arti-Stain Company* (D. C., Mass.), 32 Am. B. R. 640, *affd.* 32 Am. B. R. 643, 216 Fed. 942.

It is not within the contemplation of this order to permit the trustee and creditors concurrently to pursue a re-examination of a claim, or to permit a creditor to do so when the trustee for sufficient reasons does not approve, or when in the interests of all it is desirable that the trustee should conduct the proceeding. *Matter of Lewensohn* (C. C. A., 2d Cir.), 9 Am. B. R. 368, 121 Fed. 1. This provision authorizes a petition by a creditor at the appropriate stage of the proceeding when it may be desirable for the creditor to intervene. The word “desire” is used in the sense of intend. *Matter of Lewensohn* (C. C. A., 2d Cir.), 9 Am. B. R. 368, 121 Fed. 1.

The right to apply by petition for a re-examination, under this order and section 57-k, seems to be limited to the trustee and to creditors who are dissatisfied with the amount allowed to some creditor of the bankrupt other than the petitioner. *In re Chambers, Calder & Co.* (Ref., R. I.), 6 Am. B. R. 707.

The language of this subdivision clearly excludes action on the part of any one but the trustee or a creditor. And the bankrupt has no right to compel action on the part of a trustee when that official or any of the creditors refuse to take such action after demand made. *Matter of Levy* (Ref., N. Y.), 7 Am. B. R. 56.

When there is a trustee in existence, proceedings for a re-examination of claims of creditors may be instituted only by him, and a creditor has no capacity to attack the claims of other creditors. *Matter of Lewensohn* (C. C. A., 2d Cir.), 9 Am. B. R. 368, 121 Fed. 1. The trustee in bankruptcy may institute a joint proceeding against several creditors. *Matter of Lyon* (Ref., N. Y.), 7 Am. B. R. 61.

If the trustee should, without sufficient reason, refuse to proceed, the court by its order may compel him to do so or remove him for disobedience. *Matter of Lewensohn* (C. C. A., 2d Cir.), 9 Am. B. R. 368, 121 Fed. 1.

Time of re-examination.—A claim may be re-examined prior to the qualification of the trustee, as delays frequently ensue in the election and qualification of this officer, and it might be that evidence would be lost in the meantime. *Matter of Lewensohn* (C. C. A., 2d Cir.), 9 Am. B. R. 368, 121 Fed. 1. A re-examination cannot be had after the estate has been closed. *Matter of Lewensohn* (C. C. A., 2d Cir.), 9 Am. B. R. 368, 121 Fed. 1.

Notice of hearing on petition for re-examination.—A trustee is not required to give notice of a re-examination to all the creditors. Notice to the claimant is sufficient. *In re Mammoth Pine Lumber Co.* (D. C., Ark.), 8 Am. B. R. 651, 661, 109 Fed. 308. Notice of a special meeting, called upon the petition of a creditor to have a re-examination of certain claims under this subdivision, should be sent out by the referee and not by the petitioner. *In re Stoever* (D. C., Pa.), 5 Am. B. R. 250, 105 Fed. 355.

In a proceeding to obtain a re-examination of a claim the referee shall give notice to the creditor whose claim is contested of a hearing on the petition for re-examination. At this hearing the referee shall take the examination of the creditor and of any witness that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished the referee may so order. The burden of proof is on the objecting party. *In re Doty* (Ref., N. Y.), 5 Am. B. R. 58.

Petition for re-examination.—Answers or exceptions to claims, filed by a trustee may be treated as a petition for the re-examination of the claims. It would be better practice, however, to follow the general order. *In re Mammoth Pine Lumber Co.* (D. C., Ark.), 8 Am. B. R. 651, 660, 109 Fed. 308.

What claims may be re-examined.—This subdivision prescribes the method by which the trustee or a creditor may invoke the re-examination of a claim filed, and is broad enough to include any and all claims—secured and unsecured. It is quite as important to the estate and other creditors that the right of a secured or priority creditor to vote upon the excess of his claim over his security or priority should be correctly determined and limited to the proper amount as that the amount of any other claim asserted should be ascertained. *Matter of Columbia Iron Works* (D. C., Mich.), 14 Am. B. R. 526, 535, 142 Fed. 234.

This paragraph refers to claims against the bankrupt that were in existence when the petition was filed, and not to claims against the estate for expenses of administration, such as a referee’s account. *In re Reliance, etc., Co.* (D. C., Pa.), 4 Am. B. R. 49, 100 Fed. 619.

Relief on re-examination.—This subdivision limits proceedings with reference to a reconsideration of claims to the mere matter of expunging or diminishing them. *Fitch v. Richard* (C. C. A., 1st Cir.), 16 Am. B. R. 835, 837, 147 Fed. 196. A claim which has been allowed may be reconsidered and rejected on the petition of a creditor. *Matter of Collins* (D. C., La.), 37 Am. B. R. 692, 235 Fed. 937.

There does not appear to be any authority for increasing the amount of a claim by a petition for re-examination. It would seem that the proper method for a creditor to pursue whose claim has been disallowed is for him promptly to file his petition for a review of the orders of the referee by the district court, or if through inadvertence the creditor has omitted to include in his proof of claim any items which are provable against the estate he should either file an amended proof of claim or a second proof of claim based upon such additional items. *In re Chambers, Calder & Co.* (Ref., R. I.), 6 Am. B. R. 707.

Where a trustee petitions for a re-examination of a creditor's claim, the referee has no power to do more than allow the petition, expunge or diminish the claim, or refuse to do either, and he cannot pass upon and decide controversies involving questions of fact regarding the title or other legal rights to property between the trustee and third parties, thus depriving the parties of trial by jury as secured by the Constitution. *In re Peacock* (D. C., N. Car.), 24 Am. B. R. 159, 178 Fed. 851.

A court of bankruptcy has jurisdiction by a summary proceeding to diminish or expunge an allowed claim unless the claimant pays to the trustee the value of the property of the bankrupt which he has taken and converted to his own use, without any prior claim to it, after the petition in bankruptcy was filed. *In re Paterson Co.* (C. C. A., 8th Cir.), 25 Am. B. R. 855, 186 Fed. 629.

Other cases citing this order.—*In re Soper and Slada* (Ref., N. Y.), 1 Am. B. R. 193, 196; *In re Pauly* (Ref., N. Y.), 2 Am. B. R. 333, 335; *In re Blankfein* (D. C., N. Y.), 3 Am. B. R. 165, 168, 97 Fed. 191; *In re Rider* (D. C., N. Y.), 3 Am. B. R. 192, 96 Fed. 811; *Hayer v. Comstock* (Sup. Ct., Iowa), 7 Am. B. R. 493; *In re Jones* (D. C., Mich.), 18 Am. B. R. 206, 209, 151 Fed. 108; *In re John Osborne Sons & Co.* (C. C. A., 2d Cir.), 24 Am. B. R. 65, 177 Fed. 184; *Davis v. Trust Co.* (C. C. A., 6th Cir.), 25 Am. B. R. 621, 639, 181 Fed. 10; *Matter of Goodman-Kinstler Cigar Co.* (D. C., Cal.), 32 Am. B. R. 624; *Matter of Siegel Company* (D. C., Mass.), 32 Am. B. R. 645, 216 Fed. 943; *Williams v. U. S. Fidelity & Guaranty Co.*, 236 U. S. 549, 34 Am. B. R. 181; *Matter of Krecun* (C. C. A., 7th Cir.), 36 Am. B. R. 172, 229 Fed. 711.

XXII. TAKING OF TESTIMONY.

The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee shall note upon the deposition any question objected to, with his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

[General Order X, 1867, with changes, recognizing the right of the referee to decide objections raised as to the competency, relevancy and materiality of questions; and with other slight changes.]

Cross-references: To the law: As to examinations, §§ 7(9), 21, 38-a(2); As to costs, § 2(18).

To the General Orders: XXII.

To the Official Forms: Nos. 29, 30, 56.

To the Equity Rules: LXVII, to LXIX.

Duty of referee in taking testimony.—It is the duty of the referee under this order to receive the evidence which is offered, to note objections and to record the evidence; and, if either party persists in offering incompetent or irrelevant matter, the other party has a remedy, because the order provides that "the court shall have power to deal with the costs of incompetent, immaterial or irrelevant depositions or parts of them as may be just." The equity practice is to be followed by the referees. *In re Sturgeon* (C. C. A., 2d Cir.), 14 Am. B. R. 681, 139 Fed. 608.

A hearing before a referee in bankruptcy, being substantially a hearing in proceedings in equity, is governed by the rules of equity of the United States courts; and the general order in bankruptcy regulating the examination of witnesses before the referee, is almost identical in substance with rule in equity No. 67. *In re Lipset* (D. C., N. Y.), 9 Am. B. R. 32, 119 Fed. 379.

Referees in bankruptcy in taking testimony are governed by the rules in equity, and should not on simple objection excuse witnesses from answering questions, but it is his duty to note the objection and take the answer. *Dressel v. North State Lumber Co.* (D. C., N. Car.), 9 Am. B. R. 541, 119 Fed. 531.

It is the duty of the referee to take all excluded testimony down and make the same a part of the record with his ruling on the objections and also the exceptions which may be taken noted in connection with such testimony. In *re Lipset* (D. C., N. Y.), 9 Am. B. R. 32, 119 Fed. 379. *Contra, Matter of Wilde's Sons* (D. C., N. Y.), 11 Am. B. R. 714.

The referee, whether acting as such or as a special commissioner, must receive all the evidence offered upon a hearing before him, noting the objections made, and he may refuse to stop the proceedings and certify questions raised on objections to testimony. *Bank of Ravenswood v. Johnson* (C. C. A., 4th Cir.), 16 Am. B. R. 206, 143 Fed. 463. Upon the hearing of objections to the granting of a bankrupt's discharge, he should preserve all testimony objected to, noting the objections and taking answers subject thereto, and report the same to the court, or if necessary, certify to the court on proper application any particular ruling. In *re Isaacson* (D. C., N. Y.), 23 Am. B. R. 665, 174 Fed. 406; *United States v. Liberman* (D. C., N. Y.), 32 Am. B. R. 734, 735, 176 Fed. 161.

The referee in taking testimony must have it taken down preferably in narrative form, but upon objection raised, it is his duty to require the matter to be presented by question, to which the objection and reason thereof is to be clearly but briefly noted, then to enter his ruling thereon as to whether proper or not and although he may rule it to be improper, yet allow it to be answered. In *re Romine* (D. C., W. Va.), 14 Am. B. R. 785, 788, 138 Fed. 837.

Examination of absent bankrupts and witnesses.—This general order has somewhat regulated the practice of taking testimony in cases pending before a referee; but the Supreme Court does not seem to have especially regulated the practice of taking the testimony or an inquisitorial examination of absent bankrupts and witnesses. It seems that the original equity practice is the proper method of taking such testimony. In *re Williams* (D. C., Tenn.), 10 Am. B. R. 538, 543, 123 Fed. 321.

Admissibility of unsigned testimony.—Notes of testimony given by bankrupts on examination at creditors' meeting, which was not completed because of their refusal to answer, are admissible in evidence in a proceeding to punish them for contempt, although not read to or signed by them as required by this general order, especially where their accuracy is proved by the stenographer who made them. *Matter of Kaplan Brothers* (C. C. A., 3d Cir.), 32 Am. B. R. 305, 213 Fed. 753.

Where a creditor, objecting to a bankrupt's discharge, dies pending the application, his testimony, taken by consent and given under oath, may be used, upon proof of the administration of the oath to testify, even though the testimony was not read over to the witness and signed by him as required by this general order. *Matter of Blaesser* (D. C., N. Y.), 36 Am. B. R. 795, 230 Fed. 528.

Examination of testimony by witness.—A witness, although not a creditor but a party owing money to a bankrupt estate, is entitled to examine the minutes of his testimony before signing the same. *Matter of Waters-Colver Co.* (D. C., N. Y.), 32 Am. B. R. 379, 212 Fed. 761.

Original proceeding before referee.—The provisions of this General Order do not preclude a referee, acting as a judicial officer in a proceeding originally instituted before him, from excluding irrelevant evidence, nor require him to admit and record all the evidence offered whether under objection or not. In *re Harrison Bros.* (D. C., Pa.), 28 Am. B. R. 293.

Other cases citing this order.—In *re Hoyt & Mitchell* (D. C., N. Car.), 11 Am. B. R. 784, 127 Fed. 968; *Matter of Kinnane & Company* (D. C., Ohio), 33 Am. B. R. 243, 217 Fed. 488.

XXIII. ORDERS OF REFEREE.

In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.

[General Order VIII, 1867, with verbal changes.]

Cross-references: To the law: Generally.

To the General Orders: IV, XII.

To the Equity Rules: LXXXV, LXXXVI.

See In *re Russell Card Co.* (D. C., N. J.), 23 Am. B. R. 300, 174 Fed. 202. It is the duty of referees to make their orders conform to this rule. *Faulk & Co. v. Steiner* (C. C. A., 5th Cir.), 21 Am. B. R. 623, 165 Fed. 861.

In *re Abbey Press* (C. C. A., 2d Cir.), 13 Am. B. R. 11, 134 Fed. 51, the court said: "We do not think this order should be held to apply to a mere direction or ruling that a witness be sworn or that he shall or shall not answer certain questions."

Failure to recite notice in order.—An order of a referee, dismissing a claim unless the claimant surrender a preference, is not invalid because of its failure to recite notice as provided in this general order, especially where the claimant was not entitled to notice to

confer jurisdiction. *McCulloch v. Davenport Savings Bank* (D. C., Iowa), 35 Am. B. R. 765, 226 Fed. 309.

Error without prejudice.—The fact that without complying with this order, the referee made an order on the unadjudicated member of a partnership, after it and the other member had been adjudicated bankrupt, to file the schedule of his debts and the inventory of his property on or before nineteen days after the adjudication, is not fatal to the order of the court confirming such an order, because the unadjudicated member was required by the bankruptcy law and general order 8 to make these filings within ten days after that adjudication. *Armstrong v. Fisher* (C. C. A., 8th Cir.), 34 Am. B. R. 701, 224 Fed. 97.

Other cases citing this order.—*Matter of Lacey & Company* (Sup. Ct., D. C.), 35 Am. B. R. 231, 43 Wash. L. R. 434.

XXIV. TRANSMISSION OF PROVED CLAIMS TO CLERK.

The referee shall forthwith transmit to the clerk a list of the claims proved against an estate, with the names and addresses of the proving creditors.

[Compare General Order XI, 1867. This general order does not fit into the present system of administration, and is rarely observed.]

Cross-references: To the law: §§ 39-a, 57.

To the General Orders: XII, XX.

To the Official Forms: No. 19.

Taxation of costs.—The details of making taxation of costs may be attended to in the office of the clerk or the referee, as authorized by this order. *Matter of Scott* (Ref., Mass.), 7 Am. B. R., 710, 713.

XXV. SPECIAL MEETING OF CREDITORS.

Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the act, the court may call such a meeting, specifying in the notice the purpose for which it is called.

[This general order is new. Its necessity or even value is doubted.]

Cross-references: To the law: As to meetings of creditors, § 55; As to meeting for choice of new trustee, § 44; As to notices of meetings, § 58.

To the General Orders: XIII.

To the Official Forms: Nos. 52, 53, 54, 55.

See *In re Louis Lewensohn* (D. C., N. Y.), 3 Am. B. R. 299, 303, 98 Fed. 576.

XXVI. ACCOUNTS OF REFEREE.

Every referee shall keep an accurate account of his traveling and incidental expenses, and of those of any clerk or any officer attending him in the performance of his duties in any case which may be referred to him: and shall make return of the same under oath to the judge, with proper vouchers when vouchers can be procured, on the first Tuesday in each month.

[First part of General Order XII, 1867, with substantial change. Referees usually keep accurate accounts, but the making of monthly returns of expenses is rare.]

Cross-references: To the law: §§ 9-a, 42.

To the General Orders: X, XXXV(2), and, by analogy, XIX.

Cases citing this order.—*In re Todd* (D. C., N. Y.), 6 Am. B. R. 88, 91, 106 Fed. 265; *In re Scott* (Ref., Mass.), 7 Am. B. R. 35; *In re Mammoth Pine Lumber Co.* (D. C., Ark.), 8 Am. B. R. 651, 654, 109 Fed. 308; *In re Daniels* (D. C., Ia.), 12 Am. B. R. 446, 449, 130 Fed. 597; *Matter of McCubbin* (Sup. Ct., D. C.), 33 Am. B. R. 277.

XXVII. REVIEW BY JUDGE.

When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.

[General Order XVII, 1874, with changes.]

Cross-references: To the law: §§ 2(10), 38-a, 39-a(5).

To the General Orders: By analogy, XXXVI.

To the Supplementary Forms: Nos. 158, 159, and, by analogy, Nos. 146, 147, 148, 149.

Purpose of order.—The purpose of this general order is to provide a simple and effective method of procedure for securing early hearings and a speedy determination of litigated questions. In *re Koenig & Van Hoogenhuyze* (D. C., Tex.), 11 Am. B. R. 617, 127 Fed. 891. It is intended to carry into effect the provisions of § 39 so as to avoid as far as possible the sending of the original proofs to the judge and to substitute therefor where the ends of justice will permit a summary thereof. *Cunningham v. German Ins. Bank* (C. C. A., 6th Cir.), 4 Am. B. R. 192, 103 Fed. 932; *Crin v. Woodford* (C. C. A., 4th Cir.), 14 Am. B. R. 302, 306, 136 Fed. 34.

This general order provides the only method for securing a review by the judge of an order or finding by the referee, in *re Clark Coal & Coke Co.* (D. C., Pa.), 23 Am. B. R. 273, 173 Fed. 658; *Matter of Octave Mining Co.* (D. C., Ariz.), 32 Am. B. R. 474, 212 Fed. 457, and an attempted appeal from a decision of the referee confers no power on the court. *Matter of Octave Mining Co.* (D. C., Ariz.), 32 Am. B. R. 474, 212 Fed. 457. There can be no review unless a petition is filed; it is not sufficient for the referee to certify a question for review without a petition. *Craddock-Terry Co. v. Kaufman* (D. C., Tex.), 23 Am. B. R. 724, 175 Fed. 303.

The certification of a question prevents disputes among counsel concerning the opinion presented and decided, and the summary of the evidence is required in order to save the judge the labor of examining what is often a mass of testimony on many different questions. In *re Kurtz* (D. C., Pa.), 11 Am. B. R. 129, 125 Fed. 992.

Review under § 38.—This general order and § 38 of the act provide for review by the court of the orders of referees in the most general terms and are far from limiting the court to the rules which govern a chancery suit. Therefore, the district court may disregard the findings of the referee entirely, and proceed *de novo* to reject them for reasons of law, or refuse them or accept them in whole or in part without assigning reasons therefor. In *re Pettingill & Co.* (C. C. A., 1st Cir.), 14 Am. B. R. 757, 761, 135 Fed. 218. But a review under § 38 of the bankruptcy act cannot be had unless the procedure prescribed by this general order is followed. In *re Home Discount Co.* (D. C., Ala.), 17 Am. B. R. 168, 147 Fed. 538.

Parties entitled to review.—Where by consent certain creditors are permitted by an order of the court to become parties to a petition to review an order of the referee a district court has jurisdiction to review such order although the claim of the original petitioner has been simply filed with the referee and neither allowed or disallowed. Such petitioner, if not "a bankrupt creditor," is at least "such other person" as under this order is entitled to a review. *Allgair v. Fisher & Co.* (C. C. A., 3d Cir.), 16 Am. B. R. 278, 143 Fed. 962.

The use of the word "creditor" in this general order, as one who has the right to take a review, should be confined to a review or appeal in case a creditor's individual claim is decided adversely; where the body of creditors' interests is affected the review must be taken by the trustees solely as their representative. *Matter of Arti-Stain Company* (D. C., Mass.), 32 Am. B. R. 640, affd. 32 Am. B. R. 643, 216 Fed. 942. See also *Matter of Siegel Co.* (D. C., Mass.), 32 Am. B. R. 645, 216 Fed. 945.

General review not intended.—This general order provides for "review by the judge of any order made by the referee," but it seems that a general review of the proceedings before the referee or a review of rulings not directly affecting an order made was not intended either by the act or by the orders. In *re Kelly Dry Goods Co.* (D. C., Wis.), 4 Am. B. R. 528, 102 Fed. 747. Ordinarily a review by the judge of an order made by the referee will be confined to the error pointed out in the petition for review. *Matter of Natelle De Gottardi* (D. C., Cal.), 7 Am. B. R. 723, 129, 114 Fed. 328.

Specific questions, as they arise in the proceedings, are to be presented on certificate of the referee, or in the case of orders entered on petition for review. In *re Kelly Dry Goods Co.* (D. C., Wis.), 4 Am. B. R. 528, 102 Fed. 747.

Application for review; when granted.—An application for a review of the decision of the referee will be dismissed when the party objecting has not complied with the requirements of this order. In *re Schiller* (D. C., Va.), 2 Am. B. R. 704, 96 Fed. 400; In *re Scott* (D. C., N. Car.), 3 Am. B. R. 625, 94 Fed. 404. Thus, a petition will be dismissed where it asks for a review of the decision of the referee instead of a review of the order of the referee. In *re Chambers, Calder & Co.* (Ref., R. I.), 6 Am. B. R. 709. Or where the referee simply transmits to the clerk the notice of testimony, his opinion and the creditor's petition for review. The precise questions ruled upon and the summary of the evidence relating thereto should always be presented. In *re Kurtz* (D. C., Pa.), 11 Am. B. R. 129, 125 Fed. 992. But where the referee, believing that all the testimony would be needed to present the questions at issue failed to summarize the evidence, the court will not deprive the petitioners of their rights to a review. *Crim v. Woodford* (C. C. A., 4th Cir.), 14 Am. B. R. 302, 306, 136 Fed. 34.

If any injustice is done a witness by an order of a referee he has a right to review the same and to be heard thereon before a judge of the court under this order. *Matter of Abbey Press* (C. C. A., 2d Cir.), 13 Am. B. R. 11, 17, 134 Fed. 51. The rulings of a referee cannot be reviewed, while the case is still pending before him, by simply filing in the district court exceptions to such ruling. In *re Hawley* (D. C., Iowa), 8 Am. B. R. 632, 116 Fed. 428. A referee can certify a question which he foresees may arise from a proceeding before him and upon which he desires to be advised. In *re Beukauff Sons & Co.* (D. C., Pa.), 14 Am. B. R. 344, 135 Fed. 251.

A statement by the referee that "if the claimant and his attorney desire to appeal the case, they will have ten days from this date, on *paying all costs incurred before the referee*," would seem to cover inadmissible additions to what is required by the general order. *West v. McLaughlin Co.* (C. C. A., 6th Cir.), 20 Am. B. R. 654, 657, 162 Fed. 124.

Upon a reference, to ascertain facts designed alone to aid the court in determining whether a bankrupt should be discharged or not, a referee is not required to certify objections made to his rulings upon the testimony. In *re Romine* (D. C., W. Va.), 14 Am. B. R. 785, 138 Fed. 837.

A referee may not review his own order upon exceptions thereto. In *re Greek Mfg. Co.* (D. C., Pa.), 21 Am. B. R. 111, 164 Fed. 211; In *re Marks* (D. C., Pa.), 22 Am. B. R. 568, 171 Fed. 281.

Filing petition.—This general order imperatively requires the referee to certify the question to the judge, not the next month nor the year following, but forthwith, in order that there may be an early determination of the questions at issue. In *re Koenig & Van Hoogenfuyze* (D. C., Tex.), 11 Am. B. R. 617, 127 Fed. 891. The right to file a petition cannot be so exercised as unreasonably and necessarily to delay the distribution of the assets of the bankrupt. In *re Grant* (D. C., R. I.), 16 Am. B. R. 256, 143 Fed. 661.

A referee's decision may be reviewed only by petition therefor under this general order. In *re Russell* (D. C., Cal.), 5 Am. B. R. 567, 105 Fed. 501.

The effect of a special district rule, taken in connection with this general order considered, and held, that a decision of a referee may only be reviewed by petition and that such petition must be presented within ten days, the period specified by the rule, or afterward only by allowance of a judge of the district court and that an order once entered is not subject to be reviewed or altered by the referee himself. In *re Leshner & Son* (D. C., Pa.), 5 Am. B. R. 218, 176 Fed. 650. See also *Matter of Wister* (D. C., Pa.), 36 Am. B. R. 809.

Although no time limit for filing a petition for the review of an order of the referee is fixed by the bankrupt act, or by the general orders, still, it seems that such petition should be presented promptly. Thus, a petition presented after eighteen months should be dismissed. In *re Chambers, Calder & Co.* (Ref., R. I.), 6 Am. B. R. 700. A petition for review under this order may be filed within a reasonable time from the date of the filing of the revised order. *Crin v. Woodford* (C. C. A., 4th Cir.), 14 Am. B. R. 302, 306, 136 Fed. 34. Such reasonable time may be fixed by a standing rule. In *re Foss* (D. C., Me.), 17 Am. B. R. 439, 147 Fed. 790. The petition should be filed within twenty days. *Matter of Maloney* (Sup. Ct., D. C.), 21 Am. B. R. 502, 37 Wash. L. Rep. 147. Under the rule in the Eastern District of Pennsylvania the petition must be filed in ten days. In *re Marks* (D. C., Pa.), 22 Am. B. R. 568, 171 Fed. 281. Eleven months after the decision is not within a reasonable time. *Matter of Octave Mining Co.* (D. C., Ariz.), 32 Am. B. R. 474, 212 Fed. 457. A compliance with a local rule, requiring that petitions for review of orders of referees shall be filed within ten days from the date of the order sought to be reviewed, is sufficient. *Matter of Kruse* (D. C., Ia.), 37 Am. B. R. 687, 234 Fed. 470.

Where a petitioner to review an order of a referee in bankruptcy filed its petition by mistake with the clerk instead of the referee as required by this general order, in the absence of a special rule prescribing an express limitation of time for initiating proceedings for such review, an application for special leave to file its petition anew is addressed to the discretion of the district court, even though the ten days which it has been customary to allow for making such applications have elapsed. In *re Nippon Trading Co.* (D. C., Wash.), 25 Am. B. R. 695, 182 Fed. 959.

An appeal may be taken to the circuit court of appeals from the decision of the judge where the amount of the claim is more than \$500. *Clendening v. Nat'l Bank* (Sup. Ct., N. D.), 11 Am. B. R. 245, 251. See § 25-a.

Other cases citing this order.—In *re Howard* (D. C., Cal.), 4 Am. B. R. 69, 100 Fed. 630; *Mueller v. Nugent*, 7 Am. B. R. 224, 229, 184 U. S. 1; In *re Arnett* (D. C., Tenn.), 7 Am. B. R. 522, 112 Fed. 770; In *re Hawley* (D. C., Iowa), 8 Am. B. R. 629, 116 Fed. 429; In *re Heebner* (D. C., Pa.), 13 Am. B. R. 256, 132 Fed. 1003; In *re Fisher & Co.* (D. C., N. J.), 14 Am. B. R. 366, 135 Fed. 223; *Bank v. Johnson* (C. C. A., 4th Cir.), 16 Am. B. R. 206, 143 Fed. 463; *Matter of Cohn* (Ref., Cal.), 18 Am. B. R. 786, 792; *Knapp & Spencer Co. v. Drew* (C. C. A., 8th Cir.), 20 Am. B. R. 355, 359, 160 Fed. 413; In *re Peacock* (D. C., N. Car.), 24 Am. B. R. 159, 163, 178 Fed. 851; *Matter of Monsarrat* (D. C., Hawaii), 25 Am. B. R. 815, 817; *Matter of Katz* (D. C., N. J.), 32 Am. B. R. 422, 216 Fed. 949; *Matter of Arti-Stain Company* (D. C., Mass.), 32 Am. B. R. 643, 216 Fed. 942; *Peck v. Richter* (C. C. A., 8th Cir.), 33 Am. B. R. 11, 217 Fed. 880; *Matter of Humphreys* (D. C., N. Car.), 34 Am. B. R. 655, 221 Fed. 907; *Matter of Lacey & Company* (Supp. Ct., D. C.), 43 Wash. L. Rep. 434, 35 Am. B. R. 231; *Matter of Isert* (D. C., Cal.), 36 Am. B. R. 431.

XXVIII. REDEMPTION OF PROPERTY AND COMPOUNDING OF CLAIMS.

Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to

compound and settle any debts or other-claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee.

[General Order XVII, 1867, with slight changes. This general order is an inheritance merely. Its value, save in so far as it refers to § 27, is doubted.]

Cross-references: To the law: As to redemption of property from liens, none, save by analogy, §§ 2 (7), 67; As to compounding of claims, §§ 27, 58-a (7), and by analogy, § 26.

To the General Orders: XXXIII.

The determining question is what action is for the best interests of the estate; that is, the creditors as a whole. In re Kearney Bros. (D. C., N. Y.), 25 Am. B. R. 757, 760, 184 Fed. 190.

Under this order not only the bankrupt, but his trustee, or any creditor who has proven his claim may, whenever it is for the benefit of the estate, redeem any mortgage or lien upon the bankrupt's property. In re Hasie (D. C., Tex.), 30 Am. B. R. 83, 88.

Other cases citing this order.—In re Mammoth Pine Lumber Co. (D. C. Ark.), 8 Am. B. R. 651, 668, 109 Fed. 308; In re Wolf & Levy (D. C., Tenn.), 10 Am. B. R. 153, 122 Fed. 127; In re Grainger (C. C. A., 9th Cir.), 20 Am. B. R. 166, 173, 160 Fed. 69.

XXIX. PAYMENT OF MONEYS DEPOSITED.

No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks.

[Latter half of General Order XXVII, 1867, without material change.]

Cross-references: To the law: §§ 47-a, 61.

To the Supplementary Forms: No. 165.

This general order is mandatory.—Huttig Manfg. Co. v. Edwards (C. C. A., 8th Cir.), 20 Am. B. R. 349, 354. And where the trustee has not deposited the money with a designated depository as required by this order the trustee will not be allowed the payment of money as an exemption. In re Hoyt (D. C., N. Car.), 9 Am. B. R. 574, 119 Fed. 987. See also In re Hoyt & Mitchell (D. C., N. Car.), 11 Am. B. R. 784, 127 Fed. 968. The referee has no authority to order the trustee to pay out funds belonging to the estate of a bankrupt. In re Cobb (D. C., N. Car.), 7 Am. B. R. 202, 112 Fed. 655.

Money deposited as required by the act cannot be paid except by check or warrant drawn in accordance with the order and countersigned by the judge or some one designated by the judge for that purpose. These deposits should therefore be made to the creditor by the court or judge, designating at the time of the deposit the estate to which such deposits belong. In re Cobb (D. C., N. Car.), 7 Am. B. R. 202, 112 Fed. 655. As the trustees must sign the checks, it would seem that the fund should be deposited to the credit of the trustee, as such, designating the estate in bankruptcy. In re Carr (D. C., N. Car.), 9 Am. B. R. 58, 117 Fed. 572.

Recovery of deposit; order of referee as res judicata.—An order of a referee in bankruptcy, denying the right to recover a check payable to a trustee in bankruptcy, which has been deposited by a person not a creditor, as a part of a deposit required under a composition, and payment thereon subsequently stopped after some controversy had arisen, is *res adjudicata*

and a bar to a subsequent action in the state court by the maker of the check. *Coen v. James*, 164 N. Y. App. Div. 419, 33 Am. B. R. 249.

Other cases citing this order.—*Kinkad v. Bacon & Sons* (C. C. A., 6th Cir.), 36 Am. B. R. 390, 230 Fed. 362.

XXX. IMPRISONED DEBTOR.

If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon *habeas corpus*, by the jailer or any officer in whose custody he may be, before the referee, for the purpose of testifying in any manner relating to his bankruptcy; and, if committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of *habeas corpus* to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.

[General Order XXVII, 1867, without substantial change.]

Cross-references: To the law: § 9-a.

To the General Orders: XII (1).

To the Supplementary Forms: None; but, by analogy, Nos. 87, 88.

The term "arrest" may be held to apply to the continued detention of a person in custody, although the word is frequently used to mean the original taking of a person into custody; and that when the statute provides for the exemption of a bankrupt from arrest upon civil process, except in certain cases, it means, not only that he shall not be taken into custody, but also that he shall not be detained in custody, after he becomes a bankrupt. *Turgeon v. Emery*, (D. C., Me.), 25 Am. B. R. 694, 182 Fed. 1016; *Matter of Komar* (D. C., N. Y.), 37 Am. B. R. 683, 234 Fed. 378.

Discharge from imprisonment; when granted.—This general order provides for cases where the bankrupt is in custody under an arrest made both before and after the initiation of the bankruptcy proceedings; but it is only in cases where the bankrupt has been arrested or committed after the filing of his petition, that the court is authorized to grant a discharge from imprisonment, even though the debt be provable. In *re Claiborne* (D. C., N. Y.), 5 Am. B. R. 812, 109 Fed. 74. The district court is required to discharge on *habeas corpus* a bankrupt imprisoned upon process in any civil action for the collection of a claim provable in bankruptcy. *Matter of Adler* (C. C. A., 2d Cir.), 16 Am. B. R. 414, 144 Fed. 659. The general order extends to claims provable in bankruptcy. In *re Hilton* (D. C., N. Y.), 4 Am. B. R. 774, 104 Fed. 981.

A bankrupt arrested under a judgment entered upon an action for breach of promise is entitled to a discharge from custody under this general order. In *re Fife* (D. C., Pa.), 6 Am. B. R. 258, 109 Fed. 880.

Where a bankrupt is imprisoned upon a judgment for the support of a bastard child the court will not release him from imprisonment by a writ of *habeas corpus*. In *re Baker* (D. C., Kan.), 3 Am. B. R. 101, 96 Fed. 954.

The bankrupt is exempt from arrest on civil process while attending to his duties in the bankruptcy court. *Matter of Dresser* (D. C., N. Y.), 10 Am. B. R. 270, 124 Fed. 915.

Test of legality of bankrupt's imprisonment.—The order must yield to the terms of the suit, and the test of the legality of the bankrupt's imprisonment is not whether the claim or demand upon which it is based is provable against the bankrupt's estate, but it is whether his discharge in bankruptcy would operate as a release of the claim or demand. In *re Baker* (D. C., Kan.), 3 Am. B. R. 101, 96 Fed. 954. The decision of the courts under the act of 1867 fully sustain this view. In *re Robinson*, 6 Blatchf. 253; In *re Patterson*, 2 Ben. 155; In *re Whitehouse*, 1 Lowell, 429.

Compared with section 9 of the act.—It seems that there is nothing in the provisions of this order necessarily inconsistent with section 9 of the act, and if there are, the provisions of the act must prevail. *People ex rel. Taranto v. Erlanger* (D. C., N. Y.), 13 Am. B. R. 197, 132 Fed. 883. It is presumably limited in its operation to the same period of time as General Order XII, and thereby becomes practically compatible with section 9-a, subd. 2. In *re Lewensohn* (D. C., N. Y.), 3 Am. B. R. 594, 598, 99 Fed. 73.

Bail.—Where a bankrupt makes application, under General Order No. 30, for his release from arrest, the court, neither under section 2 (15) nor under section 9-b, is authorized to require the bankrupt to give bail. *United States ex rel. Kelley v. Peters* (D. C., Ill.), 22 Am. B. R. 177, 166 Fed. 613.

Other cases citing this order.—*Knott v. Putnam* (D. C., Vt.), 6 Am. B. R. 80, 107 Fed. 907; *Barrett v. Prince* (C. C. A., 7th Cir.), 16 Am. B. R. 64, 143 Fed. 302.

XXXI. PETITION FOR DISCHARGE.

The petition of a bankrupt for a discharge shall state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt.

[This general order is new.]

Cross-references: To the law: §§ 14, 18-c.

To the General Orders: XXXII.

To the Official Forms: No. 57.

To the Equity Rules: XX to XXV.

Cases citing this order.—In *re Soper and Slada* (Ref.), 1 Am. B. R. 193, 196; In *re Glass* (D. C.; Tenn.), 9 Am. B. R. 391, 394, 119 Fed. 509; In *re Taylor* (D. C., Ala.), 26 Am. B. R. 143, 146.

XXXII. OPPOSITION TO DISCHARGE OR COMPOSITION.

A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge.

[General Order XXIV, 1867, in part.]

Cross-references: To the law: §§ 12, 14.

To the General Orders: IV, XXXI.

To the Official Forms: Nos. 58, 59.

To the Supplementary Forms: As to opposition to discharge, Nos. 110, 111, 112, 113, 114, 115, and, by analogy, Nos. 105, 106, 107, 108, 109. As to opposition to confirmation of a composition, Nos. 99, 100, 101, 102, 103, and, by analogy, Nos. 94, 95, 96, 97, 98.

Intent and purpose of order.—It is evident from the language of this general order that it was intended the appearance of objecting creditors, or other persons interested, should be entered on the day upon which they were required to show cause as upon that day the court passes upon the right of the petitioner to be discharged, and will enter such a decree if no objecting creditor appears. In *re Ginsberg* (D. C., Pa.), 12 Am. B. R. 459, 130 Fed. 627.

Compliance with order.—This general order should be strictly complied with, and failure so to do will only be excused when excellent reasons therefor are shown to the court. In *re Clothier* (D. C., Pa.), 6 Am. B. R. 203, 108 Fed. 199.

The exceptions to be filed in ten days should be filed before the judge. *Mahoney v. Ward* (D. C., N. Car.), 3 Am. B. R. 770, 100 Fed. 278.

Appearance of creditors opposing discharge.—The appearance of a creditor opposing a bankrupt's discharge must be entered on the day when the creditors are required to show cause. In *re Grant* (D. C., Pa.), 14 Am. B. R. 398, 135 Fed. 889; In *re Young* (D. C., Pa.), 20 Am. B. R. 697, 162 Fed. 912. A failure to enter an appearance on the return day precludes objecting creditors from filing exceptions to a discharge thereafter, even though they be filed within the ten days. In *re Ginsburg* (D. C., Pa.), 12 Am. B. R. 459, 130 Fed. 627.

A creditor opposing a discharge has the duty of alleging sufficiently specified grounds of such opposition, and the burden of proving such grounds. In *re Holman* (D. C., Iowa), 1 Am. B. R. 600, 92 Fed. 512.

Opposing creditors should be required to enter their appearance and file specifications in writing of the ground of opposition, except in the rare cases where the facts may warrant the court in ordering an investigation of suspicious circumstances if its own motion. *Adler v. Jones* (C. C. A., 6th Cir.), 6 Am. B. R. 245, 109 Fed. 967. If the time within which specifications of opposition to a discharge may be filed is not extended by the court as required by this order, a subsequent application will be dismissed upon motion. In *re Albrecht* (D. C. Pa.), 5 Am. B. R. 223, 104 Fed. 974.

Presumption of appearance.—Upon appeal from an order denying a discharge to a bankrupt, the record failed to disclose any appearance by the objecting creditors on the day when the creditors were by law required to show cause against his discharge. It was held, that it must be presumed that such appearance as is required by this general order was duly and properly entered, where no objection thereto had been urged in the court below and the certificate of the clerk of the district court appended to the record recited that the same was "a true transcript of so much of the record and proceedings of said court as was requested by counsel

for appellant." *Shaffer v. The Koblegard Co.* (C. C. A., 4th Cir.), 24 Am. B. R. 898, 183 Fed. 71, affg. 22 Am. B. R. 147.

Time of filing objections.—Objections to a discharge must be filed with the clerk of the bankruptcy court within ten days after the "show cause" hearing, and unless filed within that time a motion to dismiss must be granted, unless the time within which to file the objections with the clerk is enlarged in accordance with this general order, and that question will not be considered unless formal motion to enlarge the time is made within the ten days. *Matter of C. H. Kendrick & Co.* (D. C., Vt.), 35 Am. B. R. 630, 226 Fed. 680.

Enlargement of time.—The district judge may, in his discretion, extend the time within which a creditor may enter his appearance in opposition to a bankrupt's discharge, even after the expiration of the time limit as provided in this order. *In re Levin* (C. C. A., 1st Cir.), 23 Am. B. R. 845, 176 Fed. 177.

Amendment of objections.—The court may, in its discretion, permit the specifications of objections to a bankrupt's discharge to be amended after the expiration of the ten days allowed by this general order, for the filing thereof. *In re Nathanson* (D. C., N. Y.), 18 Am. B. R. 252, 152 Fed. 585; *In re Osborne* (C. C. A., 1st Cir.), 8 Am. B. R. 165.

Upon an application to confirm a composition where no creditors appeared formally in opposition, but the trustee, as trustee, appeared and opposed such confirmation, though not a party to the record, and where such composition was refused and an appeal was taken by the bankrupt against the trustee, and citation issued to such trustee and to no other person, the appeal must be dismissed. *Ross v. Saunders* (C. C. A., 1st Cir.), 5 Am. B. R. 350, 105 Fed. 915.

Other cases citing this order.—*In re Quackenbush* (D. C., N. Y.), 4 Am. B. R. 274, 102 Fed. 282; *In re Gasser* (C. C. A., 8th Cir.), 5 Am. B. R. 32, 104 Fed. 537; *In re Glass* (D. C., Tenn.), 9 Am. B. R. 391, 119 Fed. 509; *In re Henschel* (Sp. Com., N. Y.), 12 Am. B. R. 31, 34; *In re Levey* (D. C., N. Y.), 13 Am. B. R. 312, 133 Fed. 572; *Matter of Alex* (D. C., Pa.), 15 Am. B. R. 450; *Matter of Krecun* (C. C. A., 7th Cir.), 36 Am. B. R. 172, 229 Fed. 711.

XXXIII. ARBITRATION.

Whenever a trustee shall make application to the court for authority to submit a controversy arising in the settlement of a demand against a bankrupt's estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the application shall clearly and distinctly set forth the subject-matter of the controversy, and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise.

[Part of General Order XX, 1867.]

Cross-references: To the law: §§ 26, 58-a(7), and, by analogy, § 27.

To the General Orders: By analogy, XXVIII.

Cases citing this order.—*In re Hixon* (D. C., Iowa), 1 Am. B. R. 610, 93 Fed. 440.

XXXIV. COSTS IN CONTESTED ADJUDICATIONS.

In cases of involuntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed the debtor shall recover like costs against the petitioner.

[Part of General Order XXXI, 1867, without change.]

Cross-references: To the law: §§ 2(18), 3-e.

To the General Orders: By analogy, X.

Application of order.—This order is confined in its terms to involuntary bankruptcy, and contested adjudications. *In re Barrett* (D. C., Tenn.), 12 Am. B. R. 626, 636, 113 Fed. 107. Effect of order, see *In re Halsey Electric Generator Co.* (D. C., N. J.), 23 Am. B. R. 401, 413, 163 Fed. 118.

Under this general order and section 824 of the U. S. Revised Statutes, providing that on a trial in equity \$20 attorney's fees shall be taxed in favor of the successful and against the losing party, an alleged involuntary bankrupt who successfully resists the proceeding is entitled to an attorney's fee of \$20. *Matter of Wise* (D. C., Wash.), 32 Am. B. R. 510, 212 Fed. 567.

Power to award costs.—The district court, sitting in bankruptcy, has power to award costs against a creditor who fails to substantiate his specifications of objection in opposition

to the bankrupt's discharge. This power is inherent in the district court. In *re Wolpert* (Ref., N. Y.), 1 Am. B. R. 436. But the court has no power to award costs where a petition in bankruptcy against a corporation is dismissed for want of jurisdiction. The rule which denies to a court the power to award costs; when a case is dismissed for want of jurisdiction (Citizens Bk. v. Vanon, 164 U. S. 319), prevails in a court of bankruptcy. In *re Philadelphia & Lewes Transportation Co.* (D. C., Pa.), 11 Am. B. R. 444, 127 Fed. 896.

Costs; amount or items.—Where an application is contested, either at the outstart, or afterward on motion to vacate, the costs include all that could be recovered under similar circumstances, if the case were in equity. *Selkregg v. Hamilton Bros.* (D. C., Pa.), 16 Am. B. R. 474, 144 Fed. 556. But counsel fees, expenses and damages will not be granted in addition to the costs, unless the property has been seized pursuant to section 3-e of the act. In *re Ghiglione* (D. C., N. Y.), 1 Am. B. R. 580, 93 Fed. 186. See also In *re Hines* (D. C., Or.), 16 Am. B. R. 538, 144 Fed. 147.

Nature of costs included.—This order does not refer to the costs provided for in section 3(e) of the bankruptcy act and therefore the entry of judgment for costs incident upon the determination of the issue of bankruptcy in favor of the debtor, including costs or the attendance of witnesses and docket fees on jury trials, authorized by this order, is not *res adjudicata* of the issue raised by a subsequent petition to fix the costs, expenses and damages by reason of the seizing and detaining of the property of the debtor, authorized by section 3(e). Matter of *McKenzie* (D. C., Wash.), 34 Am. B. R. 111, 219 Fed. 630.

Other cases citing this order.—*Hoffschlaeger Co. v. Young Nap* (D. C., Hawaii), 12 Am. B. R. 526.

XXXV. COMPENSATION OF CLERKS, REFEREES, AND TRUSTEES.

1. The fees allowed by the act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out moneys; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers.

2. The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in traveling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act and allowed by special order of the judge.

3. The compensation allowed to trustees by the act shall be in full compensation for the services performed by them; but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts.

4. In any case in which the fees of the clerk, referee, and trustee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceeding in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed. He may also, pending such proceedings, both in voluntary and involuntary cases, order the commissions of referees and trustees to be paid immediately after such commissions accrue and are earned.

[This general order is new. The last sentence of subdivision 4 was added in September, 1906.]

Cross-references: To the law: As to compensation of clerks, §§ 51, 71. As to compensation of referees, §§ 40, 72. As to compensation of trustees, §§ 48, 72. As to pauper cases, § 51-a(2).

To the General Orders: X, XII, XVII, XIX, XXVI, XXIX.

To the Supplementary Forms: Nos. 166, 169.

Fees of clerk.—The clerk has no authority to demand more than the statutory fees. In *re Langslow, Fowler & Co.* (D. C., N. Y.), 1 Am. B. R. 258, 98 Fed. 869.

Compensation of referee; special allowance.—The performance by the referee of the ordinary services following a general reference, or of services following a special reference having to do with any of the matters which the Supreme Court have said *may be referred* to the referee by the judge, authorizes the referee to receive only the compensation specially provided in the statute. But the performance of other services, not included within the above category, if referred to the referee, or to any other person as a *special master*, pursuant to the general power of the court to call to its aid the services of a special master, would justify the allowance of special fees therefor. *Matter of Langford, Felts & Myers* (D. C., Cal.), 35 Am. B. R. 519, 225 Fed. 311.

No construction of this general order will authorize any allowance to the referee except for the specific purposes named. In *re Mammoth Pine Lumber Co.* (D. C., Ark.), 8 Am. B. R. 651, 664, 109 Fed. 308. It seems that the Supreme Court did not intend that additional compensation should be given to a referee. In *re Wilcox* (D. C., Mich.), 19 Am. B. R. 241, 243, 156 Fed. 685. Additional compensation not allowed where business of bankrupt is continued by trustee. *Bray v. Johnson* (C. C. A., 4th Cir.), 21 Am. B. R. 383, 166 Fed. 57.

A special allowance to a referee for services performed under the statute cannot be made, even with the consent of attorneys. The fees fixed by statute are in full compensation. *Dressel v. North State Lumber Co.* (D. C., N. Car.), 9 Am. B. R. 541, 547, 119 Fed. 531. The referee has no authority for charging a *per diem* in any case whatsoever. In *re Pierce* (D. C., Colo.), 6 Am. B. R. 747, 111 Fed. 516.

Compensation of referees; when no assets.—This General Order and section 40 of the act recognizes no other compensation to the referee, where there are no assets than the preliminary fee deposited with the clerk. In *re Langslow, Fowler & Co.* (D. C., N. Y.), 1 Am. B. R. 258, 98 Fed. 869.

Compensation of referee; services away from home.—A referee cannot charge extra for his own service merely because they are performed away from home. *Matter of Elk Valley Coal Mining Co.* (D. C., Ky.), 32 Am. B. R. 197, 213 Fed. 383.

Advance payment of referee's fees.—Without an order of the judge the referee cannot demand an advance payment of his fees by the trustee. *Matter of Borger* (Sup. Ct., D. C.), 43 Wash. L. Rep. 436, 35 Am. B. R. 238.

Allowance for expenses.—The provision "in regard to expenses of mailing notices, traveling and perpetuating testimony, refers to actual expenses; but a referee may make a general charge, which should be a uniform charge in all cases, for blanks that may be used in each case, for notices to creditors, and orders which may be entered by him. He may make a similar charge for clerk hire where the business is such that clerks are needed." In *re Pierce* (D. C., Colo.), 6 Am. B. R. 747, 111 Fed. 516. It is obvious that the cost of the publication of the necessary notices upon application for discharge, and for stationery, are expenses properly chargeable to the bankrupt or his estate, under this general order, but the referee is not entitled to charge for his own services. In *re Dixon* (D. C., Cal.), 8 Am. B. R. 145, 114 Fed. 675.

Maintenance of an office, clerk hire in preparing and mailing notices to creditors and attendance to correspondence are "expenses necessarily incurred in the performance of their duties under the Act," and hence, upon being "allowed by special order of the judge," as provided in general orders 26 and 35, the referee should be entitled to reimbursement therefor. *Matter of McCubbin Co.* (Sup. Ct., D. C.), 33 Am. B. R. 277; *Matter of Lacey & Co.* (Sup. Ct., D. C.), 43 Wash. L. Rep. 434, 35 Am. B. R. 231.

While a referee is entitled to his own traveling expenses, he should not be allowed such expenses of his clerk, unless special circumstances are shown. *Matter of Elk Valley Coal Mining Co.* (D. C., Ky.), 32 Am. B. R. 197, 213 Fed. 383.

A charge for mailing notices based upon a "fee" of 25 cents for each notice will not be allowed. The utmost that can be allowed for this service is the amount of proper "expenses" incurred in mailing the notices as contemplated by the general order, and such amount must be shown by proper proof. *Matter of Elk Valley Coal Mining Co.* (D. C., Ky.), 32 Am. B. R. 197, 213 Fed. 383.

A charge of 40 cents for mailing notices of applications for discharge, based upon sections 828 and 840 of the U. S. Rev. Stat. is unauthorized. *Matter of Loughney* (D. C., Wash.), 34 Am. B. R. 206, 218 Fed. 980.

Compensation of trustee.—This order limits the compensation of the trustee and is conclusive. In *re Carolina Cooperage Co.* (D. C., N. Car.), 3 Am. B. R. 154, 96 Fed. 920. Additional compensation will not be allowed to a trustee for services in investigating the bankrupt's disposition of property and the loss of his stock by fire. In *re Screws* (D. C., Ga.), 17 Am. B. R. 296, 147 Fed. 989. An allowance of \$2.50 to the trustee for his services as a lawyer not only violates this general order, but also the bankruptcy act itself. In *re Felson* (D. C., N. Y.), 15 Am. B. R. 185, 194, 139 Fed. 281. Motion for approval of additional expenses incurred by trustee allowed, such expenses being satisfactorily shown to be "necessarily incurred" by the trustee in the performance of his duties. *Matter of Hart & Co.* (D. C., Hawaii), 17 Am. B. R. 480.

The trustee and receiver are allowed to employ attorneys whose compensation is part of the expense of the trusteeship or receivership. An attorney employed by creditors to oppose claims, after the appointment of a trustee, is not entitled to compensation for such

services unless the trustee has improperly refused to make defense. In *re Roadarmour* (C. C. A. 6th Cir.), 24 Am. B. R. 49, 177 Fed. 379.

Application of subdivision 4.—It is manifest that this subdivision relates only to cases in voluntary bankruptcy, and the language shows that there may be such cases in which the petitioning debtor is not required to pay the fees of the clerk, referee and trustee, before or at the time of filing his petition, although he presents a schedule of property in excess of the exemptions allowed by the law of the State of his domicile and surrenders an estate in bankruptcy. Otherwise, it would be futile to provide that "the judge at any time during the pendency of the proceedings in bankruptcy may order those fees to be paid out of the estate." *Sellers v. Bell* (C. C. A., 5th Cir.), 2 Am. B. R. 529, 554, 94 Fed. 801.

Application under pauper's oath.—The application of a party to proceed under the pauper's oath will be denied and his petition will be dismissed unless within a reasonable time the deposit is made, where it appears that he is earning \$30 per month. In *re Collier* (D. C., Tenn.), 1 Am. B. R. 182, 93 Fed. 191. A referee is unauthorized to require the bankrupt to pay the statutory fee before he is given his discharge, where such bankrupt has filed an affidavit of inability. In *re Plimpton* (D. C., Vt.), 4 Am. B. R. 614, 103 Fed. 775.

Preparation and mailing of notices.—It was intended by this general order that the clerk should prepare or supervise the printing, mailing, etc., of the notices required, and did not intend that the field of the clerk should be invaded, and the prerogatives of his office usurped, and an arm of the court impaired by uncertainty in the discharge of such functions of his office, by persons preparing the copies of the petition for discharge and notice, and require the clerk to certify and mail them. *Matter of Longhney* (D. C., Wash.), 34 Am. B. R. 206, 218 Fed. 980.

Special or extra compensation is not allowable to the clerk of the court, under this general order, for mailing notices to creditors; his clerical services in such matters—so far at least as no extraordinary expense is involved—being covered by the filing fee of ten dollars provided by section 52, subd. a of the Bankruptcy Act. *Matter of Iwanga* (D. C., Hawaii), 36 Am. B. R. 285.

Other cases citing this order.—In *re Thoth* (D. C., Ohio) 4 Am. B. R. 780, 104 Fed. 291; In *re Epstein* (D. C., Ark.), 6 Am. B. R. 191, 109 Fed. 878; In *re Scot* (Ref., Mass.), 7 Am. B. R. 35; In *re Mammoth Pine Lumber Co.* (D. C., Ark.), 8 Am. B. R. 651, 116 Fed. 731; In *re Daniels* (D. C., Iowa), 12 Am. B. R. 446, 130 Fed. 597; In *re Dunn Hardware & Furniture Co.* (D. C., N. Car.), 14 Am. B. R. 186, 134 Fed. 997.

XXXVI. APPEALS.

1. Appeals from a court of bankruptcy to a circuit court of appeals, or to the Supreme Court of a territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in courts of the United States.

2. Appeals under the act to the Supreme Court of the United States from a circuit court of appeals, or from the Supreme Court of a territory, or from the Supreme Court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a justice of the Supreme Court of the United States.

3. In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law.

[This general order is practically new. Compare, however, General Order XXVI, 1867.]

Cross-references: To the law: §§ 24, 25.

To the General Orders: By analogy, XXVII.

To the Official Forms: None.

To the Supplementary Forms: Nos. 146, 147, 148, 149, and, by analogy, Nos. 158, 159.

Subdivision 2; effect of.—The requirement, that appeals to the Supreme Court shall be taken within thirty days after judgment, has the same effect as if written in the statute. *Conboy v. Nat. Bank*, 203 U. S. 147, 16 Am. B. R. 775. Where an appeal to this court was

taken within thirty days and the circuit court of appeals made the findings of fact and conclusions of law part of the record by an order made within thirty days, directing the same to be filed *nunc pro tunc*, as of the date of the judgment, there is a sufficient compliance with the provisions of said general order. *Coder, Trustee, etc., v. Arts* (Sup. Ct.), 22 Am. B. R. 1, 213 U. S. 223.

Writ of error; time within which to bring.—The statutes (R. S., § 1008, and the Act of March 3, 1891, ch. 517, §§ 4, 5), fix the time within which writs of error may be brought to this court, and a motion to dismiss a writ of error upon the ground that it was not sued out in time, because General Order No. 36 allows only thirty days for appeals, and upon the further ground that no bill of exceptions was filed will be denied. *Grant Shoe Co. v. Laird Co.* (Sup. Ct.), 21 Am. B. R. 484, 212 U. S. 445.

Intention of subdivision 3.—It is not the intention of this subdivision that a circuit court of appeals shall, of its own motion, ascertain and determine in advance of its decision upon an appeal in bankruptcy, whether a question is raised upon which a party is entitled to allowance of an appeal to the Supreme Court. If such right is claimed, it should be called to attention in advance of decision, with requests for findings in the event of adverse ruling upon the question alleged to be appealable. *Knapp v. Milwaukee Trust Co.* (C. C. A., 7th Cir.), 20 Am. B. R. 671, 673, 162 Fed. 675, affg. 19 Am. B. R. 491. See also *Crucible Steel Co. v. Holt* (C. C. A., 6th Cir.), 23 Am. B. R. 302, 174 Fed. 127.

Where, before a discharge is issued to the bankrupt, the opposing creditors by petition ask that separate findings of facts and conclusions of law be filed as provided in this general order, the order granting the discharge must be set aside and the prayer of the petition granted. *In re Rauchenplat* (D. C., Porto Rico), 9 Am. B. R. 763.

Request for findings.—Findings of fact and conclusions of law under General Order in Bankruptcy No. 36, paragraph 3, will not ordinarily be made unless requested, and one who contemplates an appeal to the Supreme Court, if the conclusion of the Circuit Court of Appeals shall be against him, should make a request for such findings before the decree of the Circuit Court of Appeals is entered. *Washington v. Tearney* (C. C. A., 4th Cir.), 28 Am. B. R. 633.

Record on appeal; contents of: Where the record does not contain the findings of facts and conclusions of law of the court below, as required by this order, the appeal will be dismissed and the omission cannot be supplied by reference to the opinion of the court below. *Chapman v. Bowers*, 18 Am. B. R. 844, 207 Fed. 89.

While neither the bankruptcy act nor the general orders prescribe the practice to be adopted in proceedings on revisory petitions, the matters of law of which revision is sought should in some manner be clearly presented. *Ross v. Stroh* (C. C. A., 3d Cir.), 21 Am. B. R. 644, 165 Fed. 628.

An appeal to the Circuit Court of Appeals from an order or decree denying an adjudication and dismissing an involuntary petition cannot be entered where the record contains none of the testimony, either in form or substance, returned by the referee and passed upon by the district court. *Matter of Murphy* (C. C. A., 9th Cir.), 36 Am. B. R. 712, 229 Fed. 988.

Where a trustee in bankruptcy has filed a petition to sell all the stock in trade and other property of the bankrupt, and appellant has intervened to establish the lien of a chattel mortgage on such property to be satisfied out of the proceeds of sale, and the validity of such mortgage has been attacked by the trustee, it is a controversy arising in a bankruptcy proceeding and the procedure upon appeal to the U. S. Supreme Court is the same as in like cases under the Court of Appeals Act of 1891, and no special findings of fact and conclusions of law in the circuit court of appeals are required, as General Order No. XXXVI, adopted pursuant to § 25-b of the bankruptcy act, does not apply to such a case. *In re Standard Telephone & Elec. Co.*, 216 U. S. 545, 24 Am. B. R. 761, affg. 20 Am. B. R. 761.

Other cases citing this order.—*In re Abraham* (C. C. A., 5th Cir.), 2 Am. B. R. 266, 292, 93 Fed. 767; *First Nat. Bank of Denver v. Klug*, 8 Am. B. R. 12, 186 U. S. 204; *Jaquith v. Alden*, 9 Am. B. R. 773, 189 U. S. 78; *Hiscock v. Varick Bank of N. Y.*, 18 Am. B. R. 1, 208 U. S. 28; *Bacon v. Roberts* (C. C. A., 3d Cir.), 17 Am. B. R. 421, 146 Fed. 729; *Armstrong v. Fernandez*, 19 Am. B. R. 746, 750, 208 U. S. 324; *In re Cooper Bros.* (D. C., Pa.), 20 Am. B. R. 392, 159 Fed. 956; *Duryea Power Co. v. Sternbergh* (Sup. Ct., U. S.), 25 Am. B. R. 66, 68, 218 U. S. 299; *Hill v. Western Electric Co.* (C. C. A., 6th Cir.), 32 Am. B. R. 332, 214 Fed. 243; *Matter of Krecun* (C. C. A., 7th Cir.), 36 Am. B. R. 172, 229 Fed. 711.

XXXVII. GENERAL PROVISIONS.

In the proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case,

vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing.

[Last half of General Order XXII, 1867, without material change.]

Equity practice.—The district court, being a court of equity in bankruptcy matters, is a court of equity for all purposes in such matters, and all the principles and rules of equity apply. In *re Huddleston* (Ref., Ala.), 1 Am. B. R. 572, 574. Under this general order the rules of equity practice "must be followed as near as may be." *Ex parte Steele* (D. C., Ala.), 20 Am. B. R. 575, 606, 162 Fed. 694.

It is well settled that, except in certain specified particulars, proceedings in bankruptcy are of an equitable nature. In *re Waugh* (C. C. A., 9th Cir.), 13 Am. B. R. 187, 192, 133 Fed. 281.

Application of order.—*Shulte v. Patterson* (C. C. A., 8th Cir.), 77 Am. B. R. 99, 102, 147 Fed. 509; *Matter of Fleischer* (D. C., N. Y.), 18 Am. B. R. 194, 197, 151 Fed. 81.

Under the provisions of this general order, which extends the equity rules of the Supreme Court to "proceedings in equity," failure to file an answer to a petition seeking to expunge a claim justifies a decree *pro confesso* under Rule 18, carrying the ordinary incidents and consequences of such a decree. In *re Docker-Foster Co.* (D. C., Pa.), 10 Am. B. R. 584, 123 Fed. 190.

Where a petition in involuntary proceedings, in conformity with this general order, stated that the claims of the petitioning creditors were for goods sold and delivered, and that the alleged bankrupts purchased the same within one year from the date of the execution of the petition, and were provable claims, it is unnecessary to state when the several amounts became due, the amount of the securities held nor the manner in which their value was fixed. *Matter of Hark Bros.* (D. C., Pa.), 14 Am. B. R. 400, 135 Fed. 603.

Application of equity rules in bankruptcy proceedings.—This general order does not make the General Equity Rules applicable as rules of court in the performance of the administrative work of the courts of bankruptcy. They may be looked to for analogies but not for rules. *International Harvester Co. v. Carlson* (C. C. A., 8th Cir.), 33 Am. B. R. 178, 217 Fed. 736.

Summary proceedings.—This general order applies only to equity proceedings, properly so called, and not to summary proceedings by the trustee to compel the bankrupt to turn over money to him. *Matter of Cunney* (D. C., Mass.), 35 Am. B. R. 617, 225 Fed. 426.

Other cases citing this order.—In *re Keisler* (Ref., Wis.), 2 Am. B. R. 79; In *re Strait* (Ref., N. Y.), 2 Am. B. R. 308; In *re Lipset, Levitt & Co.* (Ref., N. Y.), 9 Am. B. R. 32, 34; In *re Glass* (D. C., Tenn.), 9 Am. B. R. 391, 399, 119 Fed. 509; In *re Williams* (D. C., Tenn.), 10 Am. B. R. 538, 543, 123 Fed. 321; In *re Henschel* (Spec. Com., N. Y.), 12 Am. B. R. 31; In *re Barrett* (D. C., Tenn.), 12 Am. B. R. 626, 636, 132 Fed. 362; In *re Kenney & Co.* (D. C., Ind.), 14 Am. B. R. 611, 615, 136 Fed. 451; *Matter of McIntyre & Co.* (C. C. A., 2d Cir.), 24 Am. B. R. 4, 40, 176 Fed. 552; *Matter of Pierce, Jr.* (D. C., Wash.), 32 Am. B. R. 96, 210 Fed. 389; *Matter of Loughran* (C. C. A., 3d Cir.), 33 Am. B. R. 350, 218 Fed. 619.

XXXVIII. FORMS.

The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case.

Construction of statute: orders and forms.—Seek the meaning and intent of the law first and follow that rather than the order or form, and if the latter are not harmonious each with the other, seek the meaning and intent of the order and follow it rather than the form. In *re Soper and Slada* (Ref., N. Y.), 1 Am. B. R. 193.

Forms; use of.—The forms are not designed to effect any change in the law. They are "forms" and nothing more. Thus, it has been held that the failure of a bankrupt to precisely observe "Schedule B (5)" in making a claim for exemptions is not fatal. *Burke v. Guarantee Title & Trust Co.* (C. C. A., 3d Cir.), 14 Am. B. R. 31, 134 Fed. 562.

The brackets used in Form No. 1 for debtor's petition, containing the phrase "or has resided or has had his domicile" show that the Supreme Court meant that one or the other of the statements may be used; and they are inserted in the form by way of suggestion of such alterations as may be necessary to suit the circumstances of any particular case. In *re Laskaris* (Ref., N. Y.), 1 Am. B. R. 480.

Other cases citing this order.—In *re Gerber* (C. C. A., 9th Cir.), 26 Am. B. R. 608, 617; *Matter of Lenters* (D. C., Pa.), 35 Am. B. R. 3, 225 Fed. 878; *Pollack v. Meyer Bros. Drug Co.* (C. C. A., 8th Cir.), 36 Am. B. R. 835.

OFFICIAL FORMS

AS PRESCRIBED BY

THE SUPREME COURT OF THE UNITED STATES AT THE
OCTOBER TERM OF 1898.

[1225]

OFFICIAL FORMS IN BANKRUPTCY.¹

[N. B.—Oaths required by the act, except upon hearings in court, may be administered by referees and by officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken. Bankrupt Act of 1898, c. 4, § 20.]

- Form No. 1. Debtor's petition, 1228.*
No. 2. Partnership petition, 1242.
No. 3. Creditors' petition, 1244.
No. 4. Order to show cause upon creditors' petition, 1245.
No. 5. Subpoena to alleged bankrupt, 1246.
No. 6. Denial of bankruptcy, 1246.
No. 7. Order for jury trial, 1247.
No. 8. Special warrant to marshal, 1248.
No. 9. Bond of petitioning creditor, 1249.
No. 10. Bond to marshal, 1250.
No. 11. Adjudication that debtor is not bankrupt, 1251.
No. 12. Adjudication of bankruptcy, 1252.
No. 13. Appointment, oath, and report of appraisers, 1252.
No. 14. Order of reference, 1254.
No. 15. Order of reference in judge's absence, 1255.
No. 16. Referee's oath of office, 1255.
No. 17. Bond of referee, 1256.
No. 18. Notice of first meeting of creditors, 1257.
No. 19. List of debts proved at first meeting, 1258.
No. 20. General letter of attorney in fact when creditor is not represented by attorney at law, 1259.
No. 21. Special letter of attorney in fact, 1260.
No. 22. Appointment of trustee by creditors, 1261.
No. 23. Appointment of trustee by referee, 1262.
No. 24. Notice to trustee of his appointment, 1262.
No. 25. Bond of trustee, 1263.
No. 26. Order approving trustee's bond, 1264.
No. 27. Order that no trustee be appointed, 1264.
No. 28. Order of examination of bankrupt, 1265.
No. 29. Examination of bankrupt or witness, 1266.
No. 30. Summons to witness, 1266.
No. 31. Proof of unsecured debt, 1267.

1. For the validity of these forms, see Section Thirty, *ante*.

- Form No. 32. Proof of secured debt, 1268.*
No. 33. Proof of debt due corporation, 1269.
No. 34. Proof of debt by partnership, 1276.
No. 35. Proof of debt by agent or attorney, 1271.
No. 36. Proof of secured debt by agent, 1272.
No. 37. Affidavit of lost bill, or note, 1273.
No. 38. Order reducing claim, 1274.
No. 39. Order expunging claim, 1275.
No. 40. List of claims and dividends to be recorded by referee and by him delivered to trustee, 1275.
No. 41. Notice of dividend, 1276.
No. 42. Petition and order for sale by auction of real estate, 1277.
No. 43. Petition and order for redemption of property from lien, 1278.
No. 44. Petition and order for sale subject to lien, 1279.
No. 45. Petition and order for private sale, 1280.
No. 46. Petition and order for sale of perishable property, 1281.
No. 47. Trustee's report of exempted property, 1282.
No. 48. Trustee's return of no assets, 1283.
No. 49. Account of trustee, 1284.
No. 50. Oath to final account of trustee, 1285.
No. 51. Order allowing account and discharging trustee, 1286.
No. 52. Petition for removal of trustee, 1286.
No. 53. Notice of petition for removal of trustee, 1287.
No. 54. Order for removal of trustee, 1287.
No. 55. Order for choice of new trustee, 1288.
No. 56. Certificate by referee to judge, 1289.
No. 57. Bankrupt's petition for discharge, 1289.
No. 58. Specification of grounds of opposition to bankrupt's discharge, 1291.
No. 59. Discharge of bankrupt, 1291.
No. 60. Petition for meeting to consider composition, 1292.
No. 61. Application for confirmation of composition, 1293.
No. 62. Order confirming composition, 1294.
No. 63. Order of distribution on composition, 1295.

Form No. 1.

Debtor's Petition.²

To the Honorable

Judge of the District Court of the United States

for the District of

The petition of, of, in the county of,
 and district and State of, [State occupation], respectfully
 represents:

². Consult Sections Two, Four, Eighteen, and Fifty-nine. See also General Orders II, IV, V, VI, VII. Petition and schedules

in voluntary proceedings should be drawn and verified in triplicate and filed with the clerk.

That he has had his principal place of business [*or has resided, or has had his domicile*]³ for the greater portion of six months next immediately preceding the filing of this petition at, within said judicial district;⁴ that he owes debts which he is unable to pay in full; that he is willing to surrender all his property for the benefit of his creditors except such as is exempt by law, and desires to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule⁵ hereto annexed, marked A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts:

That the schedule hereto annexed, marked B, and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts:

Wherefore your petitioner prays that he may be adjudged⁶ by the court to be a bankrupt⁷ within the purview of said acts.

....., *Attorney.*

United States of America, District of, ss.:⁸

I,, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

....., *Petitioner.*

Subscribed and sworn to before me this . . . day of, A. D. 19 . . .

.....

.....

[*Official character.*]

3. Strike out some or all the words in brackets, as the facts may be.

4. § 2(1).

5. § 7-a(8).

6. § 18-g.

7. If partners petition, use Form No. 117, *post*, omitting certain allegations if all join.

8. Verification.—See under section eighteen, *ante*.

SCHEDULE A.—STATEMENT OF ALL DEBTS OF BANKRUPT.⁹

SCHEDULE A. (1)

Statement of all creditors who are to be paid in full, or to whom priority is secured by law.¹⁰

Claims which have priority.	Reference to ledger or voucher.	Names of creditors.	Residence ¹¹ (if unknown, that fact must be stated).	Where and when contracted.	Nature and consideration of the debt, and whether contracted as partner or joint contractor; and if so, with whom.	Amount.
(1) Taxes and debts due and owing to the United States.						\$ c.
(2) Taxes due and owing to the State of _____, or to any county, district or municipality thereof.						
(3) Wages due workmen, clerks, servants to an amount not exceeding \$300 each, earned within three months before filing the petition.						
(4) Other debts having priority by law.						
					Total.....	

Petitioner.

9. §§ 7-a (8), 39-a (2) (6); General Order IX. For suggestions as to drafting schedules, see Section Seven, ante, and General Order V. The insertion of the word "None" where the form calls for statements not applicable to the particular case, is usual.

10. § 64-a-b.

11. Names and addresses should be written with care. Wertheimer v. Howard, 14 Am. B. R. 547, 47 Misc. 145, 93 N. Y. Supp. 518; Liesum v. Krauss, 35 Misc. 376, 71 N. Y. Supp. 1022. Ditto marks should not be used in stating the addresses of creditors. In re Mackey (Ref., N. Y.), 1 Am. B. R. 593. Abbreviations should be avoided. Sutherland v. Lasher, 11 Am. B. R. 780, 41 N. Y. Misc. 249. Official forms should be used. Mahoney et al. v. Ward, 3 Am. B. R. 770, 100 Fed. 278; In re McClintock, 13 Am. B. R. 606. But they are forms and nothing more and are to be observed and used with such alterations as may be necessary to suit the circumstances of any particular case. Burke v. Guarantee Title & Trust Co. (C. C. A., 3d Cir.), 14 Am. B. R. 31, 67 C. C. A. 486, 134 Fed. 562.

SCHEDULE A. (5)

Accommodation paper is

[N. B.—The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, and acceptors thereof, are to be set forth under the names of the holders; if the bankrupt be liable as drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. Same particulars as to other commercial paper.]

Reference to ledger or voucher.	Names of holders.	Residences (if unknown, that fact must be stated).	Names and residence of persons accommodated.	Place where contracted.	Whether liability was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount.
						\$ c.
					Total.....	

_____, Petitioner.

OATH TO SCHEDULE A.

United States of America, District of....., ss:

On this.....day of....., A. D. 19...., before me personally came....., the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his debts, in accordance with the acts of Congress relating to bankruptcy.

Subscribed and sworn to before me this.....day of....., A. D. 19....
[Official character.]

16. Consult foot-notes to Schedule A (4).

SCHEDULE B. (2)¹⁸

Personal Property.

a.—Cash on hand.....	\$	c.
b.—Bills of exchange, promissory notes, or securities of any description (each to be set out separately).....		
c.—Stock in trade, in — business of —, at —, of the value of —.....		
d.—Household goods and furniture, household stores, wearing apparel and ornaments of the person, viz.....		
e.—Books, prints, and pictures, viz.....		
f.—Horses, cows, sheep, and other animals (with number of each), viz.....		
g.—Carriages and other vehicles, viz.....		
h.—Farming stock and implements of husbandry, viz.....		
i.—Shipping, and shares in vessels, viz.....		
k.—Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated, viz.....		
l.—Patents, copyrights, and trade-marks, viz.....		
m.—Goods or personal property of any other description, with the place where each is situated viz.....		
Total.....		

—, Petitioner.

18. Consult foot-note to Schedule B (1).

SCHEDULE B. (3) 19
Choses in action.

	Dollars.	Cents.
a.—Debts due petitioner on open account.....		
b.—Stocks in incorporated companies, interest in joint-stock companies and negotiable bonds.....		
c.—Policies of insurance.....		
d.—Unliquidated claims of every nature, with their estimated value.....		
e. Deposits of money in banking institutions and elsewhere.....		
Total.....		

_____, Petitioner.

19. Consult foot-note to Schedule B (1).

SCHEDULE B. (4) ²⁰

Property in reversion, remainder, or expectancy, including property held in trust for the debtor or subject to any power or right to dispose of or to charge.

[N. B.—A particular description of each interest must be entered. If all or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same, as far as known to the debtor.]

General interest.	Particular description.	Supposed value of my interest.
Interest in land.....		\$ c.
Personal property.....		
Property in money, stock, shares, bonds, annuities, etc.....		
Rights and powers, legacies and bequests.....		
(Total.....		
Property heretofore conveyed for benefit of creditors.		Amount realized from proceeds of property conveyed.
What portion of debtor's property has been conveyed by deed of assignment or otherwise, for benefit of creditors; date of such deed, name and address of party to whom conveyed, amount realized therefrom, and disposal of same, so far as known to debtor.....		\$ c.
What sum or sums have been paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy.....	Total.....	

_____, Petitioner.

20. Consult footnote to Schedule B (1). See also Pollack v. Meyer Bros. Drug Co. (C. C. A.; 8th Cir.), 36 Am. B. R. 835.

SCHEDULE B. (5) ²¹

A particular statement of the property claimed as exempted from the operation of the acts of Congress relating to bankruptcy, giving each item of property and its valuation; and, if any portion of it is real estate, its location, description, and present use.

	Valuation.	
	\$	c.
Military uniform, arms, and equipments.....		
Property claimed to be exempted by state laws; its valuation; whether real or personal; its description and present use; and reference given to the statute of the State creating the exemption.....		
Total.....		
_____, Petitioner.		

21. The failure of a bankrupt to precisely observe this schedule in making a claim for exemption is not fatal. *Burke v. Guarantee Title & Trust Co.* (C. C. A., 3d Cir.), 14 Am. B. R. 31, 67 C. C. A. 486, 134 Fed. 562. As to what is exempt, see Section Six; as to necessity of claiming, see Section Seven. Consult also foot-note to Schedule A (1).

SCHEDULE B. (6)²²*Books, papers, deeds, and writings relating to bankrupt's business and estate.*

The following is a true list of all books, papers, deeds, and writings relating to my trade, business, dealings estate, and effects, or any part thereof, which, at the date of this petition, are in my possession or under my custody and control, or which are in the possession or custody of any person in trust for me, or for my use, benefit, or advantage; and also of all others which have been heretofore, at any time, in my possession, or under my custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books.

Deeds.

Papers.

_____, *Petitioner.*OATH TO SCHEDULE B.²³

United States of America, District of, ss.:

On this day of, A. D. 19.., before me personally came, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his estate, both real and personal, in accordance with the acts of Congress relating to bankruptcy.

.,

.,

[*Official character.*]

²². Consult foot-note to Schedule B(1).

²³. This oath is perhaps unnecessary, the petition, which refers to the schedules, being verified. If used it should be changed into

the form of an affidavit (as is that at the end of the petition itself), to be signed by the affiant, with the proper jurat to be signed by the officer administering the oath.

SUMMARY OF DEBTS AND ASSETS.

[From the statements of the bankrupt in Schedules A and B.]

Schedule A.	1	(1)	Taxes and debts due United States.			
"	2	(2)	Taxes due States, counties, districts, and municipalities.			
"	3	(3)	Wages.			
"	4	(4)	Other debts preferred by law.			
Schedule A.	5		Secured claims.			
Schedule A.	6		Unsecured claims.			
Schedule A.	7		Notes and bills which ought to be paid by other parties thereto.			
Schedule A.	8		Accommodation paper.			
			Schedule A, total.			
Schedule B.	9		Real estate.			
Schedule B.	10		Cash on hand.			
"	11		Bills, promissory notes, and securities.			
"	12		Stock in trade.			
"	13		Household goods, etc.			
"	14		Books, prints, and pictures.			
"	15		Horses, cows, and other animals.			
"	16		Carriages and other vehicles.			
"	17		Farming stock and implements.			
"	18		Shipping and shares in vessels.			
"	19		Machinery, tools, etc.			
"	20		Patents, copyrights, and trade-marks.			
"	21		Other personal property.			
Schedule B.	22		Debts due on open accounts.			
"	23		Stocks, negotiable bonds, etc.			
"	24		Policies of insurance.			
"	25		Unliquidated claims.			
"	26		Deposits of money in banks and elsewhere.			
Schedule B.	27		Property in reversion, remainder, trust, etc.			
Schedule B.	28		Property claimed to be excepted.			
Schedule B.	29		Books, deeds and papers.			
			Schedule B, total.			

Form No. 2.

Partnership Petition.²⁴

To the Honorable
Judge of the District Court of the United States
for the District of

The petition of respectfully represents:

That your petitioners and have been partners under the firm name of, having their principal place of business at, in the county of, and district and State of, for the greater portion of the six months next immediately preceding the filing of this petition; that the said partners owe debts which they are unable to pay in full; that your petitioners are willing to surrender all their property for the benefit of their creditors, except such as is exempt by law, and desire to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by oath, contains a full and true statement of all the debts of said partners, and, as far as possible, the names and places of residence of their creditors, and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B; verified by oath, contains an accurate inventory of all the property, real and personal, of said partners, and such further statements concerning said property as are required by the provisions of said acts.

And said further states that the schedule hereto annexed, marked C, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked D, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said further states that the schedule hereto annexed, marked E, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places

²⁴ Consult Sections Four, Five, and Fifty-nine, if all partners join. If one or more do not, consult Sections Five and Eighteen. See, generally, Section Two for the place to file and Section Seven for the schedules. Read also General Orders V,

VI, VII, VIII. In the "Supplementary Forms," *post*, Form No. 117 will be found useful when all the partners do not join in a voluntary petition; also, by way of suggestion, when they do.

of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked F, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said further states that the schedule hereto annexed, marked G, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked H, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said further states that the schedule hereto annexed, marked J, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts, and that the schedule hereto annexed, marked K, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

Wherefore your petitioners pray that the said firm may be adjudged by a decree of the court to be bankrupts within the purview of said acts.

.....,
.....,
.....,

....., *Attorney.*

Petitioners.

....., the petitioning debtors mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of their knowledge, information, and belief.

.....,
.....,
.....,

Petitioners.

Subscribed and sworn to before me, this day of, A. D. 19...

[*Official character.*]

[Schedules to be annexed corresponding with schedules under Form No. 1.]

24a. Form for adjudication of firm and petitioning partners.—Where an adjudication is desired of petitioning partners as individuals as well as the firm, official form No. 2 should not be literally followed, but

there should be inserted in the prayer of the petition a request for the adjudication of the petitioning partners as well as the firm. *Matter of Lenoir-Cross Co.* (D. C., Tenn.), 35 Am. B. R. 774, 226 Fed. 227.

Form No. 3.

Creditors' Petition.²⁵

To the Honorable

Judge of the District Court of the United States

for the District of

The petition of, of, and,
of, and, of, respectfully shows:²⁶

That, of, has for the greater portion of six
months next preceding the date of filing this petition, had his principal place
of business, [*or* resided, *or* had his domicile] at, in the county
of and State and district aforesaid, and owes debts to the amount
of \$1,000.

That your petitioners are creditors of said, having
provable claims amounting in the aggregate, in excess of securities held by
them, to the sum of \$500. That the nature and amount of your petitioners'
claims are as follows:

.....
.....

And your petitioners further represent that said is
insolvent, and that within four months next preceding the date of this
petition the said committed an act of bankruptcy, in that
he did heretofore, to wit, on the day of.....

.....

Wherefore your petitioners pray that service of this petition, with a sub-
poena, may be made upon, as provided in the acts of
Congress relating to bankruptcy, and that he may be adjudged by the
court to be a bankrupt within the purview of said acts.

....., Secretary
.....,
.....,

Petitioners.

....., *Attorney.*

25. This form is demurrable. The use
of Form No. 118, *post*, is suggested.

26. For the necessary allegations in a
creditors' petition consult Sections Two,
Three, Four, Five (if against a partner-

ship), Eighteen, and Fifty-nine. See also
General Orders V, VI, VII, IX, XI, and
Equity Rules XX to XXV, XXVIII to
XXX. See also *Mather v. Coe*, 1 Am. B. R.
504, 92 Fed. 333.

United States of America, District of, ss.:

.,,, being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.

Before me,, this . . . day of, 19....
.,

[Official character.]

[Schedules to be annexed corresponding with schedules under Form No. 1.]

Form No. 4.

Order to Show Cause upon Creditors' Petition.²⁷

In the District Court of the United States for the District of,

IN THE MATTER OF 	}	In Bankruptcy.
--	---	----------------

Upon consideration of the petition of that be declared a bankrupt, it is ordered, that the said do appear at this court, as a court of bankruptcy, to be holden at, in the district aforesaid, on the day of, at . . . o'clock in the noon, and show cause, if any there be, why the prayer of said petition should not be granted; and

It is further ordered that a copy of said petition, together with a writ of subpœna, be served on said, by delivering the same to him personally or by leaving the same at his last usual place of abode in said district, at least five days before the day aforesaid.

Witness the Honorable, judge of the said court, and the seal thereof, at, in said district, on the day of, A. D. 19...

{ Seal of the court. }	Clerk.
---------------------------	-------	--------

27. This form is archaic. It is an adaptation from Form No. 57, under the law of 1867, and does not fit either the present law or the general orders. It is now rarely used. Form No. 5 is enough. Consult Section Eighteen of this work.

Form No. 5.**Subpœna to Alleged Bankrupt.²⁸**

United States of America, District of

To, in said district, greeting:

For certain causes offered before the district court of the United States of America within and for the district of, as a court of bankruptcy, we command and strictly enjoin you, laying all other matters aside and notwithstanding any excuse, that you personally appear²⁹ before our said district court to be holden at, in said district, on the day of, A. D. 19..., to answer³⁰ to a petition filed by in our said court, praying that you may be adjudged a bankrupt; and to do further and receive that which our said district court shall consider in this behalf. And this you are in no wise to omit, under the pains and penalties of what may befall thereon.

Witness the Honorable, judge of said court, and the seal thereof, at, this day of, A. D. 19...

{ Seal of
the court. }

.....,
Clerk.³¹

Form No. 6.**Denial of Bankruptcy.³²**

In the District Court of the United States for the District of

IN THE MATTER OF

In Bankruptcy.

At, in said district, on the day of, A. D. 19...

28. This is always issued and is tested by the clerk. See General Order III. For method of service, see Section Eighteen, *ante*, and note that the time within which to appear has been shortened by the amendatory act of 1903, as has the time for service by publication.

29. For methods of appearance, see Section Eighteen.

30. For the memorandum to be put at the bottom of this subpœna, see Equity Rule

XII. Consult also for process and service, Equity Rules VII to XVI.

31. For "Order Directing Service by Publication," see Form No. 121; for "General Appearance," see Form No. 122; for "Appearance by Intervening Creditor," see Form No. 123; and for other forms useful in involuntary proceedings, see "Supplementary Forms," *post*, and Hagar and Alexander's Bankruptcy Forms.

32. Consult for available defenses to a

And now the said appears, and denies³³ that he has committed the act of bankruptcy set forth in said petition, or that he is insolvent, and avers that he should not be declared bankrupt for any cause in said petition alleged; and this he prays may be inquired of by the court,³⁴ [or, he demands that the same may be inquired of by a jury.]³⁵

Subscribed and sworn to before me, this day of, A. D. 19..

.....,

[Official character.]

Form No. 7.³⁶

Order for Jury Trial.³⁷

In the District Court of the United States for the District of

IN THE MATTER OF

.....

In Bankruptcy.

At, in said district, on the day of, A. D. 19...

Upon the demand in writing filed by, alleged to be a bankrupt, that the fact of the commission by him of an act of bankruptcy, and the fact of his insolvency may be inquired of by a jury, it is ordered, that said issue be submitted to a jury.³⁸

{ Seal of
the court. }

.....,

Clerk.

creditors' petition, Sections Two, Three, Four, Five (if against a partnership), Eighteen, and Fifty-nine; for time to file denial (answer), see § 18-b, as amended by the act of 1903. See also *Mather v. Coe*, 1 Am. B. R. 504, 92 Fed. 333.

33. For form of "General Answer," see Form No. 127; for "Answer Alleging More than Twelve Creditors," see Form No. 128; and for other useful forms in involuntary cases, see "Supplementary Forms," *post*.

34. For pleadings in equity, see Equity Rules generally.

35. The demand for a jury trial is often in a separate paper; see Form No. 126.

36. This order is not used in the southern district of New York.

37. This follows as a matter of course the timely filing of a denial in the shape of Form No. 6, provided the denial puts at issue either insolvency or the commission of an act of bankruptcy; or, if such an issue is made by an answer and demand of jury trial in the method suggested by Forms Nos. 126 and 127.

38. For practice on jury trials consult Section Nineteen, *ante*. See also General Order III. For costs in contested adjudications, see General Order XXXIV.

Form No. 8.

Special Warrant to Marshal.³⁹

In the District Court of the United States for the District of

IN THE MATTER OF

In Bankruptcy.

To the marshal of said district or to either of his deputies, greeting:

Whereas a petition for adjudication of bankruptcy was, on the day of, A. D. 19....., filed against, of the county of and State of, in said district, and said petition is still pending; and whereas it satisfactorily appears that said has committed an act of bankruptcy [*or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value*], you are therefore authorized and required to seize and take possession of all the estate, real and personal, of said, and of all his deeds, books of account, and papers, and to hold and keep the same safely subject to the further order of the court.

Witness the Honorable, judge of the said court, and the seal thereof, at, in said district, on the of, A. D. 19...

{ Seal of }
{ the court. }

.....,
Clerk.

RETURN BY MARSHAL THEREON.

By virtue of the within warrant, I have taken possession of the estate of the within-named, and of all his deeds, books of account, and papers which have come to my knowledge.

.....,
Marshal [or Deputy Marshal].

³⁹ This form is somewhat of an inheritance from the law of 1867. It is useful in seizures of property authorized by §§ 3-e and 69. It is suggestive when a receiver is appointed under § 2 (3) and given power to take possession of the bankrupt's prop-

erty under § 2(15). See the appropriate Sections of this work; also General Orders III, X, XIX, and Equity Rule XV. The oath at the end of the form may be taken before any of the officers mentioned in § 20.

Fees and Expenses.

1. Service of warrant.....		
2. Necessary travel, at the rate of six cents a mile each way.....		
3. Actual expenses in custody of property and other services, as follows.....		
 [Here state the particulars.]		

.....,
Marshal [or *Deputy Marshal*].

District of, A. D. 19...

Personally appeared before me the said, and made oath that the above expenses returned by him have been actually incurred and paid by him, and are just and reasonable.

.....,
Referee in Bankruptcy.

Form No. 9.

Bond of Petitioning Creditor.⁴⁰

Know all men by these presents: That we,, as principal, and, as sureties, are held and firmly bound unto, in the full and just sum of dollars, to be paid to the said, executors, administrators, or assigns to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this day of, A. D. 19...

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the district court of the United States for the district of against the said, and the said has applied to that court for a warrant to the marshal of said district directing him to seize and hold the property of said, subject to the further orders of said district court:

Now, therefore, if such a warrant shall issue for the seizure of said property, and if the said shall indemnify the said for such damages as he shall sustain in the event such seizure

40. This bond seems to conform to the requirements of § 69. It can be used also in seizures under § 3-e. See foot-note to Form No. 8.

shall prove to have been wrongfully obtained, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in

presence of —

..... [SEAL.]

..... [SEAL.]

..... [SEAL.]

Approved this day of, A. D. 19...

.....,

District Judge.

Form No. 10.

Bond to Marshal.⁴¹

Know all men by these presents: That we,, as principal, and, as sureties, are held and firmly bound unto, marshal of the United States for the district of in the full and just sum of dollars, to be paid to the said, his executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this day of, A. D. 19...

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the district court of the United States for the district of, against the said, and the said court has issued a warrant to the marshal of the United States for said district, directing him to seize and hold property of the said, subject to the further order of the court, and the said property has been seized by said marshal as directed, and the said district court, upon a petition of said, has ordered the said property to be released to him:

Now, therefore, if the said property shall be released accordingly to the said, and the said, being adjudged a bankrupt, shall turn over said property or pay the value thereof in money to the trustee, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in the

presence of —

..... [SEAL.]

..... [SEAL.]

..... [SEAL.]

Approved this day of, A. D. 19...

.....,

District Judge.

⁴¹. See foot-notes to Forms Nos. 8 and 9. This bond seems to apply only to § 69.

Form No. 11.

Adjudication that Debtor is Not Bankrupt.⁴²

In the District Court of the United States for the District of

IN THE MATTER OF 	}	In Bankruptcy.
--	---	----------------

At, in said district, on day of, A. D. 19...; before the Honorable, judge of the district of

This cause came on to be heard at, in said court, upon the petition of that be adjudged a bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, and [*here state the proceedings, whether there was no opposition, or, if opposed, state what proceedings were had.*]

And thereupon, and upon consideration of the proofs in said cause [*and the arguments of counsel thereon, if any*], it was found that the facts set forth in said petition were not proved; and it is therefore adjudged that said was not a bankrupt, and that said petition be dismissed, with costs.

Witness the Honorable, judge of said court, and the seal thereof, at, in said district, on the day of, A. D. 19...

{ Seal of
the court. }

.....,
Clerk.

⁴². This form is the converse of Form No. 12. See, generally, Sections Two, Three, Four, Five (if against a partnership), Eighteen, and Fifty-nine; General Orders

IV, V, VI, VII, XXXIV; and compare Equity Rules LXXXV and LXXXVI. Numerous forms in point by analogy will be found in "Supplementary Forms," *post*.

Form No. 12.

Adjudication of Bankruptcy.⁴³

In the District Court of the United States for the District of

<p style="text-align: center;">IN THE MATTER OF</p> <p style="text-align: center;">.....</p> <p style="text-align: center;"><i>Bankrupt</i> .</p>	}	In Bankruptcy.
---	---	----------------

At, in said district, on the day of, A. D. 19..., before the Honorable, judge of said court in bankruptcy, the petition of that^{43a} be adjudged a bankrupt, within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said is hereby declared and adjudged bankrupt accordingly.

Witness the Honorable, judge of said court, and the seal thereof, at, in said district, on the day of A. D. 19...

{ Seal of }
{ the court }

.....,
Clerk.

Form No. 13.

Appointment, Oath, and Report of Appraisers.⁴⁴

In the District Court of the United States for the District of

<p style="text-align: center;">IN THE MATTER OF</p> <p style="text-align: center;">.....</p> <p style="text-align: center;"><i>Bankrupt</i> .</p>	}	In Bankruptcy.
---	---	----------------

It is ordered that, of, of, and, of, three disinterested per-

43. The use of this form is quite universal. When the adjudication is made by the referee (§ 38-a(1)), it should follow the framework of the numerous referee orders in "Supplementary Forms," *post*, note the absence of the judge from the district or the division, the receipt of an order of reference from the clerk certifying that fact (§ 18-f-g; Form No. 15), and omit the

teste clause, but otherwise follow the above phraseology. See, generally, in Sections Eighteen and Thirty-eight.

43a. If the adjudication is of a partnership and the partners, see Section Five, *ante*, for the proper words here, and insert the same in the title.

44. See Section Seventy and compare General Order XVII.

sons, be, and they are hereby, appointed appraisers to appraise the real and personal property belonging to the estate of the said bankrupt set out in the schedules now on file in this court, and report their appraisal to the court, said appraisal to be made as soon as may be, and the appraisers to be duly sworn.

Witness my hand this day of, A. D. 19...

.....,

*Referee in Bankruptcy.*⁴⁵

..... District of, ss.:

Personally appeared the within-named and severally made oath that they will fully and fairly appraise the aforesaid real and personal property according to their best skill and judgment.

.....

.....

.....

Subscribed and sworn to before me, this day of, A. D. 19...

.....,

[*Official character.*]

We, the undersigned, having been notified that we were appointed to estimate and appraise the real and personal property aforesaid, have attended to the duties assigned us, and after a strict examination and careful inquiry, we do estimate and appraise the same as follows:⁴⁶

	Dollars.	Cents.

In witness whereof we hereunto set our hands, at, this day of, A. D. 19...

.....

.....

.....

⁴⁵. The appraisers can be sworn in before any officer mentioned in § 20.

⁴⁶. The schedule here is much too short. It is thought that there should be at least two schedules, one for real estate and the other for personal property, and that the appraisers should set out the various items with much of the particularity required of

a bankrupt (§ 7[8]). A statement of the basis of valuation, as "at cost," or "25% off cost," and of the intumbrances, if any, will also prove valuable to the officers and the creditors. At the end of the schedules there should also be a "summary statement."

Form No. 14.

Order of Reference.⁴⁷

In the District Court of the United States for the District of

IN THE MATTER OF

.....

Bankrupt .

} In Bankruptcy.

Whereas of, in the county of and district aforesaid, on the day of, A. D. 19..., was duly adjudged a bankrupt upon a petition filed in this court by [*or, against*] him on the day of, A. D. 19..., according to the provisions of the acts of Congress relating to bankruptcy.

It is thereupon ordered, that said matter be referred to, one of the referees in bankruptcy of this court, to take such further proceedings therein as are required by said acts; and that the said shall attend before said referee on the day of at, and thenceforth shall submit to such orders as may be made by said referee or by this court relating to said bankruptcy.

Witness the Honorable, judge of the said court, and the seal thereof, at in said district, on the day of, A. D. 19....

{ Seal of
the court. }

.....,
Clerk.

⁴⁷ This order is discussed in the text. See Sections Eighteen and Twenty-two. Consult also General Order XII.

Form No. 15.

Order of Reference in Judge's Absence.⁴⁸

In the District Court of the United States for the District of

IN THE MATTER OF

In Bankruptcy.

Whereas on the day of, A. D. 19..., a petition was filed to have, of, in the county of and district aforesaid, adjudged a bankrupt according to the provisions of the acts of Congress relating to bankruptcy; and whereas the judge of said court was absent from said district at the time of filing said petition [*or, in case of involuntary bankruptcy*, on the next day after the last day on which pleadings might have been filed, and none have been filed by the bankrupt or any of his creditors], it is thereupon ordered that the said matter be referred to, one of the referees in bankruptcy of this court, to consider said petition and take such proceedings therein as are required by said acts; and that the said shall attend before said referee on the day of, A. D. 19..., at

Witness my hand and the seal of the said court, at, in said district, on the day of, A. D. 19...

{ Seal of
the court. }

.....,
Clerk.

Form No. 16.

Referee's Oath of Office.⁴⁹

I,, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as referee in bankruptcy, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God.

Subscribed and sworn to before me, this day of, A. D. 19...

.....,
District Judge.

⁴⁸. See foot-notes to Form No. 12.

⁴⁹. See Section Thirty-six. This oath can be taken before any officer mentioned in § 20.

Form No. 17.

Bond of Referee.⁵⁰

Know all men by these presents: That we, of , as principal, and of and of , as sureties, are held and firmly bound to the United States of America in the sum of dollars, lawful money of the United States, to be paid to the said United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this day of , A. D. 19...

The condition of this obligation is such that whereas the said has been on the day of , A. D. 19... , appointed by the Honorable , judge of the district court of the United States for the district of , a referee in bankruptcy in and for the county of , in said district, under the acts of Congress relating to bankruptcy:

Now, therefore, if the said shall well and faithfully discharge and perform all the duties pertaining to the said office of referee in bankruptcy, then this obligation to be void; otherwise to remain in full force and virtue.

Signed and sealed .
in the presence of—

..... [L. S.]
..... [L. S.]
..... [L. S.]

Approved this day of , A. D. 19...

.....

District Judge.

⁵⁰. This bond is required by § 50.

Form No. 18.

Notice of First Meeting of Creditors.⁵¹

In the District Court of the United States for the District of

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: right;"><i>Bankrupt</i> .</p>	}	In Bankruptcy.
--	---	----------------

To the creditors of, of, in the county of, and district aforesaid, a bankrupt.

Notice is hereby given that on the day of, A. D. 19..., the said was duly adjudicated bankrupt; and that the first meeting of his creditors will be held at in, on the day of, A. D. 19..., at o'clock in the noon, at which time the said creditors may attend, prove their claims, appoint a trustee, examine the bankrupt, and transact such other business as may properly come before said meeting.

.....,
Referee in Bankruptcy.

....., 19...

51. The use of this form is quite universal. With some changes it can be adapted to fit all of the notices given by the referee, and not by the clerk. See Forms No. 176, 177, 178, in "Supplementary Forms," *post*. For proofs of mailing and of publication, see Forms Nos. 179, 180. For notices given by the clerk in the form of orders to show cause, see Forms Nos. 96, 108, 138. Consult also Section Fifty-eight, generally, and General Order XXI (2).

Form No. 19.

List of Debts Proved at First Meeting.⁵²

In the District Court of the United States for the District of

IN THE MATTER OF

.....

Bankrupt .

} In Bankruptcy.

At, in said district, on the day of, A. D. 19...,
before, referee in bankruptcy.

The following is a list of creditors who have this day proved their debts:

Names of creditors	Residence.	Debts proved.	
		Dolls.	Cts.

.....,

Referee in Bankruptcy.

52. This form is archaic. It does not fit the present law or practice, and is rarely, if ever, used. See General Order XXIV, which is also practically a dead letter, and

Sections Thirty-nine and Fifty-seven of this work. The referees keep a list in their claim book and transmit dividend lists to the trustee.

Form No. 20.

General Letter of Attorney in Fact when Creditor is not Represented by Attorney at Law,⁵³
In the District Court of the United States for the District of

IN THE MATTER OF

..... } In Bankruptcy.

Bankrupt .

To,

.....:

I,, of, in the county of and State of, do hereby authorize you, or any one of you, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other place and time as may be appointed by the court for holding such meeting or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion, for me and in my name to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said bankrupt, and for me to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due me under any composition, and for any other purpose in my interest whatsoever, with full power of substitution.

In witness whereof I have hereunto signed my name and affixed my seal the day of, A. D. 19...

....., [L. S.]

Signed, sealed, and delivered in presence of —

.....,

Acknowledged before me, this day of, A. D. 19...

.....,

[Official character.]

⁵³. See §§ 1 (9), 57, and General Orders IV and XXI (5). Consult also discussion of the necessity of power of attorney to an

attorney in law representing a creditor in a bankruptcy proceeding, in Section Fifty-six, ante.

Form No. 21.

Special Letter of Attorney in Fact.⁵⁴

IN THE MATTER OF

In Bankruptcy.

Bankrupt .

To,

.....:

I hereby authorize you, or any one of you, to attend the meeting of creditors in this matter, advertised or directed to be holden at, on the day of, before, or any adjournment thereof, and then and there for and in name to vote for or against any proposal or resolution that may be lawfully made or passed at such meeting or adjourned meeting, and in the choice of trustee or trustees of the estate of the said bankrupt.

....., [L. S.]

In witness whereof I have hereunto signed my name and affixed my seal the day of, A. D. 19...

Signed, sealed, and delivered in presence of —

.....,

Acknowledged before me, this day of, A. D. 19...

.....,

[Official character.]

⁵⁴ See foot-note to Form No. 20. This form is for use when the attorney is not given general authority. It is rarely used.

Form No. 22.

Appointment of Trustee by Creditors.⁵⁵

In the District Court of the United States for the District of

IN THE MATTER OF

.....

Bankrupt .

In Bankruptcy.

At, in said district, on the day of, A. D. 19..., before, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors in the above bankruptcy, and of which due notice has been given in the [*here insert the names of the newspapers in which notice was published*], we, whose names are hereunder written, being the majority in number and in amount of claims of the creditors of the said bankrupt, whose claims have been allowed, and who are present at this meeting, do hereby appoint, of, in the county of and State of, to be the trustee.. of the said bankrupt's estate and effects.

Signatures of creditors.	Residence of the same.	Amount of debt.	
		Dolls.	Cts.

Ordered, that the above appointment of trustee.. be, and the same is hereby approved.⁵⁶

.....,
Referee in Bankruptcy.

55. Cross-references: For who appoints trustees, §§ 2 (17), 44; for qualifications of trustees, § 45; for meetings of creditors, § 55; for who may vote at such meetings, § 56; for notices of meetings of creditors, § 58-a-b. See also General Orders XIII, XIV, XV.
56. This form is also somewhat archaic. It is not often used. Referees having the

right to approve or disapprove the choice of creditors (General Order XIII), a brief order of approval and fixing the bond, but without requiring the signatures of creditors, is suggested as a substitute. See Form No. 160. For order dispensing with the appointment of trustee (General Order XV), see Form No. 27 and compare Form No. 77.

Form No. 23.**Appointment of Trustee by Referee.⁵⁷**

In the District Court of the United States for the District of

IN THE MATTER OF

.....

} In Bankruptcy.

Bankrupt .

At, in said district, on the day of, A. D. 19..., before, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors under the said bankruptcy, and of which due notice has been given in the [here insert the names of the newspapers in which notice was published] I, the undersigned referee of the said court in bankruptcy, sat at the time and place above mentioned; pursuant to such notice, to take the proof of debts and for the choice of trustee under the said bankruptcy; and I do hereby certify that the creditors whose claims had been allowed and were present, or duly represented, failed to make choice of a trustee of said bankrupt's estate, and therefore I do hereby appoint, of, in the county of and State of, as trustee of the same.

.....
Referee in Bankruptcy.

Form No. 24.**Notice to Trustee of His Appointment.⁵⁸**

In the District Court of the United States for the District of

IN THE MATTER OF

.....

} In Bankruptcy.

Bankrupt .

To, of, in the county of, and district aforesaid:

⁵⁷. See foot-note to Form No. 22. Form No. 160 can easily be adapted to fit the facts outlined above.

⁵⁸. This form seems to be required by General Order XVI. It is, however, little used. As to the trustee's bond, see § 50.

I hereby notify you that you were duly appointed trustee [or one of the trustees] of the estate of the above-named bankrupt at the first meeting of the creditors, on the day of, A. D. 19... and I have approved said appointment. The penal sum of your bond as such trustee has been fixed at dollars. You are required to notify me forthwith of your acceptance or rejection of the trust.

Dated at the day of, A. D. 19...

Referee in Bankruptcy.

Form No. 25.

Bond of Trustee.⁵⁹

Know all men by these presents: That we,, of, as principal, and, of, and, of, as sureties, are held and firmly bound unto the United States of America in the sum of dollars, in lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this day of, A. D. 19...

The condition of this obligation is such, that whereas the above-named was, on the day of, A. D. 19..., appointed trustee in the case pending in bankruptcy in said court, wherein is the bankrupt, and he, the said, has accepted said trust with all the duties and obligations pertaining thereunto:

Now, therefore, if the said, trustee as aforesaid, shall obey such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of said bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said trustee, then this obligation to be void; otherwise, to remain in full force and virtue.

Signed and sealed in

presence of —

....., [SEAL.]
 [SEAL.]
 [SEAL.]

⁵⁹ The court must "receive" evidence of the actual value of the securities. Where they are natural persons this can best be done by adding an affidavit as to property to the bond. Thus see Form No. 167, *post*.

Form No. 26.**Order Approving Trustee's Bond.⁶⁰**

At a court of bankruptcy, held in and for the District of,
at, this day of, 19...

Before, referee in bankruptcy, in the District Court
of the United States for the District of

IN THE MATTER OF

.....

Bankrupt .

} In Bankruptcy.

It appearing to the court, of, and in said
district, has been duly appointed trustee of the estate of the above-named
bankrupt, and has given a bond with sureties for the faithful performance
of his official duties, in the amount fixed by the creditors [or by order of
the court], to wit, in the sum of dollars, it is ordered that the said
bond be, and the same is hereby, approved.

.....,
Referee in Bankruptcy.

Form No. 27.**Order that No Trustee be Appointed.⁶¹**

In the District Court of the United States for the District of

IN THE MATTER OF

.....

Bankrupt .

} In Bankruptcy.

It appearing that the schedule of the bankrupt discloses no assets, and
that no creditor has appeared at the first meeting, and that the appointment

⁶⁰. This order is not so phrased as to give certain important facts when recorded in a record office (§ 21-e). Hence Form No. 168, *post*. See also Sections Twenty-one and Fifty of this work.

⁶¹. See General Order XV and foot-notes. Consult also Sections Six and Forty-seven. If this form is used it may, perhaps, be supplemented as to the bankrupt's exempt property by Form No. 109.

of a trustee of the bankrupt's estate is not now desirable, it is hereby ordered that, until further order of the court, no trustee be appointed and no other meeting of the creditors be called.

.....,

Referee in Bankruptcy.

Form No. 28.

Order for Examination of Bankrupt.⁶²

In the District Court of the United States for the District of

IN THE MATTER OF	}	In Bankruptcy.
.....		
<i>Bankrupt .</i>		

At, on the day of, A. D. 19...

Upon the application of, trustee of said bankrupt [or creditor of said bankrupt], it is ordered that said bankrupt attend before, one of the referees in bankruptcy of this court, at on the day of, at o'clock in the noon, to submit to examination under the acts of Congress relating to bankruptcy, and that a copy of this order be delivered to him, the said bankrupt, forthwith.

.....,

Referee in Bankruptcy.

⁶². See Sections Seven and Twenty-one, also Section Twelve. Compare General Order XII (1). This form is rarely used; the bankrupt appears without a formal

order and is examined at the first meeting of creditors or adjournments thereof. Where the testimony of one not the bankrupt is desired Form No. 30 is used.

Form No. 29.

Examination of Bankrupt or Witness.⁶³

In the District Court of the United States for the District of

IN THE MATTER OF

.....

In Bankruptcy.

Bankrupt.

At, in said district, on the day of, A. D. 19..., before, one of the referees in bankruptcy of said court,, of, in the county of, and State of, being duly sworn and examined at the time and place above mentioned, upon his oath says: [*Here insert substance of examination of party.*]

.....,
Referee in Bankruptcy.

Form No. 30.

Summons to Witness.⁶⁴

To

Whereas, of, in the county of, and State of, has been duly adjudged bankrupt, and the proceeding in bankruptcy is pending in the district court of the United States for the district of

These are to require you, to whom this summons is directed, personally to be and appear before, one of the referees in bankruptcy of the said court, at, on the day of, at ... o'clock in the noon, then and there to be examined in relation to said bankruptcy.

Witness the Honorable, judge of said court, and the seal thereof at, this day of, A. D. 19...

.....,
Clerk.

63. This is archaic. The bankrupt or the witness is sworn and his examination taken down by a stenographer and transcribed, and the testimony, after being read over and signed, is made a part of the referee's record-book. Consult General Order XXII; also §§ 7(9), 21, 38-a(2), 41-a.

64. Cross-references: To the law,

§§ 7(9), 21, 52-b; to the general orders, III, XXII; to the forms, No. 28. See also, for designation of persons other than the marshal to serve subpoenas. Equity Rule XV, though the phrasing of the Return, *supra*, seems to indicate that any person may serve a subpoena without specific designation.

Return of Summons to Witness.

In the District Court of the United States for the District of

IN THE MATTER OF

In Bankruptcy.

Bankrupt .

On this day of, A. D. 19..., before me came,
, of, in the county of and State of,
 and makes oath, and says that he did, on, the day of,
 A. D. 19..., personally serve, of, in the
 county of and State of, with a true copy of the summons
 hereto annexed, by delivering the same to him; and he further makes oath
 and says that he is not interested in the proceeding in bankruptcy named in
 said summons.

Subscribed and sworn to before me, this day of, A. D.
 19...

Form No. 31.

Proof of Unsecured Debt.⁶⁵

In the District Court of the United States for the District of

IN THE MATTER OF

In Bankruptcy.

Bankrupt .

At, in said district of, on the day of
, A. D. 19..., came, of, in the
 county of, in said district of, and made oath, and

⁶⁵. Consult Section Fifty-seven. See also
 General Order XXI. If this form does
 not fit the latter special clauses must
 usually be added. Thus (1) that no note

is held to or judgment entered on the debt,
 and (2) concerning the average due date
 on an account maturing at different times,
 and (3) if on open account, when such

says that , the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of dollars; that the consideration of said debt is as follows:
.....
.....
that no part of said debt has been paid [except];
.....
that there are no set-offs or counterclaims to the same [except];
.....
and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever.

.....,
Creditor.

Subscribed and sworn to before me, this day of , A. D. 19...

.....,
[Official character.]

Form No. 32.

Proof of Secured Debt.⁶⁷

In the District Court of the United States for the District of

<p>IN THE MATTER OF</p> <p>.....</p> <p><i>Bankrupt .</i></p>	}	In Bankruptcy.
---	---	----------------

At , in said district of , on the day of , A. D. 19... , came , of , in the county of , in said district of , and made oath, and says that

account became or will become due, and (4) if by a corporation (see Form No. 33) why the claim is not verified by its treasurer, and (5) if the claim has been assigned after the bankruptcy, certain other allegations as to the assignment. For these special clauses see Form No. 170.

66. This can be sworn to before persons "authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken." See § 20.
67. See foot-notes to Form 31.

....., the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent, in the sum of dollars; that the consideration of said debt is as follows; that no part of said debt has been paid [except]; that there are no set-offs or counterclaims to the same [except]; and that the only securities held by this deponent for said debt are the following:

.....,
Creditor.

Subscribed and sworn to before me, this day of, A. D. 19...

.....,
[Official character.]

Form No. 33.

Proof of Debt Due Corporation.⁶⁸

In the District Court of the United States for the District of

IN THE MATTER OF

..... } In Bankruptcy.

Bankrupt . .

At, in said district of, on the day of, A. D. 19..., came, of, in the county of, and State of, and made oath, and says that he is of the, a corporation incorporated by and under the laws of the State of, and carrying on business at, in the county of and State of, and that he is duly authorized to make

⁶⁸. See foot-notes to Form 31.

Proof by corporation should be made by treasurer. May be made through its agent or attorney when sufficient reason is shown why it is not made by treasurer, or if it has none, by the officer whose duties most nearly correspond to those of treasurer as provided by General Order No. XXI. Matter of Reboulin Fils Co. (D. C., N. J.), 19

Am. B. R. 215, — Fed. —. When proof is not made by the treasurer insert the following clause: "That the reason this proof is not made by the treasurer is that . . . etc. [stating reason], and that deponent is an officer of such corporation whose duties most nearly correspond to those of treasurer."

this proof, and says that the said , the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of the said petition, and still is justly and truly indebted to said corporation in the sum of dollars; that the consideration of said debt is as follows: ;
that no part of said debt has been paid [except] ;
that there are no set-offs or counterclaims to the same [except] ; and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

.....,
..... of said Corporation.

Subscribed and sworn to before me, this day of , A. D. 19...

.....,
[Official character.]

Form No. 34.

Proof of Debt by Partnership.⁶⁹

In the District Court of the United States for the District of

IN THE MATTER OF <i>Bankrupt</i> .	} In Bankruptcy.

At , in said district of , on the day of , A. D. 19... , came , of , in the county of , in said district of , and made oath, and says that he is one of the firm of , consisting of himself and , of , in the county of and State of ; that the said , the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to this deponent's said firm in the sum of dollars; that the consideration of said

69. See foot-notes to Form No. 31.

debt is as follows:
.....;
that no part of said debt has been paid [except];
that there are no set-offs or counterclaims to the same [except
.....]; and this deponent has not, nor has his said firm, nor has any
person by their order, or to this deponent's knowledge or belief, for their
use, had or received any manner of security for said debt whatever.

.....,
Creditor.

Subscribed and sworn to before me, this day of, A. D.
19...

.....,
[*Official character.*]

Form No. 35.

Proof of Debt by Agent or Attorney.⁷⁰

In the District Court of the United States for the District of

IN THE MATTER OF	} In Bankruptcy.
.....	
<i>Bankrupt .</i>	

At, in said district of, on the day of,
A. D. 19..., came, of, in the county of
....., and State of, attorney [*or* authorized agent] of
....., in the county of, and State of, and made
oath and says that, the person by [*or* against] whom a
petition for adjudication of bankruptcy has been filed, was at and before the
filing of said petition, and still is, justly and truly indebted to the said
....., in the sum of dollars; that the consideration
of said debt is as follows:
.....;
that no part of said debt has been paid [except
.....];
and that this deponent has not, nor has any person by his order, or to this
deponent's knowledge or belief, for his use had or received any manner of

70. See foot-notes to Form No. 31.

security for said debt whatever. And this deponent further says, that this deposition cannot be made by the claimant in person because

.....
and that he is duly authorized by his principal to make this affidavit, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated, and that such debt, to the best of his knowledge and belief, still remains unpaid and unsatisfied.

.....

Subscribed and sworn to before me, this day of, A. D. 19...

.....,
[Official character.]

Form No. 36.

Proof of Secured Debt by Agent.⁷¹

In the District Court of the United States for the District of

IN THE MATTER OF

..... } In Bankruptcy.
Bankrupt .

At, in said district of, on the day of, A. D. 19..., came, of, in the county of, and State of, attorney [or authorized agent] of, in the county of, and State of, and made oath, and says that, the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to the said in the sum of dollars; that the consideration of said debt is as follows:; that no part of said debt has been paid [except.....]; that there are no set-offs or counterclaims to the same [except.....];

⁷¹. See foot-notes to Form No. 31.

and that the only securities held by said for said debt are the following
;
 and this deponent further says that this deposition cannot be made by the claimant in person because

 and that he is duly authorized by his principal to make this deposition, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated.

Subscribed and sworn to before me, this day of, A. D. 19...

.....,
[Official character.]

Form No. 37.

Affidavit of Lost Bill, or Note.⁷²

In the District Court of the United States for the District of

IN THE MATTER OF

In Bankruptcy.

Bankrupt .

On this day of, A. D. 19..., at, came of, in the county of, and State of, and makes oath and says that the bill of exchange [*or note*], the particulars whereof are underwritten, has been lost under the following circumstances, to wit,

 and that he, this deponent, has not been able to find the same; and this deponent further says that he has not, nor has the said, or any person or persons to their use, to this deponent's knowledge or belief, negotiated the said bill [*or note*], nor in any manner parted with or assigned the legal or beneficial interest therein, or any part thereof; and that he, this deponent, is the person now legally and beneficially interested in the same.

⁷². See foot-notes to Form No. 31.

Bill or note above referred to.

Date.	Drawer or maker.	Acceptor.	Sum.	

.....

Subscribed and sworn to before me, this day of, A. D. 19...

.....,

[Official character.]

Form No. 38.

Order Reducing Claim.⁷³

In the District Court of the United States for the District of

IN THE MATTER OF

.....

} In Bankruptcy.

Bankrupt .

At, in said district, on the day of, A. D. 19...

Upon the evidence⁷⁴ submitted to this court upon the claim of against said estate [and, *if the fact be so*, upon hearing counsel thereon], it is ordered, that the amount of said claim be reduced from the sum of, as set forth in the affidavit in proof of claim filed by said creditor in said case, to the sum of, and that the latter-named sum be entered upon the books of the trustee as the true sum upon which a dividend shall be computed [*if with interest*, with interest thereon from the day of, A. D. 19...].

.....,

Referee in Bankruptcy.

73. See, generally, Section Fifty-seven, *ante*. Read also § 2(2), and General Order XXI(6).

74. For forms for petition and notice on an application to reduce or expunge, see Forms Nos. 171 and 172, *post*.

Form No. 39.**Order Expunging Claim.⁷⁵**

In the District Court of the United States for the District of

IN THE MATTER OF

.....

In Bankruptcy.

Bankrupt .

At, in said district, on the day of, A. D. 19...

Upon the evidence submitted to the court upon the claim of against said estate [and, *if the fact be so*, upon hearing counsel thereon], it is ordered that said claim be disallowed and expunged from the list of claims upon the trustee's record in said case.

.....,
Referee in Bankruptcy.

Form No. 40.

List of Claims and Dividends to be Recorded by Referee and by him Delivered to Trustee.⁷⁶

In the District Court of the United States for the District of

IN THE MATTER OF

.....

In Bankruptcy.

Bankrupt .

At, in said district, on the day of, A. D. 19...

⁷⁵. See foot-note to Form No. 38.

⁷⁶. This form fits into § 39-a(1). As a rule, however, dividend sheets are prepared by the trustee from the files and record-book of the referee. The practice here is somewhat archaic. See Forms Nos. 166 and

168 for use of a part of the form in connection with an order declaring a dividend and ordering it paid and the practice there outlined. Consult also, generally, Sections Thirty-nine and Sixty-five, *ante*.

A list of debts proved and claimed under the bankruptcy of
with dividend at the rate of per cent this day declared thereon by
....., a referee in bankruptcy.

No.	Creditors. [To be placed alphabetically, and the names of all the parties to the proof to be carefully set forth.]	Sum proved.		Dividend.	
		Dollars.	Cents.	Dollars.	Cents.

.....,
Referee in Bankruptcy.

Form No. 41.

Notice of Dividend.⁷⁷

In the District Court of the United States for the District of

IN THE MATTER OF <i>Bankrupt .</i>	}	In Bankruptcy.
--	---	----------------

At, on the day of, A. D. 19...

To,

Creditor of, bankrupt:

I hereby inform you that you may, on application at my office,, on the day of, or on any day thereafter, between the hours of, receive a warrant for the dividend due to you out of the above estate. If you cannot personally attend, the warrant will be delivered to your order on your filling up and signing the subjoined letter.

.....,
Trustee.

⁷⁷ This form is an inheritance from the law of 1867. It is rarely used. Consult, generally, Sections Thirty-nine and Fifty-seven, and for the notice now required, Section Fifty-eight. See also § 65 and General Order XXIX.

For notice of final meeting, see Form No. 176, which, by the substitution of the dividend clause in Form No. 177, can be adapted to a notice for the declaration and payment of a dividend. Compare also Forms Nos. 162, 164, 165.

Creditor's Letter to Trustee.

To,

Trustee in bankruptcy of the estate of, bankrupt:

Please deliver to the warrant for dividend payable out of the said estate to me.

.....,

Creditor.

Form No. 42.

Petition and Order for Sale by Auction of Real Estate.⁷⁸

In the District Court of the United States for the District of

IN THE MATTER OF

.....

In Bankruptcy.

Bankrupt .

Respectfully represents, trustee of the estate of said bankrupt, that it would be for the benefit of said estate that a certain portion of the real estate of said bankrupt, to wit: [*Here describe it and its estimated value*] should be sold by auction, in lots or parcels, and upon terms and conditions, as follows:

Wherefore he prays that he may be authorized to make sale by auction of said real estate as aforesaid.

Dated this day of, A. D. 19...

.....,

Trustee.

The foregoing petition having been duly filed, and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or after hearing* in favor of said

78. Read Section Seventy, *ante*, and consult General Order XVIII on sales. See also for notice § 58-a (4) and the sale clause in Form No. 177, when inserted, as there explained, in Form No. 176:

It is also suggested that an adaptation of this form to the framework of Forms Nos. 190 and 191, or if after notice, to Forms Nos. 190 and 193, will be more in accord with modern methods and the practice outlined in the law and the general orders.

Use of form.—In order to bring about a

public sale of bankrupt's assets, Official Form No. 42 should be followed, which prescribes a petition by the trustee to the referee asking leave to sell the property at public sale. Notice of such petition is given to creditors and on the return thereof the referee if he sees fit, directs a sale which is then carried on by the trustee without further notice. In re Nevada-Utah Mines & Smelters Corporation, (D. C., N. Y.), 28 Am. B. R. 409, *affd.* (C. C. A., 2d Cir.), 29 Am. B. R. 754.

petition and in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's real estate specified in the foregoing petition, by auction, keeping an accurate account of each lot or parcel sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this day of, A. D. 19...

.....,

Referee in Bankruptcy.

Form No. 43.

Petition and Order for Redemption of Property from Lien.⁷⁹

In the District Court of the United States for the District of

IN THE MATTER OF

.....

} In Bankruptcy.

Bankrupt .

Respectfully represents, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit: [*Here describe the estate or property and its estimated value*] is subject to a mortgage [*describe the mortgage*], or to a conditional contract [*describing it*], or to a lien [*describe the origin and nature of the lien*], [*or if the property be personal property, has been pledged or deposited and is subject to a lien*] for [*describe the nature of the lien*], and that it would be for the benefit of the estate that said property should be redeemed and discharged from the lien thereon. Wherefore he prays that he may be empowered to pay out of the assets of said estate in his hands the sum of, being the amount of said lien, in order to redeem said property therefrom.

Dated this day of, A. D. 19...

.....,

Trustee.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being

⁷⁹. The redemption of property from liens is not common under the present law. This form, however, fits into General Order XXVIII, which is an inheritance from the

law of 1867. See, generally, Sections Twenty-seven and Sixty-seven. As to notice, see § 58-a(7). See also foot-note to Form No. 42.

represented thereat [*or after hearing* in opposition thereto], it is ordered that the said trustee be authorized to pay out of the assets of the bankrupt's estate specified in the foregoing petition the sum of, being the amount of the lien, in order to redeem the property therefrom.

Witness my hand this day of, A. D. 19...

.....,
Referee in Bankruptcy.

Form No. 44.

Petition and Order for Sale Subject to Lien.⁸⁰

In the District Court of the United States for the District of

IN THE MATTER OF

.....

In Bankruptcy.

Bankrupt .

Respectfully represents, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit: [*Here describe the estate or property and its estimated value*] is subject to a mortgage [*describe mortgage*], or to a conditional contract [*describe it*], or to a lien [*describe the origin and nature of the lien*], or [*if the property be personal property*] has been pledged or deposited and is subject to a lien for [*describe the nature of the lien*], and that it would be for the benefit of the said estate that said property should be sold, subject to said mortgage, lien, or other incumbrance. Wherefore he prays that he may be authorized to make sale of said property, subject to the incumbrance thereon.

Dated this day of, A. D. 19...

.....,
Trustee.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or after hearing* in favor of said petition and in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate

^{80.} See foot-notes to Forms Nos. 42 and 43. As to effect of failure to follow this form, see *In re Thockmorton* (C. C. A., 6th Cir.), 28 Am. B. R. 487.

specified in the foregoing petition, by auction [*or, at private sale*], keeping an accurate account of the property sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this day of, A. D. 19...

.....,
Referee in Bankruptcy.

Form No. 45.

Petition and Order for Private Sale.⁸¹

In the District Court of the United States for the District of

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: right;"><i>Bankrupt .</i></p>	}	In Bankruptcy.
--	---	----------------

Respectfully represents, duly appointed trustee of the estate of the aforesaid bankrupt.

That for the following reasons, to wit,
.....
.....
it is desirable and for the best interest of the estate to sell at private sale a certain portion of the said estate, to wit:
.....
.....

Wherefore he prays that he may be authorized to sell the said property at private sale.

Dated this day of, A. D. 19...

.....,
Trustee.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or after hearing in favor of said petition and in opposition thereto*], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, at private sale, keeping an accurate account of each

⁸¹. See sections of the statute and Sections of this work, referred to in the footnotes to Forms Nos. 42, 43, and 44. See also General Order XVIII(2).

article sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this day of, A. D. 19...

.....,
Referee in Bankruptcy.

Form No. 46.

Petition and Order for Sale of Perishable Property.⁸²

In the District Court of the United States for the District of

IN THE MATTER OF

..... } In Bankruptcy.

Bankrupt .

Respectfully represents the said bankrupt, [or, a creditor, or the receiver, or the trustee of the said bankrupt's estate].

That a part of the said estate, to wit,

..... now in, is perishable, and that there will be loss if the same is not sold immediately.

Wherefore he prays the court to order that the same be sold immediately as aforesaid.

Dated this day of, A. D. 19...

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to the creditors of the said bankrupt, [or without notice to the creditors], now, after due hearing, no adverse interest being represented thereat, [or after hearing in favor of said petition and in opposition thereto] I find that the facts are as above stated, and that the same is required in the interest of the estate, and it is therefore ordered that the same be sold forthwith and the proceeds thereof deposited in court.

Witness my hand this day of, A. D. 19...

.....,
Referee in Bankruptcy.

⁸². See foot-notes to Forms Nos. 42, 43, 44, and 45, and, as to sales of perishable property generally, Sections Fifty-eight and

Seventy, *ante*, and General Order XVIII(3).

Form No. 47.

Trustee's Report of Exempted Property.⁸³

In the District Court of the United States for the District of

IN THE MATTER OF <i>Bankrupt</i> .	} In Bankruptcy.
--	------------------

At, on the day of, 19...

The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid, as his own property, under the provisions of the acts of Congress relating to bankruptcy.

General head.	Particular description.	Value.	
		Dolls.	Cts.
Military uniform, arms, and equipments. Property exempted by State laws(2)....			

.....,

Trustee.

⁸³. See, generally, Sections Six, Seven, and Forty-seven, *ante*. Consult also §§ 2(11) and 70-b of the statute. This form fits into General Order XVII, but

should be verified and specify the State statute under which the exemptions are set apart. For other useful forms on exemptions, see Nos. 77, 78, 79 and 80.

Form No. 48.

Trustee's Return of No Assets.⁸⁴

In the District Court of the United States for the District of

<p>IN THE MATTER OF</p> <p>.....</p> <p style="text-align: right;"><i>Bankrupt .</i></p>	<p>In Bankruptcy.</p>
--	-----------------------

At, in said district, on the day of, A. D. 19...

On the day aforesaid, before me comes, of, in the county of and State of, and makes oath and says that he, as trustee of the estate and effects of the above-named bankrupt, neither received nor paid any moneys on account of the estate.

Subscribed and sworn to before me at, this day of, A. D. 19...

.....,
*Referee in Bankruptcy.*⁸⁵

⁸⁴. Consult, generally, Section Forty-seven; also General Order XVII. See also, for the other forms for trustees' reports, Forms Nos. 165 and 167.

⁸⁵. This return should be signed by the trustee and verified, but not necessarily before the referee; see § 20.

Form No. 50.

Oath to Final Account of Trustee.⁸⁷

In the District Court of the United States for the District of

IN THE MATTER OF

..... In Bankruptcy.

Bankrupt .

On this day of, A. D. 19..., before me come, of, in the county of and State of, and makes oath, and says that he was, on the day of, A. D. 19..., appointed trustee of the estate and effects of the above-named bankrupt, and that as such trustee he has conducted the settlement of the said estate. That the account hereto annexed, containing sheets of paper, the first sheet whereof is marked with the letter, [*reference may here also be made to any prior account filed by said trustee*] is true, and such account contains entries of every sum of money received by said trustee on account of the estate and effects of the above-named bankrupt, and that the payments purporting in such account to have been made by said trustee have been so made by him. And he asks to be allowed for said payments and for commission and expenses as charged in said accounts.

.....
Trustee.

Subscribed and sworn to before me, at, in said district of, this day of, A. D. 19...

.....
[Official character.]

87. This form seems hardly necessary, save when used as suggested in the foot-note to Form No. 49. See the practice outlined in Forms Nos. 162 and 163.

Form No. 51.**Order Allowing Account⁸⁸ and Discharging Trustee.**

In the District Court of the United States for the District of

IN THE MATTER OF

.....

In Bankruptcy.

Bankrupt .

The foregoing account having been presented for allowance, and having been examined and found correct, it is ordered that the same be allowed, and that the said trustee be discharged of his trust.

.....,

Referee in Bankruptcy.

Form No. 52.**Petition for Removal of Trustee.⁸⁹**

In the District Court of the United States for the District of

IN THE MATTER OF

.....

In Bankruptcy.

Bankrupt .

To the Honorable,

Judge of the District Court of the District of:

The petition of, one of the creditors of said bankrupt, respectfully represents that it is for the interest of the estate of said bankrupt that, heretofore appointed trustee of said bankrupt's estate, should be removed from his trust, for the causes following, to wit: [*Here set forth the particular cause or causes for which such removal is requested.*]

⁸⁸. When the practice outlined in Forms Nos. 167 and 168 is followed, this form will not be used. It is to the same effect as a clause in Form No. 164. See Section Forty-seven and the foot-notes to Forms Nos. 49 and 50.

⁸⁹. This form fits into General Orders XIII and XVII. Trustees being rarely removed it is not important. See §§ 2(17), 44 and 46.

Wherefore pray that notice may be served upon said, trustee as aforesaid, to show cause, at such time as may be fixed by the court, why an order should not be made removing him from said trust.

Form No. 53.

Notice of Petition for Removal of Trustee.⁹⁰

In the District Court of the United States for the District of

IN THE MATTER OF

.....

Bankrupt.

} In Bankruptcy.

At, on the day of, A. D. 19...
To,

Trustee of the estate of, bankrupt:

You are hereby notified to appear before this court, at, on the day of, A. D. 19..., at ... o'clock ... m., to show cause (if any you have) why you should not be removed from your trust as trustee as aforesaid, according to the prayer of the petition of, one of the creditors of said bankrupt, filed in this court on the day of, A. D. 19..., in which it is alleged [*here insert the allegation of the petition*].

.....,
Clerk.

Form No. 54.

Order for Removal of Trustee.⁹¹

In the District Court of the United States for the District of

IN THE MATTER OF

.....

Bankrupt

} In Bankruptcy.

Whereas, of, did on the day of, A. D. 19..., present his petition to this court, praying that for

⁹⁰. See foot-note to Form No. 52.

⁹¹. See foot-note to Form No. 52.

the reasons therein set forth,, the trustee of the estate of said, bankrupt, might be removed:

Now, therefore, upon reading the said petition of the said and the evidence submitted therewith, and upon hearing counsel on behalf of said petitioner and counsel for the trustee, and upon the evidence submitted on behalf of said trustee,

It is ordered that the said be removed from the trust as trustee of the estate of said bankrupt, and that the costs of the said petitioner incidental to said petition be paid by said trustee [or, out of the estate of the said, subject to prior charges].

Witness the Honorable, judge of the said court, and the seal thereof, at, in said district, on the day of, A. D. 19 . . .

{ Seal of }
{ the court. }

.....
Clerk.

Form No. 55.

Order for Choice of New Trustee.⁹²

In the District Court of the United States for the District of

IN THE MATTER OF

.....

In Bankruptcy.

Bankrupt .

At, on the day of, A. D. 19 . . .

Whereas by reason of the removal [or the death or resignation] of, heretofore appointed trustee of the estate of said bankrupt, a vacancy exists in the office of said trustee,

It is ordered that a meeting of the creditors of said bankrupt be held at, in, in said district, on the day of, A. D. 19 . . ., for the choice of a new trustee of said estate.

And it is further ordered that notice be given to said creditors of the time, place, and purpose of said meeting, by letter to each, to be deposited in the mail at least ten days before that day.

.....
Referee in Bankruptcy.

⁹² See foot-note to Form No. 52.

Form No. 56.

Certificate by Referee to Judge.⁹³

In the District Court of the United States for the District of

IN THE MATTER OF

In Bankruptcy.

Bankrupt

I,, one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings: [*Here state the question, a summary of the evidence relating thereto, and the finding and order of the referee thereon.*]

And the said question is certified to the judge for his opinion thereon.

Dated at, the day of, A. D. 19...

Referee in Bankruptcy.

Form No. 57.

Bankrupt's Petition for Discharge.⁹⁴

IN THE MATTER OF

In Bankruptcy.

Bankrupt

To the Honorable,

Judge of the District Court of the United States

for the District of

....., of, in the county of and State of
....., in said district, respectfully represents that on the day of

⁹³ This form is hardly sufficient for the practice under the present law. Now the referee rarely certifies questions to the judge for decision. It suggests, however, the certificate on review. For certificates for referees in various matters, including

reviews, see Forms Nos. 97, 104, 109, 145, 153, 166, 169, in "Supplementary Forms," *post*. See also §§ 2(10), 39-a(5) and General Order XXVII. On reviews, consult Section Thirty-nine, *ante*.

⁹⁴ This form and the "Order of Notice

....., last past, he was duly adjudged bankrupt under the acts of Congress relating to bankruptcy; that he has duly surrendered all his property and rights of property, and has fully complied with all the requirements of said acts and of the orders of the court touching his bankruptcy.

Wherefore he prays that he may be decreed by the court to have a full discharge from all debts provable against his estate under said bankrupt acts, except such debts as are excepted by law from such discharge.

Dated this day of, A. D. 19...

.....,
Bankrupt.

Order of Notice Thereon.

District of, ss.:

On this day of, A. D. 19..., on reading the foregoing petition, it is —

Ordered by the court, that a hearing be had upon the same on the day of, A. D. 19....., before said court, at, in said district, at ... o'clock in the noon; and that notice thereof be published in a newspaper printed in said district, and that all known creditors and other persons in interest may appear at the said time and place and show cause, if any they have, why the prayer of the said petitioner should not be granted.

And it is further ordered by the court, that the clerk shall send by mail to all known creditors copies of said petition and this order, addressed to them at their places of residence as stated.

Witness the Honorable, judge of the said court, and the seal thereof, at, in said district, on the day of, A. D. 19...

{ Seal of }
{ the court. }

.....,
Clerk.

..... hereby depose, on oath, that the foregoing order was published in the on the following days, viz.:

On the day of and on the day of, in the year 19...

District of

Therein" following it has caused much confusion. The petition itself is within the law (see also General Order XXXI); and if verified by the bankrupt may be used. But the order, at least in so far as it requires the clerk to send to the creditors copies of the petition, is clearly wrong. See, generally, Sections Fourteen and Fifty-

eight, *ante*. See also suggested "Order to Show Cause," being Form No. 126. For other forms in discharge proceedings, see Forms Nos. 105, 106, 107, 108, 109, 110, 111, 112 and 113 in "Supplementary Forms," *post*. Consult also §§ 17, 38-a (4) and 58-a (2)-b.

....., 19...
 Personally appeared and made oath that the foregoing statement by him subscribed is true.

Before me,

.....,

[*Official character.*]

I hereby certify that I have on this day of, A. D. 19..., sent by mail copies of the above order, as therein directed.

.....,

Clerk.

Form No. 58.

Specification of Grounds of Opposition to Bankrupt's Discharge.⁹⁵

In the District Court of the United States for the District of

IN THE MATTER OF

.....

In Bankruptcy.

Bankrupt.

....., of, in the county of and State of, a party interested in the estate of said, bankrupt, do hereby oppose the granting to him of a discharge from his debts, and for the grounds of such opposition do file the following specification: [*Here specify the grounds of opposition.*]

.....,

Creditor.

Form No. 59.

Discharge of Bankrupt.⁹⁶

District Court of the United States,

..... District of

Whereas, of in said district, has been duly adjudged a bankrupt, under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it

⁹⁵. This form should have a verification. See, for another form, Form No. 111, *post*. For grounds of objection to discharge and the practice, consult Section Fourteen, *ante*. See also General Order XXXII.

⁹⁶. This differs from the discharge certificate under the law of 1867. The use of this form is universal. For effect, consult Section Fourteen, *ante*.

is therefore ordered by this court that said be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the day of, A. D. 19..., on which day the petition for adjudication was filed him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness the Honorable, judge of said district court, and the seal thereof this day of, A. D. 19...

{ Seal of
the court. }

.....,
Clerk.

Form No. 60.

Petition for Meeting to Consider Composition.⁹⁷

District Court of the United States for the District of

IN THE MATTER OF

..... } In Bankruptcy.

Bankrupt .

To the Honorable, Judge of the District Court of the United States for the District of

The above-named bankrupt respectfully represent that a composition of per cent. upon all unsecured debts, not entitled to a priority in satisfaction of debts has been proposed by to creditors, as provided by the acts of Congress relating to bankruptcy, and verily believe that the said composition will be accepted by a majority in number and in value of creditors whose claims are allowed.

Wherefore, he pray that a meeting of creditors may be duly called to act upon said proposal for a composition, according to the provisions of said acts and the rules of court.

.....,
Bankrupt.

⁹⁷. This form is never used, as offer and acceptances are filed and application made at once to confirm. See Section Twelve, *ante*.

Form No. 61.

Application for Confirmation of Composition.⁹⁸

In the District Court of the United States for the District of ,

<p style="text-align: center;">IN THE MATTER OF</p> <p style="text-align: center;">.....</p> <p style="text-align: center;"><i>Bankrupt.</i></p>	}	<p>In Bankruptcy.</p>
--	---	-----------------------

To the Honorable, Judge of the District Court of the
 United States for the District of :

At, in said district, on the day of , A. D. 19 . . . ,
 now comes, the above-named bankrupt, and respectfully
 represents to the court that, after he had been examined in open court [*or*
 at a meeting of his creditors] and had filed in court a schedule of his property
 and a list of his creditors, as required by law, he offered terms of composition
 to his creditors, which terms have been accepted in writing by a majority
 in number of all creditors whose claims have been allowed, which number
 represents a majority in amount of such claims; that the consideration to
 be paid by the bankrupt to his creditors, the money necessary to pay all debts
 which have priority, and the costs of the proceedings, amounting in all to
 the sum of dollars, has been deposited, subject to the order of the
 judge, in the National Bank, of, a designated depository
 of money in bankruptcy cases.

Wherefore the said respectfully asks that the said
 composition may be confirmed by the court.

.....,

Bankrupt.

98. This form, when verified by the bank-
 rupt, is sufficient to bring a proposed com-
 position before the court. Consult Section
 Twelve, generally. See also Forms Nos.

94, 95, 96, 97, 98, 99, 100, 101, 102 and
 103 for a complete practice on composition.
 See also § 58-a(2) and General Order
 XXXII.

Form No. 62.

Order Confirming Composition.⁹⁹

In the District Court of the United States for the District of,

IN THE MATTER OF

.....

Bankrupt .

In Bankruptcy.

An application for the confirmation of the composition offered by the bankrupt having been filed in court, and it appearing that the composition has been accepted by a majority in number of creditors whose claims have been allowed and of such allowed claims; and the consideration and the money required by law to be deposited, having been deposited as ordered, in such place as was designated by the judge of said court, and subject to his order; and it also appearing that it is for the best interest of the creditors; and that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises, or acts contrary to the acts of Congress relating to bankruptcy: It is therefore hereby ordered that the said composition be, and it hereby is, confirmed.

Witness the Honorable, judge of said court, and the seal thereof, this day of, A. D. 19...

{ Seal of }
{ the court. }

.....,

Clerk.

⁹⁹ For another form adapted to a refusal to confirm, and containing also directions for distribution. See Form No. 103, *post*. Consult Section Twelve, generally.

Form No. 63.

Order of Distribution on Composition.¹⁰⁰

UNITED STATES OF AMERICA:

In the District Court of the United States for the District of

<p style="text-align: center;">IN THE MATTER OF</p> <p style="text-align: center;">.....</p> <p style="text-align: center;"><i>Bankrupt .</i></p>	}	In Bankruptcy.
---	---	----------------

The composition offered by the above-named bankrupt in this case having been duly confirmed by the judge of said court, it is hereby ordered and decreed that the distribution of the deposit shall be made by the clerk of the court as follows, to wit: 1st, to pay the several claims which have priority; 2d, to pay the costs of proceedings; 3d, to pay, according to the terms of the composition, the several claims of general creditors which have been allowed, and appear upon a list of allowed claims, on the files in this case which list is made a part of this order.

Witness the Honorable, judge of said court, and the seal thereof, this day of, A. D. 19...

{ Seal of
the court }

.....,

Clerk.

^{100.} It is thought this order should be combined with that confirming the composition. See foot-note to Form No. 62, and compare Form No. 103, *post*.

SUPPLEMENTARY FORMS.

PREFATORY NOTE.

These forms are in no sense official. Many of them are based upon the practical experience of referees and practitioners. Some of them are taken from Hagar and Alexander's Bankruptcy Forms (2d ed.). No effort has been made to supply forms for every contingency that may arise in a bankruptcy proceeding; but simply to afford the profession hints as to the more common steps and, largely, where no forms are now available.

The supplementary forms are later indexed in with the official forms and the general orders. For convenience of reference, a list, arranged by the sections of the statute to which they are peculiarly appropriate, is also given.

It is suggested that reference be made to Hagar and Alexander's Bankruptcy Forms (2d ed.), where forms for every step in bankruptcy proceedings will be found. This work will be found of great value in ascertaining the correct practice in all the various bankruptcy proceedings which have been discussed in the text of Collier on Bankruptcy.

SCHEDULE OF FORMS.

SECTION TWO.

- FORM No. 64.—Petition for Appointment of Receiver before Adjudication.
No. 65.—Order Appointing Receiver before Adjudication.
No. 66.—Petition for Appointment of Receiver after Adjudication and Reference.
No. 67.—Order Appointing Receiver after Adjudication and Reference.
No. 68.—Petition by Receiver to Continue Business of Bankrupt.
No. 69.—Order Authorizing Receiver to Continue Business of Bankrupt.
No. 70.—Order that Receiver Complete Contracts.
No. 71.—Report of Receiver.
No. 71a.—Receiver's Account and Oath to Same.
No. 71b.—Report of Special Master on Receiver's Accounts.
No. 71c.—Notice of Motion to Confirm Report of Special Master on Receiver's Account.
No. 72.—Order Confirming Report of Special Master on Receivers' Accounts.
No. 73.—Petition for Injunction other than against Suits.
No. 74.—Referee's Stay and Show Cause other than against Suits.
No. 75.—Referee's Order that Writ of Injunction Issue.
No. 76.—Order that Writ of Injunction Issue, after Referee's Stay and Show Cause.

SECTION SIX.

- No. 77.—Order Determining Exemptions when no Trustee Appointed.
No. 78.—Exceptions to Trustee's Report Setting off Exemptions.
No. 79.—Order Determining Exemptions after Trustee's Report.
No. 80.—Petition by Bankrupt for Review of Referee's Order on Exemptions.

SECTION SEVEN.

- No. 81.—Petition for Order Amending Schedules.
No. 82.—Order to Show Cause on Amendment of Schedules.
No. 83.—Order Amending Schedules.
No. 84.—Affidavit to Schedule of Creditors, when Bankrupt Cannot be Found.
No. 85.—Petition that Bankrupt Turn Over Concealed Assets.
No. 86.—Order that Bankrupt Turn Over Concealed Assets.

SECTION NINE.

- No. 87.—Petition for Order of Protection.
No. 88.—Order of Protection.

SECTION ELEVEN.

- No. 89.—Petition for Stay of Pending Suit.
No. 90.—Referee's Stay and Show Cause on Pending Suit.
No. 91.—Stipulation that Show Cause be Heard by Referee.
No. 92.—Decision and Report of Referee on Application for Stay Stipulated before Him.
No. 93.—Order that Writ of Injunction Issue.

SECTION TWELVE.

- No. 94.—Offer of Composition.
No. 95.—Notice to Creditors.
No. 96.—Acceptance of Composition.
No. 97.—Referee's Certificate in Composition.
No. 98.—Order to Show Cause in Composition.
No. 99.—Appearance of Objecting Creditor in Composition.
No. 100.—Specification of Objection in Composition.

- FORM No. 101.— Order of Reference to Special Master in Composition.
 No. 102.— Report of Special Master in Composition.
 No. 103.— Order Confirming (or Refusing to Confirm) Composition.
 No. 104.— Petition to Set Aside Composition.
 No. 104a.— Order Setting Aside a Composition.

SECTION FOURTEEN.

- No. 105.— Petition for Extension of Time to Apply for Discharge.
 No. 106.— Referee's Certificate on Application for Extension of Time.
 No. 107.— Order Extending Time to Apply for Discharge.
 No. 108.— Order to Show Cause on Application for Discharge.
 No. 109.— Referee's Certificate of Conformity on Discharge.
 No. 110.— Appearance by Objecting Creditor on Discharge.
 No. 111.— Specification of Objection to Discharge.
 No. 112.— Exceptions to Specifications.
 No. 113.— Order of Reference to Special Master on Discharge.
 No. 114.— Notice of Hearing before Special Master.
 No. 115.— Report of Special Master on Discharge.
 No. 116.— Order Denying Discharge, after Reference to Special Master.

SECTION EIGHTEEN.

- No. 117.— Voluntary Petition of Partnership, all Partners not Joining.
 No. 118.— Involuntary Petition by Three Creditors.
 No. 119.— Involuntary Petition by One Creditor Against a Partnership.
 No. 120.— Petition for Service by Publication.
 No. 121.— Order Directing Service by Publication.
 No. 122.— General Appearance in Involuntary Case.
 No. 123.— Appearance by Intervening Creditor.
 No. 124.— Petition to Intervene.
 No. 125.— Order Allowing Intervention.
 No. 126.— Application for Jury Trial in Involuntary Case.
 No. 127.— General Answer in Involuntary Case.
 No. 128.— Answer Alleging More than Twelve Creditors.
 No. 129.— Demurrer to Petition.
 No. 130.— Notice of Argument of Demurrer.
 No. 131.— Order of Reference to Special Master in Involuntary Cases.
 No. 132.— Notice of Hearing Before Special Master.
 No. 133.— Notice of Trial in Involuntary Proceeding.
 No. 134.— Report of Special Master in Involuntary Case.
 No. 135.— Exceptions to Report of Special Master in Involuntary Case.
 No. 136.— Order upon Report of Special Master Dismissing Petition.
 No. 137.— Petition of Petitioning Creditors for Dismissal in Involuntary Case.
 No. 138.— Order to Show Cause on Petition for Dismissal in Involuntary Case.
 No. 139.— Order of Dismissal on Petition of Petitioning Creditors and after Notice in Involuntary Case.
 No. 140.— Order of Adjudication and Reference.
 No. 141.— Order Denying Adjudication.
 No. 142.— Petition to Vacate Adjudication.
 No. 143.— Notice of Motion to Vacate Adjudication.

SECTION NINETEEN.

- No. 144.— Demand for Jury Trial.

SECTION TWENTY-TWO.

- No. 145.— Referee's Certificate of Disqualification.

SECTIONS TWENTY-FOUR AND TWENTY-FIVE.

- No. 146.— Petition to Revise in Matter of Law.
 No. 147.— Order of District Court Allowing Petition for Revision in Matter of Law.
 No. 148.— Notice to Respondent on Revision.

- FORM No. 149.— Order of Circuit Court of Appeals on Revision.
No. 150.— Citation on Appeal.
No. 151.— Notice of Motion for Stay Pending Review.
No. 152.— Order Staying Proceedings Pending Petition for Review under § 24-b.
No. 153.— Petition for Writ of Error from Supreme Court to a Circuit Court of Appeals.
No. 154.— Writ of Error from Supreme Court to Circuit Court of Appeals.

SECTION TWENTY-SEVEN.

- No. 155.— Petition for Meeting of Creditors to Consider Proposed Compromise.
No. 156.— Notice to Creditors of Special Meeting.
No. 157.— Order Authorizing Compromise.

SECTION THIRTY-NINE.

- No. 158.— Petition for Review of Referee's Order.
No. 159.— Referee's Certificate on Review.

SECTION FORTY-FOUR.

- No. 160.— Order Approving Appointment of Trustee.

SECTION FORTY-SEVEN.

- No. 161.— Trustee's First Report.
No. 162.— Order Declaring and Ordering First Dividend Paid.
No. 163.— Trustee's Final Report and Account.
No. 164.— Final Order of Distribution.
No. 165.— Trustee's Combined Dividend Check and Receipt.

SECTION FORTY-EIGHT.

- No. 166.— Referee's Certificate of Fees Payable.

SECTION FIFTY.

- No. 167.— Bond of Trustee, with Justification of Sureties.
No. 168.— Order Approving Trustee's Bond.

SECTION FIFTY-ONE.

- No. 169.— Certificate of Referee as to Falsity of Pauper Affidavit.

SECTION FIFTY-SEVEN.

- No. 170.— Special Clauses for Proofs of Debt (to Conform to General Order XXI)
No. 171.— Petition for Reconsideration and Rejection of Claim.
No. 172.— Notice of Petition for Reconsideration and Rejection of Claim.
No. 173.— Proof of Secured Debt.
No. 174.— Order Expunging or Reducing Proof of Debt.
No. 175.— Order Allowing Claim.

SECTION FIFTY-EIGHT.

- No. 176.— Notice of Final Meeting.
No. 177.— Special Clauses for Notices to Creditors.
No. 178.— Combined Notice to Creditors.
No. 179.— Affidavit of Publication of Notice.
No. 180.— Affidavit of Mailing of Notice.

SECTION SIXTY-TWO.

- No. 181.— Order Appointing Attorney for Trustee.

SECTION SEVENTY.

- FORM No. 182.—Petition for Instruction as to Burdensome Property.
No. 183.—Order on Petition as to Burdensome Property.
No. 184.—Order Allowing Trustee to Continue Business.
No. 185.—Petition for Leave by Trustee to Sue.
No. 186.—Order Authorizing Trustee to Sue.
No. 187.—Demand in Reclamation.
No. 188.—Petition to Reclaim.
• No. 189.—Answer in Reclamation.
No. 190.—Petition for Sale under General Order XVIII(2).
No. 191.—Order for Sale under General Order XVIII(2).
No. 192.—Petition to Confirm Sale.
No. 193.—Order Confirming Sale after Notice to Creditors.
/ No. 194.—Petition for Private Sale by Trustee.
No. 195.—Order for Private Sale by Trustee.
No. 196.—Petition for Sale Free and Clear of Liens.
No. 197.—Notice of Motion for Sale Free and Clear of Liens.
No. 198.—Order Directing Sale Free and Clear of Liens.

SUPPLEMENTARY FORMS.

Form No. 64.

Petition for Appointment of Receiver Before Adjudication.¹

In the District Court of the United States for the District of

IN THE MATTER OF

.....

Bankrupt .

In Bankruptcy No. ...

To the Hon., District Judge:

Your petitioners respectfully show:

That their petition for the adjudication of of the of, in said district, to be a bankrupt was filed herein on the day of, 19...; that such proceeding is still pending, and will not be determined for some time.

That, as your petitioners are informed and believe, the estate of said bankrupt consists of and is worth substantially as follows:²

That it is absolutely necessary for the preservation of said estate that a receiver be appointed to take charge of the same³, for the following reasons:⁴

1. See, generally, Section Two, *ante*. And compare §§ 3-e and 59 with Forms Nos. 8, 9, and 10.

2. Here recite the property, under the two general heads of real and personal, in sufficient detail, showing in whose possession it is and whether there are any adverse claimants.

3. Or a specified part of it, stating it.

4. Here state the reasons, as, for instance, (1) that "the bankrupt has absconded and abandoned the same;" or (2) that "the bankrupt is selling the same at

prices much less than such property is worth, to wit, or has threatened or is liable so to do;" or (3) that "the bankrupt is neglecting such property and the same is deteriorating or liable so to do." The petition should state that the appointment of a receiver is absolutely necessary for the preservation of the estate. In re Oakland Lumber Co. (C. C. A. 2d Cir.), 23 Am. B. R. 181, 174 Fed. 634; In re Rosenthal (D. C., N. J.), 16 Am. B. R. 448, 144 Fed. 548.

That your petitioners file herewith the bond of, in \$, as required by § 3-e of the bankruptcy act of 1898.⁵

That⁶ it will be for the best interests of said bankrupt and his creditors that his business, located at No. street, in the of, in said district, be continued until the hearing and decision on the petition for adjudication herein, for the following reasons:

That no previous application has been made to this or any other court for the order hereinafter asked.

Wherefore your petitioners pray that, of, in said district, be appointed receiver herein, with power to take charge of and hold said estate⁷ and to continue said business, and for such other order as shall be just and lawful.

Dated,,,,, 19 . . .

.,
.,
.,

*Petitioners.*⁸

STATE OF, }
County of, } ss.:
City of, }

I (We),, the petitioner . . mentioned and described in the foregoing petition, do hereby (severally) make solemn oath that the statements of fact therein contained are true, according to the best of my (our) knowledge, information, and belief.

.

Subscribed and sworn to before me, this day of, 19 . . .

.

.

5. For bond, see Form No. 9, changing recitals to fit this kind of an application and the condition clause to fit § 3-e.

6. Omit this paragraph if the receiver is to be a custodian only.

7. Or a specified part of it, stating it.

8. This application can be made by one petitioner only. If made by attorney, show in affidavit of verification why petition was not made by the creditors.

Form No. 65.

Order Appointing Receiver Before Adjudication.⁹

In the District Court of the United States for the District of

IN THE MATTER OF

.....

Bankrupt .

In Bankruptcy No. ...

Whereas, a petition for adjudication of bankruptcy was, on the day of, 19..., filed against, of the of, in said district, and said petition is still pending, and whereas it satisfactorily appears that it is absolutely necessary for the preservation of the estate of said bankrupt that a receiver be appointed to take charge of and to hold such estate, and that he continue the business of said bankrupt, and a bond¹⁰ having been filed, as provided in § 3-e of the bankruptcy act of 1898; now, on motion of, Esq., attorney for the petitioner,

It is ordered:

That said bond be and the same hereby is approved, both as to its form, sufficiency, and manner of execution.

That, of, in said district, be, and he hereby is, appointed receiver of the estate of said bankrupt¹¹ on filing an additional bond as receiver in the sum of \$, with sufficient sureties, to be approved by this court, and that thereupon such receiver take charge of and hold such estate until further order.

That¹² said receiver continue the business of such bankrupt, at No. ... street, in the of, in said district, until further order.¹³

It is further ordered that, should be adjudicated a bankrupt, said receiver continue as such, with the powers herein conferred, until the appointment and qualification of a trustee of said bankrupt.

9. This order follows Form No. 64. See foot-notes to same.

10. The order should require the bond of the petitioning creditors be filed before the receiver takes possession of the property. *Matter of Haff* (C. C. A., 2d Cir.), 13 Am. B. R. 354, 135 Fed. 472, 68 C. C. A. 340.

11. Or a specified part of it, stating it.

12. Omit this paragraph, if the receiver is to be custodian only.

13. Here add any limitations as, for instance, concerning the borrowing of money, the buying of new goods, etc.

Witness the Honorable, judge of the said court, and the seal thereof, at the city of, in said district, on the day of, 19...

{ Seal of }
{ the court. }

.,

Clerk.

Form No. 66.

Petition for Appointment of Receiver After Adjudication and Reference.¹⁴

In the District Court of the United States for the District of

IN THE MATTER OF

.....

Bankrupt .

} In Bankruptcy No. ...

To, Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That your petitioner was adjudicated a bankrupt herein on the day of, 19... , and on the same day this proceeding was duly referred.

That your petitioner's estate consists of and is worth substantially as follows:¹⁵

That it is absolutely necessary for the preservation of said estate that a receiver be appointed to take charge of the same, for the following reasons:¹⁶

That ¹⁷ it will be for the best interests of your petitioner's creditors that his business, located as above stated, be continued until a trustee can be appointed and qualify, for the following reasons:

That no previous application has been made to this or any other court for the order hereinafter asked.

Wherefore your petitioner prays that a receiver may be appointed herein,

14. This form is chiefly valuable in voluntary cases to protect assets until a trustee can be appointed. It can, of course, be made by a creditor as well as the bankrupt. See, generally, Section Two, *ante*.

15. Here recite the property under the two general heads of real and personal, in sufficient detail, showing in whose possession it is, and whether there are any adverse claimants.

16. Here state the reasons, as, for instance, (1) that "a portion of said estate is perishable, to wit, and should be sold at once;" or (2) that "such property is without protection from theft or the elements, and not insured."

17. Omit this paragraph, if the receiver is to be custodian only.

with¹⁸ power to continue said business, and for such other order as shall be just and lawful.

Dated,, 19...

.....,
Petitioner.

STATE OF }
County of } ss.:
City of }

I,, the petitioner mentioned and described in the foregoing petition, do hereby make solemn oath that the statements of fact therein contained are true, according to the best of my knowledge, information, and belief. ,

Subscribed and sworn to before me, this day of, 19...

.....,
.....

Consent of Creditors.¹⁹

We, the undersigned, creditors of said bankrupt, holding unsecured claims in the amounts set opposite our names, do hereby join in the annexed petition, and do nominate, of the of, in said district, for receiver.

Dated,, 19...

....., \$.....
....., \$.....
....., \$.....

18. So also this clause may be omitted.

19. While not essential to secure the consent of creditors, the practice is advised.

See "Practice" on receiverships in Section Two, *ante*.

Form No. 67.

Order Appointing Receiver After Adjudication and Reference.²⁰

At a Court of Bankruptcy, held in and for the District of,
at, this day of, 19...

Present:, Esq., Referee.

IN THE MATTER OF

.....

In Bankruptcy No. ...

Bankrupt .

Application having been made for the appointment of a receiver herein, and that he be given power to continue the business of the bankrupt, and creditors, in a total of \$....., having joined in such application and nominated, to be such receiver; now, on motion of, Esq., attorney for said

It is ordered:

That of the of, in said district, be, and he hereby is, appointed receiver of the estate of said bankrupt, on filing a bond in the sum of \$....., with sufficient sureties, to be approved by this court.

That²¹ said receiver continue the business of said bankrupt, at No. ... street, in the of, in said district.

That²² said receiver have power also to

That said receiver continue as such until the appointment and qualification of a trustee herein.

.....,

Referee in Bankruptcy.

²⁰. This form follows Form No. 66. See foot-notes to same.

²¹. Omit this paragraph, if receiver is to be custodian only.

²². Use only when the receiver is given special powers.

Form No. 68.

Petition by Receiver to Continue Business of Bankrupt.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 65.)

United States District Court, for the District of

IN THE MATTER OF

.....

In Bankruptcy No. ...

Bankrupt .

To the District Court of the United States, for the District of

The petition of respectfully shows:

That by an order of this court, dated, your petitioner was duly appointed temporary receiver herein, and duly qualified by filing the required bond. That on entering upon his duties herein as receiver, your petitioner has taken possession of the property, assets and effects of the bankrupt, consisting of

 at street,

That he has made a careful investigation of the condition of the bankrupt's business and finds that said bankrupt has on hand a large number of unfilled orders, from which it is estimated the sum of \$..... could be realized upon completion of same.

That there is also a large stock of material on hand, consisting of

 and largely available for the purpose of completing such orders.

That this property will be greatly enhanced in value by making it up into manufactured goods; otherwise, but a small amount will be realized for the creditors in disposing of the property in its present condition.

Your petitioner believes it to be to the best interests of this estate that he be permitted to carry on the business for a limited period and fill these orders.

(That at the time the petition in bankruptcy was filed against the said bankrupt, he was endeavoring to effect a settlement with his creditors, and said bankrupt as your petitioner is informed, believes that he can now effect such settlement with his creditors, if the business be continued and the good will preserved.)

Wherefore, your petitioner respectfully prays that he be permitted and empowered to continue the business as conducted by the bankrupt for a period

of days, and that in the conduct of the business, he be permitted to incur such expense and enter upon such contracts as in his judgment may seem proper in the premises.

Dated, 19...

.....,

Petitioner.

[*Verification.*]

Form No. 69.

Order Authorizing Receiver to Continue Business of Bankrupt.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 66.)

At a stated term of the United States District Court held in and for the District of, at the Court House in the City of, on the, day of, 19...

Present: Hon., District Judge.

IN THE MATTER OF

.....

Bankrupt .

On the annexed petition, temporary receiver herein, verified the day of, 19..., and sufficient reason appearing to me therefor it is hereby

Ordered that, as receiver herein, be and he hereby is permitted, authorized and empowered to continue and carry on the business as conducted by the bankrupt herein, for a period of days, from date hereof, and in the conduct of said business, to make such contracts and incur such expense as in his discretion may be necessary.

.....,

D. J.

Form No. 70.**Order that Receiver Complete Contracts.**

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 69.)

At a stated term of the District Court of the United States for the
 District of, held at the Court House, City of
, on the day of, 19....

Present: Hon., District Judge.

IN THE MATTER OF

.....
Bankrupt .

Upon reading and filing the annexed petition of, temporary receiver herein, verified the day of, 19...., and the annexed consent dated, 19...., and on motion of, attorney for receiver, it is

Ordered that said, receiver herein, be and he hereby is permitted and allowed to complete the orders which have come into his possession and which are in the course of manufacture or unfilled, and to dispose of the same when completed, in the regular course of business, for cash, and to make such expenditures in relation thereto as may become necessary.

.....
 D. J.

Form No. 71.**Report of Receiver.**

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 75.)

United States District Court, for the District of

IN THE MATTER OF

.....
Bankrupt .

In Bankruptcy No. ...

To the United States District Court, for the District of:

I,, do hereby make and file my report and account as temporary receiver of the estate of the above-named bankrupt:

1. I was appointed temporary receiver herein on the day of, 19..., and required to file a bond in the penalty of (\$.....). Having been notified of my appointment, I obtained a certified copy of the order thereof, and filed my bond in the penalty required, and in company with the attorney for the petitioning creditors, I visited the premises of the alleged bankrupt, No. street, I there met and interviewed, the secretary of the company, and others. Subsequently other officers of the alleged bankrupt arrived at the premises, and after consultation with attorney, turned over the premises to me. I placed a custodian in charge of the premises and took possession of the books, etc. I found that the bankrupt was a corporation, engaged in the manufacture and sale of I had a long consultation with the officers of the company and with various large creditors, in regard to the advisability of continuing the business, inasmuch as the company had on hand orders to be executed, amounting to about \$....., and a large supply of material. I also learned that the company had been accustomed to obtain advances upon all its invoices and that almost all of the accounts due the company had been assigned for these advances. That upwards of \$..... of book accounts had been so assigned and no estimate could be then formed as to what, if any, equity the alleged bankrupt might have in said accounts.

I finally decided that it would be of advantage to the estate to apply for an order authorizing me as receiver to continue the business for a period of twenty days, with leave to apply for a further extension, if desirable. I directed the custodian to take an inventory of all the property and sent all of the outstanding insurance policies to the various companies for transfer of interest.

2. On, 19..., I obtained an order allowing me to continue the business for a period of days. I called an informal meeting of the creditors to meet at the bankrupt's premises, attended at the said meeting and remained in consultation with the attorneys and creditors for a considerable period. Also had consultations with the attorneys for the bankrupt company and, attorneys for creditors. I made a careful examination of the stock on hand and of the books, employed an expert accountant and obtained a general idea of the condition of the business. Revised and reduced the payroll as much as possible. I made arrangements with a number of supply houses to sell goods on credit and had various interviews with credit men.

[Insert any additional or special allegations as to services, etc.]

On, 19..., I obtained the consents of creditors representing a majority in amount of claims, for an order extending my time to run the business for an additional twenty days, inasmuch as there were a

large number of unfilled orders yet on hand and an order was signed to that effect. Subsequently I verified a petition for the appointment of appraisers and for a sale. On, 19 . . . , an informal meeting of creditors was held on the bankrupt's premises, for which I prepared a detailed statement of the general condition of the business.

That in carrying on the business of the bankrupt company it was necessary for me to devote a large amount of time to the details of the said business and to visit the premises of the bankrupt frequently. That I employed about persons, including the factory, office and sales departments and the weekly payroll averaged \$. to \$. That at the time I commenced to carry on the business, there were about \$. in orders on hand and I subsequently obtained about \$. additional orders. That as receiver I purchased merchandise and supplies, amounting to about \$., as shown in Schedule B, hereto annexed.

I manufactured, filled and shipped all of the orders above mentioned, which were deemed profitable to fill. Annexed hereto is my verified account as receiver, showing receipts and disbursements in the conduct of the business. The merchandise and plant were sold at public auction pursuant to order of this court.

I have received no compensation for my services as receiver and in conducting the business of the bankrupt under the order of this court.

Wherefore, I respectfully pray that my said account be passed as filed, that suitable allowances be made to, my attorneys, and to the duly appointed appraisers and to myself as receiver, and for carrying on the business of said bankrupt, and that I be discharged as receiver herein.

All of which is respectfully submitted.

Dated,,,, 19 . . .

.,,

Receiver.

Form No. 71a.

Receiver's Account and Oath to Same.

(Hagar and Alexander's Bankruptcy Forms (2d Ed.), No. 76.)

United States District Court,
..... District of
In Bankruptcy.

IN THE MATTER OF <i>Bankrupt.</i>	No.....
--	---------

Account of, Receiver.

RECEIPTS.

I charge myself as follows:

19.....		\$.....
.....
.....
.....
Total receipts		\$.....

DISBURSEMENTS.

I credit myself as follows:

19.....		\$.....
.....
.....
.....
Total disbursements		\$.....

SUMMARY STATEMENT.

Total receipts	\$.....
Total disbursements .....	.....
<hr/>	
Balance in hands of Receiver..	\$.....
Dated, 19...	

.....
Receiver.

United States District Court,
 District of
 In Bankruptcy.

IN THE MATTER OF <i>Bankrupt.</i>	}	No.....
--	---	---------

On the day of, 19..., before me comes
, and makes oath and says he was on the day of
, 19..., appointed receiver of the estate and effects of the
 above named bankrupt; that as such receiver he has conducted the adminis-
 tration of the estate; that the account hereto annexed, containing
 sheets of paper, subscribed by him is true, and such account contains entries
 of every sum of money received by the said receiver on account of the estate
 of the above named bankrupt, and that the payments purporting in such
 account to have been made by such receiver, have been so made by him, and
 he asks to be allowed for such payments and expenses as charged in said
 account.

Subscribed and sworn to before me at the City of, in the
 District of, this day of, 19...
 [Annex vouchers for all payments.]

Form No. 71b.

Report of Special Master on Receiver's Account.
 (Hagar and Alexander's Bankruptcy Forms (2d Ed.), No. 80.)

United States District Court,
 for the District of

IN THE MATTER OF <i>Bankrupt.</i>	}	In Bankruptcy No.....
--	---	-----------------------

To the Honorable,
 Judge of the above named Court:

I,, one of the Referees in Bankruptcy, to whom, as Special
 Master, have been referred the report and account of, as
 receiver herein, together with the application of the said receiver for an
 allowance in payment of his services and disbursements as such; and also
 the application of, for an allowance in payment of his
 services and disbursements as attorney for the said receiver; and also the
 application of, and for an
 allowance for their services as appraisers appointed by the court to appraise
 the estate of the bankrupt in the hands of the said receiver, due notice

having been given to the creditors herein as required by the rule of this court, having been duly attended by the parties and creditors and having heard and considered the allegations and proofs, do hereby respectfully report as follows:

I was duly attended, upon the hearings herein, by, the said receiver and by, his attorney, by, the duly appointed trustee in bankruptcy herein and certain creditors. No objections were made or filed to the account of the said receiver.

I have carefully examined the said report and account, together with the vouchers submitted in support thereof, and find the same in all respects correct and true, and recommend that same be passed and allowed as filed.

The petition was filed herein on the day of, 19.. The bankrupt was adjudicated on the day of, 19... The said temporary receiver was duly appointed, 19..., and immediately qualified and took possession of the bankrupt's property and effects. was appointed trustee, 19...

The bankrupt was engaged in business as a and had places of business, one at, and another at both in the City of The receiver, pursuant to order of the court, sold all the property of the bankrupt found in the stores mentioned at public auction. The gross amount realized from this sale was \$. From this the auctioneer deducted, for his services and disbursements, the sum of \$., leaving as the net result of the sale, \$. This is all that the estate has as yet recovered, although it appears that the receiver and his attorneys believe that further sums may be recoverable.

A summary account of the receiver's cash is as follows: He has received in all the sum of \$. and he has disbursed in all the sum of \$., leaving a balance in his hands of \$.

I think that the receiver discharged all the duties required of him as such in a satisfactory manner. His attorney also acted with diligence in the discharge of the duties required of him. Much of the services shown by the receiver's attorney consists of examination of the bankrupt and others, for the purpose of discovering assets and obtaining evidence upon which to base proceedings for the recovery of property believed to have been wrongfully taken from the estate. These services seem to have been rendered with diligence.

I, therefore respectfully recommend that the said receiver make the following disposition of the funds in his hands:

1. That he shall retain in full compensation by way of commission for his services as receiver as aforesaid, the sum of \$., and in addition thereto, the sum of \$. for disbursements, in all the sum of \$.

2. That he shall pay to, for his services as attorney for the said receiver, the sum of \$., and in addition thereto the sum of \$. for his disbursements, making in all the sum of \$.

3. That he pay to each of the appraisers herein, the sum of \$. in full compensation for services as such, making in all \$.

4. That he shall pay to the undersigned, Special Master, in full compensation for his services and disbursements in this proceeding, the sum of

..... \$.:....., and that having made the aforesaid payments, he shall pay over the amount then remaining in his hands to, as trustee in bankruptcy herein, and that upon making such payments, the said be discharged as such receiver, and his bond cancelled.

All of which is respectfully submitted.

Dated, 19...

.....,
Special Master,
(or Referee).

Form No. 71c.

Notice of Motion to Confirm Report of Special Master on Receiver's Account.

[Hagar and Alexander's Bankruptcy Forms (2d Ed.), No. 81.]

In the District Court of the United States,
for the District of:
In Bankruptcy.

IN THE MATTER OF Bankrupt.	}	No.
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SIR:

You will please take notice, that upon the receiver's report, account, exceptions thereto and all the proceedings had herein, and upon the report of, Esq., Special Master (or Referee), dated the day of, 19..., the undersigned will respectfully move this court at a stated term thereof to be held in the Federal Court House, City of, on the day of, 19..., at o'clock M., of said day, or as soon thereafter as counsel can be heard, for an order in all respects confirming the report of, Esq., Special Master (or Referee), passing and allowing the receiver's accounts herein, overruling the exceptions thereto and fixing the compensation for services of the receiver, his counsel, the counsel for the petitioning creditors and the appraisers, and for such other and further relief as may be just and proper.

Dated, 19...

Yours, etc.,

.....,
Attorneys for Receiver,
Office and P. O. Address,
.....,
..... St.,
.....

To, Esq.,
Trustee,
.....
.....

Form No. 72.

Order Confirming Report of Special Master on Receiver's Accounts.

(Hagar and Alexander's Bankruptcy Forms [2d. Ed.], No. 82.)

At a stated term of the District Court of the United States for the
 District of, held at the Court House, City of
, on day of, 19...

Present: Hon., District Judge.

IN THE MATTER OF

..... } No. ...

Bankrupt.

....., temporary receiver of the above-named bankrupt, having presented his account and vouchers in support thereof, and having moved to confirm his report and that allowances be made to the said receiver and to his counsel for their services, and to the attorneys for the petitioning creditors, etc., and an application having thereupon been made to confirm and approve the said account and make such allowances, and the said matters having been referred to, Esq., as Special Master, and the said Special Master having filed his report thereon, dated..... day of, 19...,

Now after hearing, Esq., of counsel for the receiver, in support of said application, and due deliberation having been had thereon, upon reading and filing the report of the said Special Master, the account and report of, receiver herein, it is

Ordered:—That the report of, Esq., Special Master (or Referee) appointed herein, be, and the same hereby is in all respects confirmed and approved,

And it is further ordered:—That the account of, temporary receiver of the property, assets and effects of, bankrupt above named, be, and the same hereby is in all things allowed, approved and confirmed.

And it is further ordered:—That, temporary receiver herein, be, and he hereby is, allowed for his services the sum of \$..... and that the disbursements expended by him in the safe administration and preservation of the estate and heretofore deducted by him, be and the same hereby are allowed.

And it is further ordered:—That, temporary receiver herein, pay to the sum of \$. as and for an allowance to them as attorneys for the receiver herein and the further sum of \$. disbursements incurred and expended on behalf of the receiver in the safe administration and preservation of the estate herein, and amounting in the aggregate to the sum of \$.

And it is further ordered: — That, temporary receiver herein, pay to,, and, the sum of \$. each for services rendered by them as appraisers herein.

And it is further ordered: — That, temporary receiver herein, pay to, Esq., the Special Master herein, the sum of \$. for his services and disbursements on this accounting.

And it is further ordered:—That, temporary receiver herein, after making the payments as herein directed, pay the balance remaining in his hands to, trustee in bankruptcy herein.

And it is further ordered:—That upon making such payments, temporary receiver herein, be discharged as receiver of the property, assets and effects of the above-named bankrupt, and that the bond given by him for the faithful performance of his duties be canceled and discharged, and the sureties thereon released from any and all liability thereunder (and that the bond given by the petitioning creditor upon whose application the receiver was appointed herein under section 3, subdivision e of the bankruptcy act, be canceled and annulled, and the sureties thereon exonerated from any and all liability thereunder.)

.,
D. J.

Form No. 73.

Petition for Injunction Other than Against Suits.²³

In the District Court of the United States for the District of

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: right;"><i>Bankrupt</i> .</p>	}	In Bankruptcy No. ...
--	---	-----------------------

To, Esq.,²⁴ Referee in Bankruptcy:

Your petitioner respectfully shows:

²³. For the validity of injunctions granted by referees, see, generally, Sections Two, Eleven and Thirty-eight. Read also General Order XII, which, however, refers only to injunctions against proceedings or

officers. See also *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224.

²⁴. If before adjudication, address to the judge.

That he is the receiver²⁵ herein.

That the above-named bankrupt was duly adjudged herein on the day of, 19..., and, thereafter, the following proceedings were had:²⁶

That²⁷

That, unless the injunction hereinafter asked is granted, your petitioner and the creditors of said bankrupt will suffer irreparable injury.

That no previous application has been made to this or any other court for the order hereinafter asked.

Wherefore, your petitioner prays for a writ of injunction herein, forbidding the said, his attorneys, agents, and servants, from²⁸ and for such other order as shall be just and lawful.

Dated,, 19...

Petitioner.

[Add verification as in Form No. 66.]

Form No. 74.

Referee's Stay and Show Cause Other than Against Suits.²⁹

At a Court of Bankruptcy, held in and for the District of, at, this day of, 19...

Present:, Esq., Referee.

IN THE MATTER OF

.....

In Bankruptcy No. ...

Bankrupt.

Application having been made for a writ of injunction directed to, of the of, in said district,

25. Or "the bankrupt;" or "the trustee;" or "a creditor of the bankrupt."

26. Recite the previous steps in the proceeding briefly.

27. Here give the name and residence of the person sought to be enjoined, and the facts making the injunction necessary, as an imminent sale on a foreclosure where the equity of redemption is substantial; or, the giving of a voidable preference as defined in § 60, and proceedings by the creditor preferred which may result in the property getting into the hands of an inno-

cent holder for value, in this case specifying whether or not the property is in the possession of the bankrupt or an adverse claimant, and, if the latter, by what kind of a transfer and with what notice, if any, of the bankruptcy he holds. See, generally, "Injunctions other than against Suits," in Section Two, *ante*, and cases cited.

28. Here state briefly the acts or transactions which the petitioner seeks to prevent.

29. The referee may, it is thought, grant an injunction without a show cause. See

restraining him from³⁰

and it appearing that the same should be heard and decided by the judge, and that the said be so restrained meanwhile; now, on motion of, Esq., attorney for, the petitioner,

It is ordered:

That, his attorneys, agents, and servants, be, and they are and each of them is hereby restrained and enjoined from³¹ until the hearing and decision of the show cause hereinafter ordered.

That the said show cause, before the Hon., District Judge, at the United States District Court Room, in the of, in said district, on the day of, 19..., at o'clock, .. M., or as soon thereafter as counsel can be heard, why a writ of injunction should not issue out of said court restraining and enjoining him, the said, from³¹ forever.³²

Let service of this order on the said³³, by delivery to him personally of a copy of the same and of the petition on which it is granted within days previous to the day last hereinbefore mentioned, be sufficient.³⁴

.....,

Referee in Bankruptcy.

Mueller v. Nugent, 184 U. S. 1, 7 Am. B. R. 224, and consult generally "Injunctions other than against Suits" in Section Two, ante. If a show cause is not thought necessary use Form No. 107, or if the local practice does not call for the issuance of the writ of injunction, draw a referee's order restraining and enjoining the person named as suggested by the words of this form.
30. Make this recital fit the prayer of the petition.

- 31. Here state the acts or transactions which are enjoined.
- 32. Or until a time certain, specifying it or "until further order."
- 33. Or "on, Esq., his attorney of record," if any; or "on either or both the said and, his attorney," as the court may direct.
- 34. Service should never be by mail, or on any person other than here specified.

Form No. 75.

Referee's Order that Writ of Injunction Issue.³⁵

At a Court of Bankruptcy, held in and for the District
of, at, this day of, 19...

Present:, Esq., Referee.

IN THE MATTER OF

..... } In Bankruptcy No. ...
Bankrupt .

Application having been made for a writ of injunction directed to
....., of the of, in said district, restrain-
ing him from³⁶;
and it appearing that the same should be granted by the referee and not
by the judge;³⁷ on motion of, Esq., attorney for
.....,³⁸ and, Esq., also appearing for
the said and objecting thereto (or consenting),

It is ordered:

That a writ of injunction issue out of said court, and under its seal, and
tested by its clerk,³⁹ restraining and enjoining the said,
his attorneys, agents, and servants from⁴⁰ forever.⁴¹

That, until such writ shall issue, the said, his
attorneys, agents, and servants, be and they hereby are restrained and
enjoined from the doing of said acts.

.....,

Referee in Bankruptcy.

35. See foot-note 29, Form No. 74.

36. See foot-note 30, to same form.

37. If brought on before the referee by stipulation (see Form No. 91) strike out this clause and substitute for it, "and the same being now moved by stipulation before the referee instead of before the judge."

38. Strike out to end of paragraph if there is no appearance in opposition.

39. See General Order III.

40. Here state the acts or transactions enjoined.

41. Or until a time certain, specifying it, or "until further order."

Form No. 76.

Order that Writ of Injunction Issue, After Referee's Stay and Show Cause.⁴²

In the District Court of the United States for the District of

IN THE MATTER OF

.....:.....

} In Bankruptcy No. ...

Bankrupt .

Whereas, application has been previously made for a writ of injunction directed to of the of in said district, and a temporary injunction was granted thereon by Esq., referee in bankruptcy of this court, and the said required to show cause in this court why the same should not be continued forever,⁴³ and such show cause being this day moved by Esq., attorney for the petitioner, and ⁴⁴ after hearing Esq., attorney for said , opposed:

It is ordered:⁴⁵ that a writ ⁴⁶ of injunction issue out of this court, under its seal and tested by its clerk, restraining and enjoining the said , and his attorneys, agents, and servants, from ⁴⁷ forever.⁴⁸

Witness, the Honorable , Judge of the said court, and the seal thereof, at the city of , in said district, on the day of , 19...

{ Seal of }
{ the court. }

..... ,
Clerk.

42. To be used only in cases where the referee grants a temporary injunction with show cause. See Form No. 74 and foot-note 29. Compare also Form No. 75.

43. Or recite the duration of the injunction as shown in the referee's order.

44. Strike out to end of paragraph if there is no appearance in opposition.

45. If application is denied, strike out

balance of form and add: "That such application be and the same hereby is denied, and such temporary injunction herein is vacated."

46. For form of writ, see works on Federal Practice.

47. Here state the acts or transactions enjoined.

48. See foot-note 43.

Form No. 77.

Order Determining Exemptions When no Trustee Appointed.⁴⁹

At a Court of Bankruptcy, held in and for the District
of, at, this day of, 19....

Present:, Esq., Referee.

IN THE MATTER OF

.....

In Bankruptcy No. ...

Bankrupt

An order having been entered herein dispensing with a trustee, as provided in General Order XV; and it appearing, from the affidavit of the bankrupt filed on this application and Schedule B (5) filed with his petition herein, that he has duly claimed and is entitled to the exemptions hereinafter mentioned; now, on motion of, Esq., his attorney,

It is ordered that the said bankrupt's claim to exemptions be determined as follows:

That he is entitled, under of the laws of the State of, to the following property:⁵⁰

.....
and that the same be delivered to him forthwith.

.....,

Referee in Bankruptcy.

49. Consult, generally, Sections Six and Forty-seven. And see General Order XV and Form No. 27. See also §§ 2(11), 38(4). Forms Nos. 78, 79, 80 should also be noted.

50. Here say "that claimed by him in his said Schedule B (5)," or, if all of same are not set off to him, specify those that are set off.

Form No. 78.

Exceptions to Trustee's Report Setting off Exemptions.⁵¹

In the District Court of the United States for the District of.....

IN THE MATTER OF

.....

Bankrupt .

In Bankruptcy No. ...

Now comes, of, a creditor of the above-named bankrupt,⁵² and excepts to the trustee's report setting off said bankrupt's exceptions, filed herein on the day of, 19...,⁵³ in that such report⁵⁴ sets off to said bankrupt the following:⁵⁵

.....
for the following reasons:⁵⁶

.....
and prays that a hearing may be had upon such exceptions and that the same may be argued, as provided in General Order XVII.

Dated,,, 19...

.....,

*Excepting Creditor.*⁵⁷

51. See, generally, Sections Six and Forty-seven, and for trustee's report on exemptions, Form No. 47, which, however, it is thought, should be verified and should specify the State statute under which the exemptions are set apart. The practice on exceptions will be found in General Order XVII. If the bankrupt is the party aggrieved he must ask a review. See Form No. 80.

52. If the exceptions are made by attorney add: "by, of the of, in said district, his attorney, duly authorized to that end." For the authority required if the exceptions are not filed by a creditor, see § 1(9).

53. Or, if the exceptions are to the referee's order, strike out this clause and substitute: "and excepts to the order of, Esq., referee in bankruptcy herein, determining said bankrupt's claim to exemptions, entered on the day of, 19..."

54. "Or order," as the case may be.

55. Here copy in the set-off objected to, or phrase it in words so that the exception will be clearly indicated.

56. Here insert words showing the error excepted to.

57. If by an attorney, add "by , his attorney, address No. ,,"

Form No. 79.

Order Determining Exemptions After Trustee's Report.⁵⁸

At a Court of Bankruptcy, held in and for the District of
....., at, this day of, 19...

Before, Esq., Referee:

IN THE MATTER OF

.....

Bankrupt .

In Bankruptcy No. ...

The trustee herein having, more than twenty days since, filed his report of exempted property, in accordance with General Order XVII, and no exceptions having been taken thereto,⁵⁹ now, on motion of, Esq., attorney for said bankrupt,

It is ordered:

That said trustee's report of exempted property be, and the same hereby is, in all things confirmed,⁶⁰ and the bankrupt's claim to exemptions is hereby determined accordingly.

That the property specified in such report be delivered to said bankrupt forthwith.

.....,

Referee in Bankruptcy.

⁵⁸. See foot-note 51. This form can also easily be changed to fit a case where exceptions have been taken (Form No. 78) and argued.

⁵⁹. If exceptions have been taken, change to fit the facts; if the report of the trustee

is not to be confirmed in whole or in part, here give the reasons.

⁶⁰. Or, in case such report is not confirmed, in whole or in part, stop here and insert words indicating the decision.

Form No. 80.

Petition by Bankrupt for Review of Referee's Order on Exemptions.⁶¹

In the District Court of the United States for the District of

IN THE MATTER OF

.....

Bankrupt .

In Bankruptcy No. ...

To, Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That he was adjudged a bankrupt herein on the day of, 19..., and that a trustee of his estate was in such proceeding subsequently appointed.

That such trustee, on the day of, 19..., filed a report of exempted property herein, and that, on the day of, 19..., an order was entered determining your petitioner's claim to exempt property, as stated in such report.⁶²

⁶³

That such order was erroneous, for the following reasons:⁶⁴

Wherefore, your petitioner, feeling aggrieved because of said order, prays that said trustee's report and the said order be reviewed, as provided in the bankruptcy law of 1898 and General Order XXVII.

Dated,,, 19...

.....,

Bankrupt.

[Add verification as in Form No. 66.]

61. If granted, for Referee's Certificate on Review, see Form No. 159. See, generally, for practice on reviews, Section Thirty-nine, *ante*. A creditor can, of course, ask for a review. If so, see Forms Nos. 158 and 159.

62. If confirmation was refused either in

whole or in part here state the substance of the referee's order.

63. Or, if the referee's order modified the trustee's report, strike out "as stated in such report," and substitute "as follows:"

64. Here indicate the reasons constituting the error complained of.

Form No. 81.

Petition for Order Amending Schedules.⁶⁵

In the District Court of the United States for the District of

IN THE MATTER OF

.....

In Bankruptcy No. ...

Bankrupt.

To, Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That he was duly adjudicated a bankrupt herein on the day of, 19..., and that his schedules, as required by § 7 (8) of the bankruptcy law of 1898, have been duly filed herein.

That the first meeting of your petitioner's creditors has been called for⁶⁶ the day of, 19...

That, at the time your petitioner's schedule of creditors was prepared, by inadvertence,⁶⁷ the names and the statutory facts concerning the claims of certain creditors were omitted therefrom.⁶⁸

That such names and facts are as follows:⁶⁹

That⁷⁰ the above-mentioned creditors have not been regularly notified of said first meeting of creditors.

That,⁷¹ at the time your petitioner's schedule of property was prepared, by inadvertence, a certain interest in property vested in your petitioner was omitted therefrom, namely:⁷²

65. This petition can be adapted to a case where the petition and not the schedules needs amendment. See Section Eighteen, *ante*. Compare, generally, General Order XI, and Sections Seven and Eighteen.

66. If the meeting has been held, change to fit the facts.

67. Or give any other reason bringing the case within General Order XI.

68. Or state what was the act or omission which makes the amendment necessary.

69. If an amendment of Schedule A is desired, give the name of the creditor, his

residence, when and where the debt was contracted, and its consideration and amount, and if secured, etc., with the same particularity required by the appropriate page of Schedule A of Form No. 1.

70. Omit this, if notice has been sent them.

71. Use this paragraph only when the amendment of Schedule B is desired.

72. Here give a sufficient description to show all the facts required by the appropriate page of Schedule B of Form No. 1.

That no previous application has been made for the order hereinafter asked.

Wherefore, your petitioner prays for an order amending said schedules in the particulars above specified,⁷³ and that notice be given accordingly.

Dated at,,,, 19...

.,

[Add verification as in Form No. 66.]

Petitioner.

Form No. 82.

Order to Show Cause on Amendment of Schedules.⁷⁴

At a Court of Bankruptcy, held in and for the District of
at, this day of, 19...

Present:, Esq., Referee.

IN THE MATTER OF

.

Bankrupt .

In Bankruptcy No. ...

On reading and filing the petition of, the bankrupt herein, wherein he prays for an order amending his schedules in certain particulars, now, on motion of, Esq., his attorney,

It is ordered:

That the creditors hereinafter named show cause before the undersigned, at, in the of, in said district, on the day of, 19... at o'clock, M., or as soon thereafter as counsel can be heard, why the prayer of said petition should not be granted and why said petitioner's schedules, hereinafter mentioned, should not be amended by adding to Schedule A⁷⁵ the names and facts hereinafter set forth:⁷⁶ and⁷⁷ by adding to Schedule B⁷⁸ the following statement of facts as to property:⁷⁹

73. If notice has been given, stop here.

74. This form fits into Form No. 81. See foot-note 65 to same.

75. Here insert (1), (2), (3), (4), or (5), dependent on the page of Schedule A sought to be amended.

76. See foot-note 68, Form No. 81.

77. See foot-note 71, Form No. 81.

78. Here insert (1), (2), (3), (4), (5), or (6), dependent on the page of Schedule B sought to be amended.

79. See foot-note 72, Form No. 81.

Let service of this order be made by mail, addressed to said persons at their places of residence as above stated, not later than ten days prior to the return day hereof.⁸⁰

.....,
Referee in Bankruptcy.

Form No. 83.

Order Amending Schedules.⁸¹

At a Court of Bankruptcy, held in and for the District of
....., at, on the day of, 19...

Present:, Esq., Referee.

IN THE MATTER OF <i>Bankrupt .</i>	} In Bankruptcy No. ...

Application having been heretofore made for an order amending Schedule⁸²
....., previously filed herein and an order to show cause having been
granted thereon on the day of, 19..., and proof of mailing
said order, as provided therein, now being made, and⁸³
.....
.....
now, on motion of, Esq., attorney for said bankrupt,
It is ordered:

That Schedule A ()⁸⁴ herein be amended by adding thereto, in the
proper columns, the following facts:⁸⁵
.....

80. If Schedule B only is to be amended, notice should be given the trustee, and this paragraph changed accordingly.
81. This order should be in triplicate, one for the clerk, one for the trustee, and one for the referee. Compare Forms Nos. 81 and 82. See also, generally, Sections Seven and Eighteen, *ante*, and General Order XI.
82. Here insert, for instance, "A (3)" or "B (2)," to fit the petition.

83. Recite whether there was appearance in opposition, and if so by what creditor or the trustee, and by what attorney represented.
84. See foot-note 82.
85. Indicate the columns on the appropriate page of schedule A by numeral as if in Schedule A (3) thus: (1) page 25, (2) John Smith, (3) 650 Broadway, New York, (4) New York, (5) Merchandise, (6) \$5,203.69."

That⁸⁶ Schedule B () be amended by adding thereto the following words:⁸⁷

.....

.....,

Referee in Bankruptcy.

Form No. 84.

Affidavit to Schedule of Creditors When Bankrupt Cannot be Found.⁸⁸

In the District Court of the United States for the District of

IN THE MATTER OF	} In Bankruptcy No. ...
.....	
<i>Bankrupt.</i>	

STATE OF }
County of } ss.:
City of }

....., of, being severally duly sworn, depose and say that they⁸⁹ are the petitioning creditors in the above proceeding; that the said, the bankrupt, is absent from the said district and cannot be found; that your petitioners have diligently inquired into his affairs for the purpose of ascertaining the names and places of residence of all of his creditors, and, according to the best of their information, such names and places of residence are set out in Schedule A, hereto annexed.

.....
.....
.....

Subscribed and sworn to before me, this day of, 19...
.....,
.....

⁸⁶. Use only if Schedule B is to be amended.

⁸⁷. See foot-note 85, and indicate columns of appropriate page of Schedule B, as there indicated.

⁸⁸. This practice is outlined in General Order IX. See also Sections Seven and Thirty-nine.

⁸⁹. One petitioner acquainted with the facts can make this affidavit; if so, change the form accordingly.

Schedule A.⁹⁰

Unsecured Creditors.

Names.	Residences.	Amounts.	
		Dolls.	Cts.

Creditors Holding Securities.

Names.	Residences.	Securities.	Values.		Amounts.	
			Dolls.	Cts.	Dolls.	Cts.

Form No. 85.

Petition that Bankrupt Turn over Concealed Assets.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 119.)

United States District Court, for the District of

IN THE MATTER OF	}	In Bankruptcy No. ...
.....		
<i>Bankrupt</i> .		

To, Esq., Referee in Bankruptcy:

The petition of respectfully shows:

1. That he is the trustee herein duly qualified and acting.
2. Petitioner respectfully alleges that through his attorney, he has examined the bankrupt and other witnesses in this proceeding and thoroughly investigated the books of the bankrupt and the circumstances connected with this bankruptcy.
3. Petitioner alleges, upon information and belief, that, the said bankrupt has in his possession or under his control the following

90. Attach this schedule to the affidavit, filling in names, residences, amounts, etc., with as much accuracy as possible.

property belonging to his said estate in bankruptcy:
.....
.....

That the said bankrupt is fraudulently concealing same from your petitioner as trustee.

4. That said property so concealed amounts in value to at least \$.....

5. That the sources of petitioner's knowledge and the grounds of his belief as to this property are as follows:

[Here specify fully.]
.....
.....

6. No previous application has been made for an order herein.

Wherefore, your petitioner prays for an order directing the bankrupt to turn over and deliver forthwith to your petitioner, all of such property or moneys so concealed, and for such other and further relief as may be just and proper.

.....,
Petitioner.

[Verification.]

Form No. 86.

Order that Bankrupt Turn over Concealed Assets.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 203.)

United States District Court, for the District of

IN THE MATTER OF	} In Bankruptcy No. ...
.....	
Bankrupt .	

....., the trustee herein, having made an application to compel the bankrupt above named, to turn to his said trustee, the sum of \$....., proceeds of certain property belonging to his estate, alleged to be in the possession and control of said bankrupt and which the said bankrupt is fraudulently concealing from his said trustee, and the said having filed his verified answer thereto and the matter having been duly heard and testimony taken, and the referee having rendered a decision thereon,

Now, upon reading and filing the petition of, trustee herein, verified the day of, 19..., the answer of,

bankrupt herein, verified the day of, 19..., the testimony and all proceedings had herein, and after hearing, attorney for the said trustee, in support of said petition, and, attorney for, in opposition thereto, it is, upon motion of, attorney for said trustee,

Ordered, that the prayer of the trustee's petition herein be, and it hereby is, in all respects granted, and

It is further ordered, that the said, bankrupt herein, account for and pay over within days to, as trustee herein, the sum of \$..... belonging to his said estate in bankruptcy and found to be in his possession or under his control.

Dated,, 19....

.....,

Referee in Bankruptcy.

Form No. 87.

Petition for Order of Protection.⁹¹

In the District Court of the United States for the District of

IN THE MATTER OF

.....

In Bankruptcy No. ...

Bankrupt ..

To, Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That he was adjudicated bankrupt herein on the day of, 19..., and on the same day his proceeding in bankruptcy was duly referred.

That your petitioner has not yet made application for his discharge herein.

That your petitioner has reason to believe that he is liable to arrest upon civil process, other than in the cases specified in § 9-a of the bankruptcy law of 1898.

That no previous application has been made to this or any other court for the order hereinafter asked.

⁹¹. See, generally, Section Nine, *ante*. Consult also General Order XII (1). The application often takes the form of a petition for an injunction against further

proceedings in a suit, on the theory that a body execution is a step in a suit. See Forms Nos. 89, 90, 91, 92, 93.

Wherefore, your petitioner prays for an order of protection from arrest, as provided in said § 9-a and General Order XII (1).

Dated,, 19...

.....,

Petitioner.

[Add verification as in Form No. 66.]

Form No. 88.

Order of Protection.⁹²

At a Court of Bankruptcy, held in and for the, District
of, at, this day of, 19...

Present:, Esq., Referee.

IN THE MATTER OF

.....

In Bankruptcy No. ...

Bankrupt .

The above-named bankrupt having, on the day of, 19..., applied for an order of protection, and it appearing that one year has not yet elapsed since the date of his adjudication, viz., the day of, 19..., and that he has not yet been discharged herein, now, on motion of, Esq., attorney for said bankrupt,

It is ordered:

That all persons and officers be and they hereby are prohibited from arresting the said bankrupt on civil process, save in the cases specified in subdivisions (1) and (2) of § 9-a of the bankruptcy law of 1898, until twelve months after the date of such adjudication, or, if within that time the bankrupt applies for a discharge, then until the question of such discharge is determined.

.....,

Referee in Bankruptcy.

⁹². This fits into Form No. 87. See foot-note 91 to that form. Consult, generally, Section Nine and General Order XII (2).

Form No. 89.

Petition for Stay of Pending Suit.⁹³

In the District Court of the United States for the District of

IN THE MATTER OF

.....

In Bankruptcy No. ...

Bankrupt .

To, Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That he was duly adjudicated a bankrupt⁹⁴ herein on the day of, 19..., and that he has not yet made application for a discharge.

That, among your petitioner's debts scheduled herein, is one for dollars (\$.....), in favor of, and that such debt is of such a nature that a discharge in bankruptcy, as provided in the bankruptcy law of 1898 as amended, would be a release.

That, at the time of the filing of the petition on which said adjudication was made, a suit was pending on such debt in the Court of, entitled v., in which action, Esq., of, in the of, in said district, is the attorney of record of the plaintiff, and that the same is still pending therein;⁹⁵ and that, if such⁹⁶ is allowed to proceed, injury will be done your petitioner,⁹⁷ for the following reasons:⁹⁸

93. See, generally, Section Eleven, and compare Section Two and Forms Nos. 73, 74, 75 and 76, and the foot-notes to such forms, especially foot-note 23 to Form No. 73. Application may also be made for a stay of a suit begun after the bankruptcy (see, generally, Section Eleven), though the power to grant it flows rather from § 2(15). If such an application is to be made this form can easily be adapted to fit the facts. The form here given refers only to a stay asked by the bankrupt. It can be varied to fit the very diverse facts on which these stays may be granted. Any other form would, in the nature of things, be a mere skeleton and of little value to the practitioner.

94. This petition can also be made by the petitioning creditors if before adjudication,

and, if after, by the trustee, and, if the latter, the allegations should be changed so as to show the trustee's appointment and qualification, and injury to the estate if the stay is not granted. The form given applies only to a case where the bankrupt desires to prevent the entry of a judgment.

95. Or in a proper case add: "that such suit has resulted in a judgment against your petitioner and that there is now pending before, Esq., as referee, a proceeding supplementary to execution," or as the facts may be.

96. "Suit" or "proceeding."

97. Or "your petitioner's estate in bankruptcy."

98. Set out the reasons carefully and clearly.

That no previous application has been made to this or any other court for the stay herein asked.

Wherefore, your petitioner prays that further proceedings in said suit⁹⁹ may be stayed for the time prescribed in § 11-a of said law, in particular,¹
.....
and for such further order as shall be just and lawful.

Dated,, 19...

.....,

Petitioner.

[Add verification as in Form No. 66.]

Form No. 90.

Referee's Stay and Show Cause on Pending Suit.²

At a Court of Bankruptcy, held in and for the District of
....., at, this day of, 19...

Present:, Esq., Referee.

IN THE MATTER OF <i>Bankrupt .</i>	}	In Bankruptcy No. ...
--	---	-----------------------

Application having been made for an order staying further proceedings in a certain suit in the Court of, entitled v.; and it appearing that the same should be heard and decided by the judge and such proceedings be stayed meanwhile; now, on motion of Esq., attorney for the applicant,

It is ordered:

That, the plaintiff in said action, and his attorneys, agents, and servants, be, and they are, and each of them is, hereby stayed from any further proceedings therein, in particular from³
.....
until the hearing and decision of the show cause hereinafter ordered.

<p>99. Or, as the facts may be.</p> <p>1. Here specify the particular act to which the stay is mainly directed.</p> <p>2. Consult footnote 93 of Form No. 89</p>	<p>and see foot-note 29 to Form No. 74 for cross-references.</p> <p>3. Here specify the particular act to which the stay is mainly directed.</p>
---	---

That⁴ the said , the plaintiff in such action, show cause before the Honorable , District Judge, at the United States District Court Room, in the of , in said district, on the day of , 19 . . . , at o'clock, . . . m., or as soon thereafter as counsel can be heard, why this stay should not be continued for the space of twelve months from the date of the adjudication herein, or, if within that time the said bankrupt shall apply for a discharge, then until the question of such discharge shall be determined;⁵ and then and there also show cause, if any, why a writ of injunction should not issue out of and under the seal of said court accordingly.

Let service of this order on said , the plaintiff,⁶ by delivering to him personally a copy of the same and of the petition on which it is granted, within days previous to the day last hereinbefore mentioned, be sufficient.⁶

. ,
Referee in Bankruptcy.

Form No. 91.

Stipulation that Show Cause be Heard by Referee.⁸

In the District Court of the United States for the District of

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: right;"><i>Bankrupt .</i></p>	}	In Bankruptcy No. ...
--	---	-----------------------

It is hereby stipulated that the order to show cause previously granted herein, returnable before the Honorable , District Judge, on the day of , 19 . . . , may be brought on before and be determined by , Esq., Referee in Bankruptcy, who granted the same, instead of said judge; and that the same may be moved

4. If a show cause is not thought necessary use Form No. 93, or if the local practice does not call for the issuance of the writ of injunction, draw a referee's order restraining and enjoining the person named, as suggested by the words of this form.

5. If a writ is not asked for, stop this paragraph here.

6. Or "on , Esq., his attorney of record," if any; or "on either or

both the said and , his attorney," as the court may direct.

7. Service should never be by mail, or on any person other than one here specified.

8. This form will be found useful when the residence of the judge is in another division or county from that of the bankrupt. Consult, generally, Section Eleven and Forms Nos. 89, 90, 92, and 93, and the foot-notes thereto.

before said referee at, in the of,
in said district, on the day of, 19 . . . , at o'clock, . . . m.

Dated,,,, 19 . . .

.,

, Attorney for

.,

Attorney for

Form No. 92.

Decision and Report of Referee on Application for Stay Stipulated Before Him.⁹

In the District Court of the United States for the District of

IN THE MATTER OF

.

In Bankruptcy No. . . .

Bankrupt .

To the Hon., District Judge:

Application having been made for a stay directed to, plaintiff in an action in the Court of, entitled v., and a temporary stay having been previously granted, and the said ordered to show cause before the district judge why such stay should not be continued, and such show cause having been moved before me, on stipulation of all parties, and the petitioning bankrupt appearing by, Esq., his attorney, and, said plaintiff, appearing by, Esq., his attorney;

It is hereby found and recommended that an order be entered¹⁰ directing a writ of injunction to issue to, restraining and enjoining him from further proceedings in said suit in particular¹¹ until twelve months after the date of the adjudication herein, unless the said bankrupt shall, previous to that time, apply for a discharge, and then until the question of such discharge shall be determined.

9. This form fits into Form No. 91, which, and the foot-notes thereto, see. Compare also Forms Nos. 89, 91, and 93. Consult, generally, Section Eleven.

10. If the recommendation is against the continuance of the stay, stop here, and add:

"denying such application and vacating the temporary stay previously granted herein."

11. Here specify the particular act to which the stay is mainly directed.

Herewith are handed up the petition and other papers used on such application and show cause.

Respectfully submitted,

.....,
Referee in Bankruptcy.

Dated,,,,, 19...

Form No. 93.

Order that Writ of Injunction Issue,¹²

In the District Court of the United States for the District of

IN THE MATTER OF

.....

} In Bankruptcy No. ...

Bankrupt .

Whereas application has been previously made herein for a stay directed to, plaintiff, in a suit in the Court of, entitled v., and a temporary stay was granted by, Esq., Referee in Bankruptcy, and such application has been argued in the first instance, by stipulation, before such referee, and he having reported in favor¹³ of such stay; now, on motion of Esq., attorney for the petitioner, and¹⁴ after hearing Esq., attorney for said, opposed;

It is ordered:¹⁵

That such report and recommendation be approved, and that a writ¹⁶ of injunction issue, directed to, restraining and enjoining him from further proceedings in such suit, in particular form,¹⁷ until twelve months after the date of the adjudication herein, unless the said

12. To be used only in cases where the referee grants a temporary injunction with show cause. See Form No. 90, foot note 2. It is thought also that the referee can on a stipulation bringing the show cause on before him, issue an order directing the clerk to issue the writ, thus avoiding the circumstance resulting from Form No. 92. If so, Form No. 93 can be adapted to the usual form of a referee's order; see Form No. 75. Consult, generally, Section Eleven.

13. Or "against the continuance."

14. Strike out to end of paragraph if there is no appearance in opposition.

15. If the application is denied, follow foot-note 45, Form No. 76.

16. For form of writ, see works on Federal Practice.

17. Here specify the particular act to which the stay is directed.

bankrupt shall, previous to that time, apply for a discharge, and then until the question of such discharge shall be determined.

Witness the Honorable, Judge of said court and the seal thereof, at the city of, in said district, this day of, 19...

{ Seal of }
the court. }, Clerk.

Form No. 94.

Offer of Composition.¹⁸

In the District Court of the United States for the District of

IN THE MATTER OF <i>Bankrupt</i> .	} In Bankruptcy No. ...

To, Esq., Referee in Bankruptcy, and the creditors of, a bankrupt:

The undersigned, who was adjudicated a bankrupt herein on the day of, 19... , and whose schedules of creditors and property have been previously filed at,, with, Esq., the referee in bankruptcy in charge, and who was examined in open court herein on the day of, 19... ,¹⁹ does hereby offer a composition at per cent. (. . . . %) of the claims of his creditors, allowed or to be allowed, except those entitled to priority, in this proceeding.

This ²⁰ offer is to be effective only after the examination of the undersigned in open court, as provided in § 12-a of the bankruptcy law of 1898.

Dated,, 19...

....., Bankrupt.

18. This is the first step in composition. The practice suggested by Form No. 60 applied under the law of 1867, but does not under that of 1898. See, generally, Section Twelve; Form No. 61, together with Forms Nos. 94, 96, 97, 98, 99, 100, 101, 102, and 103, are thought to outline a complete practice on this increasingly important branch

of bankruptcy law. For substitute for Forms Nos. 62 and 63, see Form No. 102.
19. If the examination has not been held but is to be, specify the date and then use the paragraph referred to in foot-note 20.
20. Omit this if the bankrupt has already been examined.

STATE OF , }
 County of , } ss.:
 City of , }

On this day of, 19..., the above-named
 appeared before me and acknowledged the execution of the fore-
 going offer of composition.

.....,

Form No. 95.

Notice to Creditors.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 294.)

United States District Court, for the District of

IN THE MATTER OF

.....

In Bankruptcy No. ...

Bankrupt .

To the creditors of , bankrupt:

Notice is hereby given that the above-named bankrupt has filed his petition, verified the day of; 19..., setting forth among other things that he has offered terms of composition, which terms have been accepted in writing by a majority in number of all creditors whose claims have been allowed, and which number represents a majority in amount of such claims, that the consideration to be paid by the bankrupt to his creditors and the money necessary to pay all debts which have priority and the costs of the proceedings have been duly deposited in a duly designated depository, and asking that said composition may be confirmed by the court.

Notice is hereby given that all creditors and other persons are ordered to attend at the hearing before the Honorable Judge of the United States District Court in the United States Court House, on,, 19..., atM., and then and there show cause, if any they have, why the prayer of said petitioner should not be granted, and also to attend the examination of the bankrupt thereon.

Dated,, 19...

.....,
Referee in Bankruptcy.

No. Street,

City of

[Annex proof of publication as on discharge proceeding.]

Form No. 96.

Acceptance of Composition.²¹

In the District Court of the United States for the District of

IN THE MATTER OF	} In Bankruptcy No. ...
.....	
Bankrupt .	

To, Esq., Referee in Bankruptcy, and the bankrupt above named:

The undersigned creditors, whose signatures, residences, claims, and the amount at which the same have been allowed, are hereafter set out, do hereby accept the offer of composition at per cent. (....%) made herein by, the above-named bankrupt, on the day of, 19...; this²² acceptance, however, to be effective only after such bankrupt shall be examined in open court.

Dated,, 19...

Signatures of creditors. ²³	Residences.	Debts allowed.	
		Dolls.	Cts.

STATE OF
County of
City of
} ss.:

On this day of, 19..., the above-named
..... and
..... and
appeared before me and severally acknowledged the execution of the foregoing acceptance of offer of composition.

.....
.....

21. See foot-notes to Form No. 94 and consult, generally, Section Twelve.

22. Strike this clause out if bankrupt has already been examined.

23. The creditors should sign here, using

their business names, and, in case of partnerships, corporations, and the like, the person who actually signs should add his own name: thus, "Smith & Co., by John Smith, one of such partnership."

Form No. 97.

Referee's Certificate in Composition.²⁴

In the District Court of the United States for the District of

IN THE MATTER OF

.....

Bankrupt .

In Bankruptcy No. ...

To the Honorable, District Judge:

I,, one of the referees in bankruptcy of your court, do hereby certify as follows:

First: That, the bankrupt herein, was duly adjudicated such on the day of, 19..., and that he filed his schedules of creditors and property herein, as provided by § 7 (8) of the bankruptcy law of 1898, on the day of, 19...

Second: That the first meeting of creditors was held herein on the day of, 19..., and the bankrupt was then examined in open court; and that such examination was taken by a stenographer, reduced to writing, and forms a part of the record-book handed up herewith.

Third: That, at such first meeting of creditors, claims of creditors, aggregating dollars (\$....) in amount, and (....) in number, were duly allowed, and that the names and residences of such creditors and the amounts at which their claims were allowed, are set forth in Schedule A hereto annexed and made a part of this report.

Fourth: That, at such first meeting of creditors, claims of creditors entitled to priority, amounting to dollars (\$....) in amount, and (....) in number, were duly allowed, and that the names and residences of such creditors and the amounts at which their claims were allowed as entitled to priority, are set forth in Schedule B hereto annexed and made a part of this report.

Fifth: That, at the date of this certificate, the claims of certain creditors duly scheduled have not yet been presented for allowance, and that the names and residences of such creditors and the amounts of their claims as so scheduled are set out in Schedule C hereto annexed and made a part of this report.

²⁴ Since the referee cannot confirm a composition, and practically all the papers are on file with him, this certificate is necessary. See, generally, Section Twelve.

Sixth: That the cost of this proceeding, as shown by said record-book, is, to this date, dollars (\$....).

Seventh: That appraisers were appointed herein and have filed a report, showing the value of the assets of said bankrupt to be dollars (\$....), and that the basis of their valuation in such report is as follows:²⁵

Eighth: That the said bankrupt, after he had been so examined and so filed said schedules, offered terms of composition to his creditors at per cent. (....%), as shown by his offer handed up herewith.

Ninth: That a majority in number of all of said creditors whose claims have been allowed, viz.: (....) creditors, whose claims represent a majority in amount of all such allowed claims, viz.: dollars (\$....), have accepted in writing said bankrupt's offer of composition; all as is shown by such acceptances, handed up herewith.

Tenth: That, so far as appears from the files and records herein, said composition will be for the best interests of the creditors and is made in good faith and not procured by any means, promises, or acts prohibited by said bankruptcy law, nor has the bankrupt been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge.²⁶

I hand up herewith, for the information of the judge:

- (1) The record-book of this proceeding to the date of this certificate.
- (2) All claims allowed or refused allowance.
- (3) The appraisal, above mentioned.
- (4) The offer of composition.
- (5) The acceptances of creditors.
- (6) All other papers filed with me herein.

Respectfully submitted,

.....,

Referee in Bankruptcy.

Dated,,, 19...

Schedule A.

Claims Allowed.

Names of creditors.	Residences.	Amount allowed.	
		Dolls.	Cts.

²⁵ For instance: Sixty per cent. of cost, or cost price, or, as the facts may be.

²⁶ This paragraph may be modified to

fit the facts, and should not be inserted if the referee is in doubt on any of the matters mentioned therein. See § 12-d.

Schedule B.**Priority Claims Allowed.**

Names of creditors.	Residences.	Amount allowed.	
		Dolls.	Cts.

Schedule C.**Claims Not Yet Allowed.**

Names of creditors.	Residences.	Amount scheduled.	
		Dolls.	Cts.

Form No. 98.**Order to Show Cause in Composition.²⁷**

In the District Court of the United States for the District of

<p>IN THE MATTER OF</p> <p>.....</p> <p style="text-align: right;"><i>Bankrupt</i> .</p>	}	In Bankruptcy No. ...
--	---	-----------------------

Whereas, application has been made for the confirmation of the composition offered by the above-named bankrupt, and it appears that such composition has been accepted in writing by a majority in number of all of his creditors whose claims have been allowed, which majority represents a majority in amount of such claims, and that the consideration for such composition required by § 12-b of the bankruptcy law of 1898 has been duly deposited; now, on motion of, Esq., attorney for such bankrupt,

It is ordered:

²⁷ The application for this order may be made by Form No. 61, which, however, should be verified. Consult, generally, Section Twelve, *ante*. See also forms just *ante* and *post*.

That all creditors of, a bankrupt, as well as all other parties in interest, show cause, at a hearing to be had on such application before the District Court of the United States for the District of, at, in the of, in said district, on the day of, 19 . . . , at o'clock, . . m., or as soon thereafter as such hearing is called, why such application should not be granted.

That notice of such hearing be given by mailing a copy of this order to each of the creditors, parties in interest and attorneys entitled to notice in this proceeding, and by publishing a copy hereof in the designated newspaper of the county district of such bankrupt's residence, as provided by such law.

That such notice be so given by or under the direction of the referee in charge of this proceeding.²⁸

Witness, the Honorable, Judge of the said court, and the seal thereof, at the city of, in said district, on the day of, 19

{ Seal of }
{ the court. }

.,
Clerk.

Form No. 99.

Appearance of Objecting Creditor in Composition.²⁹

In the District Court of the United States for the District of

IN THE MATTER OF

.

In Bankruptcy No. . . .

Bankrupt .

To the District Court of the United States for the District of:

The clerk of this court will please enter my appearance as attorney for, of,, a creditor of, the above-named bankrupt, who desires to file a specification of objection to the confirmation of his proposed composition herein.

Dated,,,,, 19

.,
Attorney for,
Objecting Creditor.

Address,

²⁸. Or, if that is the local practice, by the clerk.

²⁹. Consult, generally, Section Twelve.

See also General Order XXXII, for time within which this appearance must be entered, and compare Equity Rule XVII.

Form No. 100.

Specification of Objection in Composition.³⁰

In the District Court of the United States for the District of

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt</i> .</p>	}	<p>In Bankruptcy No. ...</p>
---	---	------------------------------

Now comes, of, a creditor and person interested in the estate of, the above-named bankrupt, and does hereby oppose and object to the confirmation of the composition offered by said bankrupt, and, for grounds of such opposition and objection, does file the following specification.³¹

That ³² such confirmation is not and will not be for the best interests of the creditors of said bankrupt because of the following facts, which the undersigned charges to be true, viz.:³³

.....

Wherefore, objection is made to such confirmation and a hearing and the judgment of the court is asked thereon.

.....,
Objecting Creditor.
 [by

his attorney.
 Address,]

STATE OF,
 County of,
 City of, } ss.:

I,, the objecting creditor mentioned and described in the foregoing specification of objection, do hereby make solemn oath that

30. Consult for available objections Section Twelve, *ante*. See also General Order XXXII.

31. There may, of course, be more than one objection.

32. Or specify any other objection mentioned in § 12-d.

33. Here set out facts as in any other pleading, showing them in sufficient detail to give the bankrupt proper notice of the issue he must meet.

the statements of fact contained therein are true, according to the best of my knowledge, information, and belief.³⁴

Subscribed and sworn to before me, this day of, 19...

Form No. 101.

Order of Reference to Special Master in Composition.³⁵

In the District Court of the United States for the District of

IN THE MATTER OF

Bankrupt .

In Bankruptcy No. ...

Whereas, application has been made for the confirmation of a composition offered by the above-named bankrupt and a hearing set to consider the same, and, a creditor of said bankrupt, having appeared by, Esq., his attorney, and filed a specification of objection to such confirmation; now, on motion of, Esq., attorney for

It is ordered:

That the issue made by such application and such specification of objection be referred to, Esq., as special master, to ascertain and report the facts, with his conclusions thereon.

Witness, the Honorable, Judge of the said court, and the seal thereof, at the city of, in said district, on the day of, 19...

{ Seal of
the court. }

Clerk.

34. If the specification is made by the creditor's attorney, the latter's affidavit should show why the creditor does not verify and how the attorney is acquainted with the facts; also that he is authorized

by the creditor to file the specification and verify for him.

35. This form will not be used if the judge determines to hear the matter himself. See Section Twelve, generally, and the foot-notes to forms just *ante* and *post*.

Form No. 102.

Report of Special Master in Composition.³⁶

In the District Court of the United States for the District of

IN THE MATTER OF

.....

} In Bankruptcy No. ...

Bankrupt .

To the Honorable, District Judge:

I,, special master, appointed herein by an order of your court, dated the day of, 19..., do hereby report as follows:

On receipt of said order, I set³⁷ the day of, 19..., at o'clock, .. M., at, in the of in said district, as the time and place at which such reference should be proceeded with, and notified the respective attorneys; that, at such time and place, the bankrupt was represented by, Esq., his attorney, and the objecting creditor by, Esq., his attorney, and³⁸ that there were the following additional appearances:

That, thereafter, the proceedings were as indicated in the record-book of such reference, which, with the testimony taken and the depositions used, is handed up herewith.

That, in accordance with such proceedings, and after due consideration, I do find the facts to be as follows:³⁹

.....

That, on such facts, it is my opinion, and I do, therefore, recommend, that:⁴⁰

.....

36. See foot-note 35 to Form No. 101. This form can also be used for the several reports by a special master referred to in the text and *post*.

37. For practice on references to special masters, see Equity Rules LXXXIII to LXXXIV.

38. If there were no additional appearances strike this out.

39. The referee usually prepares his own findings. They should be stated with sufficient particularity to inform the judge as to the issue, and, if possible, refer to the testimony by page number and to depositions by name of deponent and date.

40. Here state the conclusion and recommendation in a single sentence.

My fees on such reference are dollars (\$....), and my disbursements are dollars (\$....), a total of dollars (\$....), which have been paid to me by the petitioning bankrupt.⁴¹

I hand up herewith:

(1) The record-book on this reference, including the testimony of witnesses therein.

(2) The petition.

(3) The specification of objection.

(4) The depositions used on such reference.

(5) The exhibits referred to in such record-book.

(6) All other papers filed or used on such reference.

Dated,, 19...

Respectfully submitted,

.....,
Special Master.

Form No. 103.

Order Confirming (or Refusing to Confirm) Composition.⁴²

In the District Court of the United States for the District of

IN THE MATTER OF

.....

In Bankruptcy No.

Bankrupt .

Whereas, an application for the confirmation of the composition at per cent. (....%), offered by the bankrupt to his creditors, has been made herein, and it appearing that such composition has been accepted by a majority in number of all of the creditors whose claims have been allowed, and that such number represents a majority in amount of such claims, and the consideration required by § 12-b of the bankruptcy law of 1898 having been deposited in the place designated by this court; and an order having been previously granted requiring creditors to show cause why such composition should not be confirmed, and due notice having been given as required by § 58-a (2), and no specification of objections to such confirmation having

41. Or "the objecting creditor," as the case may be.

42. This form accomplishes the same as Forms Nos. 62 and 63, and also formally dismisses the proceeding. Consult, gener-

ally, Section Twelve, and for effect of confirmation, see §§ 14-c, 21-f-g, and 70-f. See also General Orders XII(3), XXIX, and XXXII.

been filed,⁴³ and the court being satisfied in all of the particulars specified in § 12-d of said law.⁴⁴

It is ordered that⁴⁵ said composition be, and the same hereby is, in all things confirmed.

It is further ordered that distribution of said consideration shall be made by, the trustee herein,⁴⁶ and that he, first, pay from said deposit the claims of creditors entitled to priority, as fixed by the files and records of this proceeding or as may hereafter be ordered;⁴⁷ second, pay the costs of this proceeding⁴⁸ in the sums and to the persons as likewise so fixed; third, pay, according to the terms of said composition, the claims of the general creditors⁴⁹ allowed herein, as shown by the files and records of this proceeding and as may hereafter be ordered; and fourth, if any balance shall remain, that the same continue on deposit until twelve months from this date, subject to such subsequent orders as may be granted herein during that period, and then, if any of said consideration shall remain, that the same be distributed by the person above designated *pro rata* among such creditors as, prior to that time, shall have proven and had their claims allowed herein.⁵⁰

It is further ordered that said proceeding in bankruptcy against the above-named bankrupt be, and the same hereby is dismissed.

Witness, the Honorable, Judge of the said court, and the seal thereof, at the city of, in said district, on the day of, 19...

{ Seal of }
{ the court }

.,
Clerk.

43. Or if a specification of objections was filed, strike out this clause and substitute "and a specification of objection having been filed by, and the same having been duly heard," reciting the reference to the special master, if any, and the filing of his report and its recommendation; for such recitals, see Form No. 116.

44. If confirmation is denied, change this recital to fit the facts.

45. In that event also stop here and add:

"confirmation of such composition be and the same hereby is refused; and the referee in charge is directed to proceed with the administration of said estate," concluding with the *teste* clause at the end of the form.

46. Or by the referee or the clerk, as the court may order.

47. See § 64-a-b.

48. See §§ 62 and 64-b(2).

49. See § 57.

50. See § 66.

Form No. 104.

Petition to Set Aside a Composition.

(Hagar and Alexander's Bankruptcy Forms (2d Ed.), No. 271.)

In the District Court of the United States for the District of

IN THE MATTER OF

Bankrupt.

To the District Court of the United States, for the District of

The petition of respectfully shows to this court and alleges:

1. That he is a creditor and party in interest herein, whose claim has been duly filed and allowed in this proceeding.

2. That on the day of, 19..., the bankrupt herein, after he had been examined before the referee, duly offered a composition in said proceeding to his creditors upon the following terms and conditions:

That said offer was thereafter duly accepted by petitioner and other creditors of said bankrupt, upon the terms and conditions as offered and on the day of, 19..., the said composition was duly confirmed by the district judge in the manner and form as offered and accepted.

3. That said composition was offered and accepted and confirmed upon statements that all the creditors should share equally in said composition and receive the same *pro rata* amounts upon their said several claims.

4. That since the entry of the order confirming said composition and within a period of six months thereafter your petitioner has discovered that statements upon which the said composition was procured were false and untrue and that fraud was practiced by the said bankrupt in procuring the said composition in the following particulars: [*Here allege specifically the fraudulent acts of bankrupt by which it is claimed the composition is vitiated.*]

5. That all of the above facts and circumstances were not known to petitioner prior to the confirmation of the composition herein.

6. That your petitioner relied upon the representations of the bankrupt and would not have accepted said composition had he known the exact situation and the fraudulent acts of the bankrupt, as above stated.

7. No previous application for the order asked for herein has been made.

Wherefore, your petitioner prays that the said composition be vacated and set aside, the proceeding reinstated and the property returned to the trustee for distribution, according to the bankruptcy law.

.....,
Petitioner.

[Verification.]

Form No. 104-A.

Order Setting Aside a Composition.

(Hagar and Alexander's Bankruptcy Forms (2d Ed.), No. 310.)

At a State Term of the District Court of the United States, held in
and for the District of, at the Court House, in the
City of, on the day of, 19 . . .

Present:

Hon.,
District Judge.

IN THE MATTER OF

Bankrupt.

., a creditor of the above named bankrupt, having
filed a petition herein, verified the day of, 19 . . ., praying
that the composition of said bankrupt with his creditors, confirmed by order
of this court dated the day of, 19 . . ., be vacated and
set aside for fraud in procuring same, and the proceeding reinstated, and an
order to show cause having been issued thereon on the day of
., 19 . . ., and the said motion having come on for hearing before
this court on the day of, 19 . . ., (and a trial had),

Nok, upon reading and filing the petition of aforesaid,
and upon all the pleadings and proceedings herein, and after hearing
., Esq., in support of said motion, and,
Esq., in opposition thereto, and due deliberation having been had thereon,
it is, on motion of, attorney for said petitioner.

Ordered, adjudged and decreed that the composition of the bankrupt with
his creditors herein, confirmed by this court by order made and entered on
the ay of, 19 . . ., be and the same hereby is in all
respects vacated and set aside and the bankruptcy proceeding reinstated.

And it is further ordered that the property of the said bankrupt be and
hereby is restored to the trustee herein and the said trustee directed to pro-
ceed with the administration of this estate, as provided in the Bankruptcy
Act.

D. J.

Form No. 105.

Petition for Extension of Time to Apply for Discharge.⁵¹

In the District Court of the United States for the District of

IN THE MATTER OF

Bankrupt.

To the Honorable, District Judge:

Your petitioner respectfully shows:

That he is the bankrupt herein.

⁵¹ Consult Section Fourteen, generally.

That more than twelve and less than eighteen months have elapsed since the day of, 19..., when he was adjudicated bankrupt.

That he was unavoidably prevented from filing an application for a discharge within twelve months after such adjudication for the following reasons:⁵²

That he desires to file such application and secure a discharge.

That no previous application has been made to this or any other court for the order hereinafter asked.

Wherefore your petitioner prays for an order extending his time to file such petition for discharge until the expiration of eighteen months from the date of such adjudication.

Dated,,,,, 19...

.....,
Petitioner.

[Add verification as in Form No. 66.]

Form No. 106.

Referee's Certificate on Application for Extension of Time.⁵³

In the District Court of the United States for the District of

IN THE MATTER OF

.....
Bankrupt.

To the Honorable, District Judge:

I,, referee in bankruptcy in charge of this proceeding, do hereby certify:

That the above-named bankrupt was adjudicated herein on the day of, 19...

That, from the files and records of such proceeding and any information possessed by me, there appears no reason why such bankrupt's petition for an extension of time to file application for a discharge should not be granted;⁵⁴ and that, in my opinion, such bankrupt has not been guilty of laches in applying for his discharge.

I, therefore, recommend that his petition for extension of time be granted.

Dated,,,,, 19...

.....,
Referee in Bankruptcy.

⁵². Here give reasons as, for instance, lack of funds to pay expenses, illness, absence, etc. See § 14-a.

⁵³. This certificate is not required, but is often applied for, the referee having all the facts before him.

⁵⁴. Or, if reasons against the granting of the petition or any facts which should be brought to the attention of the judge exist, state them here. Consult Section Fourteen.

Form No. 107.

Order Extending Time to Apply for Discharge.⁵⁵

In the District Court of the United States for the District of.....

IN THE MATTER OF

.....

In Bankruptcy No. ...

Bankrupt .

Whereas, a petition for an extension of time to apply for discharge, as provided in § 14-a of the bankruptcy law of 1898, has been filed by the above-named bankrupt, and an order to that effect is recommended by Esq., the referee in bankruptcy in charge of this proceeding; now, on motion of Esq., attorney for said bankrupt,

It is ordered:

That the time of the bankrupt herein, to apply for a discharge be, and the same hereby is, extended until the expiration of eighteen months from the day of, 19..., the date of his adjudication herein.

Witness, the Honorable, Judge of the said court, and the seal thereof, at the city of, in said district, on the day of, 19...

{ Seal of }
{ the court. }

.....,
Clerk.

55. This order usually follows the petition and certificate, Forms Nos. 105 and 106. Consult Section Fourteen, *ante*; and for other forms on proceedings for a dis-

charge, see Forms Nos. 57, 58 and 59, as supplemented by Forms Nos. 108, 109, 110, 111, 113, 114, and 115. See also General Order XXXI.

Form No. 108.

Order to Show Cause on Application for Discharge.⁵⁶

In the District Court of the United States for the District of.....

IN THE MATTER OF

.....

Bankrupt .

In Bankruptcy No. ...

Whereas, application has been made by the above-named bankrupt for a discharge, as provided by § 14-a of the bankruptcy law of 1898; now, on motion of, Esq., attorney for such bankrupt,

It is ordered:

That all creditors of ⁵⁷, a bankrupt, as well as all other parties in interest, show cause, at a hearing to be had on such application before the District Court of the United States for the District of, at, in the of, in said district, on the day of, 19..., at o'clock, .. M., or as soon thereafter as such hearing may be had, why such application should not be granted.

That notice of such hearing be given by mailing a copy of this order at least ten days prior to the date set for such hearing to each of the creditors, parties in interest and attorneys⁵⁸ entitled to notice of proceedings herein, and by publishing a copy hereof in the designated newspaper of the county district of such bankrupt's residence, not later than one week prior to such date.⁵⁹

That such notice be so given by, or under the direction of, the referee in bankruptcy in charge of this proceeding.⁶⁰

Witness, the Honorable, Judge of the said court, and the seal thereof, at the city of, in said district, on the day of, 19...

{ Seal of }
{ the court. }

.....,
Clerk.

56. This form is intended as a substitute for the "Order of Notice" which is a part of Form No. 57. For criticisms of same, see Sections Fourteen and Fifty-eight.

57. In partnership cases, substitute: "of, a partnership and"

and, as individuals, members of such copartnership, bankrupts."

58. For instance those designated by creditors under General Order XXI(2).

59. See § 58-b, and compare § 58-a(2).

60. Or by the clerk, as is the practice in each district.

Form No. 109.

Referee's Certificate of Conformity on Discharge.⁶¹

In the District Court of the United States for the District of

IN THE MATTER OF

.....

Bankrupt.

In Bankruptcy No. ...

To the Honorable, District Judge:

I,, referee in bankruptcy in charge of this proceeding, do hereby certify:

That I have given the notice of the hearing on the application of the bankrupt for a discharge, as directed by an order dated the day of, 19..., herein, as appears by the affidavit of mailing⁶², and the affidavit of publication, hereto attached and made a part hereof.

That, from the files and record-book of this proceeding, it appears that was adjudicated bankrupt herein on the day of, 19...

That the administration of said bankrupt's estate is closed.⁶³

That from such files and record-book, it satisfactorily appears that such bankrupt has not committed any of the offenses or done any of the acts which would be an objection to his discharge, and that, in my opinion, such application should be granted.⁶⁴

Dated,,,,, 19...

.....,

Referee in Bankruptcy.

⁶¹ This form conforms to the practice in those districts where the referee, and not the clerk, gives the notice of application for a discharge. It is usually drawn by the referee. Consult Section Fourteen, generally, for practice. See also forms just *ante* and *post*.

⁶² Or "my certificate of mailing" if the referee mails the notices himself.

⁶³ Or, if the case is not closed, state the facts, as: "not closed, but has proceeded to a first meeting and choice of trustee, and the bankrupt's examination is completed;" or "to a first dividend."

⁶⁴ If the contrary is true, or there is any reason why the hearing should be postponed, state the facts and make the proper recommendation.

Form No. 110.

Appearance by Objecting Creditor on Discharge.⁶⁵

In the District Court of the United States for the District of

IN THE MATTER OF

.....

Bankrupt .

In Bankruptcy No. ...

To the District Court of the United States for the District of:

The clerk of this court will please enter my appearance as attorney for
, of,, a creditor of,
 the above-named bankrupt, who desires to file a specification of objection to
 the application of such bankrupt for a discharge.

Dated,,,,, 19...

.....
*Attorney for Objecting Creditor.*Address,

Form No. 111.

Specification of Objection to Discharge.⁶⁶

In the District Court of the United States for the District of

IN THE MATTER OF

.....

Bankrupt .

In Bankruptcy No. ...

Now comes, of,, a creditor and
 person interested in the estate of, the above-named
 bankrupt, and opposes and objects to the granting of such bankrupt's appli-

⁶⁵. Consult, generally, Section Fourteen, *ante*. See also General Order XXXII, for time within which this appearance must be entered, and compare Equity Rule XVII.

⁶⁶. Consult, generally, Section Fourteen, *ante*, and General Order XXXII. This form is thought more in accord with § 14-b and such general order than is Form No. 58. See also forms just *ante* and *post*.

cation for a discharge, and, for grounds of such opposition and objection, does file the following specification:

I. That such application should not be granted, because of the following facts, which the undersigned charges to be true, viz.:⁶⁷

II. That such application should not be granted, because of the following facts, constituting an additional ground, which the undersigned charges to be true, viz.:⁶⁸

Wherefore, objection is made to the granting of such application for a discharge and a hearing and the judgment of the court is asked thereon.

.....,
Objecting Creditor.
[by
.....,
*his Attorney.*⁷⁰
Address,.....
.....,
[*Add verification as in Form No. 100.*]

Form No. 112.

Exceptions to Specifications.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 275.)

United States District Court, District of]

IN THE MATTER OF <i>Bankrupt .</i>	} In Bankruptcy No. ...

....., the bankrupt herein, by, his attorney, hereby excepts to the specifications filed herein in behalf of as follows:

67. For instance. "That such applicant was granted a discharge in a voluntary proceeding within six years prior to this application, to wit: In the District Court of the United States for the District of, on the day of 19..."

68. If a second ground is alleged insert it here, for instance: "Such applicant has committed one of the offenses punishable by imprisonment specified in § 29-b of the bankruptcy law of 1898, in that" specifying the offense charged, giving time, place, and transaction.

70. See foot-note 34 to Form No. 100.

1. He excepts to the first of the said specifications on the ground that the same is indefinite, insufficient, and does not state an offense under the United States bankruptcy act which would be a bar to the discharge of the bankrupt, to wit:

2. He excepts to the specification numbered "....." on the ground that the allegations contained in the same do not contain any specific averment of fact; that the said specification is vague, indefinite and general; that the said specification does not raise any issue that can be met by the bankrupt herein, as the said specification fails to state what statements were made by the bankrupt which are stated to have been knowingly false when made.

3. That the said specifications hereinbefore excepted to should be dismissed and stricken out.

Dated, 19...

.....,
Counsel for bankrupt,
..... Street,
.....

Form No. 113.

Order of Reference to Special Master on Discharge.⁷¹

In the District Court of the United States for the District of

IN THE MATTER OF <i>Bankrupt</i> .	} In Bankruptcy No. ...

Whereas, application has been made by the above-named bankrupt for a discharge herein and a hearing set to consider the same, and, a creditor of said bankrupt, having appeared by, Esq., his attorney, in opposition, and filed a specification of objection thereto; now, on motion of, Esq., attorney for

It is ordered:

That the issue made by such application and such specification of objec-

⁷¹ Consult, generally, Section Fourteen, and the forms just *ante* and *post*. This form will not be used if the judge determines to hear the matter himself.

tion be referred to, Esq., as special master, to ascertain and report the facts, with his conclusions thereon.

Witness, the Honorable, Judge of the said court, and the seal thereof, at the city of, in said district, on the day of, 19...

{ Seal of
the court. }

.....,
Clerk.

Form No. 114.

Notice of Hearing Before Special Master.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 279.)

United States District Court, District of

IN THE MATTER OF

..... } In Bankruptcy No. ...

Bankrupt .

Please take notice that the issues raised by the specifications of objection to the discharge of the above-named bankrupt, filed by, have been duly referred to, Esq., as special master (*or* referee) for examination, testimony and report and that a hearing will be held upon said specifications at the office of the said special master (*or* referee) No., city of, on the day of, 19..., at o'clock, . . . M., and a motion made to dismiss the said specifications, and for such other and further relief as to the court may seem just and proper.

Dated,, 19...

.....,
Attorney for bankrupt,
..... Street,
City of

To

....., Esq.,
Attorney for creditors,

.....

Form No. 115.**Report of Special Master on Discharge.⁷²**

See Form No. 102, and the foot-notes thereto. Such form is equally available in a proceeding for discharge.

Form No. 116.**Order Denying Discharge, After Reference to Special Master.⁷³**

In the District Court of the United States for the District of

IN THE MATTER OF

..... } In Bankruptcy No. ...

Bankrupt .

Whereas, application has been made by , a bankrupt, for a discharge herein, and a specification of objection having been filed thereto by , a creditor and party in interest, and such specification having been referred to , Esq., as special master, to ascertain and report the facts with his opinion, and such special master having reported and recommended that such specification be sustained, and exceptions⁷⁴ to such report having been duly filed by said bankrupt, and the same having been argued; now, on motion of , Esq., attorney for such objecting creditor, , Esq., attorney for the bankrupt, appearing in opposition,

It is ordered:

That the specification of objection of , a creditor and party in interest herein, be, and the same hereby is, sustained.

That the application of the said , a bankrupt, be, and the same hereby is, denied.

That⁷⁵ the objecting creditor herein recover and have judgment against

⁷² For practice, consult Section Fourteen, and the forms just *ante* and *post*.

⁷³ This order is the converse of Form No. 59, and, in cases of hearings before a special master resulting in a report recommending a discharge and awarding costs,

etc., can, it is thought, be adapted to it. Consult, generally, Section Fourteen, *ante*.

⁷⁴ If no exceptions were filed, leave this clause out. For practice on exceptions, see Equity Rules LXXXIII and LXXXIV.

⁷⁵ If costs are allowed, add this.

the bankrupt for⁷⁶ dollars (\$.....), being dollars (\$.....), less costs, and dollars (\$.....), his disbursements herein.

Witness, the Honorable, Judge of the said court, and the seal thereof, at the city of, in said district, on the day of, 19...

{ Seal of
the court. }

.....,
Clerk.

Form No. 117.

Voluntary Petition of Partnership, All Partners Not Joining.⁷⁷

To the Honorable, Judge of the District Court of the United States, for the District of

The petition of, and, of the of, in the county of, in said district, by occupation respectively and, respectfully shows:

That your petitioners and are and have been partners under the style of, which partnership has had its principal place of business at the of, in the county of, in said district,⁷⁸ for the greater portion of the six months immediately preceding the filing of this petition; and that said partnership is insolvent and owes debts in excess of one thousand dollars (\$1,000).

That your petitioners as individuals each owes debts which he is unable to pay in full.

That such partnership and your petitioners are willing to surrender its and their property for the benefit of its and their creditors, respectively, except such as is exempt by law, and desire to obtain the benefits of the bankruptcy law of 1898, as amended.

That the said, whose place of residence is in the of, in the district of, has refused and still refuses to join in this petition; that he is neither a wage-earner nor a person engaged chiefly in farming or the tillage of the soil, and as an individual, owes debts which he is unable to pay in full.

That⁷⁹ such partnership has been dissolved, but there has as yet been no final settlement thereof.

⁷⁶ The disbursements should be shown by affidavit at time application for costs is made.

⁷⁷ This form can be adapted to a case where all the partners join, and then used as a substitute for Form No. 2, if desired. Consult, generally, Sections Five and Eighteen, and see General Orders VI, VII, and VIII.

⁷⁸ If the petition is filed in the district of the domicile or residence of one of the partners, here add an allegation to show the fact.

⁷⁹ If there has been a dissolution, use this clause, modifying slightly the previous allegations to fit; if not, leave it out. See § 5-a.

That the schedule hereto annexed marked A, and verified by your petitioners' oaths, contains a full and true statement of all the debts of said partnership, and (so far as it is possible to ascertain) the names and residences of its creditors, and such further statements concerning said debts as are required by said law.

That the schedule hereto annexed marked B, and verified by your petitioners' oaths, contains an accurate inventory of all of the property of said partnership, both real and personal, and such further statements⁸⁰ concerning said property as are required by said law.

That the schedule hereto annexed marked C, and verified by the oath of your petitioner, contains a full and true statement of all of his individual debts, and (so far as it is possible to ascertain) the names and places of residence of his individual creditors, and such further statements concerning said debts as are required by said law.

That the schedule hereto annexed marked D, and verified by the oath of your petitioner, contains an accurate inventory of all of his individual property, both real and personal, and such further statements concerning said property as is required by said law.⁸¹

Wherefore, your petitioners pray⁸² that such partnership and your petitioners as individuals may be adjudged bankrupt within the purview of such bankruptcy law of 1898, as amended, and that service of this petition with a subpoena be made upon, such nonconsenting partner, and that such proceedings be had as are provided in said law and General Order VIII of the Supreme Court and as the court may order.

.,

.,

Petitioners.

.,

Attorney of Petitioners.

STATE OF, }
 County of, } ss.:
 City of, }

We, and, the petitioning debtors mentioned and described in the foregoing petition, do severally make solemn

80. If exemption is claimed in the partnership assets, insert a reference to such claim here. See Section Six, *ante*.

81. Repeat the last two paragraphs as to each partner, numbering the schedules, Schedule E and F, G and H, etc.

82. Prayer should ask for an adjudication of the individuals as well as of the firm. In *re* Wing Yick Co. (D. C., Hawaii), 13 Am. B. R. 757.

oath that the statements of fact contained therein are true, according to the best of our knowledge, information, and belief.

Subscribed and sworn to before me, this day of, 19...

[Attach schedules⁸³ and summary statements for each the partnership and the petitioning partners, using those suggested by Form No. 1, but changing their lettering to correspond to the allegations of the petition.]

Form No. 118.

Involuntary Petition by Three Creditors.⁸⁴

To the Honorable, Judge of the District Court of the United States, for the District of

The petition of, of,, and of,, and of, respectfully shows:⁸⁵

That of the of, in said district, has, for the greater portion of the six months next preceding the date of the filing of this petition, had his principal place of business⁸⁶ at the of, in the county of, in said district, and is by occupation a

That the said owes debts to the amount of one thousand dollars (\$1,000) and over, is insolvent, and is neither a wage-earner nor a person engaged principally in farming or the tillage of the soil.⁸⁷

(That⁸⁸ the said is a corporation, organized under the laws of the State of, and that it is engaged principally in trading and mercantile pursuits.)

83. Schedules should be complete both for the firm and for each partner. In re Gay (D. C., N. H.), 3 Am. B. R. 529, 98 Fed. 870.

84. This form should be executed in duplicate. It is intended as a substitute for Form No. 3, which is clearly demurrable. See Sections Three, Four, Five, Eighteen, and Fifty-nine, and the forms for involuntary proceedings, immediately post.

85. If petitioners are corporations, indicate under what laws; if copartnerships,

set out the firm name and add: "composed of and, etc."

86. Or "resided" or "had his domicile," as the case may be.

87. If the bankruptcy of a partnership is asked, modify this paragraph and those preceding so as to show the jurisdictional allegations as to the partnership and the individuals composing it, suggested by Form No. 143.

88. If the alleged bankrupt is a corporation, insert this paragraph, modifying the previous allegations where necessary.

(That,⁸⁹ upon information and belief, the said has less than twelve creditors.)

That your petitioners are creditors of said, having provable claims against him which amount in the aggregate, in excess of the value of securities held by them, to five hundred dollars (\$500); and that neither of your petitioners is entitled to priority of payment on his said claim, within the meaning of § 64-b of the bankruptcy law of 1898, nor has either of your petitioners received a preference within the meaning of § 60-a-b of such law, as amended.⁹⁰

That the nature and amount of your petitioners' claims and the securities held by them, if any, are as follows:⁹¹

That, within four months preceding the filing of this petition, viz.: on the day of, 19...,⁹² the said, while insolvent, committed an act of bankruptcy in that he did⁹³

(That⁹⁴ your petitioners have made diligent effort to find the said within said district; that he is not, and has not for days been at his place of business; nor has he during the same time been at his usual place of abode; that, according to your petitioners' best information and belief, the said has absconded; and that personal service of a subpoena cannot be made on him in said district.)

Wherefore,⁹⁵ your petitioners pray that service of this petition, with a subpoena, may be made upon, as provided by said bankruptcy law of 1898 as amended, and that he may be adjudged bankrupt within the purview of such law.

.....,
.....,
.....,

Petitioners.

.....,

Attorney for Petitioners.

89. Use only if petition is by one creditor.

90. Or as the case may be. See § 59-b.

91. Set out sufficient facts to inform the court as to amount, consideration, and the like.

92. If the act of bankruptcy was evidenced by an instrument that was required to be recorded or might be recorded, see § 3-b(1), and modify this allegation to fit the facts.

93. Here set out the act of bankruptcy clearly, giving sufficient facts as to time,

place, transaction, etc., to show unequivocally the commission of an act or acts bringing the case within one of the subdivisions of § 3-a.

94. Use only when order of publication is to be asked. Change facts in form to fit the facts of each case.

95. If the bankruptcy of a partnership is desired, modify this clause so that it will ask adjudication of both the partnership and the individuals. See Form No. 117.

STATE OF , }
 County of , } ss.
 City of , }

..... and ,⁹⁶ the petitioning creditors mentioned and described in the foregoing petition, do hereby severally make solemn oath that the statement of fact contained in the foregoing petition are true, according to the best of their knowledge, information, and belief.⁹⁷

..... ,
 ,

Subscribed and sworn to before me, this day of , 19...
 ,

Form No. 119.

Involuntary Petition by One Creditor Against a Partnership.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 9.)

To the Honorable..... ,

Judge of the District Court of the United States, for the
 District of :

The petition of , of , respectfully shows:

First. That and are and have been copartners, doing business under the firm name and style of , and have had their principal place of business at , State and district aforesaid, for the greater portion of the six months next preceding the date of the filing of this petition; that the said partnership is insolvent and owes debts to the amount of one thousand dollars and upwards and is neither a wage-earner nor a person engaged principally in farming or the tillage of the soil.

Second. That upon information and belief, the said partnership has less than twelve creditors.

Third. That your petitioner is a creditor of said and composing the partnership firm of , having a provable claim against said partnership, amounting in the aggregate in excess of securities held by him to the sum of five hundred dollars; that

^{96.} If verified by members of a partnership or officers of a corporation, describe the affiants properly.

^{97.} If, for any reason, this verification is made by attorney, change to fit the facts, and bring it within the cases cited on p. 218, *ante*.

your petitioner is not entitled to priority of payment of his said claim within the meaning of section 64 (b) of the United States bankruptcy act and the amendments thereof, nor has he received a preference within the meaning of section 60 (a-b) of such law as amended.

Fourth. That the nature and amount of your petitioner's claim is as follows:

.....
.....

No part of said claim has been paid though duly demanded.

Fifth. Your petitioner represents that the said and , composing the partnership firm of , while insolvent and within four months next preceding the date of this petition, committed an act of bankruptcy in that they did heretofore, to wit:

[*Here specify act, giving facts, bringing under section 3-a.*]

Wherefore your petitioner prays that service of this petition with a subpoena may be made upon the said and individually and as copartners doing business under the firm name and style of , as provided in the acts of Congress relating to bankruptcy and that they as individuals and the firm of may be adjudged bankrupt within the purview of said acts.

Dated,,, 19...

.....,
Petitioner.

.....,
Attorney for Petitioner,
Office and Post Office Address,
..... Street,
.....

[*Verification.*]

Form No. 120.

Petition for Service by Publication.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 44.)

United States District Court, District of,

IN THE MATTER OF

..... In Bankruptcy No. ...

Alleged Bankrupt .

To the Honorable, Judge of the District Court of the United States for the District of

The petition of Messrs. respectfully shows to this court and alleges:

1. That your petitioners are the attorneys for the petitioning creditors herein. That a petition in bankruptcy was duly filed and an application for the appointment of a receiver was made, which application was granted, and the receiver is now in possession of assets of the above-named alleged bankrupt.

2. A subpoena was issued to the marshal and a return thereto was made, and the marshal returned that he was unable to serve the alleged bankrupt personally as he was without the jurisdiction of this court.

3. That the above-named alleged bankrupt (is a corporation organized under the laws of the State of) resides, (or has its principal office and place of business) at No., city of

4. Your petitioners further allege that the above-named alleged bankrupt has not designated a person upon whom process might be served in the State of

5. Your petitioners further allege that the alleged bankrupt is without the jurisdiction of this court and has absconded. That by reason thereof, personal service of the subpoena herein upon the alleged bankrupt is impossible.

Wherefore, your petitioners pray that an order may be made herein permitting service by publication upon the above-named alleged bankrupt. And your petitioners will ever pray.

Dated,,,,, 19...

.....,
Petitioner.

[Verification.]

Form No. 121.

Order Directing Service by Publication.⁹⁸

In the District Court of the United States for the District of

IN THE MATTER OF

.....

Bankrupt .

} In Bankruptcy No. ...

Whereas, a petition was, on the day of, 19..., filed herein for an adjudication of bankruptcy against, and it appears therefrom that said bankrupt is not within the district and that personal service of the subpoena herein cannot be made on him therein; now, on motion of, Esq., attorney for said petitioner,

It is ordered:

That service of such subpoena be made by publishing this order, together with said subpoena, in, a newspaper published at, in said district, once a week for two consecutive weeks, the last of such publications to be on the day of, 19...; and by mailing a copy of this order and said petition and subpoena to the last known place of abode of the said, in said district, on or before the day of the first publication.

Witness, the Honorable, Judge of the said court, and the seal thereof, at the city of, in said district, on the day of 19...

{ Seal of }
{ the court. }

.....,
Clerk.

⁹⁸. This form is thought to be in accordance with the new method of service by publication, provided by the amendatory

act of 1903. See Section Eighteen. The subpoena should be made returnable at least "ten days after the last publication."

Form No. 122.

General Appearance in Involuntary Case.⁹⁹

In the District Court of the United States for the District of

IN THE MATTER OF

.....

In Bankruptcy No. ...

Bankrupt .

To the District Court of the United States, for the District of:

The clerk of this court will please enter my appearance as attorney for of, the alleged bankrupt¹ who desires to plead herein in response to the petition of and and, that the said be adjudicated bankrupt.

Dated,, 19...

.....,

Attorney for,

Address,

.....

⁹⁹. This appearance must now be filed within five days after the return day. See § 18-b, as amended. Consult Section Eighteen, *ante*, and see General Order IV and Equity Rule VII.

1. Or "a creditor of the alleged bankrupt," if a creditor, and *not* the bankrupt, appears.

Form No. 123.

Appearance by Intervening Creditor.²

In the District Court of the United States for the District of

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: right;"><i>Bankrupt</i> .</p>	}	In Bankruptcy No. ...
--	---	-----------------------

To the District Court of the United States for the District of :

I,, a creditor of, against whom a petition for an adjudication in bankruptcy, filed by, on the day of, 19..., is pending, desire to appear in such proceeding; and, to that end, the clerk of this court will please enter my presence, by, Esq., of No. St.,, whom I hereby appoint as my attorney for such proceeding; and take note that I join in such petition as provided in § 59-f of the bankruptcy law of 1898.

Dated,, 19...

.....,
Intervening Creditor.
Address,
.....

STATE OF, }
County of, } ss.:
City of, }

On this day of, 19..., before me appeared
....., the intervening creditor above mentioned, and acknowledged the execution of the above.

.....,
.....

² Consult, generally, Sections Eighteen and Fifty-nine, especially the latter. See also numerous forms for involuntary cases immediately *ante* and *post*.

Form No. 124.

Petition to Intervene.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 13.)

United States District Court, or the District of

IN THE MATTER OF

.....

In Bankruptcy No. ...

Alleged Bankrupt .

To the Honorable, Judge of the District Court of the
 United States, for the District of

The petition of respectfully alleges and shows on in-
 formation and belief:

1. That your petitioner,, is a creditor of the above
 named,, having a provable claim against the same
 amounting to in excess of securities held by him. That
 the nature and amount of your petitioner's claim is for:

.....

and that no part of said claim has been paid, although duly demanded.

2. That on or about the day of, 19...,
 filed in the office of the clerk of this court a petition that
 be adjudged an involuntary bankrupt. That the said petition
 is still pending and that your petitioner desires to join in the petition of the
 said, that the said be adjudged an
 involuntary bankrupt.

Wherefore, your petitioner would respectfully pray that he be allowed to
 join in the said petition of, that the said
 be adjudged a bankrupt within the purview of the bankruptcy act
 of 1898 and the amendments thereof.

.....,

Petitioner.

[Verification.]

Form No. 125.**Order Allowing Intervention.**

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 14.)

At a stated term of the District Court of the United States, for the
 District of, held at the United States
 Court House, City of, on the day
 of, 19...

Present: Hon., District Judge.

IN THE MATTER OF

..... } In Bankruptcy No.

Alleged Bankrupt .

Upon reading and filing the annexed petition of
 verified, 19..., praying that he be joined as a petitioning creditor
 in the above-entitled proceeding, and upon the petition in bankruptcy and
 all proceedings heretofore had herein, and upon motion of,
 attorney for said petitioner, it is

Ordered, that be and he hereby is allowed to intervene
 herein, and is hereby joined and made a petitioning creditor, in the
 petition praying for the involuntary adjudication of
 filed in the office of the clerk of the district court of the United States, for
 the district of, on the day of, 19 ...

.....,
D. J.

Form No. 126.**Application for Jury Trial in Involuntary Case.³**

In the District Court of the United States for the District of

IN THE MATTER OF

.....

} In Bankruptcy No. ...

Bankrupt .

I,, of the of, in said district, the alleged bankrupt, who have this day filed an answer to the petition herein for an adjudication in bankruptcy, do hereby apply for and demand a trial by jury in respect to those questions concerning which I am entitled thereto by the terms of § 19-a of the bankruptcy law of 1898.

Dated,,, 19...

.....,
*Answering Bankrupt.*⁴

Form No. 127.**General Answer in Involuntary Case.⁵**

In the District Court of the United States for the District of

IN THE MATTER OF

.....

} In Bankruptcy No. ...

Bankrupt .

Now comes, of, the person against whom a petition for an adjudication in bankruptcy has been filed

3. Consult, generally, Sections Eighteen and Nineteen. See also Form No. 6. This application can be made only by the alleged bankrupt. For the time within which it must be filed, see § 19-a.

4. This application should be made by the alleged bankrupt, and not by his attorney.

5. This form supplements Form No. 6. Consult, generally, Section Eighteen; and for available grounds for an answer see §§ 3-a-b, 4, 5, and 59. For form for adjudication, see Form No. 12; for dismissal, see Form No. 11. See also, generally, the Equity Rules.

herein,⁶ and does hereby controvert such petition and file the following answer:⁷

I. That⁸ the said did not commit an act of bankruptcy as alleged in such petition, but, on the contrary, the undersigned charges the facts to be: that⁹

II. That⁸ and and
....., the petitioning creditors herein, have not provable claims against the said which amount in the aggregate, in excess of the value of securities held by them, to five hundred dollars (\$500), but, on the contrary, the undersigned charges the facts to be: that¹⁰

Wherefore, answer is made to such petition and a hearing¹¹ and the judgment of the court is asked thereon.

.....,
*Answering Bankrupt.*¹²
[by
.....,
*his Attorney.*¹³
Address
.....]

[Add verification as in Form No. 100, changing to fit the facts, as, for instance, substituting "answer" for "specification of objection," therein.]

6. Or "a creditor of, against whom," showing clearly the possession of a provable debt (§ 63, as interpreted by § 57).
7. There may, of course, be several counts in the answer. Careful pleading seems to require one for at least each material fact at issue.
8. The two objections here suggested are

but samples. Each answer should be adapted to the facts relied on.
9. Here the facts relied on by the answering bankrupt or creditor should be pleaded.
10. Id.
11. Or "trial."
12. Or "creditor."
13. See foot-note 34 to Form No. 100.

Form No. 128.**Answer Alleging More Than Twelve Creditors.¹⁴**

In the District Court of the United States for the District of

IN THE MATTER OF

.....

Bankrupt

In Bankruptcy No. ...

Now comes, of, the person against whom a petition for an adjudication in bankruptcy has been filed herein,¹⁵ and does hereby controvert such petition and file the following answer:

That the creditors of the said are twelve and more in number.

That annexed hereto is a list of all such creditors, with their addresses, under oath, as required by § 59-d of the bankruptcy law of 1898.

Wherefore, answer is made to such petition, and a hearing¹⁶ and the judgment of the court is asked thereon.

.....
*Answering Bankrupt.*¹⁷

[by

.....,
his Attorney,
Address,
.....]

List of Creditors and Addresses.

The following is the list of the creditors and their addresses, referred to in the foregoing answer:

Names of creditors.	Addresses.

.....
*Answering Bankrupt.*¹⁷

14. Only available where the petition is within § 59-d. Consult, generally, Sections Fifty-nine and Eighteen. See foot-notes just *ante* and *post*.

15. See foot-note 6 to Form No. 127.

16. A jury trial cannot be demanded on the issue raised by this answer.

17. Or "creditor."

STATE OF
 County of
 City of } ss.:

I,, the answering bankrupt¹⁸ mentioned and described in the foregoing answer, do hereby make solemn oath that the statements of fact contained in such answer are true, according to the best of my knowledge, information, and belief; and also that the list annexed thereto and therein referred to comprises all of the creditors of the said and gives their addresses, so far as they are known or can be ascertained.¹⁹

Subscribed and sworn to before me, this day of, 19...

,

Form No. 129.

Demurrer to Petition.

(Hagar and Alexander's Bankruptcy Forms, No. 14.)

United States District Court, for the District of

IN THE MATTER OF	} In Bankruptcy No. ...
.....	
<i>Alleged Bankrupt</i>	

Now comes, the above-named alleged bankrupt, (or a creditor of alleged bankrupt,) by, his attorney, by protestation, not confessing or acknowledging all or any of the matters or things in said petition in bankruptcy set forth to be true in such manner and form as the same are therein set forth and alleged, and demurs to the petition of, filed herein, 19..., upon the following grounds:

First: That it appears on the face of the said petition that the court is without jurisdiction to grant the relief prayed for in said petition.

Second: That said petition is wholly without equity.

18. See foot-note 34 to Form No. 100.

19. If the affidavit is made by an answering creditor, his efforts to ascertain the

names and addresses of the creditors should be given.

Third: That said petition does not state facts sufficient to warrant the granting of the relief prayed for therein.

Fourth: That the petitioners have not by their said petition shown themselves entitled to the relief therein prayed for, or any part thereof.

.....,
Attorney for
Alleged Bankrupt (or Creditor).

STATE OF, }
County of, } ss.:
City of, }

....., being duly sworn, deposes and says: That he is the herein; that the foregoing demurrer is not interposed for delay.

.....,
Sworn to before me this day of, 19...

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

Dated,, 19...

.....,
Attorney for

Form No. 130.

Notice of Argument of Demurrer.

United States District Court, for the District of

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: center;"><i>Alleged Bankrupt .</i></p>	}	<p>In Bankruptcy No. ...</p>
---	---	------------------------------

Please take notice that the demurrer of, alleged bankrupt (*or creditor* herein) to the petition filed herein on the day of, 19..., will be brought on for argument before the Hon., United States District Judge, for the District of at the United States Court House, in the city of, on the day of, 19..., at o'clock in the noon of said day

and a motion made to overrule said demurrer with costs and for such other or further relief as to the court may seem just and proper.

Dated, 19...

.....,
Attorney for Petitioning Creditors,
No. Street,
City of

To, Esq.,
Attorney for Alleged Bankrupt,
(or *Creditor.*)

Form No. 131.

Order of Reference to Special Master in Involuntary Case.²⁰

In the District Court of the United States for the District of

IN THE MATTER OF <i>Bankrupt .</i>	} In Bankruptcy No. ...

Whereas, a petition has been filed herein asking an adjudication in bankruptcy of the above-named bankrupt, and, the said bankrupt,²¹ having appeared by, Esq., his attorney, and filed an answer to such petition; now, on motion of, Esq., attorney for

It is ordered:

That the issue made by such petition and answer be referred to, Esq., as special master, to ascertain and report the facts, with his conclusions thereon.

Witness, the Honorable, Judge of the said court, and the seal thereof, at the city of, in said district, on the day of, 19...

{ Seal of
the court. }

.....,
Clerk.

20. See foot-note 36 to Form No. 101. Consult, generally, Section Eighteen, and the forms just *ante* and *post*. 21. Or "a creditor of such bankrupt."

Form No. 132.

Notice of Hearing Before Special Master.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 33.)

United States District Court, for the District of

IN THE MATTER OF	} In Bankruptcy No. ...
.....	
<i>Alleged Bankrupt</i> .	

SIR:

Please to take notice, that a hearing under the order of reference entered on, in the above entitled proceeding, will be brought on before, Esq., as special master, at his office, No. street, city of, on the day of, 19..., at o'clock, .. m. of that day, or soon thereafter as counsel can be heard.

Dated the day of, 19...

Yours, etc.,

.....
Attorney for

To

....., Esq.,
Attorney for

Form No. 133.**Notice of Trial in Involuntary Proceeding.**

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 24.)

United States District Court, for the District of

IN THE MATTER OF

..... In Bankruptcy No. ...

Alleged Bankrupt. .

Please take notice that the issues raised by the petition and answer filed herein will be brought on for a trial and a motion will be made for judgment as prayed for in the petition *or* to dismiss the petition herein, at a term of this court, to be held in and for the district, at the court room, in the United States Court House, in the city of,, on the day of, 19..., at o'clock in the noon of that day, or as soon thereafter as counsel can be heard.

Dated,,, 19...

Yours, etc.,

.....,
Attorneys for Petitioners,
 [or *Alleged Bankrupt.*]

..... Street,

To

Messrs.

Attorneys for

.....

Form No. 134.**Report of Special Master in Involuntary Case.²²**

See Form No. 102, and the foot-notes thereto. With slight changes in the recitals, such form is equally available on a reference in an involuntary case.

²² For practice, consult Section Eighteen, and the forms just *ante* and *post*.

Form No. 135.

Exceptions to Report of Special Master in Involuntary Case.²³

In the District Court of the United States for the District of

IN THE MATTER OF

..... In Bankruptcy No. ...

Bankrupt .

Now comes, of,,²⁴ who previously filed herein an answer to the petition for an adjudication in bankruptcy of the above-named bankrupt,²⁵ and excepts to the report of, Esq., as special master, appointed by an order made herein on the day of, 19..., in that such report²⁶
.....
for the following reasons:²⁷

And prays that the same may be heard, as provided in Equity Rule LXXXIII.

Dated,,, 19...

.....,
Excepting Creditor.

[or

.....,
Attorney for Excepting

Address,

.....]

23. For practice, see Equity Rules LXXXIII and LXXXIV. Consult, generally, Section Eighteen. For form for adjudication, see Form No. 12; for dismissal, see Form No. 11; for costs, see General Order XXXIV and § 2(18).

24. If exceptions are filed by attorney, as is usual, add "by, his attorney herein."

25. Or if the exceptions are taken by the petitioning creditor, change to fit the facts.

26. Here state the error or errors excepted to.

27. Here give the grounds of the exceptions, that the court and the opposing attorney may know fully the issue to be determined on the hearing on the exceptions.

Form No. 136.

Order Upon Report of Special Master Dismissing Petition, Etc.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 36.)

At a stated term of the District Court of the United States for the
..... District of, held at the United
States Court House, City of, on the
day of, 19...

Present: Hon., District Judge.

IN THE MATTER OF

..... } In Bankruptcy No. ...

Alleged Bankrupt.

A motion having been made herein by for an order
confirming the report of, Esq., special master, appointed
herein under an order dated, 19..., and dismissing the
petition in bankruptcy heretofore filed herein with costs and for an order
vacating and discharging the order of, 19..., appointing a
temporary receiver herein and for other and further relief, and the said
motion having duly come on for argument, now on the involuntary petition
in bankruptcy filed herein 19..., by,
and, creditors, the answers filed thereto by,
a creditor, and by, the alleged bankrupt, the order of
this court dated, 19..., appointing,
receiver of the estate of said alleged bankrupt, the order of reference herein
dated, 19..., and the report of said special master dated
....., 19..., and notice of this motion with proof of due service
thereof, and the report and petition of said, verified
....., 19..., for an allowance for his services and disbursements
to be paid by the petitioning creditors, and for his discharge as such receiver,
and for further relief, and the petition of, attorney for
said receiver, verified, 19..., for an allowance for his
services and disbursements as attorney for said receiver, and on all the pro-
ceedings had herein, after hearing, Esq., of counsel for
....., alleged bankrupt herein,, Esq.,
attorney for the petitioning creditors herein, and Esq., attorney
for the receiver herein, and due deliberation having been had, it is

Ordered, that the report of said special master herein be and hereby is in all respects confirmed and that the petition in bankruptcy filed herein, 19 . . . , praying that said be adjudged an involuntary bankrupt, be and the same hereby is dismissed with \$. costs and disbursements, as taxed, which said sum,, and are hereby directed to pay to the said, alleged bankrupt, and it is further

Ordered, that the matters of the said report, application and petition of, Esq., temporary receiver herein, and the petition of his said attorneys filed herein, 19 . . . , be and the same hereby are referred to, Esq., as special master for examination, testimony and report thereon with all convenient speed.

.,
D. J.

Form No. 137.

Petition of Petitioning Creditors for Dismissal in Involuntary Case.²⁸

In the District Court of the United States for the District of

IN THE MATTER OF

. } In Bankruptcy No. . . .
Bankrupt .

To the Honorable, District Judge:

Your petitioners ²⁹ respectfully show:

That, on the day of, 19 . . . , they filed a petition herein for an adjudication in bankruptcy against, of the of, in said district.

That, since that time, the following proceedings have been had:³⁰

That your petitioners desire and consent that said petition and proceeding be dismissed.

That annexed hereto is a list of all the creditors of the said, with their addresses, so far as your petitioners know or have been able to ascertain.

28. Consult, generally, Sections Fifty-nine, Fifty-eight, and Eighteen.

29. This petition can, of course, be made by the bankrupt, with the consent of the petitioning creditors, or for want of prosecu-

tion, and, if so, the allegations should be changed to fit the facts.

30. Here give a brief summary of the steps in the proceeding to date.

That no previous application has been made for the order hereinafter asked.

Wherefore, your petitioners pray that such proceeding and petition be dismissed, and that notice be given such creditors as is provided by § 58-a (8) of the bankruptcy law of 1898.

.....,

Petitioners.

List of Creditors and Addresses.

The following is the list of the creditors and their addresses referred to in the foregoing petition:

Names of creditors.	Addresses.

.....,

*Petitioners.*³¹

STATE OF, }
 County of, } ss.:
 City of, }

We,, and, the petitioners mentioned and described in the foregoing petition, do hereby severally make solemn oath that the statements of fact contained in such petition are true, according to the best of our knowledge, information, and belief; and also that the list annexed thereto and therein referred to comprises all of the creditors of the said and gives their addresses, so far as they are known or can be ascertained.

.....,

Subscribed and sworn to before me, this day of, 19...

.....

31. This petition cannot be made by the attorney, save when the petition for an ad-

judication can be so made. See, generally, Section Eighteen, and Form No. 118.

Form No. 138.

Order to Show Cause on Petition for Dismissal in Involuntary Case.³²

In the District Court of the United States for the District of

IN THE MATTER OF

..... } In Bankruptcy No. ...

Bankrupt .

Whereas, application has been made by the petitioning creditors herein³³ for the dismissal of their petition for an adjudication in bankruptcy against of the of, in said district; now, on motion of, Esq., attorney for such alleged bankrupt, It is ordered:

That ~~all~~ creditors of³⁴ show cause, before the district court of the United States for the district of, at, in the of, in said district, on the day of, 19..., at .. M., or as soon thereafter as such hearing may be had, why such application should not be granted.

That notice of such hearing be given by mailing a copy of this order at least ten days prior to the date set for such hearing to each of the creditors whose names appear in the list of creditors annexed to the petition on which this application is based, and by publishing a copy hereof in the designated newspaper of such alleged bankrupt's residence, not later than one week prior to such date.³⁵

Witness, the Honorable, Judge of the said court, and the seal thereof, at the city of, in said district, on the day of, 19...

{ Seal of }
 { the court. }

.....,
Clerk.

32. Compare Form No. 137 and the foot-notes thereto.

33. See foot-note 29 to Form No. 137.

34. See foot-note 57 to Form No. 108.

35. § 58-b.

Form No. 139.

Order of Dismissal on Petition of Petitioning Creditors and After Notice in Involuntary Case.³⁶

In the District Court of the United States for the District of

IN THE MATTER OF

..... } In Bankruptcy No. ...

Bankrupt .

Whereas, a petition was, on the day of, 19..., filed herein for an adjudication in bankruptcy against, and application was subsequently made for a dismissal of such proceeding and petition by the petitioners therein,³⁷ and an order to show cause having been granted thereon, and notice having been given as provided in said order, such matter having been regularly called and no creditor having appeared to oppose,³⁸ and the court being satisfied that said petition should be granted;³⁹ now, on motion of, Esq., attorney for,

It is ordered:

That the petition herein to have adjudicated bankrupt and the proceedings thereon be, and the same hereby are, dismissed.⁴⁰

Witness, the Honorable, Judge of the said court, and the seal thereof, at the city of, in said district, on the day of, 19...

{ Seal of }
{ the court. }

.....,
Clerk.

36. See Forms Nos. 137 and 138 and the foot-notes thereto.

37. Or, if by the bankrupt, or for want of prosecution, state the facts.

38. Or, if a creditor appeared, note appearance and the facts.

39. Or, if the application is to be refused, "denied."

40. Or, if the application for dismissal is refused, change to conform to the order made.

Form No. 140.

Order of Adjudication and Reference.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 27.)

In the District Court of the United States, for the District of.....

IN THE MATTER OF

.....

In Bankruptcy No. ...

Bankrupt .

At, in said district, on the day of
, A. D. 19..., before the Honorable,
 Judge of the said court in bankruptcy, the petition of

 that he be adjudged bankrupt, within the true intent and meaning of the
 acts of Congress relating to bankruptcy, having been heard and duly con-
 sidered, the said

hereby declared and adjudged bankrupt accordingly.

And it is further ordered, that the said matter be referred to

.....
 one of the referees in bankruptcy of this court, to take all such further pro-
 ceedings therein as are required by said acts of Congress, and all such acts
 therein as the court might take or perform, except such as by law or the
 general orders of the Supreme Court are required to be performed by the
 judge; and that the said bankrupt shall attend before said referee on the
 day of 19..., at ... o'clock, .. M., and
 thenceforth shall submit to such orders as may be made by said referee or by
 the court relating to said bankruptcy.

Witness, the Honorable, Judge of the said court,
 and the seal thereof, at the city of, in said district, on the
 day of, A. D. 19...

.....,
District Judge.

.....,
Clerk.

Form No. 141.

Order Denying Adjudication.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 30.)

United States District Court, for the District of

IN THE MATTER OF

..... } In Bankruptcy No. ...

Alleged Bankrupt.

At, in said district, on day of,
A. D. 19..., before the Honorable....., Judge of the
..... district of

This cause came on to be heard at, in said court, upon
the petition of and and
....., that be adjudged a bankrupt within
the true intent and meaning of the acts of Congress relating to bankruptcy,
and [*here state the proceeding, whether there was no opposition, or if opposed,
state what proceedings were had*].

And thereupon, and upon consideration of the proofs in said cause (and
the arguments of counsel thereon, if any), it was found that the facts set
forth in said petition were not proved; and it is therefore adjudged that
said is not a bankrupt, and that said petition be dis-
missed, with costs.

Witness, the Honorable, Judge of said court, and the
seal thereof, at, in said district, on the
day of, A. D. 19...

{ Seal of }
{ the court. }

.....,
District Judge.

Form No. 142.

Petition to Vacate Adjudication.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 43.)

United States District Court, for the District of

IN THE MATTER OF

..... } In Bankruptcy No. ...

Bankrupt . }

To the District Court of the United States, for the District of

The petition of respectfully shows and alleges:

First: That he resides in the city of, State of*Second:* That your petitioner is a creditor of said alleged bankrupt and his claim is based upon the following facts:

.....

.....

Third: That heretofore and on or about the day of
, 19..., your petitioner instituted an action in the
 court of county against the above-named
 alleged bankrupt, as defendant. That said action was brought to recover the
 sum of \$....., and on the day of, 19..., a
 judgment was rendered in said action in favor of petitioner.

Fourth: That an execution upon the said judgment was duly issued to
 the sheriff of county, the said judgment having been duly
 docketed in the office of the clerk of county. That said execution
 was duly levied upon the real property of the said defendant.

Fifth: That on, 19..., a petition in involuntary bank-
 ruptcy was filed in this court against the above-named,
 and a receiver appointed. That thereafter an alleged adjudication was made
 therein in which the said was declared a bankrupt. The
 said receiver has made a demand upon the sheriff to deliver over to him all
 the property of heretofore levied upon under the execution
 obtained by petitioner upon his said judgment.

Sixth: That your petitioner is informed and verily believes that the
 aforesaid petition in bankruptcy filed herein did not set forth the jurisdic-
 tional facts required under the bankruptcy act, and is defective and void,
 and insufficient to confer jurisdiction upon the court to proceed therein. That

the said petition and subpœna required to be served upon the alleged bankrupt by law were never in fact properly served upon the said bankrupt, as required by law to obtain jurisdiction over the said bankrupt, and that the purported service of the same upon the said..... was illegal and void, in that said petition and subpœna were alleged to have been served outside of this district, and not upon the alleged bankrupt personally. That the alleged bankrupt had absconded and left the jurisdiction That this court never in fact, acquired any jurisdiction whatever in the said bankruptcy proceeding, and the alleged adjudication was for that reason without jurisdiction and void.

Your petitioner therefore prays that an order be granted herein, vacating and setting aside the alleged adjudication in bankruptcy herein, vacating the appointment of the receiver herein and all proceedings heretofore had, and dismissing the petition heretofore filed herein.

That no previous application for this order has been made.

Dated, 19...

.....,
Petitioner.

[*Verification.*]

Form No. 143.

Notice of Motion to Vacate Adjudication.

(Hagar and Alexander's Bankruptcy Forms, No. 40.)

United States District Court, for the, District of

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: right;"><i>Bankrupt .</i></p>	}	In Bankruptcy No. ...
--	---	-----------------------

SIRS:

Please take notice that upon the annexed petition of, duly verified the day of, 19..., and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this court at a term thereof, to be held in the United States Court House at, on the day of, 19..., at o'clock in the noon of that day or as soon thereafter as counsel can be heard, for an order vacating and setting aside the alleged adjudication in

bankruptcy herein, and all proceedings thereon, and dismissing the petition heretofore filed herein, and for such other and further relief as to the court may seem just and proper in the premises.

Dated, 19...

Yours, etc.,

.....
Attorney for Petitioner,
 Office and Post Office Address,
 Street,

To

....., Esq.,
Attorney for Petitioning Creditors.

To

....., Esq.,
Attorney for Creditors.

Form No. 144.

Demand for Jury Trial.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 22.)

United States District Court, for the District of

IN THE MATTER OF

..... } In Bankruptcy No. ...
Alleged Bankrupt.

I,, of, in said district, the alleged bankrupt, who has this day filed an answer to the petition filed on the day of, 19..., by, and, praying for an adjudication in involuntary bankruptcy, do hereby apply for and demand a trial by jury in respect to those matters concerning which I am entitled thereto by the provisions of section 19-a of the bankruptcy act.

Dated, 19...

.....
Alleged Bankrupt .

Form No. 145.

Referee's Certificate of Disqualification.⁴¹

In the District Court of the United States for the District of

IN THE MATTER OF
.....
Bankrupt .

In Bankruptcy No. ...

To the Honorable, District Judge:

I,, one of the referees in bankruptcy of your court, do hereby certify that I am disqualified to act as such in the above entitled proceeding,⁴² for the following reasons:⁴³

I do, therefore, return the papers transmitted to me by the clerk.

Dated,,, 19...

.....,
Referee in Bankruptcy.

41. For general disqualification, see § 35; for what referees may not do, §-39-b; for reference of case after adjudication, see § 22.
42. Or the disqualification may exist as

to a portion of the proceeding, as in a contest on a certain claim.
43. Here insert reasons, as relationship, relation of attorney and client with bankrupt, or any other reason (see § 22).

Form No. 146.

Petition to Revise in Matter of Law.⁴⁴

In the District Court of the United States for the District of

IN THE MATTER OF

In Bankruptcy No. ...

Bankrupt .

To ⁴⁵ the Honorable, the Judges of the Circuit Court of Appeals of the Circuit of the United States:

Your petitioner respectfully shows:

That he resides at, and is a creditor ⁴⁶ of
, a bankrupt, who was so adjudged by the district court
 of the United States for the district of, on the
 day of, 19...

That, after such adjudication, the following proceedings were had in the
 case of the said bankrupt:⁴⁷

That, on the day of, 19..., an order was granted and
 entered by said district court of the United States,⁴⁸
,
 a copy of which order is hereto annexed.

That said order was erroneous in matter of law in that:⁴⁹

Wherefore, your petitioner, feeling aggrieved because of such order, asks
 that the same may be revised in matter of law by your honorable court, as
 provided in § 24-b of the bankruptcy law of 1898, and the rules and practice
 in such case provided.⁵⁰

[Add verification as in Form No. 66.]

Petitioner.

44. Consult, generally, Sections Twenty-four and Twenty-five, and General Order XXXVI, though the latter seems to refer to appeals only.

45. If the petition is to the district court in the first instance, this form should be addressed to the district judge.

46. Or specify how he is interested in the proposed revision.

47. Here recite steps leading up to the ruling or order complained of.

48. Here state specifically the erroneous order or ruling of which revision in law is sought, as, "enjoining and restraining your petitioner from disposing of the following described property, viz.:;" or, "requiring your petitioner to deliver to the said trustee in bankruptcy certain property, viz.:, or as the facts may be.

49. Here give the equivalent of an assignment of error on an appeal in equity.

50. See Section Twenty-five, *ante*, footnote 11.

Form No. 147.

Order of District Court Allowing Petition for Revision in Matter of Law.⁵¹

In the District Court of the United States for the District of

IN THE MATTER OF <i>Bankrupt .</i>	}	In Bankruptcy No. ...
--	---	-----------------------

Whereas, application has been made for revision in matter of law by the circuit court of appeals of the circuit of the United States of the order entered herein on the day of, 19..., and the court being satisfied that the question there determined is one of which revision may be asked, as provided in § 24-b of the bankruptcy law of 1898,⁵² and that the application should be granted; on motion of, Esq., attorney for the petitioner,

It is ordered:

That the order of this court, made and entered herein on the day of, 19..., be revised in matter of law by the circuit court of appeals of the circuit of the United States, as provided by § 24-b of the bankruptcy law of 1898, and the rules and practice of that court.

That the clerk, within days from this date, prepare, at the expense of the petitioner, a certified copy of such order and of the record of this case pertinent to such order, and file the same with the clerk of such circuit court of appeals.

Witness, the Honorable, Judge of the said court and the seal thereof, at the city of, in said district, on the day of, 19...

{ Seal of }
{ the court. }

.....,
Clerk.

51. Use this form only in case application is made to the district court in the first instance. If application is made to the circuit court of appeals, a formal order allowing the review is often not entered, but the case is at once docketed and the

clerk gives notice of the pendency of the petition for revision to the respondent. See Section Twenty-five, foot-note 11.
52. Certain orders cannot be reviewed at all, others only by appeal. Consult, generally, Section Twenty-five, ante.

Form No. 148.

Notice to Respondent on Revision.⁵³

In the District Court of the United States for the District of

IN THE MATTER OF

In Bankruptcy No. ...

Bankrupt .

To, of, and, of
, his attorney:

Please take notice ⁵⁴ that a petition, a copy of which is served on you herewith, is pending in the circuit court of appeals of the circuit of the United States, and that you are required to answer, demur, plead, or move to dismiss the same within ⁵⁵ days from the date of this notice, or, in case of your default, the same may be granted and a mandate issued accordingly.

Witness, the Honorable, the judges of the circuit court of appeals of the circuit, and the seal of said court, at, in said circuit, this day of, 19...

{ Seal of }
 { the court. }

Clerk.

53. See Sections Twenty-four and Twenty-five, *ante*, and the forms just *ante*.

54. In the first circuit, this notice takes the form of an order to show cause entered as of course. This form can be easily modified to fit that practice. It is thought to

combine both the features of a mere notice and the more formal elements of an order to show cause. Compare Section Twenty-five, foot-note 11.

55. This time is usually fixed by rule.

Form No. 149.

Order of Circuit Court of Appeals on Revision.⁵⁶

At a session of the Circuit Court of Appeals for the Circuit,
held at the city of, in the District of
....., on the day of, 19...

Present — The Hon., Circuit Judge;
The Hon., Circuit Judge, and
The Hon., Judge.

IN THE MATTER OF <i>Bankrupt</i> .	}	In Bankruptcy No. ...
--	---	-----------------------

A petition having been filed herein by, of,
....., on the day of, 19..., asking for revision in
matter of law of the order of the district court of the United States for
the district of, in bankruptcy, made and entered in
the above entitled cause, and due notice of such petition having been given
the respondent and the same having been regularly heard,⁵⁷
....., Esq., appearing for the petitioner, and, Esq.,
for the respondent, and this court being satisfied that:⁵⁸
.....
.....

It is ordered:

That the said petition of for a revision be, and the
same hereby is, dismissed,⁵⁹ with costs.

That the mandate of this court issue to said district court accordingly.

Witness, the Honorable, the judges of the circuit court of appeals of
the circuit, and the seal of said court, at, in said
circuit, this day of, 19...

{ Seal of } { the court. }, <i>Clerk.</i>
-------------------------------	-------------------------

⁵⁶. See, generally, Sections Twenty-four and Twenty-five.
⁵⁷. Here specify how, as "and submitted on briefs without oral argument;" or as the facts may be.
⁵⁸. Here recite briefly the decision as to whether or not error in law was committed by the court below.
⁵⁹. Or "granted;" or, if in part only, "granted in so far as it refers to"

Form No. 150.

Citation on Appeal.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 359.)

United States District Court, for the District of.....

IN THE MATTER OF

..... In Bankruptcy No. ...

Bankrupt .

United States of America, ss:

The President of the United States to, Greeting:

You and each of you are hereby cited and admonished to appear in the United States circuit court of appeals for the circuit, in the city of; on the day of, 19..., pursuant to the appeal duly obtained and filed in the clerk's office of the district court of the United States for the district of, wherein you as objecting creditors are appellees and, bankrupt, is the appellant, to show cause, if any there be, why the order and decree in said appeal mentioned, should not be reversed and corrected, and why speedy justice should not be done to the parties in that behalf, and to do and receive that may appertain to justice to be done in the premises.

Witness, the Honorable, United States Judge for the district of, on the day of, in the year of our Lord one thousand nine hundred and

.....,

J.

Form No. 151.**Notice of Motion for Stay Pending Review.**

(Hagar and Alexander's Bankruptcy Forms (2d Ed.), No. 379.)

United States District Court, for the District of
In Bankruptcy.

IN THE MATTER OF

.....
Bankrupt.

Sir:

Upon all the proceedings had herein and on the petition to review the order and decree entered herein on the day of, 19..., directing that (etc.), filed in the clerk's office of the United States Circuit Court of Appeals for the Circuit, on or about, 19..., I shall move this Court at a session thereof to be held on the day of, 19..., at ... A. M., or as soon thereafter as counsel can be heard, for a stay of all proceedings herein on said final order and decree, pending said petition to review; also for such other and further relief as to the court may seem proper.

Dated,, 19...

.....,
Attorney for,
(Address.)

To, Esq.,
Attorney for

Form No. 152.**Order Staying Proceedings Pending Petition for Review Under 24-b.**

(Hagar and Alexander's Bankruptcy Forms (2d Ed.), No. 76.)

At a State Term of the District Court of the United States, in and
for the district of, at the Court House,
in the City of, on the day of, 19...

Present:

Hon.,
District Judge.

IN THE MATTER OF

.....
Bankrupt.

Upon reading and filing the petition of duly verified, the petition to review herein, and on motion of attorney for said petitioner, and sufficient reason appearing therefor, it is

Ordered, that further proceedings to enforce the order made and entered herein dated to, be stayed, pending the hearing and determination of the petition for review herein, upon the filing in this Court by the petitioner of a supersedeas bond, with good and sufficient sureties to the satisfaction of the Court in the sum of \$.....

.....
U. S. D. J.

Form No. 153.

Petition for Writ of Error from the Supreme Court to a Circuit Court of Appeals.

(Hagar and Alexander's Bankruptcy Forms (2d Ed.), No. 383.)

United States Circuit Court of Appeals, for the Circuit.

<p>.....</p> <p><i>Plaintiff in Error,</i></p> <p>vs.</p> <p>.....</p> <p><i>Defendant in Error.</i></p>	}
--	---

Your petitioner,, plaintiff in error in the above entitled cause, respectfully shows that the above entitled cause is now pending in the United States circuit court of appeals for circuit, and that a judgment has therein been rendered on the day of, affirming (or reversing) a judgment of the district court of the United States for the district of, and that the matter in controversy in said suit exceeds thousand dollars, besides costs, and that the jurisdiction of none of the courts above mentioned is or was dependent in any wise upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of the different States, and that this cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error; and therefore your petitioner would respectfully pray that a writ of error be allowed him in the above entitled cause directing the clerk of the United States circuit court of appeals for the circuit to send the record and proceeding in said cause with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said plaintiff in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

.....,
Plaintiff in Error,
 By
His Attorney.

The foregoing petition is granted and writ of error allowed as prayed for upons giving bond according to law in the sum of \$.....

.....,
*Associate Justice of the Supreme Court of
 the United States.*

Form No. 154.**Writ of Error from the Supreme Court of the United States to a Circuit Court of Appeals.**

(Hagar and Alexander's Bankruptcy Forms (2d Ed.), No. 384.)

United States of America, ss.:

The President of the United States to the Honorable, the Judges of the
United States Circuit Court of Appeals for the Circuit,
Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals before you, or some of you, between , plaintiff in error, and , defendant in error, a manifest error hath hapened, to the great damage of the said plaintiff in error as by his complaint appears. We being willing that error, if any hat been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Form No. 155.

Petition for Meeting of Creditors to consider Proposed Compromise.

(Hagar and Alexander's Bankruptcy Forms (2d Ed.), No. 115.)

United States District Court for the District of

IN THE MATTER OF

Bankrupt.

To, Esq., Referee in Bankruptcy:

The petition of respectfully shows:

1. That your petitioner is the trustee herein, duly qualified and acting.
2. That among the assets coming into the hands of your petitioner is a certain claim consisting of:
.....
against of That your petitioner has made efforts to collect said claim, has presented same and demanded payment thereof. That payment was refused by the said on the following grounds, to wit:
.....
.....

3. That after considerable negotiation, your petitioner has succeeded in obtaining an offer of \$. from said in full settlement of your petitioner's claim against him. That your petitioner has fully investigated the claim, and verily believes that it is to the best interests of this estate to accept the amount offered, and petitioner recommends a compromise of he claim upon the terms offered.

Wherefore, your petitioner prays that a meeting of creditors be called upon ten days' notice, to consider a proposed compromise of the controversy of the claim against

[Verification.]

.....,
Petitioner.

Form No. 156.

Notice to Creditors of Special Meeting.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 116.)

In the District Court of the United States for the District of

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt .</i></p>	}	In Bankruptcy No. ...
---	---	-----------------------

To the creditors of, of, in the county of, and district aforesaid, a bankrupt:

Notice is hereby given that on the day of, 19..., at o'clock, .. M., there will be a meeting of the creditors of the said bankrupt, at, in the of, in said district, for the following purposes:

[*Here set forth statement of object of meeting, as for example, "To consider a proposed compromise of a controversy between the trustee herein and concerning on the following terms: "*]

To transact such other business as may properly come before said meeting.

Dated,, 19...

.....,
Referee in Bankruptcy.

Form No. 157.

Order Authorizing Compromise.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 117.)

United States District Court for the District of

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt .</i></p>	}	In Bankruptcy No. ...
---	---	-----------------------

Upon reading and filing the petition of, trustee herein, duly verified, praying for authority to compromise a controversy with

and all the proceedings heretofore had herein, and a meeting of creditors having been duly held before the referee herein on ten days' notice, to consider the proposed compromise of the controversy with the said, and no objections having been filed and no one having appeared in opposition thereto,

Now, on motion of, attorney for the said trustee, it is

Ordered, that, the trustee herein, be and he hereby is authorized to settle and compromise the controversy with of the city of, for the sum of \$., and the said trustee is authorized to execute the necessary papers to carry out said compromise.

Dated,,,, 19...

.,

Referee in Bankruptcy.

Form No. 158.

Petition for Review of Referee's Order.⁶⁰

In the District Court of the United States for the District of

IN THE MATTER OF

. } In Bankruptcy No. ...

Bankrupt .

To, Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That your petitioner is a creditor⁶¹ of, the above-named bankrupt, and that his claim has been allowed herein.

That, on the day of, 19... , an order, a copy of which is hereto annexed, was made and entered herein.

That such order was and is erroneous in that⁶²

.
.

⁶⁰. See, generally, Section Thirty-nine, *ante*. Consult also General Order XXVII. Note §§ 2(10) and 38-a. Compare also Form No. 80, and the foot-notes thereto.

⁶¹. Or "the trustee" or otherwise, as the facts may be. See General Order XXVII.

⁶². Here give the equivalent of an assignment of error in an appeal in equity, or a concise statement of the error relied on.

Wherefore, your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed, as provided in the bankruptcy law of 1898 and General Order XXVII.

Dated,, 19...

.....,
Petitioner.

[Add verification as in Form No. 66.]

Form No. 159.

Referee's Certificate on Review.⁶³

In the District Court of the United States for the District of

<p>IN THE MATTER OF</p> <p>.....</p> <p><i>Bankrupt .</i></p>	}	In Bankruptcy No. ...
---	---	-----------------------

To the Hon., District Judge:

I,, the referee in bankruptcy in charge of this proceeding, do hereby certify:

That, in the course of such proceeding, an order,⁶⁴ a copy of which is annexed to the petition hereinafter referred to, was made and entered on the day of, 19...

That, on the day of, 19..., a in such proceeding, feeling aggrieved thereat, filed a petition for a review, which was granted.

That a summary of the evidence on which such order was based is as follows:⁶⁵

That the question presented on this review is:⁶⁶

63. This form is of more general application than Form No. 56, which savors more of the practice under the law of 1867. Consult, generally, Section Thirty-nine. See also General Order XXVII. See Form No. 158 for petition.

64. If a question is to be certified without decision, use Form No. 56.

65. Here recite the facts leading up to the order, perhaps calling attention to the pages of the record-book and the documents handed up. See General Order XXVII.

66. Here phrase the question involved into an interrogation, if possible limiting it to a single sentence. See General Order XXVII.

I hand up herewith, for the information of the judge, the following papers :

- (1) The record-book of this proceeding;
- (2) The petition on which this certificate is granted;
- (3) All other papers filed with me herein which are pertinent to this review.

Dated,, 19...

Respectfully submitted,

.....,

Referee in Bankruptcy.

Form No. 160.

Order Approving Appointment of Trustee.⁶⁷

At a Court of Bankruptcy, held in and for the District
of, at, this day of, 19...

Present:, Esq.; Referee.

IN THE MATTER OF

..... } In Bankruptcy No. ...
Bankrupt .

This being the day appointed for the first meeting of creditors herein, and due notice thereof having been given as provided by the bankruptcy law of 1898, and having been appointed trustee herein by a majority vote in number and amount of claims of all the creditors of said bankrupt previously allowed and present at such meeting, and they having fixed the amount of his bond at \$.; now, on motion of Esq., attorney for,

It is ordered:

That the appointment of be, and the same is hereby, approved,⁶⁸ and that he be and become trustee herein, on filing a bond, with sufficient sureties, in \$., as provided in section 50-b of the bankruptcy law of 1898, to be approved by this court.

.....,

Referee in Bankruptcy.

⁶⁷. This is a substitute for Forms Nos. 22 and 23. Consult, generally, Section Forty-four, as affected by § 2(17) and General Order XIII. See also §§ 45, 46, 50, 55, and 56.

⁶⁸. In case approval is denied, change the recitals and the order, and where a new meeting is necessary, insert the clause calling such meeting and directing the giving of notice.

Form No. 161.

Trustee's First Report.⁶⁹

In the District Court of the United States for the District of

IN THE MATTER OF

..... } In Bankruptcy No. ...

Bankrupt .

To, Esq., Referee in Bankruptcy:

I,, the trustee in this proceeding, do hereby report as follows:

That, on the day of, 19.., I was appointed trustee herein, immediately qualified by filing the required bond, and have since acted as such.

That, upon entering on such duties, I prepared a complete inventory of all the property of such bankrupt,⁷⁰ which showed such property to consist as follows:⁷¹

That ⁷² I have caused a certified copy of the order approving such bond and of the adjudication herein to be filed for record in the offices where conveyances are recorded in the county of, in said district.⁷³

That the following is a brief detailed statement of the steps in such proceeding to this date, not hereinbefore mentioned:⁷⁴

That I desire instruction as to the following matters:⁷⁵

69. Consult, generally, Section Forty-seven. See, for penalty if report not filed, General Order XVII. This report must be filed within one month after the trustee is appointed. See § 47-a(10). The form here is merely a suggestion. Reports of this kind differ greatly in each case.

70. If an appraisal has been taken, it should also be referred to here, and a summary of it given.

71. State briefly the kind, location, value of, and incumbrances, if any, on the property, or refer to the inventory or the appraisers' report on file.

72. Use this paragraph only where there is real estate.

73. See §§ 21-e and 47-e.

74. Here set out briefly the more important steps of the proceeding to the date of this report.

75. Ask such instruction or order as the facts warrant, as to intervening in suits, whether suits to set aside alleged preferences or fraudulent transfers shall be brought, whether there shall be an immediate sale of the property or a part of it, etc., as the facts of each proceeding suggest.

That I have on hand in cash dollars (\$....), which is deposited in the bank, the designated depository of this court,⁷⁶ and that said sum is sufficient⁷⁷ for a first dividend of per cent. (....%), for the declaration and payment of which I do hereby apply.

Dated,, 19...

Respectfully submitted,

.....,
Trustee.

STATE OF, }
County of, } ss.:
City of, }

I,, the trustee herein, do hereby make solemn oath that the statements of fact contained in the above report are true, according to the best of my knowledge, information, and belief.

Subscribed and sworn to before me, this day of, 19...

Form No. 162.

Order Declaring and Ordering First Dividend Paid.⁷⁸

At a Court of Bankruptcy, held in and for the District of
....., at, this day of, 19...

Present:, Esq., Referee.

IN THE MATTER OF

..... } In Bankruptcy No. ...

Bankrupt .

Application having been heretofore made for the declaration of a first dividend of not less than per cent. (....%) herein, on the report of, the trustee herein, and due notice having been given of the proposed declaration and payment of such dividend, and no objections

^{76.} Stop here, if there is not enough on hand for a first dividend.

^{77.} See § 65-b, as amended by act of 1903.

^{78.} Consult, generally, Sections Forty-seven and Sixty-five. See also General Order XXIX, and §§ 39-a(1), 58-a(5).

having been made thereto, and it appearing from said trustee's report that such dividend will not include more than fifty per cent. (....%) of the money of the estate in excess of the debts which have priority not yet paid and such claims as will probably be allowed; now, on motion of
, Esq., attorney for such trustee,

It is ordered:

That a dividend of per cent. (....%) be, and the same hereby is, declared on all claims, not entitled to priority, allowed herein to this date, in accordance with a dividend sheet hereto annexed.

That the said dividend be paid by the trustee herein forthwith.⁷⁹

.....,
Referee in Bankruptcy.

Dividend Sheet.

No.	Dr.	Sum allowed.	Cr.

.....,
Referee in Bankruptcy.

Form No. 163.

Trustee's Final Report and Account.⁸⁰

In the District Court of the United States for the District of

<p>IN THE MATTER OF</p> <p>.....</p> <p><i>Bankrupt .</i></p>	<p>In Bankruptcy No. ...</p>
---	------------------------------

To, Esq., Referee in Bankruptcy:

I,, the trustee in this proceeding, do hereby make my final report and account as follows:

⁷⁹. If debts entitled to priority have not been paid, add a paragraph directing their payment and specifying the names of the priority claimants and the amounts at which their claims have been allowed.

⁸⁰. This form is merely a suggestion. It is impossible to give more than a skeleton of a report which must vary widely with each case. Consult, generally, Section Forty-seven, also General Order XVII.

That, on the day of, 19..., I was appointed trustee herein, immediately qualified by filing the required bond, and have since acted as such.

That I have previously filed reports herein under dates of the day of, 19..., and the day of, 19...

That the following is a brief detailed statement of the steps in this proceeding since the date of my last report:⁸¹

That the said bankrupt's property is now reduced to money,⁸² except⁸³, which property, for the following reasons⁸⁴ should be sold at public auction at the time of the final meeting herein.

That more than three months⁸⁵ has elapsed since the first dividend to creditors was declared, and said estate is now ready to be closed.

That annexed hereto is my final account, duly verified.⁸⁶

Dated,, 19...

Respectfully submitted,

Trustee.

Final Account.⁸⁷

[See and use Form No. 49.]

STATE OF, }
County of, } ss.:
City of, }

I,, the trustee herein, do hereby make solemn oath that the statements of fact contained in the foregoing report are true, according to the best of my knowledge, information, and belief; also that the account thereto annexed is true, and contains entries of every sum of money

This report must be on file fifteen days before a meeting can be held. Compare also Form No. 161, and see Form No. 164. For the account, see Form No. 49. If there are no assets, Form No. 58 should be used.

81. Here set out briefly the more important steps of the proceeding since the last report, among other things, showing the cash on hand at that time and the total of receipts and disbursements since.

82. If all in the form of cash, stop here.

83. If any property remains unsold, specify it here.

84. Give reasons for a sale, specifying whether there are any offers and the probable value, if any, of such assets.

85. See § 65-b, as amended by the act of 1903.

86. See § 47-a(8) and Form No. 49.

87. Arrange with breaks and balances corresponding to the different dividend periods, so as to permit the making of the summary statement at the end of Form No. 160.

received by me as such trustee, and that the payments in such account stated to have been made by me have been so made.⁸⁸

Subscribed and sworn to before me, this day of, 19...

Form No. 164.

Final Order of Distribution.⁸⁹

At a Court of Bankruptcy, held in and for the District of
....., at, this day of, 19...

Present:, Esq., Referee.

IN THE MATTER OF

In Bankruptcy No. ...

Bankrupt .

A final report and account having been filed by, the trustee herein, and due notice having been given of said filing and of a final meeting of creditors to examine and pass on such account⁹⁰ and of the declaration and time of payment of a final dividend herein,⁹¹ and no objection having been made to such account or to the declaration and payment of such dividend,⁹² now, on motion of, Esq., attorney for the trustee herein,

It is ordered:

That the final account of, the trustee herein, be, and the same hereby is, approved.

That⁹³

That the trustee disburse from the money on hand, for expenses of administration, the following:⁹⁴

⁸⁸. This oath is an adaptation of Form No. 50.

⁸⁹. Consult, generally, Section Forty-seven, and see §§ 55-f, 58-a(5)(6), 62, 64 and 65, and General Order XXIX.

⁹⁰. If for a sale of remaining assets, recite the fact here, and also any other matter included in the notice for the meeting.

⁹¹. If the notice included one for a proposed sale of assets recite that fact here.

⁹². In case of sale, add: "or to such proposed sale."

⁹³. If a sale was also had, insert a clause approving such sale here.

⁹⁴. Here add the items, something as follows: "To, for, \$."

.....
.....
which sums are hereby allowed, and retain in his hands dollars (\$....) for his necessary expenses in making distribution hereunder.

That said trustee pay to the following creditors ⁹⁵ entitled to priority of payment the sums severally set opposite their names, viz.: ⁹⁶

That the attorney's fee herein be dollars (\$....), which sum is hereby allowed; and that it be paid by said trustee to, Esq., attorney for the bankrupt, dollars (\$....), and ⁹⁷ to, Esq., attorney for the petitioning creditors, dollars (\$....).

That ⁹⁸ said trustee pay to, Esq., his attorney herein, dollars (\$....), which sum is hereby allowed to him for the services of such attorney, as a part of the expenses of administration herein.

That ⁹⁹ said trustee pay the previous dividend of per cent. (...%) to the following creditors, entitled thereto:

That, from the balance remaining on hand, said trustee retain his commissions, which are hereby fixed at the maximum amount specified in § 48 of the bankruptcy law of 1898, as amended, viz.: dollars (\$....), and pay to the undersigned referee his commissions and claim fees as fixed by § 40 of said law, as amended, viz.: dollars (\$....).

That the balance then remaining, viz.: the sum of dollars (\$....), be disbursed in a final dividend of per cent. (...%), which is hereby declared and ordered paid forthwith, to the creditors whose claims are approved herein and on the amount as appears on the dividend sheet hereto annexed.

That, on the coming in of vouchers for the payments herein ordered, the trustee and the sureties on his bond be, and they are hereby, discharged.

That the annexed summary statement be sent or delivered to each creditor when said dividend is paid to him.¹

.....,
Referee in Bankruptcy.

The items are usually the expenses of giving notice of the meeting, stenographer's fees, or the filing fees and expenses of petitioning creditors in involuntary cases. See § 62, and compare § 64-b(3).

⁹⁵. See § 64-b(4)(5).

⁹⁶. Here set out the names of priority creditors whose claims have been allowed and not previously paid, with the amounts to which they have been found entitled in a schedule in the body of the form, similar to that in Form No. 19.

⁹⁷. Use only in involuntary cases.

⁹⁸. Use only where the trustee has found it necessary to employ and has employed an attorney.

⁹⁹. Use only when claims have been proven since the first dividend, setting out (1) name, (2) amount of claim proven, and (3) amount of dividend in a schedule in the body of the form, similar to the dividend sheet at the end of this form.

1. This is not required, but is suggested as a safe and courteous practice.

Dividend Sheet.

[See Form No. 162, and copy in same matter.]

Summary Statement.

Total cash collected by trustee.....	\$.....
Disbursed prior to or at time of first dividend:	
For	\$.....
For priority claims.....	.....
For first dividend of .....%	.....
	<hr/>
Total	\$.....
	<hr/>
Balance on hand after first dividend.....	\$.....
Cash collected since, as per final account.....	.....
	<hr/>
Total cash for distribution on final report.....	\$.....
Disbursed as follows:	
For	\$.....
For expenses of administration.....	.....
For priority claims.....	.....
For attorney's fee, under § 64-b (3).....	.....
For legal services to trustee.....	.....
For first dividend of% to creditors whose claims had not then been allowed.....	.....
For trustee's commissions.....	.....
For referee's commissions and fees.....	.....
For final dividend.....	.....
	<hr/>
	\$.....
	<hr/>

Form No. 165.

Trustee's Combined Dividend Check and Receipt.²

In the District Court of the United States for the District of

IN THE MATTER OF

In Bankruptcy No. ...

Bankrupt .

\$.....

No.

.....,,,, 19...

The National Bank of

Pay to the order of, dollars, being a
dividend of per cent. (...%) on claim allowed in the
proceeding of, a bankrupt, by order dated,
....., 19...

Countersigned,

Trustee.

.....,

Referee in Bankruptcy.

.....

RECEIPT.

(Do not detach. If detached, the check will not be honored.)

\$.....

No.

.....,,,, 19...

Received of, the trustee of, a
bankrupt, being in full of the dividend of per cent.
(...%) on claim allowed in the proceeding of such bankrupt, by
order dated, 19...

(Creditor's Signature.)

2. This form is of course merely a sug-
gestion to trustees who wish to do their
work thoroughly. Compare, generally, Sec-

tion Forty-seven. See also § 65 and Gen-
eral Order XXIX.

Form No. 166.

Referee's Certificate of Fees Payable.³

In the District Court of the United States for the District of

IN THE MATTER OF FEES IN PROCEEDINGS
IN BANKRUPTCY REFERRED TO
.....

Referee in Bankruptcy.

To, Clerk of the United States District Court, for the
..... District of

I,, the referee in bankruptcy to whom the proceedings
in bankruptcy hereinafter mentioned were referred do hereby certify that
the following cases are closed and the fees now payable as follows:

To trustees:

No. case.	Name of bankrupt.	Name of trustee.

To bankrupts (no trustee having been appointed):

No. case.	Name of bankrupt.

To the referee:

No. case.	Name of bankrupt.

Dated,,,, 19...

.....,
Referee in Bankruptcy.

³. Consult, generally, Section Fifty-one. See also §§ 40 and 48, as amended by the
act of 1903; also General Orders XXIX and XXXV.

Form No. 167.

Bond of Trustee, with Justification of Sureties.⁴

In the District Court of the United States for the District of

IN THE MATTER OF

In Bankruptcy No. ...

Bankrupt .

Know all men by these presents: That we,, of the of, in said district, as principal, and, and, both of the of, in said district, as sureties, are held and firmly bound unto the United States of America in the sum of ⁵ dollars (\$....), in lawful money of the United States, to be paid to the United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this day of, 19...

The condition of this obligation is such that:

Whereas the above-named was, on the day of, 19..., duly adjudicated a bankrupt herein, and on the day of, 19..., the above-named was appointed trustee in said proceeding in bankruptcy, and he, the said has accepted said trust, with all the duties and obligations pertaining thereunto;

Now, therefore, if the said, trustee as aforesaid, shall obey such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of said bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as such trustee, then this obligation to be void; otherwise, to remain in full force and virtue.

..... [L. S.]

..... [L. S.]

..... [L. S.]

Signed, sealed, and delivered, in the presence of

.....

⁴ Consult, generally, Section Fifty. See also Form No. 25, for which this is a substitute, the former containing no justifica-

tion; note § 50-d-f. This bond can be adapted to that required of a receiver.

⁵ See § 50-c.

STATE OF }
County of } ss.:
City of }

On this day of, 19..., the above-named
....., and and appeared
before me, and severally acknowledged the execution of the foregoing bond.⁶
.....
.....

STATE OF }
County of } ss.:
City of }

..... and, respectively, the sureties in
the foregoing bond, being each severally duly sworn, deposes and says that
he is a resident of and a holder within the of,
in said district, and is worth in property, at its actual value, dollars⁷
(\$.....) over all the debts and liabilities which he owes or has incurred,
and exclusive of property exempt by law from levy and sale under an
execution.
.....
.....

Subscribed and sworn to before me, this day of, 19...
.....
.....

Form No. 168.

Order Approving Trustee's Bond.⁸

At a Court of Bankruptcy, held in and for the District of
....., at, this day of, 19...

Present:, Referee.

IN THE MATTER OF <i>Bankrupt</i> .	In Bankruptcy No. ...
---	-----------------------

The petition for the adjudication of the above-named bankrupt,
....., having been filed herein on the day of, 19...,

6. This is not essential, but is thought good practice.
7. See § 50-f.
8. For reasons for this, consult, generally, Sections Twenty-one and Fifty. See also § 47-c, added by the amendatory act of 1903, and § 70-a.

and , having been appointed trustee herein on the day of , 19... , and he having given a bond for the faithful performance of his official duties in the amount of dollars (\$.....), as provided by the order appointing him; now, on motion of , Esq., attorney for ,

It is ordered:

That said bond be, and the same is hereby, approved.

..... ,

Referee in Bankruptcy.

Form No. 169.

Certificate of Referee as to Falsity of Pauper Affidavit.⁹

In the District Court of the United States for the District of

IN THE MATTER OF

.....

In Bankruptcy No. ...

Bankrupt .

I, , referee in bankruptcy in charge of the above-entitled proceeding, do hereby certify:

That I have reason to believe that the pauper affidavit filed herein by the above-named bankrupt, as provided in § 51 (2) of the bankruptcy law of 1898, is false; and I do, therefore, set the day of , 19... , at .. M., as the time and , in the of , in said district, as the place, when said bankrupt shall be examined as to the truth of such affidavit.

Dated, , , , , 19... .

..... ,

Referee in Bankruptcy.

To , bankrupt:

You are hereby ordered to appear before the undersigned, for examination, at the time and place specified in the above certificate.

Dated, , , , , 19... .

..... ,

Referee in Bankruptcy.

9. Consult, generally, Section Fifty-one, and compare General Order XXXV(4).

Form No. 170.

Special Clauses for Proofs of Debt.¹⁰

[To conform to General Order XXI.]

1. Insert at the end of all proofs of debt, not resting on a note or judgment, the following averment:

“That no note has been received for such debt¹¹ (except) nor has any judgment been rendered thereon¹² (except).”

2. Insert, after the statement of the “consideration” in all proofs of debt resting on open account, the following averment:

“That the said debt became due (or will become due) on the day of, 19...”

3. Insert also, in the same place, in all proofs of debt resting on open account, where the items of account mature at different dates, the following averment:

“That the average due date of said debt is the day of, 19...”

4. Insert in all proofs of debt by a corporation (Form No. 33) which are not sworn to by the treasurer, after the words “authorized to make this proof,” the following averment:

“That the same is not made by the treasurer of such corporation, for the reason that¹³, and that the affiant is an officer of such corporation and his duties most nearly correspond to those of treasurer.”

5. In all proofs of debt where the claim was assigned after the petition in bankruptcy, but before proof, add at the end of the proof, the following averment:

“That, at the time these proceedings in bankruptcy were begun, such debt was owned by, of; that since then, by an instrument in writing, hereto annexed, such debt has been assigned to the affiant; and that annexed hereto is a deposition by said, as provided by General Order XXI (2).”

10. See, generally, Section Fifty-seven, *ante*, and General Order XXI. See also Forms Nos. 31, 32, 33, 34, 35, 36, 37, 38, and 39; also Forms Nos. 171 and 172.

11. If so, prove on the note, or surrender it and prove on the debt, adding an explanation here.

12. If a judgment has been entered, prove

on the judgment, attaching a transcript, and specifying how much of the costs, if any, were earned before the petition in bankruptcy was filed; see § 63-a(2)(3).

13. Here give the reason why the proof is not made by the treasurer, as absence, illness, etc.

Form No. 171.

Petition for Reconsideration and Rejection of Claim.¹⁴

In the District Court of the United States for the District of

IN THE MATTER OF <i>Bankrupt</i> .	} In Bankruptcy.
--	------------------

To, Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That he is the trustee herein.¹⁵

That the proof of debt of, of, claiming to be a creditor of the said, was filed herein on the day of, 19..., and, on the day of, 19..., duly allowed.

That the same should not have been allowed for the following reasons:¹⁶

.....
That the attorney of said claimant is, Esq., of

That no previous application has been made to this or any other court for the order hereinafter asked.

Wherefore, your petitioner prays that the said proof of debt may be reconsidered and rejected.¹⁷

.....,
Petitioner.

[Add verification as in Form No. 66.]

14. Consult, generally, Section Fifty-seven and General Order XXI(6); and see Forms Nos. 172, 38, and 39.

15. A creditor may make this petition; if so, he should show the allowance of his claim.

16. As, for instance, because technically imperfect, or not in accordance with the general orders, or secured, or the claimant preferred and his preference not surrendered or want of consideration, or many other reasons. The reasons should be set forth as in a pleading, so that the claim-

ant may have proper notice of the issue he must meet.

Neither the bankrupt act nor the general orders require the petitioner to aver facts which, if proved, would defeat the claim. It is only necessary to aver facts which, if true, are a sufficient cause for the re-examination of the claim. In re Watkinson & Co. (D. C., Pa.), 12 Am. B. R. 370, 130 Fed. 218.

17. This form can be adapted to a case where the application is to reduce but not reject *in toto*.

Form No. 172.

Notice of Petition for Reconsideration and Rejection of Claim.¹⁸

In the District Court of the United States for the District of

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: right;"><i>Bankrupt</i> .</p>	}	In Bankruptcy No. ...
--	---	-----------------------

To, a creditor, and, Esq., his attorney:

You will please take notice that, the trustee herein,¹⁹ has filed a petition asking that your claim against, the above-named bankrupt, be reconsidered and rejected,²⁰ and that a hearing will be had on such petition at, in the of, in said district, on the day of, 19..., at o'clock, .. M.

Dated,,, 19....

.....,
Referee in Bankruptcy.

Form No. 173.

Proof of Secured Debt.

(Hagar and Alexander's Bankruptcy Forms, No. 130.)

In the District Court of the United States for the District of

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: right;"><i>Bankrupt</i> .</p>	}	In Bankruptcy No. ...
--	---	-----------------------

At, in said district of, on the day of, A. D. 19..., came of, in the county of, State of in said district of and made oath, and says that the said

<p>^{18.} Consult, generally, Section Fifty-seven. See, for practice, General Order XXI(6). If claim is rejected, the proper order is suggested by Form No. 39; if merely reduced, by Form No. 38.</p>	<p>^{19.} If made by a creditor, change to fit the fact.</p> <p>^{20.} Or "reduced to \$....." It may be suggested that a copy of the petition should be mailed with this notice.</p>
--	---

....., the person by (*or against*) whom a petition for adjudication of bankruptcy has been filed, at and before the filing of said petition, and still justly and truly indebted to said deponent in the sum of dollars:

that the said debt exists upon.....
of which a is hereto annexed; that the consideration of said debt is as follows:

.....
.....
that the said debt due on
.....
..... the average due date being 19...;
and that no note has been received for the said debt nor any judgment rendered thereon except as aforesaid; that no part of said debt has been paid except

.....
that there are no set-offs or counterclaims to the same except.....
.....;
that the only securities held by this deponent for said debt are the following:

Subscribed and sworn to before me, this day of, A. D. 19...

.....,
Creditor.

.....,
[*Official character.*]

Form No. 174.

Order Expunging or Reducing Proof of Debt.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 164.)

United States District Court for the District of

IN THE MATTER OF

..... } In Bankruptcy No. ...

Bankrupt .

The trustee of the estate of the above-named bankrupt having filed in the office of the referee a duly verified petition praying that the proof of debt

heretofore filed herein by, an alleged creditor for \$....., be reconsidered, rejected and expunged (*or* reduced), and an order having been made herein that a hearing be had thereon on the day of, 19..., and due notice of said hearing having been given to said claimant, and to the said trustee, and the said claimant having appeared by counsel on said day, and the evidence submitted (*or* testimony having been taken thereon), now on reading and filing the trustee's said petition and after hearing, Esq., attorney for the said trustee, in support of said petition and, Esq., in opposition thereto, it is

Ordered, that the prayer of said petition be and the same is hereby granted, and it is further

Ordered, that said claim of be and it is hereby rejected, disallowed and expunged from the list of claims upon the record in this case. (*or* that said claim of be and it hereby is reduced to \$..... and allowed at said amount upon the list of claims herein.)

Dated,,, 19..

.....
Referee in Bankruptcy.

Form No. 175.

Order Allowing Claim.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 165.)

United States District Court for the District of

IN THE MATTER OF

..... } In Bankruptcy No. ...

Bankrupt .

..... having filed in the office of the referee a proof of claim against the estate of the above-named bankrupt in the sum of \$....., and the said claim having been objected to by (the trustee or certain creditors) and the objections having come on for a hearing before me, and testimony having been offered in behalf of in support of the said claim, and by (the trustee or certain objecting creditors) in opposition thereto, and due deliberation having been had, and after hearing Esq., attorney for the said claimant, in support of the said claim, and, Esq., attorney for (trustee or objecting creditors), in opposition thereto, it is

Ordered, that the said claim be and the same is hereby allowed in the sum of \$. and the objections thereto dismissed.

Dated,,,, 19. . .

.....
Referee in Bankruptcy.

Form No. 176.

Notice of Final Meeting.²¹

In the District Court of the United States for the District of

IN THE MATTER OF

..... } In Bankruptcy No. ...
Bankrupt .

To the creditors of, of, in the county of, and district aforesaid, a bankrupt:

Notice is hereby given that on the day of, A. D. 19. . . , at o'clock, . . M., there will be a meeting of the creditors of the above-named bankrupt at, in the of, in said district, to ²² *examine and pass upon the final report and account of, the trustee herein, which was filed in the office of the undersigned at, in said district, on the day of, 19. . . , and shows \$. on hand for distribution,²³ and to transact such other business as may properly come before such meeting.*

Dated,,,, 19. . .

.....
Referee in Bankruptcy.

.....,

Attorney for the Trustee.

21. Consult, generally, Section Fifty-eight. See also §§ 47-a(8), 55-f, and 65. Compare Forms Nos. 18 and 178. See also for notices given by the clerk, Forms Nos. 53, 57, 98, 108, 138.

22. The italics are used only for conven-

ience of reference in substituting clauses for other notices. See Form No. 176.

23. When the meeting is also for the declaration and payment of a final dividend, see Form No. 179.

Form No. 177.

Special Clauses for Notices to Creditors.²⁴

1. Where the notice is for a hearing on an application for a discharge or composition (§ 58-a (2)), or the proposed dismissal of the proceedings (§ 58-a (7)), as previously suggested in Forms Nos. 98, 108, and 138, the order to show cause should be used.

2. Where the notice is for the examination of the bankrupt (§ 58-a (1)), at a meeting called for that purpose, substitute for the words in italics in Form No. 172, the words:

“To attend an examination of the bankrupt.”

3. Where the notice is for a proposed sale of property (§ 58-a (4)), substitute in the same place in Form No. 172, the words:

“To consider a proposed sale of the following described property, viz.:²⁵
.....,
and if objection to said sale is not made, or, if objected to, it is ordered, forthwith to attend the sale of such property at auction to the highest bidder, on the following terms:²⁶
.....,
subject to confirmation by the undersigned, at a continuance of such meeting, which, on the conclusion of such sale, will be taken to
in the of, in said district, on the day of, 19..., at o'clock, .. M.”

4. Where the notice is for the declaration and payment of a dividend (§ 58-a (5)) substitute in the same place in Form No. 172, the words:

“For the purpose of declaring and directing the payment of a dividend of not less than per cent. upon all debts allowed prior to or on that date.”

5. Where the notice is of the proposed compromise of a controversy (§ 58-a (6)), substitute in the same place in Form No. 172, the words:

“To pass upon a proposition to compromise a controversy between the trustee herein and, concerning²⁷
..... by²⁸”

6. Where the notice is of a meeting of creditors for any purpose not specifically indicated in § 58-a, substitute in the same place in Form No. 172, the words:

“For the purpose of²⁹”

24. Consult, generally, Section Fifty-eight. See also Form No. 176 and the footnotes thereto.
25. Here insert description and give appraised value and the incumbrances, if any.
26. Here insert terms as to down payment, etc.

27. Here indicate the question at issue.
28. Here indicate the proposed compromise.
29. Here describe briefly the purpose of the meeting.

Form No. 178.

Combined Notice to Creditors.³⁰

In the District Court of the United States for the District of

IN THE MATTER OF

..... } In Bankruptcy No. ...

Bankrupt .

To the creditors of, of, in the county of, and district aforesaid, a bankrupt:

Notice is hereby given that on the day of, A. D. 19..., at o'clock, .. M., there will be a meeting of the creditors of the said bankrupt, at, in the of, in said district, for the following purposes:

I. To consider a proposed sale of the following described property, viz.:³¹, and, if objection to said sale is not made, or, if objected to, it is ordered, forthwith to attend a sale of such property at auction to the highest bidder, on such terms as may then be fixed;

II. To examine and pass upon the final report and account of the trustee, which was filed in the office of the undersigned at, in said district, on the day of, 19..., and shows \$..... on hand for distribution;

III. For the purpose of declaring and ordering paid a final dividend herein;

IV. To transact such other business as may properly come before said meeting.

Notice³² is also given that, unless proofs of debt are filed on or before the day set for such meeting, the same cannot share in such dividend.

Dated,, ..,, 19...

.....
Referee in Bankruptcy.

....., Esq.,
Attorney for Trustee.

³⁰ See, generally, Section Fifty-eight, and the forms just ante, with their footnotes.

³¹ Here insert description and give ap-

praised value and the incumbrances, if any.

³² This clause should also be added to the notice of the first dividend.

Form No. 179.

Affidavit of Publication of Notice.³³

In the District Court of the United States for the District of

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: right;"><i>Bankrupt .</i></p>	}	In Bankruptcy No. ...
--	---	-----------------------

STATE OF, County of, City of,	}	ss.: [Attach slip here.]
---	---	--------------------------

....., of the of, in said district, being duly sworn, deposes and says, that he is the proprietor³⁴ of, the newspaper designated for the publication of notices in bankruptcy in the county of, in said district; and that the notice to creditors in the above-entitled proceeding, of which the attached printed slip is a copy, was published in said newspaper on the day of, 19...

.....

Subscribed and sworn to before me, this day of, 19...

.....,

.....

33. See Section Fifty-eight, *ante*, and note Form No. 179.

34. Or "foreman," or "clerk," as the case may be.

Form No. 180.

Affidavit of Mailing Notice,³⁵

In the District Court of the United States for the District of

IN THE MATTER OF

..... } In Bankruptcy No. ...

Bankrupt . . .

STATE OF }
 County of } ss.:
 City of }

[Attach notice here.]

....., of the of, in said district, being duly sworn, deposes and says that, on the day of, 19... deponent mailed notices to creditors, of which the annexed printed notice is a copy, one each to the persons, copartnerships, and corporations mentioned in the schedule of names and addresses hereto annexed, by depositing such notices in sealed, postpaid envelopes,³⁶ in the general post-office at the of, in the district aforesaid.

.....

Subscribed and sworn to before me, this day of, 19...

.....,

.....

35. See Section Fifty-eight, *ante* and Form No. 180. The original notice, the affidavit of publication, and this affidavit should be bundled together before being filed.

36. Or, if the notice is mailed by the referee, add words indicating that an "official business" envelope was used.

Form No. 181.

Order Appointing Attorney for Trustee.³⁷

At a Court of Bankruptcy, held in and for the District
of, at, this day of, 19...

Present:, Esq., Referee.

IN THE MATTER OF <i>Bankrupt</i> .	} In Bankruptcy No. ...

Application having been made for the appointment of an attorney for the trustee herein, and it appearing that the services of an attorney are and will be required, and that the appointment hereinafter made is acceptable to such trustee,³⁸ now, on motion of, Esq.,

It is ordered:

That, Esq., of the of, in said district, be, and he hereby is, appointed attorney for the trustee herein,³⁹ his compensation to be fixed and paid as an expense of administration at the final meeting of creditors.

.....,
Referee in Bankruptcy.

37. See, generally, Section Sixty-two.
38. If the choice has been submitted to creditors, here recite their action.
39. Or, "that, the trustee, be authorized to employ, of the, of, in said district, as his attorney herein."

Form No. 182.

Petition for Instruction as to Burdensome Property.⁴⁰

In the District Court of the United States for the District of

IN THE MATTER OF

In Bankruptcy No. ...

Bankrupt .

To, Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That he is the trustee herein.

That a portion of such bankrupt's estate consists of the following property:⁴¹That your petitioner has investigated the value of such property and finds the same to be worthless,⁴² for the following reasons:⁴³

That it will be for the benefit of said estate that your petitioner be instructed to disclaim title to such property and to refuse to take the same into his possession.

That no previous application has been made to this or any other court for the order hereinafter asked.

Wherefore, your petitioner prays for an order permitting him to disclaim title to such property and to refuse to take the same into his possession.

.....,
Trustee.

[Add verification as in Form No. 66.]

⁴⁰. See Section Seventy, and compare the forms immediately *ante*. See also Forms Nos. 42, 43, 44, 45, and 46.⁴¹. Here describe the property.⁴². Or, if actually burdensome to the bankrupt's estate, state that fact.⁴³. Here give the reasons on which the order is asked, showing condition, incumbrances, etc.

Form No. 183.

Order on Petition as to Burdensome Property.⁴⁴

At a Court of Bankruptcy, held in and for the District
of, at, this day of, 19...

Present:, Esq., Referee.

IN THE MATTER OF

..... } In Bankruptcy No. ...

Bankrupt .

Application having been made for an order permitting the trustee herein to disclaim title to certain worthless⁴⁵ property, and to refuse to take the same into his possession, and it appearing that such order should be granted; now, on motion of, Esq., attorney for

It is ordered:

That, the trustee herein, be, and he hereby is, directed to disclaim title to the following described property, and to refuse to take the same into his possession, viz.:⁴⁶

.....
Referee in Bankruptcy.

Form No. 184.

Order Allowing Trustee to Continue Business.

(Hagan and Alexander's Bankruptcy Forms, No. 162.)

United States District Court for the District of

IN THE MATTER OF

..... } In Bankruptcy No. ...

Bankrupt .

On reading and filing the annexed petition of, the trustee of the estate of the above-named bankrupt, verified, 19..., and on motion of, attorney for the said trustee, it is

44. See Form No. 182, and its foot-notes.

45. Here describe the property.

46. Or "burdensome."

Ordered, that the said trustee, be and he is hereby authorized, in his discretion, to continue the business of the said bankrupt, for a period of days from the date of this order.

Dated,, 19...

Referee in Bankruptcy.

Form No. 185.

Petition for Leave by Trustee to Sue.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 187.)

United States District Court, for the District of

IN THE MATTER OF <i>Bankrupt</i> .	} In Bankruptcy No. ...

To the United States District Court, for the District of :

The petition of respectfully shows:

- 1. That your petitioner is the trustee in bankruptcy herein, duly qualified and acting.
 - 2. That among the assets coming into the hands of your petitioner as trustee was a certain contract dated, 19... with That, as your petitioner is informed and verily believes, at the time of the adjudication herein, the bankrupt had entered upon the performance of said contract and completed the same.
 - 3. That the said has been examined under section 21-a, in this proceeding, but denies that there is any sum of money coming to the bankrupt herein, on account of said contract.
 - 4. That the creditors herein have requested your petitioner, as trustee, to bring an action against for the recovery of the moneys claimed to be due this estate by reason of said contract, and your petitioner has been advised by his counsel,, that he has a good and valid cause of action against
 - 5. That no previous application has been made for the order prayed for.
- Wherefore, your petitioner prays for an order authorizing and permitting him to bring an action in the court for the county of....
....., against

Petitioner.

[Verification.]

Form No. 186.

Order Authorizing Trustee to Sue.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 188.)

At a stated term of the United States District Court for the
District of, held at the United States Court House,
City of on the day of, 19...

Present: Hon., District Judge.

IN THE MATTER OF

-In Bankruptcy No. ...

Bankrupt .

Upon reading and filing the annexed petition of _____,
trustee herein, duly verified, and upon motion of _____,
attorney for said trustee, it is _____

Ordered, that, as trustee in bankruptcy of the above-named bankrupt, be and he hereby is authorized and permitted to bring an action as such trustee in bankruptcy, in the court of, county, against, upon the following alleged cause of action:

 to recover any moneys which may be due this estate from

D. J.

Form No. 187.**Demand in Reclamation.**

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 311.)

In the District Court of the United States for the District of

IN THE MATTER OF

In Bankruptcy No. ...

Alleged Bankrupt.

SIR:—

Please take notice that the undersigned is the owner of and entitled to the immediate possession of the following chattels which were wrongfully and unlawfully obtained from him by the above-named (alleged) bankrupt, and that the undersigned demands the immediate return of said property, to wit:

[Here set forth property claimed in detail].

Dated,

Yours, etc.,

By
Attorney.

Form No. 188.**Petition to Reclaim.**

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 312.)

In the District Court of the United States for the District of

IN THE MATTER OF

In Bankruptcy No. ...

Bankrupt .

To the District Court of the United States, for the District of

The petition of respectfully shows and alleges:

First: (That your petitioner is a corporation duly organized under and

existing under and by virtue of the laws of the State of, and having an office for the transaction of its business in the city of).

Second: That at all the times hereinafter mentioned, the said bankrupt was engaged in business in the city of as

Third: That your petitioner is the owner and entitled to the immediate possession of the property set forth in schedule "A" hereto annexed, and made a part hereof, and that the value of said property is (\$) dollars.

Fourth: That your petitioner further alleges upon information and belief, that heretofore and on or about the day of, 19 , an involuntary petition in bankruptcy was filed in the office of the clerk of this court, by three creditors of above bankrupt, praying that the said be adjudged an involuntary bankrupt, and that thereafter, Esq., was duly appointed as temporary receiver in bankruptcy of the said, and that pursuant to the order of his appointment, he did take possession of and continues to hold the property mentioned and described in the schedule hereto annexed and made a part hereof, marked exhibit "A," and that the said property is in the original piece in which it was delivered by your petitioner to the said (That on the day of, 19 , the said was duly adjudicated a bankrupt).

Fifth: That heretofore and before the commencement of this proceeding, due demand was made by your petitioner upon the said, Esq., receiver, that he deliver possession of the said goods, wares and merchandise in said schedule "A" mentioned to your petitioner, but that said demand has been refused.

Sixth: That heretofore and at various times between the day of and the day of, both dates inclusive, said, upon false and fraudulent representations, induced your petitioner to sell and deliver to him the said goods, wares and merchandise mentioned and described in said schedule "A" hereto annexed, and the said wrongfully, fraudulently and with intent to defraud your petitioner and knowing that your petitioner relied upon the truth of the representations so made, procured the said property to be delivered to his custody.

Seventh: That at the time that the said goods were so delivered to the said by your petitioner as aforesaid, and at the time that the said false and fraudulent representations were made as aforesaid, the said was insolvent and unable to pay his debts in full to his knowledge, and made false and fraudulent representations with intent to cheat and defraud your petitioner, and so knowing his insolvency as afore-

said, induced your petitioner to sell and deliver the said merchandise as aforesaid with the intent and design not to pay therefor when the term of credit upon which the same had been sold should have expired.

Eighth: Your petitioner further alleges that the false and fraudulent representations, the truth of which he relied upon, and which induced him to sell and deliver the said merchandise as aforesaid, are as follows, to wit:

That heretofore and on or about the day of, 19 . . . , the said did make, sign and deliver a written statement of his financial condition to in the city of , wherein he did state that he had merchandise on hand on the day of to the value of \$. ; outstanding accounts of \$. ; fixtures of the value of \$. ; and cash on hand and in bank of \$. , or a total of assets of \$. and did further state that his liabilities amounted to the sum of \$. and that he was worth over and above all his debts and liabilities the sum of \$.

Ninth: That your petitioner obtained the said statement previous to the sale and delivery of the said merchandise in said schedule "A" mentioned; and as your petitioner is informed and does verily believe, the said did deliver the said signed statement as aforesaid to petitioner for the purpose of obtaining credit, and that your petitioner relied upon the truth of the representations therein contained.

Tenth: Upon information and belief, that the aforesaid representations were false and untrue, in that the said did not have on the day of , the assets as heretofore alleged and stated by him in said statement, of the total value of \$. , and owed in liabilities a sum in excess of the liabilities as hereinabove alleged and by him in said statement specified of \$. , and that the said did not have a surplus over and above all of his debts and liabilities of the sum of \$.

Eleventh: That the said goods had not been taken by virtue of a warrant against your petitioner for the collection of any tax, assessment or fine, issued in pursuance of a statute of the United States, and that they have not been seized by virtue of an execution or warrant of attachment from or through whom your petitioner has derived title to the said chattels.

Wherefore, your petitioner does respectfully pray that the said , Esq., as said temporary receiver herein, be directed to deliver to your petitioner the said property in said schedule "A" mentioned and described, upon your petitioner filing in the office of the clerk of this court a bond in double the value of said property to be returned to him conditioned that in the event your petitioner fails to establish his right, title and interest in and to the said property, that then, and in that event, your petitioner will repay to the said receiver, or trustee hereinafter to be elected, the value of the said property so

to be delivered to him and all costs and expenses, and your petitioners have such other and further relief, as to this honorable court may seem just and proper.

Dated,,,,, 19...

.....,

Petitioner.

.....

Solicitors for Petitioner,

Address,

[*Verification.*]

(Schedule "A" annexed.)

Form No. 189.

Answer in Reclamation.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 315.)

United States District Court, for the District of

IN THE MATTER OF

..... } In Bankruptcy No. ...

Bankrupt .

..... as receiver in bankruptcy of the estate of the above-named bankrupt, answering the petition of the claimant herein, shows and alleges, upon information and belief:

1. Admits the allegations of plaintiff's petition numbered,,,,, and
2. The receiver further answering the said petition denies that he has knowledge or information sufficient to form a belief as to the allegations of paragraph numbered and of said petition, and therefore denies same.
3. The receiver further answering the said petition, denies the allegations of paragraph of said petition.
4. The receiver denies the allegations of paragraph, but admits that a letter, dated, from the attorneys for the petitioner herein and written after the filing of the petition of bankruptcy herein and containing an alleged demand was received by the bankrupt herein.

5. The receiver further answering the said complaint admits that a certain portion of the property claimed by the petitioner has come into the hands of the receiver as a part of the assets belonging to this estate.

The receiver further answering said petition and as a further and separate defense (or counterclaim) thereto alleges:

[Here set forth specifically defense or counterclaim.]

Wherefore, the receiver demands judgment dismissing the petition of the claimant herein, with costs.

.....
As Receiver in Bankruptcy of

.....
[Address.]

.....
Attorney for Receiver.

[Verification.]

[Trustee after appointment is proper person to answer and defend.]

Form No. 190.

Petition for Sale under General Order XVIII(2).⁴⁷

In the District Court of the United States for the District of

IN THE MATTER OF

..... } In Bankruptcy No. ...

Bankrupt .

To, Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That he is the trustee herein.

That a portion of such bankrupt's estate consists of the following property;⁴⁸

47. See Section Seventy and General Order XVIII(2). Though such sales are of doubtful validity, they are common. This form can be adapted to a sale of personal property, or one at public auction under

the same general order. See also Forms 42, 43, 44, 45, 46, 182, 183, 191, and 192.

48. Here insert description of property, giving its location, appraised value, the incumbrances, if any, etc.

That it will be to the advantage of the estate that such property be sold forthwith, for the following reasons:⁴⁹

That no previous application has been made to this or any other court for the order hereinafter asked.

Wherefore, your petitioner prays for an order permitting him to sell said property in the way and on the terms above specified.

[Verification same as in Form No. 66.]

Trustee.

Form No. 191.

Order for Sale under General Order XVIII(2).⁵⁰

At a Court of Bankruptcy, held in and for the District
of, at, this day of, 19...

Present:, Esq., Referee.

IN THE MATTER OF

..... } In Bankruptcy No. ...
Bankrupt .

Application having been made by the trustee herein for an order permitting such trustee to sell the following property⁵¹
.....
on the terms hereinafter mentioned, and it appearing that good cause for such sale has been shown; now, on motion of, Esq., attorney for the trustee,

It is ordered:

That, the trustee herein, be, and he hereby is, authorized to sell the property above specified to, on receipt from him of dollars (\$....) in cash.⁵²

Referee in Bankruptcy.

49. Here give the reasons, as, for instance, a cash offer of 75 per cent. of the appraised value, giving name of person making the offer, etc., or the necessity of vacating the premises in which the property is, or any of the numerous reasons which require prompt action on sales of a bankrupt's assets.

50. See foot-note 44 to Form No. 190, and the references therein.

51. Here copy the description of the property from the petition.

52. Or, as the terms may be, usually adding a clause directing the transfer of title by an instrument transferring only the trustee's right, title, and interest, and in no way amounting to a warranty. See Form No. 193.

Form No. 192.

Petition to Confirm Sale.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 251.)

United States District Court, for the District of

IN THE MATTER OF <i>Bankrupt</i> .	}	In Bankruptcy No. ...
--	---	-----------------------

To the Hon., District Judge:

The petition of respectfully shows:

That your petitioner is the temporary receiver herein, duly qualified and acting.

That on, 19..., by order of this court, the property and effects of the said bankrupt at, st., city of
....., consisting of, were offered for sale at public auction.

That the same was offered in bulk at the beginning of such sale and a bid of \$..... was made for the same, and that the goods were then offered for sale in separate lots according to catalogue, and realized the sum of \$..... or more than the bid in bulk.

That the said sum of \$..... realized, is below 75 per cent. of the appraised value of the property, which is \$, and in order to deliver said property to the purchasers, it is necessary for your petitioner to procure an order confirming said sale.

Your petitioner is of the opinion and verily believes that a larger sum than as above stated cannot be obtained, as the sale was largely attended and fairly conducted, and advises that the said goods be delivered to the respective bidders, for the reason that said merchandise will rapidly deteriorate in value, and the expense attendant upon storing the goods for a longer time, or of a resale, would be considerable, and unlikely to produce better results, and petitioner verily believes that the sale should be confirmed.

Wherefore, your petitioner respectfully prays that an order be made confirming the said sale, and authorizing him to deliver the said merchandise as sold in lots to the respective highest bidders therefor and for such other and further relief as to the court may seem just and proper.

.....,
Petitioner.

[Verification.]

Form No. 193.

Order Confirming Sale, after Notice to Creditors.⁵³

At a Court of Bankruptcy, held in and for the District
of, at, this day of, 19...

Present:, Esq., Referee.

IN THE MATTER OF

..... } In Bankruptcy No. ...
Bankrupt .

Application having been made by the trustee herein for the sale of the following property,⁵⁴ and a notice of proposed sale having been given thereon, as provided by § 58-a (4) of the bankruptcy law of 1898, and no objection having been made to said sale, and the same having then taken place and said property having been sold to, of the of, in said district, for dollars (\$.....), and now coming on for confirmation, as provided in such notice; now, on motion of, Esq., attorney for the trustee herein,

It is ordered:

That such sale be, and the same hereby is, confirmed.

That the trustee herein, on receipt of the consideration in cash, complete the same by executing the proper instrument transferring to such purchaser all his right, title, and interest in said property, and delivering the same to such purchaser.

.....,

Referee in Bankruptcy. .

53. See Sections Seventy and Fifty-eight. This form can be adapted to any sale, whether public or private, on notice, and should always be entered, for the protection of the purchaser's title. See special

clauses for sale on notice in Form No. 177. See also Forms Nos. 190 and 191, and compare Forms Nos. 42, 43, 44, 45, and 46.

54. See foot-note 48 to Form No. 190.

Form No. 194.**Petition for Private Sale by Trustee.**

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 240.)

United States District Court, for the District of

IN THE MATTER OF

..... } In Bankruptcy No. ...

Bankrupt .

To, Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That he is the trustee herein duly qualified and acting.

That a portion of such bankrupt's estate consists of the following property:

.....
That it will be to the advantage of the estate that such property be sold forthwith at private sale for the following reasons and upon the following terms:
That no previous application has been made to this court for the order hereinafter asked.

Wherefore, your petitioner prays for an order permitting him to sell said property in the way and on the terms above specified.

.....,
Petitioner.

[Verification.]

Form No. 195.

Order for Private Sale by Trustee.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 241.)

United States District Court, for the District of

IN THE MATTER OF

..... } In Bankruptcy No. ...
Bankrupt .

....., the trustee herein, having filed a duly verified petition praying for an order permitting him to sell at private sale the following property: [*Here specify property.*]

.....
.....
on the terms set forth in said petition (and a meeting of creditors having been duly held upon ten days' notice) and it appearing that good cause for such sale has been shown; now, on motion of Esq., attorney for the trustee, it is

Ordered: That, the trustee herein, be, and he hereby is authorized to sell the property above specified to for the sum of \$.....

And it is further ordered: That the said trustee keep an accurate account thereof and file same with the referee.

Dated,, day of, 19...

.....,

Referee in Bankruptcy.

Form No. 196.**Petition for Sale Free and Clear of Liens.**

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 248.)

United States District Court, District of

IN THE MATTER OF

..... In Bankruptcy No. ..

Bankrupt .

To the District Court of the United States, for the District of

The petition of respectfully shows and alleges:

First: That your petitioner was heretofore and on the day of, 19..., duly appointed the trustee in bankruptcy of all of the property of the above bankrupt and has duly qualified as such by filing his bond in this court in the sum of \$. conditioned for the faithful performance of his duties, and is now acting as such trustee.

Second: That your petitioner has taken possession of all the property of the said bankrupt which includes the following described real and personal estate located at the town of, county, State of

All that certain tract or parcel of land, with the buildings thereon erected and all machinery connected with or attached to said building and property, situate in the town of, county of and State of, bounded as follows:

.....

Together with all and singular, the tenements, hereditaments and appurtenances belonging to the said property; and the reversion, remainders, tolls, income, rents, issue and profits thereof, including all chattels, fixtures, furnishings, machinery, tools and every other estate, right, title and interest, property and appurtenances of the said

Third: That heretofore and on the day of, 19..., an involuntary petition in bankruptcy was filed herein against the above-named bankrupt, and theretofore and within four months prior to the date of the filing of the said petition, to wit, on the day of,

19..., the said bankrupt, for and in consideration of the alleged sum of \$....., made, executed and delivered a certain bond and mortgage covering all of the above-described property, to [a corporation organized under and existing by virtue of the laws of the State of]

Fourth: That the said alleged bond and mortgage were, as your petitioner is informed and does verily believe, executed and delivered under the following circumstances:

That on the said day of, 19..., and for a considerable period prior thereto, the said bankrupt above named was insolvent and that his property at a fair valuation was insufficient to pay all of his debts in full, which said debts, as your petitioner is informed and does verily believe, did on said day of, 19..., and prior thereto, aggregate the sum of about \$.....; and that all of his assets of whatsoever kind, character, nature or description, did not exceed in value the sum of about \$.....

Fifth: That on said day of, 19..., the said bankrupt was indebted to in the sum of \$....., which said indebtedness consisted of two promissory notes in writing, made, executed and delivered by to, each for the sum of \$.....

Sixth: That on said day of, 19..., the said notes of \$....., due on that day, were not paid by the said bankrupt, and were thereupon duly protested for nonpayment by the said, on which said day, as your petitioner is informed and verily believes, the said knew and had reasonable cause to believe that the said was insolvent and unable to pay his debts; and that thereafter and on the day of, 19..., well knowing that the said was insolvent and having good and reasonable cause to so believe, and without any present fair consideration, and as security for an antecedent indebtedness, he did accept and take the said bond and mortgage for the said sum of \$..... on said real and personal property hereinbefore mentioned and described.

Seventh: That heretofore and by order of this court, all of the said property hereinbefore mentioned and described was duly appraised at the sum of \$....., and as your petitioner is informed and does verily believe, the said property if sold by your petitioner subject to the said mortgage of \$....., above mentioned, will not realize any equity whatsoever by reason of the fact that the said property is not worth the amount of the said mortgage and that no one interested in property of this character would purchase said property subject to it.

Eighth: That your petitioner proposes to institute legal proceedings in this court to declare void and of no effect the said mortgage and to have the same annulled and canceled as of record, upon the ground that under and by virtue of the terms and conditions of the acts of Congress relating to bankruptcy, the giving of the said mortgage was preferential as security for an antecedent indebtedness and for no present fair consideration passing at the time of the execution and delivery thereof; and upon the further ground that the said mortgage constituted a preference by reason of the fact that at the time that the said bond and mortgage were executed and delivered, the said receiving the same, knew and had reasonable cause to know and believe that the said bankrupt was insolvent.

Ninth: That your petitioner has examined and caused to be examined, and other witnesses, to all of which testimony your petitioner upon the hearing of the application herein made begs leave to refer and from which said examination the facts as hereinbefore alleged do more particularly and at length appear.

Tenth: That your petitioner in the performance of his duties as said trustee is desirous of immediately disposing of all of the property of the bankrupt herein, and in order so to do most advantageously to the interest of the creditors of the said bankrupt, does verily believe that the said property should be sold free of and from the lien of the said mortgage of \$. which said mortgage in detail covers the said property as hereinbefore described, and which was made, executed and delivered on said day of, 19..., by the said, bankrupt herein, for the said sum of \$., and which was thereafter and on the day of, 19..., duly recorded in Liber of Mortgages at page in the office of the clerk of the county of, State of

Wherefore, your petitioner does respectfully pray this Honorable Court that an order be made herein, requiring mortgagee to show cause before this court at a time and place to be stated, why an order should not be made and entered herein, directing that all of the property mentioned and described in the petition herein and covered by the said mortgage herein referred to, be sold by your petitioner as trustee of the said bankrupt, at public auction and in the manner prescribed by the acts of Congress relating to bankruptcy, and the General Orders of the Supreme Court of the United States, free of and from the lien of the said mortgage and why the proceeds arising of and from the sale of the said property should not be held by your petitioner subject to the lien of the said mortgage, to all intents and purposes as though the said property had not been sold, subject to the final order, judgment and decree of this court, or the final order, judgment and decree of a court of competent jurisdiction, as to the validity of the said mortgage

and why your petitioner should not have such other and further relief as to this Honorable Court may seem just and proper.

And your petitioner will ever pray, etc.

Dated,,,, 19...

.....,
Petitioner.

.....,
Attorney for Trustee,
Office and Post-office address,
.....Street,
City of.....

[*Verification.*]

Form No. 197.

Notice of Motion for Sale Free and Clear of Liens.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 249.)

United States District Court for the, District of

IN THE MATTER OF

..... } In Bankruptcy No. ...
Bankrupt .

Please take notice that upon the annexed petition of, trustee in bankruptcy of the above-named bankrupt, verified, 19..., the annexed affidavit of, verified, 19..., the (mortgage, etc.) a copy whereof is hereto annexed, from to, bearing date, 19..., and upon all the proceedings and testimony taken herein, a motion will be made by the undersigned on behalf of the trustee herein before, Esq., referee in bankruptcy, in charge of this proceeding, at his office, No. street, in the city of, on the day of, 19..., at o'clock in the noon, or as soon thereafter as counsel can be heard, for an order authorizing and directing, as trustee in bankruptcy of the estate of the above-named bankrupt, to sell the property mentioned in the annexed petition of the trustee herein, and situated at,, and that the said trustee be authorized and directed to sell and dispose of the aforesaid property, now in his possession, and claimed to belong to this estate, free and clear of all liens and demands thereon, including an alleged mortgage of to,

dated, 19. . . , and that the proceeds arising from the sale of the said property be held by the trustee subject to the claims, liens and demands of the alleged mortgagees, lienors and claimants, and that the said mortgages, liens, claims and demands attach to the proceeds of such sale with the same force and effect as if upon the property itself, subject to the final order, judgment and decree of this court or of a court of competent jurisdiction as to the validity, *bona fides* and extent of such mortgage, lien, claim and demand;

And for such other and further relief as to this court may seem just and proper.

Dated,,,, 19. . .

.,

Attorney for Petitioner.

Address,

To

{ Claimant or
Alleged Mortgagee. }

Form No. 198.

Order Directing Sale Free and Clear of Liens.

(Hagar and Alexander's Bankruptcy Forms [2d Ed.], No. 250.)

United States District Court for the, District of

IN THE MATTER OF

.

In Bankruptcy No. . . .

Bankrupt .

An order having been heretofore made herein requiring to show cause before this court, at the office of, Esq., referee, why an order should not be made herein, directing that all the property, now in the possession of said trustee and mentioned and described in the petition annexed to the said order and alleged to be covered by the mortgage therein referred to, be sold by the said trustee at public auction, and in the manner prescribed by the acts of Congress relating to bankruptcy and the General Orders of the Supreme Court of the United States, free of and from the lien of the said mortgage, and why the proceeds arising of and from the sale of the said property should not be held by the said trustee subject to the lien of the said mortgage, to all intents and purposes as though the said property had not been sold: subject to the final order, judgment and

decree of this court, or of the final order, judgment or decree of a court of competent jurisdiction, as to the validity, *bona fides* and extent of the said mortgage, and for other and further relief,

Now, upon reading and filing the said order to show cause, and the petition of , trustee thereto annexed, verified the day of , 19....,

And upon the petition in bankruptcy herein, the testimony taken at the first meeting of creditors in support of the said application; and the said having duly appeared upon the return of said order to show cause and duly filed his answer, verified the day of , 19.... the affidavits of and , duly verified the and days of , 19...., in opposition to the said application,

And after hearing respective counsel for the trustee and the and due deliberation having been had; and it appearing to the satisfaction of this court that the best interests of the creditors of the said bankrupt above named will be subserved by the granting of the application, and for divers other reasons that the said application is proper, it is hereby

Ordered, adjudged and decreed, that Esq., as trustee of , bankrupt, be, and he hereby is authorized, directed and permitted to sell and dispose at public auction, and in the manner and mode as prescribed by the acts of Congress relating to bankruptcy and the General Orders of the Supreme Court of the United States, all of the property of the , bankrupt, situated at more particularly mentioned and described in a certain indenture of mortgage heretofore made by , to , for the sum of \$..... dated the day of , 19...., and recorded on the day of , 19...., at o'clock, ...M., in Liber of Mortgages, at page , in the office of the clerk of the county of , State of

And it is further ordered, adjudged and decreed, that the said as said trustee, be, and he hereby is authorized, directed and permitted to sell and dispose of the said property in said mortgage more particularly mentioned and described, free of and from the lien of the said mortgage hereinbefore described, and that the proceeds of and from the sale of the said property be held by the said trustee, subject to the lien of the said mortgage, to all intents and purposes as though the said property had not been sold: subject to the final order, judgment and decree of this court or the final order, judgment and decree of a court of competent jurisdiction, as to the validity, *bona fides* and extent of the said mortgage.

Dated, City of , , 19....

..... ,

Referee in Bankruptcy.

APPENDIX A

RULES OF PRACTICE

FOR THE

COURTS OF EQUITY OF THE UNITED STATES.*

(In effect February 1, 1913.)

RULE I.—District Court always open for certain purposes—Orders at chambers.—The district courts, as courts of equity shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein.

Any district judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

RULE II.—Clerk's office always open, except, etc.—The clerk's office shall be open during business hours on all days, except Sundays and legal holidays, and the clerk shall be in attendance for the purpose of receiving and disposing of all motions, rules, orders and other proceedings which are grantable of course.

RULE III.—Books kept by clerk and entries therein.—The clerk shall keep a book known as "Equity Docket," in which he shall enter each suit, with a file number corresponding to the folio in the book. All papers and orders filed with the clerk in the suit, all process issued and returns made thereon, and all appearances shall be noted briefly and chronologically in this book on the folio assigned to the suit and shall be marked with its file number.

The clerk shall also keep a book entitled "Order Book," in which shall be entered at length, in the order of their making, all orders made or passed by him as of course and also all orders made or passed by the judge in chambers.

He shall also keep an "Equity Journal," in which shall be entered all orders, decrees and proceedings of the court in equity causes in term time.

Separate and suitable indices of the Equity Docket, Order Book and Equity Journal shall be kept by the clerk under the direction of the court.

RULE IV.—Notice of orders.—Neither the noting of an order in the Equity Docket nor its entry in the Order Book shall of itself be deemed notice to the parties or their solicitors; and when an order is made without prior notice to, and in the absence of, a party, the clerk, unless otherwise directed by the court or judge, shall forthwith send a

* "In proceedings in equity instituted for the purpose of carrying into effect the provisions of the [Bankruptcy] Act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be."

See General Order in Bankruptcy, No. XXXVII, November, 1898.

copy thereof, by mail, to such party or his solicitor and a note of such mailing shall be made in the Equity Docket, which shall be taken as sufficient proof of due notice of the order.

RULE V.—Motions grantable of course by clerk.—All motions and applications in the clerk's office, for the issuing of mesne process or final process to enforce and execute decrees; for taking bills *pro confesso*; and for other proceedings in the clerk's office which do not require any allowance or order of the court or of a judge, shall be deemed motions and applications grantable of course by the clerk; but the same may be suspended, or altered, or rescinded by the judge upon special cause shown.

RULE VI.—Motion day.—Each district court shall establish regular times and places, not less than once each month, when motions requiring notice and hearing may be made and disposed of; but the judge may at any time and place, and on such notice, if any, as he may consider reasonable, make and direct all interlocutory orders, rulings and proceedings for the advancement, conduct and hearing of causes. If the public interest permits, the senior circuit judge of the circuit may dispense with the motion day during not to exceed two months in the year in any district.

RULE VII.—Process, mesne and final.—The process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the bill; and, unless otherwise provided in these rules or specially ordered by the court, a writ of attachment and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

RULE VIII.—Enforcement of final decrees.—Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the district court in suits at common law in actions of *assumpsit*. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found a writ of sequestration shall issue against his estate, upon the return of *non est inventus*, to compel obedience to the decree. If a mandatory order, injunction or decree for the specific performance of any act or contract be not complied with, the court or a judge, besides, or instead of, proceedings against the disobedient party for a contempt or by sequestration, may by order direct that the act required to be done be done, so far as practicable, by some other person appointed by the court or judge, at the cost of the disobedient party, and the act, when so done, shall have like effect as if done by him.

RULE IX.—Writ of assistance.—When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

RULE X.—Decree for deficiency in foreclosures, etc.—In suits for the foreclosure of mortgages, or for the enforcement of other liens, a decree may be rendered for any balance that may be found due to the plaintiff over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in rule 8 when the decree is solely for the payment of money.

RULE XI.—Process in behalf of and against persons not parties.—Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, may enforce obedience to such order by the same process as if he were

a party; and every person, not being a party, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party.

RULE XII.—Issue of subpoena—Time for answer.—Whenever a bill is filed, and not before, the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall contain the names of the parties and be returnable into the clerk's office twenty days from the issuing thereof. At the bottom of the subpoena shall be placed a memorandum, that the defendant is required to file his answer or other defense in the clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken *pro confesso*. Where there are more than one defendant, a writ of subpoena, may, at the election of the plaintiff, be sued out separately for each defendant, or a joint subpoena against all the defendants.

RULE XIII.—Manner of serving subpoena.—The service of all subpoenas shall be by delivering a copy thereof to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member of or resident in the family.

RULE XIV.—Alias subpoena.—Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to other subpoenas against such defendant, until due service is made.

RULE XV.—Process, by whom served.—The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court or judge for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

RULE XVI.—Defendant to answer—Default—Decree pro confesso.—It shall be the duty of the defendant, unless the time shall be enlarged, for cause shown, by a judge of the court, to file his answer or other defense to the bill in the clerk's office within the time named in the subpoena as required by rule 12. In default thereof the plaintiff may, at his election, take an order as of course that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*.

RULE XVII.—Decree pro confesso to be followed by final decree—Setting aside default.—When the bill is taken *pro confesso* the court may proceed to a final decree at any time after the expiration of thirty days after the entry of the order *pro confesso*, and such decree shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit. No such motion shall be granted, unless upon the payment of the costs of the plaintiff up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

RULE XVIII.—Pleadings—Technical forms abrogated.—Unless otherwise prescribed by statute or these rules the technical forms of pleadings in equity are abolished.

RULE XIX.—Amendments generally.—The court may at any time, in furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleading or record to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading. The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

RULE XX.—Further and particular statement in pleading may be required.—A further and better statement of the nature of the claim or defense, or further and better particulars of any matter stated in any pleading, may in any case be ordered, upon such terms, as to costs and otherwise, as may be just.

RULE XXI.—Scandal and impertinence.—The right to except to bills, answers, and other proceedings for scandal or impertinence shall not obtain, but the court may, upon motion or its own initiative, order any redundant, impertinent or scandalous matter stricken out, upon such terms as the court shall think fit.

RULE XXII.—Action at law erroneously begun as suit in equity—Transfer.—If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential.

RULE XXIII.—Matters ordinarily determinable at law, when arising in suit in equity to be disposed of therein.—If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court.

Rule XXIV.—Signature of counsel.—Every bill or other pleading shall be signed individually by one or more solicitors of record, and such signatures shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay.

RULE XXV.—Bill of complaint—Contents.—Hereafter it shall be sufficient that a bill in equity shall contain, in addition to the usual caption:

First, the full name, when known, of each plaintiff and defendant, and the citizenship and residence of each party. If any party be under any disability that fact shall be stated.

Second, a short and plain statement of the grounds upon which the court's jurisdiction depends.

Third, a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence.

Fourth, if there are persons other than those named as defendants who appear to be proper parties, the bill should state why they are not made parties—as that they are not within the jurisdiction of the court, or cannot be made parties without ousting the jurisdiction.

Fifth, a statement of any prayer for any special relief pending the suit or on final hearing, which may be stated and sought in alternative forms. If special relief pending the suit be desired the bill should be verified by the oath of the plaintiff, or someone having knowledge of the facts upon which such relief is asked.

RULE XXVI.—Joinder of causes of action.—The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when there is more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient ground must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials.

RULE XXVII.—Stockholder's bill.—Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action, or the reasons for not making such effort.

RULE XXVIII.—Amendment of bill as of course.—The plaintiff may, as of course, amend his bill before the defendant has responded thereto, but if such amendment be filed after any copy has issued from the clerk's office, the plaintiff at his own cost shall furnish to the solicitor of record of each opposing party a copy of the bill as amended, unless otherwise ordered by the court or judge.

After pleading filed by any defendant, plaintiff may amend only by consent of the defendant or leave of the court or judge.

RULE XXIX.—Defenses—How presented.—Demurrers and pleas are abolished. Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer; and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing at the discretion of the court. Every defense to each claim asserted by the bill, omitting any mere statement of the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court. If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and if it be denied, answer shall be filed within five days thereafter or a decree *pro confesso* entered.

RULE XXX.—Answer—Contents—Counter-claim.—The defendant in his answer shall in short and simple terms set out his defense heretofore presentable by plea in bar or abatement shall be made in evidence and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial. Averments other than of value or amount of damage, if not denied, shall be deemed confessed, except as against an infant, lunatic or other person *non compos* and not under guardianship, but the answer may be amended, by leave of the court or judge, upon reasonable notice, so as to put any averment in issue, when justice requires it. The answer may state as many defenses, in the alternative, regardless of consistency, as the defendant deems essential to his defense.

The answer must state in short and simple form any counter-claim arising out of the transaction which is the subject matter of the suit, and may, without cross-bill, set out any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims.

RULE XXXI.—Reply—When required—When cause at issue.—Unless the answer assert a set-off or counter-claim, no reply shall be required without special order of the court or judge, but the cause shall be deemed at issue upon the filing of the answer, and any new or affirmative matter therein shall be deemed to be denied by the plaintiff. If the answer include a set-off or counter-claim, the party against whom it is asserted shall reply within ten days after the filing of the answer, unless a longer time be allowed by the court or judge. If the counter-claim is one which affects the rights of other defendants they or their solicitors shall be served with a copy of the same within ten days from the filing thereof, and ten days shall be accorded to such defendants for filing a reply. In default of a reply, a decree *pro confesso* on the counter-claim may be entered as in default of an answer to the bill.

RULE XXXII.—Answer to amended bill.—In every case where an amendment to the bill shall be made after answer filed, the defendant shall put in a new or supplemental answer within ten days after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in case of an omission to put in an answer.

RULE XXXIII.—Testing sufficiency of defense.—Exceptions for insufficiency of an answer are abolished. But if an answer set up an affirmative defense, set-off or counter-claim, the plaintiff may, upon five days' notice, or such further time as the court may allow, test the sufficiency of the same by motion to strike out. If found insufficient but amendable the court may allow an amendment upon terms, or strike out the matter.

RULE XXXIV.—Supplemental pleading.—Upon application of either party the court or judge, may upon reasonable notice and such terms as are just, permit him to file and serve a supplemental pleading, alleging material facts occurring after his former pleading, or of which he was ignorant when it was made, including the judgment or decree of a competent court rendered after the commencement of the suit determining the matters in controversy or a part thereof.

RULE XXXV.—Bills of revivor and supplemental bills—Forms.—It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

RULE XXXVI.—Officers before whom pleadings verified.—Every pleading which is required to be sworn to by statute, or these rules, may be verified before any justice or judge of any court of the United States, or of any State or Territory, or of the District of Columbia, or any clerk of any court of the United States, or of any Territory, or of the District of Columbia, or any notary public.

RULE XXXVII.—Parties generally—Intervention.—Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when any one refuses to join, he may for such reason be made a defendant.

Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding.

RULE XXXVIII.—Representatives of class.—When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.

RULE XXXIX.—Absence of persons who would be proper parties.—In all cases where it shall appear to the court that persons, who might otherwise be deemed proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

RULE XL.—Nominal parties.—Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him to do so by the prayer; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

RULE XLI.—Suit to execute trusts of will—Heir as party.—In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party where he desires to have the will established against him.

RULE XLII.—Joint and several demands.—In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the

persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

RULE XLIII.—Defect of parties—Resisting objection.—Where the defendant shall by his answer suggest that the bill of complaint is defective for want of parties, the plaintiff may, within fourteen days after answer filed, set down the cause for argument as a motion upon that objection only; and where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order to amend his bill by adding parties; but the court shall be at liberty to dismiss the bill, or to allow an amendment on such terms as justice may require.

RULE XLIV.—Defect of parties—Tardy objection.—If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by motion or answer taken the objection and therein specified by name or description the parties to whom the objection applies, the court shall be at liberty to make a decree saving the rights of the absent parties.

RULE XLV.—Death of party—Revivor.—In the event of the death of either party the court may, in a proper case, upon motion, order the suit to be revived by the substitution of the proper parties. If the successors or representatives of the deceased party fail to make such application within a reasonable time, then any other party may, on motion, apply for such relief, and the court, upon any such motion may make the necessary orders for notice to the parties to be substituted and for the filing of such pleadings or amendments as may be necessary.

RULE XLVI.—Trial—Testimony usually taken in open court—Rulings on objections to evidence.—In all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or these rules. The court shall pass upon the admissibility of all evidence offered as in actions at law. When evidence is offered and excluded, and the party against whom the ruling is made excepts thereto at the time, the court shall take and report so much thereof, or make such a statement respecting it, as will clearly show the character of the evidence, the form in which it was offered, the objection made, the ruling, and the exception. If the appellate court shall be of opinion that the evidence should have been admitted, it shall not reverse the decree unless it be clearly of opinion that material prejudice will result from an affirmance, in which event it shall direct such further steps as justice may require.

RULE XLVII.—Depositions—To be taken in exceptional instances.—The court, upon application of either party, when allowed by statute, or for good and exceptional cause for departing from the general rule, to be shown by affidavit, may permit the deposition of named witnesses, to be used before the court or upon a reference to a master, to be taken before an examiner or other named officer, upon the notice and terms specified in the order. All depositions taken under a statute, or under any such order of the court, shall be taken and filed as follows, unless otherwise ordered by the court or judge for good cause shown: Those of the plaintiff within sixty days from the time the cause is at issue; those of the defendant within thirty days from the expiration of the time for the filing of plaintiff's depositions; and rebutting depositions by either party within twenty days after the time for taking original depositions expires.

RULE XLVIII.—Testimony of expert witnesses in patent and trademark cases.—In a case involving the validity or scope of a patent or trade-mark, the district court may, upon petition, order that the testimony in chief of expert witnesses, whose testimony is directed to matters of opinion, be set forth in affidavits and filed as follows: Those of the plaintiff within forty days after the cause is at issue; those of the defendant within twenty days after plaintiff's time has expired; and rebutting affidavits within fifteen days after the expiration of the time for filing original affidavits. Should the opposite party desire the production of any affiant for cross-examination, the court or judge shall, on motion, direct that said cross-examination and any re-examination take place before the court upon the trial, and unless the affiant is produced and submits to cross-examination in compliance with such direction, his affidavit shall not be used as evidence in the cause.

RULE XLIX.—Evidence taken before examiners, etc.—All evidence offered before an examiner or like officer, together with any objections, shall be saved and returned into the court. Depositions, whether upon oral examination before an examiner or like officer or otherwise, shall be taken upon questions and answers reduced to writing, or in the form of narrative, and the witness shall be subject to cross and re-examination.

RULE L.—Stenographer—Appointment—Fees.—When deemed necessary by the court or officer taking testimony a stenographer may be appointed who shall take down testimony in shorthand and, if required, transcribe the same. His fee shall be fixed by the court and taxed ultimately as costs. The expense of taking a deposition, or the cost of a transcript, shall be advanced by the party calling the witness or ordering the transcript.

RULE LI.—Evidence taken before examiners, etc.—Objections to the evidence, before an examiner or like officer, shall be in short form, stating the grounds of objection relied upon, but no transcript filed by such officer shall include argument or debate. The testimony of each witness, after being reduced to writing, shall be read over to or by him, and shall be signed by him in the presence of the officer; provided, that if the witness shall refuse to sign his deposition so taken, the officer shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal. Objection to any question or questions shall be noted by the officer upon the deposition, but he shall not have power to decide on the competency or materiality or relevancy of the questions. The court shall have power, and it shall be its duty, to deal with the costs of incompetent and immaterial or irrelevant depositions, or parts of them, as may be just.

RULE LII.—Attendance of witnesses before commissioner, master or examiner.—Witnesses who live within the district, and whose testimony may be taken out of court by these rules, may be summoned to appear before a commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in, the court.

In case of refusal of witnesses to attend or be sworn or to answer any question put by the commissioner, master or examiner or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

RULE LIII.—Notice of taking testimony before examiner, etc.—Notice shall be given by the respective counsel or parties to the opposite counsel or parties of the time and place of examination before an examiner or like officer for such reasonable time as the court or officer may fix by order in each case.

RULE LIV.—Depositions under Rev. Stat. §§ 863, 865, 866, 867—Cross-examination.—After a cause is at issue, depositions may be taken as provided by sections 863, 865, 866 and 867, Revised Statutes. But if in any case no notice has been given the opposite party of the time and place of taking the deposition, he shall, upon application and notice, be entitled to have the witness examined orally before the court, or to a cross-examination before an examiner or like officer, or a new deposition taken with notice, as the court or judge under all the circumstances shall order.

RULE LV.—Deposition deemed published when filed.—Upon the filing of any deposition or affidavit taken under these rules or any statute, it shall be deemed published, unless otherwise ordered by the court.

RULE LVI.—On expiration of time for depositions, case goes on trial calendar.—After the time has elapsed for taking and filing depositions under these rules, the case shall be

placed on the trial calendar. Thereafter no further testimony by deposition shall be taken except for some strong reason shown by affidavit. In every such application the reason why the testimony of the witness cannot be had orally on the trial, and why his deposition has not been before taken, shall be set forth, together with the testimony which it is expected the witness will give.

RULE LVII.—Continuances.—After a cause shall be placed on the trial calendar it may be passed over to another day of the same term, by consent of counsel or order of the court, but shall not be continued beyond the term save in exceptional cases by order of the court upon good cause shown by affidavit and upon such terms as the court shall in its discretion impose. Continuances beyond the term by consent of the parties shall be allowed on condition only that a stipulation be signed by counsel for all the parties and that all costs incurred theretofore be paid. Thereupon an order shall be entered dropping the case from the trial calendar, subject to reinstatement within one year upon application to the court by either party, in which event it shall be heard at the earliest convenient day. If not so reinstated within the year, the suit shall be dismissed without prejudice to a new one.

RULE LVIII.—Discovery—Interrogatories—Inspection and production of documents—Admission of execution or genuineness.—The plaintiff at any time after filing the bill and not later than twenty-one days after the joinder of issue, and the defendant at any time after filing his answer and not later than twenty-one days after the joinder of issue, and either party at any time thereafter by leave of the court or judge, may file interrogatories in writing for the discovery by the opposite party or parties of facts and documents material to the support or defense of the cause, with a note at the foot thereof stating which of the interrogatories each of the parties is required to answer. But no party shall file more than one set of interrogatories to the same party without leave of the court or judge.

If any party to the cause is a public or private corporation, any opposite party may apply to the court or judge for an order allowing him to file interrogatories to be answered by any officer of the corporation, and an order may be made accordingly for the examination of such officer as may appear to be proper upon such interrogatories as the court or judge shall think fit.

Copies shall be filed for the use of the interrogated party and shall be sent by the clerk to the respective solicitors of record, or to the last known address of the opposite party if there be no record solicitor.

Interrogatories shall be answered, and the answers filed in the clerk's office, within fifteen days after they have been served, unless the time be enlarged by the court or judge. Each interrogatory shall be answered separately and fully and the answers shall be in writing, under oath, and signed by the party or corporate officer interrogated. Within ten days after the service of interrogatories, objections to them, or any of them, may be presented to the court or judge, with proof of notice of the purpose so to do; and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. In so far as the objections are sustained, answers shall not be required.

The court or judge, upon motion and reasonable notice, may make all such orders as may be appropriate to enforce answers to interrogatories or to effect the inspection or production of documents in the possession of either party and containing evidence material to the cause of action or defense of his adversary. Any party failing or refusing to comply with such an order shall be liable to attachment, and shall also be liable, if a plaintiff, to have his bill dismissed, and, if a defendant, to have his answer stricken out and be placed in the same situation as if he had failed to answer.

By a demand served ten days before the trial, either party may call on the other to admit in writing the execution or genuineness of any document, letter or other writing, saving all just exceptions; and if such admission be not made within five days after such service, the costs of proving the document, letter or writing shall be paid by the party refusing or neglecting to make such admission, unless at the trial the court shall find that the refusal or neglect was reasonable.

RULE LIX.—Reference to master—Exceptional, not usual.—Save in matters of account, a reference to a master shall be the exception, not the rule, and shall be made only upon a showing that some exceptional condition requires it. When such a reference is made, the

party at whose instance or for whose benefit it is made shall cause the order of reference to be presented to the master for a hearing within twenty days succeeding the time when the reference was made, unless a longer time be specially granted by the court or judge; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

RULE LX.—Proceedings before master.—Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reason for any delay.

RULE LXI.—Master's report—Documents identified but not set forth.—In the reports made by the master to the court, no part of any state of facts, account, charge, affidavit, deposition, examination, or answer brought in or used before him shall be stated or recited. But such state of facts, account, charge, affidavit, deposition, examination, or answer shall be identified, and referred to, so as to inform the court what state of facts, account, charge, affidavit, deposition, examination, or answer were so brought in or used.

RULE LXII.—Power of master.—The master shall regulate all the proceedings in every hearing before him, upon every reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, or by deposition, according to the acts of Congress, or otherwise, as here provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

RULE LXIII.—Form of accounts before master.—All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories, as the master shall direct.

RULE LXIV.—Former depositions, etc., may be used before master.—All affidavits, depositions and documents which have been previously made, read, or used in the court upon any proceeding in any cause or matter may be used before the master.

RULE LXV.—Claimants before master examinable by him.—The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court if necessary.

RULE LXVI.—Return of master's report—Exceptions—Hearing.—The master, as soon as his report is ready, shall return the same into the clerk's office and the day of the return shall be entered by the clerk in the Equity Docket. The parties shall have twenty days from the time of the filing of the report to file exceptions thereto, and if no exceptions are within that period filed by either party, the report shall stand confirmed. If exceptions are filed, they shall stand for hearing before the court, if then in session, or, if not, at the next sitting held thereafter, by adjournment or otherwise.

RULE LXVII.—Costs on exceptions to master's report.—In order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay five dollars costs to the other party, and for every exception allowed shall be entitled to the same costs.

RULE LXVIII.—Appointment and compensation of masters.—The district courts may appoint standing masters in chancery in their respective districts (a majority of all the judges thereof concurring in the appointment), and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master shall be fixed by the district court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

RULE LXIX.—Petition for rehearing.—Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Circuit Court of Appeals or the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

RULE LXX.—Suits by or against incompetents.—Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable of suing for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the court or judge may direct for the protection of infants and other persons.

RULE LXXI.—Form of decree.—In drawing up decrees and orders, neither the bill, nor answers, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, consideration thereof, it was ordered, adjudged and decreed as follows, viz.:" (Here insert the decree or order.)

RULE LXXII.—Correction of clerical mistakes in orders and decrees.—Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, at any time before the close of the term at which final decree is rendered, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

RULE LXXIII.—Preliminary injunctions and temporary restraining orders.—No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall clearly appear from specific facts, shown by affidavit or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency specified, the matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of the order, and shall take precedence of all matters, except older matters of the same character. When the matter comes up for hearing the party who obtained the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the court shall dissolve his temporary restraining order. Upon two days notice to the party obtaining such temporary restraining order, the opposite party may appear and move dissolution or modification of the order, and in that event the court or judge shall proceed to hear

and determine the motion as expeditiously as the ends of justice may require. Every temporary restraining order shall be forthwith filed in the clerk's office.

RULE LXXIV.—Injunction pending appeal.—When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or a judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending, modifying or restoring the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party.

RULE LXXV.—Record on appeal—Reduction and preparation.—In case of appeal:

(a) It shall be the duty of the appellant or his solicitor to file with the clerk of the court from which the appeal is prosecuted, together with proof or acknowledgment of service of a copy on the appellee or his solicitor, a *praeceipe* which shall indicate the portions of the record to be incorporated into the transcript on such appeal. Should the appellee or his solicitor desire additional portions of the record incorporated into the transcript, he shall file with the clerk of the court his *praeceipe* also within ten days thereafter, unless the time shall be enlarged by the court or a judge thereof, indicating such additional portions of the record desired by him.

(b) The evidence to be included in the record shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness. The duty of so condensing and stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the same at the clerk's office for the examination of the other parties at or before the time of filing his *praeceipe* under paragraph a of this rule. He shall also notify the other parties or their solicitors of such lodgment and shall name a time and place when he will ask the court or judge to approve the statement, the time so named to be at least ten days after such notice. At the expiration of the time named or such further time as the court or judge may allow, the statement, together with any objections made or amendments proposed by any party, shall be presented to the court or the judge, and if the statement be true, complete and properly prepared, it shall be approved by the court or judge, and if it be not true, complete or properly prepared, it shall be made so under the direction of the court or judge and shall then be approved. When approved, it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal.

(c) If any difference arises between the parties concerning directions as to the general contents of the record to be prepared on the appeal, such difference shall be submitted to the court or judge in conformity with the provisions of paragraph b of this rule and shall be covered by the directions which the court or judge may give on the subject.

RULE LXXVI. Record on appeal—Reduction and preparation—Costs—Correction of omissions.—In preparing the transcript on an appeal, especial care shall be taken to avoid the inclusion of more than one copy of the same paper and to exclude the formal and immaterial parts of all exhibits, documents and other papers included therein; and for any infraction of this or any kindred rule the appellate court may withhold or impose costs as the circumstances of the case and the discouragement of like infractions in the future may require. Costs for such an infraction may be imposed upon offending solicitors as well as parties.

If, in the transcript, anything material to either party be omitted by accident or error, the appellate court, on a proper suggestion or its own motion, may direct that the omission be corrected by a supplemental transcript.

RULE LXXVII.—Record on appeal—Agreed statement.—When the questions presented by an appeal can be determined by the appellate court without an examination of all the pleadings and evidence, the parties, with the approval of the district court or the judge thereof, may prepare and sign a statement of the case showing how the questions arose and were decided in the district court and setting forth so much only of the facts alleged and proved, or sought to be proved, as is essential to a decision of such questions by the appellate court. Such statement when filed in the office of the clerk of the district

court, shall be treated as superseding, for the purposes of the appeal, all parts of the record other than the decree from which the appeal is taken, and, together with such decree, shall be copied and certified to the appellate court as the record on appeal.

RULE LXXVIII.—Affirmation in lieu of oath.—Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

RULE LXXIX.—Additional rules by district court.—With the concurrence of a majority of the circuit judges for the circuit, the district courts may make any other and further rules and regulations for the practice, proceedings and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, and from time to time alter and amend the same.

RULE LXXX.—Computation of time—Sundays and holidays.—When the time prescribed by these rules for doing any act expires on a Sunday or legal holiday, such time shall extend to and include the next succeeding day that is not a Sunday or legal holiday.

RULE LXXXI.—These rules effective February 1, 1913—Old rules abrogated.—These rules shall be in force on and after February 1, 1913, and shall govern all proceedings in cases then pending or thereafter brought, save that where in any then pending cause an order has been made or act done which cannot be changed without doing substantial injustice, the court may give effect to such order or act to the extent necessary to avoid any such injustice.

All rules theretofore prescribed by the Supreme Court, regulating the practice in suits in equity, shall be abrogated when these rules take effect.

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APPENDIX B.

THE BANKRUPTCY ACTS OF 1898, 1867, 1841 AND 1800.

I. THE BANKRUPTCY ACT OF 1898.

WITH AMENDMENTS OF 1903, 1906, 1910, and 1917

(With Separate Index.)

AN ACT TO ESTABLISH A UNIFORM SYSTEM OF BANKRUPTCY THROUGHOUT
THE UNITED STATES.

APPROVED JULY 1, 1898; AMENDMENTS APPROVED FEB. 5, 1903, JUNE 15, 1906, JUNE
25, 1910, AND MARCH 2, 1917.

*Be it enacted by the Senate and House of Representatives of the United States of
America, in Congress assembled:*

CHAPTER I.

DEFINITIONS.

SECTION 1. **Meaning of Words and Phrases.**—*a* The words and phrases used in this act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: (1) "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition; (2) "adjudication" shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed; (3) "appellate courts" shall include the circuit courts of appeals of the United States, the supreme courts of the Territories, and the Supreme Court of the United States; (4) "bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt; (5) "clerk" shall mean the clerk of a court of bankruptcy; (6) "corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under the laws making the capital subscribed alone responsible for the debts of the association; (7) "court" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee; (8) "courts of bankruptcy" shall include the district courts of the United States and of the Territories, the supreme court of the District of Columbia, and the United States court of the Indian Territory, and of Alaska; (9) "creditor" shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; (10) "date of bankruptcy," or "time of bankruptcy," or "commencement of proceedings" or "bankruptcy," with reference to time, shall mean the date when the petition was filed; (11) "debt" shall include any debt, demand, or claim provable in bankruptcy; (12) "dis-

charge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except by this act; (13) "document" shall include any book, deed, or instrument in writing; (14) "holiday" shall include Christmas, the Fourth of July, the Twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving; (15) a person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts; (16) "judge" shall mean a judge of a court of bankruptcy, not including the referee; (17) "oath" shall include affirmation; (18) "officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized by law to perform the duties of such officer; (19) "persons" shall include corporations, except where otherwise specified; and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations; (20) "petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named; (21) "referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or anyone acting in his stead; (22) "conceal" shall include secrete, falsify, and mutilate; (23) "secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets; (24) "States" shall include the Territories, the Indian Territory, Alaska, and the District of Columbia; (25) "transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security; (26) "trustee" shall include all of the trustees of an estate; (27) "wage-earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year; (28) words importing the masculine gender may be applied to and include corporations, partnerships, and women; (29) words importing the plural number may be applied to and mean only a single person or thing; (30) words importing the singular number may be applied to and mean several persons or things.

CHAPTER II.

CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.

§ 2. That the courts of bankruptcy as hereinbefore defined, viz., the district courts of the United States in the several States, the supreme court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to (1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdiction; (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; (3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estate,

to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; (4) arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies of corporations for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States; (5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, *and allow such officers additional compensation for such services, as provided in section forty-eight of this act*; (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; (8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered; (9) confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases; (10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; (11) determine all claims of bankrupts to their exemptions; (12) discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases; (13) enforce obedience by bankrupts, officers and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment; (14) extradite bankrupts from their respective districts to other districts; (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act; (16) punish persons for contempts committed before referees; (17) pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them; (18) tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; (19) transfer cases to other courts of bankruptcy; and (20) exercise auxiliary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy.

Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated. (*Thus amended by Act of Feb'y 5, 1903, and June 25, 1910.*)

CHAPTER III.

BANKRUPTS.

§ 3. Acts of bankruptcy.—*a* Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors, *or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States*; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

b A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the

transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary take notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.

c It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt.

d Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section take issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him.

e Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt.

If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond. (*Thus amended by Act of Feb'y 5, 1903.*)

§ 4. Who May Become Bankrupts.—a Any person except a *municipal, railroad, insurance, or banking corporation*, shall be entitled to the benefits of this act as a voluntary bankrupt.

b Any natural person, except a *wage-earner*, or a person engaged chiefly in farming or the tillage of the soil, any incorporated company, and any *moneyed, business or commercial corporation, except a municipal, railroad, insurance, or banking corporation*, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States. (*Thus amended by Acts of Feb'y 5, 1903, and June 25, 1910.*)

§ 5. Partners.—a A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

b The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates.

c The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.

d The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

e The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.

f The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership

assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

g The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

h In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.

§ 6. Exemptions of Bankrupts.—*a* This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

§ 7. Duties of Bankrupts.—*a* The bankrupt shall (1) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; (2) comply with all lawful orders of the court; (3) examine the correctness of all proofs of claims filed against his estate; (4) execute and deliver such papers as shall be ordered by the court; (5) execute to his trustee transfers of all his property in foreign countries; (6) immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this act, coming to his knowledge; (7) in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee; (8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition of a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and (9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

PROVIDED, HOWEVER, That he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence.

§ 8. Death or Insanity of Bankrupts.—*a* The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and conclude in the same manner, so far as possible, as though he had not died or become insane: PROVIDED, That in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence.

§ 9. Protection and Detention of Bankrupts.—*a* A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a State court having jurisdiction, and served within such State, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this act.

b The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days; as required by the court, and for his obedience to all lawful orders made in reference thereto.

§ 10. **Extradition of Bankrupts.**—*a* Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another.

§ 11. **Suits by and against Bankrupts.**—*a* A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.

b The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.

c A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

d Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.

§ 12. **Compositions, when Confirmed.**—*a* A bankrupt may offer, either before or after adjudication, terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors, and has filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts, compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of estates, at which meeting the judge or referee shall preside; and action upon the petition for adjudication, shall be delayed until it shall be determined whether such composition shall be confirmed.

b An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.

c A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon such application for the confirmation of a composition, and such objections as may be made to its confirmation.

d The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden.

e Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided. (*Thus amended by Act of June 25, 1910.*)

§ 13. **Compositions, when Set Aside.**—*a* The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition.

§ 14. **Discharges, when Granted.**—*a* Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

b The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained money or property on credit upon a materially false statement in writing; made by him to any person or representative for the purpose of obtaining credit from such person; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court; Provided, that a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do at a meeting of creditors called for that purpose.

c The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge. (*Thus amended by Acts of Feb'y 5, 1903, and June 25, 1910.*)

§ 15. **Discharges, when Revoked.**—*a* The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.

§ 16. **Co-Debtors of Bankrupts.**—*a* The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.

§ 17. **Debts not Affected by a Discharge.**—*a* A discharge in bankruptcy shall release a bankrupt from all of his probable debts, except such as (1) are due as a tax levied by the United States, the State, county, district or municipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity. (*Thus amended by Act of Feb'y 5, 1903, and Act of March 2, 1917.*)

CHAPTER IV.

COURTS AND PROCEDURE THEREIN.

§ 18. Process, Pleadings, and Adjudications.—*a* Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, *except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time.*

b The bankrupt, or any creditor, may appear and plead to the petition within five days after the return day, or within such further time as the court now may allow.

c All pleadings setting up matters of fact shall be verified under oath.

d If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this act, and make the adjudication or dismiss the petition.

e If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.

f If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee.

g Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee. (*Thus amended by Act of Feb'y 5, 1903.*)

§ 19. Jury Trials.—*a* A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

b If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.

c The right to submit matters in controversy, or an alleged offense under this act, to a jury shall be determined and enjoyed, except as provided by this act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury.

§ 20. Oaths, Affirmations.—*a* Oaths required by this act, except upon hearings in court, may be administered by (1) referees; (2) officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country.

b Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.

§ 21. Evidence.—*a* A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and

his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act: *Provided, That the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt.*

b The right to take depositions in proceedings under this act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided.

c Notice of the taking of depositions shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim notice shall also be served upon the claimant, and when in opposition to a discharge notice shall also be served upon the bankrupt.

d Certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence.

e A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened.

f A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.

g A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart. *(Thus amended by Act of July 5, 1903.)*

§ 22. References of Cases after Adjudication.—a After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or (2) to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district.

b The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another.

§ 23. Jurisdiction of United States and State Courts.—The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, *except suits for the recovery of property under section sixty, subdivision b; section sixty-seven e; and section seventy, subdivision e.*

c The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act. *(Thus amended by Acts of Feb'y 5, 1903, and June 25, 1910.)*

§ 24. Jurisdiction of Appellate Courts.—a The Supreme Court of the United States,* the circuit courts of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.

* Appeals in bankruptcy cases from decisions of circuit courts of appeal restricted by Act of Jan. 28, 1915, as amended by Act of September 6, 1916. See p. 606, ante.

b The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved.

§ 25. Appeals and Writs of Error.—a That appeals, as in equity cases may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to-wit: (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

b From any final decision of a court of appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

2. Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States.

c Trustees shall not be required to give bond when they take appeals or sue out writs of error.

d Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

§ 26. Arbitration of Controversies.—a The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.

b Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator.

c The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in the court and shall have like force and effect as the verdict of a jury.

§ 27. Compromises.—a The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.

§ 28. Designation of Newspapers.—a Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published.

§ 29. Offenses.—a A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee.

b A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (4) received any material amount

of property from a bankrupt after the filing of the petition, with intent to defeat this act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

c A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly (1) acted as a referee in a case in which he is directly or indirectly interested; or (2) purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or (3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do.

d A person shall not be prosecuted for any offense arising under this act unless the indictment is found or the information is filed in court within one year after the commission of the offense.

§ 30. Rules, Forms, and Orders.—*a* All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.

§ 31. Computation of Time.—*a* Whenever time is enumerated by days in this act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.

§ 32. Transfer of Cases.—*a* In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest.

CHAPTER V.

OFFICERS, THEIR DUTIES AND COMPENSATION.

§ 33. Creation of Two Officers.—*a* The offices of referee and trustee are hereby created.

§ 34. Appointment, Removal, and Districts of Referees.—*a* Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction, (1) appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and (2) designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district.

§ 35. Qualifications of Referees.—*a* Individuals shall not be eligible to appointment as referees unless they are respectively (1) competent to perform the duties of that office; (2) not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public; (3) not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and (4) residents of, or have their offices in, the territorial districts for which they are to be appointed.

§ 36. Oaths of Office of Referees.—*a* Referees shall take the same oath of office as that prescribed for judges of United States courts.

§ 37. Number of Referees.—*a* Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy.

§ 38. **Jurisdiction of Referees.**—*a* Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to (1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions; (2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment; (3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act; (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for composition or discharges, as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and (5) upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.

§ 39. **Duties of Referees.**—*a* Referees shall (1) declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable; (2) examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended; (3) furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest; (4) give notices to creditors as herein provided; (5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges; (6) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so; (7) safely keep, perfect, and transmit to the clerks the records, herein required to be kept by them, when the cases are concluded; (8) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail; (9) upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and (10) whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

b Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practice as attorneys and counselors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly, any property of an estate in bankruptcy.

§ 40. **Compensation of Referees.**—*a* Referees shall receive as full compensation for their services, payable after they are rendered, a fee of *fifteen* dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and *twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration*, and from estates which have been administered before them one per centum commissions on *all moneys disbursed to creditors by the trustee*, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.

b Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees.

c In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee. (*Thus amended by Act of February 5, 1903.*)

§ 41. **Contempts before Referees.**—*a* A person shall not, in proceedings before a referee (1) disobey or resist any lawful order, process or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been

subpoenaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law: Provided, That no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.

b The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court.

§ 42. **Records of Referees.**—a The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States.

b A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case.

c The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court.

§ 43. **Referee's Absence or Disability.**—a Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy.

§ 44. **Appointment of Trustees.**—a The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so.

§ 45. **Qualifications of Trustees.**—a Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed.

§ 46. **Death or Removal of Trustees.**—a The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.

§ 47. **Duties of Trustee.**—a Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them upon property of such estate; (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied; (3) deposit all money received by them in one of the designated depositories; (4) disburse money only by check or draft on the depositories in which it has been deposited; (5) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; (6) keep regular accounts showing all amounts

received and from what sources and all amounts expended and on what accounts; (7) lay before the final meeting of the creditors detailed statements of the administration of the estates; (8) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; (9) pay dividends within ten days after they are declared by the referees; (10) report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and (11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.

b Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

c *The trustee shall, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pays the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings.* (Thus amended by Acts of February 5, 1903, and June 25, 1910.)

§ 48. Compensation of Trustees, Receivers and Marshals.—a Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, have, and such commissions on all moneys disbursed or turned over to any person, including lien holders, by them, as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such compensation.

b In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

c The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.

d Receivers or marshals appointed pursuant to section two, subdivision three, of this act shall receive for their services, payable after they are rendered, compensation by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees, as the court may allow, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: Provided, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such compositions: Provided further, That when the receiver or marshal acts as a mere custodian and does not carry on the business of the bankrupt as provided in clause five of section two of this act, he shall not receive nor be allowed in any form or guise more than two per centum on the first thousand dollars or less, and one-half of one per centum on all above one thousand dollars on moneys disbursed by him or turned over by him to the trustee and on moneys subsequently realized from property turned over by him in kind to the trustee: Provided further, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this act.

e Where the business is conducted by trustees, marshals, or receivers, as provided in clause five of section two of this act, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned

over to any person, including lien holders, by them, and, in cases of receivers or marshals, also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees; such commissions not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: Provided, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such composition: Provided further, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this act. (Thus amended by Acts of June 15, 1903, and June 25, 1910.)

§ 49. **Accounts and Papers of Trustees.**—*a* The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest.

§ 50. **Bonds of Referees and Trustees.**—*a* Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties.

b Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties.

c The creditors of a bankrupt estate, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so.

d The court shall require evidence as to the actual value of the property of sureties.

e There shall be at least two sureties upon each bond.

f The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond.

g Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected.

h Bonds of referees, trustees, and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.

i Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this act, of whose estates they are respectively trustees.

j Joint trustees may give joint or several bonds.

k If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office.

l Suits upon referees' bonds shall not be brought subsequent to two years after the alleged breach of the bond.

m Suits upon trustees' bonds shall not be brought subsequent to two years after the estate has been closed.

§ 51. **Duties of Clerks.**—*a* Clerks shall respectively (1) account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers; (2) collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and cannot obtain, the money with

which to pay such fees; (3) deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used; (4) and within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition.

§ 52. **Compensation of Clerks and Marshals.**—*a* Clerks shall respectively receive as full compensation for their services to each estate, a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.

b Marshals shall respectively receive from the state where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their service in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals.

§ 53. **Duties of Attorney-General.**—*a* The Attorney-General shall annually lay before Congress statistical tables showing for the whole country, and by States, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important.

§ 54. **Statistics of Bankruptcy Proceedings.**—*a* Officers shall furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the Attorney-General, for statistical purposes, within ten days after being requested by him to do so.

CHAPTER VI.

CREDITORS.

§ 55. **Meetings of Creditors.**—*a* The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held.

b At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor.

c The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this act.

d A meeting of creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place.

e The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request.

f Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered.

§ 56. Voters at Meetings of Creditors.—*a* Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided.

b Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess.

§ 57. Proof and Allowance of Claims.—*a* Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.

b Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.

c Claims after being proved may, for the purpose of allowance, be filed by the claimant in the court where the proceedings are pending, or before the referee if the case has been referred.

d Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.

e Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.

f Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit.

g The claims of creditors who have received preferences, *voidable under section sixty, subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made or given*, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances.

h The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.

i Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.

j Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.

k Claims which have been allowed may be reconsidered for cause and reallocated or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.

l Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole or the proportional part thereof if rejected only in part.

m The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors.

n Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: PROVIDED, That the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer: (*Thus amended by Act of February 5, 1903.*)

§ 58. Notice to Creditors.—*a* Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy, (3) the proposed dismissal of the proceedings, and (9) *there shall be thirty days notice of all applications for the discharge of bankrupts.* (*Thus amended by the Act of June 25, 1910.*)

b Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct.

c All notices shall be given by the referee, unless otherwise ordered by the judge.

§ 59. Who may file and dismiss petitions.—*a* Any qualified person may file a petition to be adjudged a voluntary bankrupt.

b Three or more creditors who have provable claims against any person which amount in the aggregate in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.

c Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.

d If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

e In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of filing the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.

f Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.

g A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors, and to that end the court shall, before entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, and shall cause notice to be sent to all such creditors of the pendency of such application, and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest opportunity to be heard. (*Thus amended by Act of June 25, 1910.*)

§ 60. Preferred Creditors.—*a* A person shall be deemed to have given a preference if, being insolvent, he has, *within four months before the filing of the petition, or after the filing of the petition and before the adjudication*, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. *Where the reference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.*

b If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or if the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment and transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

c If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

d If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate. *(Thus amended by Act of February 5, 1903, and June 25, 1910.)*

CHAPTER VII.

ESTATES.

§ 61. Depositories for money.—*a* Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.

§ 62. Expenses of Administering Estates.—*a* The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid and allowed out of the estates in which they were incurred.

§ 63. Debts which may be Proved.—*a* Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of

action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

b Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

§ 64. Debts which have Priority.—a The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

b The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases, and, *where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery*; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks, *traveling or city salesmen*,* or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

c In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication. (*Thus amended by Act of February 5, 1903, and June 15, 1906.*)

§ 65. Declaration and Payment of Dividends.—a Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.

b The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order: *Provided, That the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed: And provided further, That the final dividend shall not be declared within three months after the first dividend shall be declared.*

c The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends.

* Amended by Act of 1906, approved June 15.

d Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such court shall be paid any amounts.

e A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this act. (*Thus amended by Act of February 5, 1903.*)

§ 66. Unclaimed Dividends.—*a* Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court.

b Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: PROVIDED, That in case unclaimed dividends belong to minors such minors may have one year after arriving at majority to claim such dividends.

§ 67. Liens.—*a* Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

b Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.

c A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened.

d Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall to the extent of such present consideration only, not be affected by this act.

e That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court*

which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

f That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: PROVIDED, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry. *(Thus amended by Act of February 5, 1903, and June 15, 1910.)*

§ 68. Set-offs and Counterclaims.—*a* In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

b A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.

§ 69. Possession of Property.—*a* A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition.

§ 70. Title to Property.—*a* The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interest in patents, patent rights, copyrights, and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: PROVIDED, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.

b All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the

court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value.

c The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee.

d Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge.

e The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*

f Upon a confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revert in him. (*Amended by Act of February 5, 1903.*)

§ 71. *That the clerks of the several district courts of the United States shall prepare and keep in their respective offices complete and convenient indexes of all petitions and discharges in bankruptcy heretofore or hereafter filed in the said courts, and shall, when requested so to do, issue certificates of search certifying as to whether or not any such petitions or discharges have been filed; and said clerks shall be entitled to receive for such certificates the same fees as now allowed by law for certificates as to judgments in said courts: Provided, That said bankruptcy indexes and dockets, shall at all times be open to inspection and examination by all persons or corporations without any fee or charge therefor. (Added by Act of February 5, 1903.)*

§ 72. *That neither the referee, receiver, marshal, nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this act. (Added by Act of February 5, 1903, and amended by Act of June 25, 1910.)*

THE TIME WHEN THIS ACT SHALL GO INTO EFFECT.

The original act of 1898 provided as follows:

a This act shall go into full force and effect upon its passage: PROVIDED, HOWEVER, That no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof.

b Proceedings commenced under State insolvency laws before the passage of this act shall not be affected by it.

The amendatory act of 1903 provides as follows:

§ 19. *That the provisions of this amendatory act shall not apply to bankruptcy cases pending when this act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of the said act of July first, eighteen hundred and ninety-eight.*

The amendatory act of 1910 provides as follows:

§ 14. *That the provisions of this amendatory Act shall not apply to bankruptcy cases pending when this Act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of said Act approved July first, eighteen hundred and ninety-eight, as amended by said Act approved February fifth; nineteen hundred and three, and as further amended by said Act approved June fifteenth, nineteen hundred and six.*

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II. THE BANKRUPTCY ACT OF 1867.

(With Amendments.)

COURTS OF BANKRUPTCY.

§ 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That* the several District Courts of the United States be, and they hereby are, constituted courts of bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and they are hereby authorized to hear and adjudicate upon the same according to the provisions of this Act.

The said courts shall be always open for the transaction of business under this Act, and the powers and jurisdiction hereby granted and conferred shall be exercised as well in vacation as in term time; and a judge sitting in chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court.

And the jurisdiction hereby conferred shall extend—

To all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy;

To the collection of all the assets of the bankrupt;

To the ascertainment and liquidation of the liens and other specific claims thereon;

To the adjustment of the various priorities and conflicting interests of all parties;

And to the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors;

And to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy.

(*Provided, That the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt, as contra-distinguished from equitable demands, shall, when such debt does not exceed five hundred dollars, be collected in the courts of the state where such bankrupt resides, having jurisdiction of claims of such nature and amount.*)*

The said courts shall have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the Circuit Courts now have in any suit pending therein in equity.

Said courts may sit for the transaction of business in bankruptcy at any place in the district, of which place, and the time of holding court, they shall have given notice, as well as at the places designated by law for holding such courts.

§ 2. *And be it further enacted, That* the several Circuit Courts of the United States within and for the districts where the proceedings in bankruptcy shall be pending shall have a general superintendence and jurisdiction of all cases and questions arising under this Act; and, except when special provision is otherwise made, may, upon bill, petition, or other proper process of any party aggrieved, hear and determine the case as a court of equity.

The powers and jurisdiction hereby granted may be exercised either by said court, or by any justice thereof, in term time or vacation.

† Said Circuit Courts shall also have *concurrent jurisdiction* with the District Courts of the same district, of all suits at law, or in equity, which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to, or vested in such assignee;

* So amended by act of 22 June, 1874, ch. 390, § 2, 18 Stat. 178.

† As amended by act of June 22, 1874, this paragraph appears in R. S., § 4979.

(R. S., § 4979.—The several Circuit Courts shall have, within each district, concurrent jurisdiction with the district court of any district, whether the powers and jurisdiction of a Circuit Court have been conferred on such district court or not, of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest or owing any debt to such bankrupt, or by any such person against an assignee, touching any property or rights of the bankrupt, transferable to or vested in such assignee.)

But no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued, for or against such assignee: *Provided*, That nothing herein contained shall revive a right of action barred at the time such assignee is appointed.

OF THE ADMINISTRATION OF THE LAW IN COURTS OF BANKRUPTCY.

§ 3. *And be it further enacted*, That it shall be the duty of the judges of the *District* Courts of the United States within and for the several districts to appoint in each Congressional District in said districts, upon the nomination and recommendation of the Chief Justice of the Supreme Court of the United States, one or more registers in bankruptcy, to assist the judge of the District Court in the performance of his duties under this Act.

No person shall be eligible to such appointment unless he be a counsellor of said court, or of some one of the courts of record of the State in which he resides.

Before entering upon the duties of his office, every person so appointed a register in bankruptcy shall give a bond to the United States, with condition that he will faithfully discharge the duties of his office, in a sum not less than one thousand dollars, to be fixed by said court, with sureties satisfactory to said court, or to either of the said justices thereof.

And he shall, in open court, take and subscribe the oath prescribed in the act entitled "An Act to prescribe an oath of office, and for other purposes," approved July second, eighteen hundred and sixty-two, and also, that he will not during his continuance in office be, directly or indirectly, interested in, or benefited by the fees or emoluments arising from any suit or matter pending in bankruptcy in either the District or Circuit Court in his district.

§ 4. *And be it further enacted*, That every register in bankruptcy, so appointed and qualified, shall have power, and it shall be his duty—

To make adjudication of bankruptcy;

To receive the surrender of any bankrupt;

To administer oaths in all proceedings before him;

To hold and preside at meetings of creditors;

To take proof of debts;

To make all computations of dividends, and all orders of distribution, and to furnish the assignee with a certified copy of such orders, and of the schedules of creditors and assets filed in each case;

To audit and pass accounts of assignees;

To grant protection;

To pass the last examination of any bankrupt in cases whenever the assignee or a creditor does not oppose;

And to sit in chambers and dispatch there such part of the administrative business of the court and such uncontested matters as shall be defined in general rules and orders, or as the district judge shall in any particular matter direct;

And he shall also make short memoranda of his proceedings in each case in which he shall act, in a docket to be kept by him for that purpose, and he shall forthwith, as the proceedings are taken, forward to the clerk of the District Court a certified copy of said memoranda, which shall be entered by said clerk in the proper minute book, to be kept in his office;

And any register of the court may act for any other register thereof.

Provided, however, That nothing in this section contained shall empower a register to commit for contempt, or to hear a disputed adjudication, or any question of the allowance or suspension of an order of discharge;

But in all matters where an issue of fact or of law is raised and contested by any party to the proceedings before him, it shall be his duty to cause the question or issue to be stated by the opposing parties in writing, and he shall adjourn the same into court for decision by the judge.

* No register shall be of counsel or attorney, either in or out of court, in any suit or matter pending in bankruptcy, in either the Circuit or District Court of his district, nor in an appeal therefrom, nor shall he be executor, administrator, guardian, commissioner, appraiser, divider, or assignee of or upon any estate within the jurisdiction of either of said courts of bankruptcy, nor be interested in the fees or emoluments arising from either of said trusts.

(R. S., Sec. 4996.* No register or clerk of court, or any partner or clerk of such register or clerk of court, or any person having any interest with either in any fees or emoluments in bankruptcy, or with whom such register or clerk of court shall have any interest in respect to any matter in bankruptcy, shall be of counsel, solicitor, or attorney, either in or out of court, in any suit or matter pending in bankruptcy in either the circuit or district court of his district, or in an appeal therefrom. Nor shall they, or either of them, be executor, administrator, guardian, commissioner, appraiser, divider, or assignee of or upon any estate within the jurisdiction of either of said courts of bankruptcy; nor be interested, directly or indirectly, in the fees or emoluments arising from either of said trusts.)

The fees of said registers, as established by this Act, and by the general rules and orders required to be framed under it, shall be paid to them by the parties for whom the services may be rendered in the course of proceedings authorized by this Act.

§ 5. *And be it further enacted*, That the judge of the District Court may direct a register to attend at any place within the district, for the purpose of hearing such voluntary applications under this Act as may not be opposed; of attending any meeting of creditors, or receiving any proof of debts, and, generally, for the prosecution of any bankruptcy or other proceedings under this Act; and the travelling and incidental expenses of such register, and of any clerk or other officer attending him, incurred in so acting, shall be settled by said court in accordance with the rules prescribed under the tenth section of this Act, and paid out of the assets of the estate in respect of which such register has so acted; or, if there be no such assets, or if the assets shall be insufficient, then such expenses shall form a part of the costs in the case or cases in which the register shall have acted in such journey, to be apportioned by the judge; and such register, so acting, shall have and exercise all powers, except the power of commitment, vested in the District Court for the summoning and examination of persons or witnesses, and for requiring the production of books, papers, and documents:

Provided always, That all depositions of persons and witnesses taken before said register, and all acts done by him, shall be reduced to writing, and be signed by him, and shall be filed in the clerk's office as part of the proceedings.

Such register shall be subject to removal by the judge of the District Court;

And all vacancies occurring by such removal, or by resignation, change of residence, death, or disability, shall be promptly filled by other fit persons, unless said court shall deem the continuance of the particular office unnecessary.

§ 6. *And be it further enacted*, That any party shall, during the proceedings before a register, be at liberty to take the opinion of the district judge upon any point or matter arising in the course of such proceedings, or upon the result of such proceedings, which shall be stated by the register in the shape of a short certificate to the judge, who shall sign the same if he approve thereof; and such certificate, so signed, shall be binding on all the parties to the proceeding; but every such certificate may be discharged or varied by the judge at chambers or in open court.

In any bankruptcy, or in any other proceedings within the jurisdiction of the court under this Act, the parties concerned, or submitting to such jurisdiction, may, at any stage of the proceedings, by consent, state any question or questions in a special case for the opinion of the court; and the judgment of the court shall be final, unless it be agreed and stated in such special case that either party may appeal, if, in such case, an appeal is allowed by this Act.

The parties may also, if they think fit, agree, that upon the question or questions raised by such special case being finally decided, a sum of money, fixed by the parties, or to be

* So amended by act of 22 June, 1874, ch. 390, sec. 18, 18 Stat. 184.

ascertained by the court, or in such manner as the court may direct, or any property, or the amount of any disputed debt or claim, shall be paid, delivered, or transferred by one of such parties to the other of them, either with or without costs.

§ 7. *And be it further enacted*, That parties and witnesses summoned before a register shall be bound to attend, in pursuance of such summons, at the place and time designated therein, and shall be entitled to protection, and be liable to process of contempt in like manner as parties and witnesses are now liable thereto in case of default in attendance under any writ of subpoena;

And all persons wilfully and corruptly swearing or affirming falsely before a register shall be liable to all the penalties, punishments, and consequences of perjury.

If any person examined before a register shall refuse or decline to answer, or to swear to or sign his examination when taken, the register shall refer the matter to the judge, who shall have power to order the person so acting to pay the costs thereby occasioned, if such person be compellable by law to answer such question or to sign such examination; and such person shall also be liable to be punished for contempt.

§ 8. *And be it further enacted*, That appeals may be taken from the District to the Circuit Courts in all cases in equity, and writs of error may be allowed to said Circuit Courts from said District Courts in cases at law under the jurisdiction created by this act when the debt or damages claimed amount to more than five hundred dollars; and any supposed creditor, whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim, may appeal from the decision of the District Court to the Circuit Court for the same district; but no appeal shall be allowed in any case from the District to the Circuit Court unless it is claimed, and notice given thereof to the clerk of the District Court, to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from.

The appeal shall be entered at the term of the Circuit Court which shall be first held within and for the district next after the expiration of ten days from the time of claiming the same.

But if the appellant in writing waives his appeal before any decision thereon, proceedings may be had in the District Court as if no appeal had been taken.

And no appeal shall be allowed unless the appellant, at the time of claiming the same, shall give bond in manner now required by law in cases of such appeals.

No writ of error shall be allowed unless the party claiming it shall comply with the statutes regulating the granting of such writs.

§ 9. *And be it further enacted*, That in cases arising under this Act, no appeal or writ of error shall be allowed in any case from the Circuit Courts to the Supreme Court of the United States, unless the matter in dispute in such case shall exceed* (two thousand dollars).

§ 10. *And be it further enacted*, That the Justices of the Supreme Court of the United States, subject to the provisions of this Act, shall frame general orders for the following purposes:

For regulating the practice and procedure of the District Courts in bankruptcy, and the several forms of petitions, orders, and other proceedings to be used in said courts in all matters under this Act;

For regulating the duties of the various officers of said courts;

(† For regulating the fees payable, and the charges and costs to be allowed, except such as are established by this Act or by law, with respect to all proceedings in bankruptcy before said courts, not exceeding the rate of fees now allowed by law for similar services in other proceedings.)

For regulating the fees payable and the charges and costs to be allowed, with respect* to all proceedings in bankruptcy before such courts, not exceeding the rate of fees now allowed by law for similar services in other proceedings.

For regulating the practice and procedure upon appeals;

For regulating the filing, custody, and inspection of records;

And generally for carrying the provisions of this Act into effect.

* Amended by act of Feb. 6th, 1875, ch. 77, sec. 3, to \$5,000.00.

† Amended by act of 22 June, 1874, ch. 390, sec. 18, 18 Stat. 184, to read as in the following paragraph.

(* And said justices shall have power under said sections, by general regulations, to simplify, and so far as in their judgment will conduce to the benefit of creditors, to consolidate the duties of the register, assignee, marshal, and clerk, and to reduce fees, costs, and charges, to the end that prolixity, delay, and unnecessary expense may be avoided.)

After such general orders shall have been so framed, they, or any of them, may be rescinded or varied, and other general orders may be framed in manner aforesaid;

And all such general orders so framed shall, from time to time, by the Justices of the Supreme Court, be reported to Congress, with such suggestions as said Justices may think proper.

VOLUNTARY BANKRUPTCY — COMMENCEMENT OF PROCEEDINGS.

§ 11. *And be it further enacted*, That if any person residing within the jurisdiction of the United States, owing debts provable under this Act exceeding the amount of three hundred dollars, shall apply by petition, addressed to the judge of the judicial district in which such debtor has resided or carried on business for the six months next immediately preceding the time of filing such petition, or for the longest period during such six months, setting forth his place of residence, his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors, and his desire to obtain the benefit of this Act;

And shall annex to his petition a schedule (words "and inventory and valuation" added by act of June 22, 1874), verified by oath before the court, or before a register in bankruptcy, or before one of the commissioners of the Circuit Court of the United States, containing a full and true statement of all his debts, and, as far as possible, to whom due, with the place of residence of each creditor, if known to the debtor, and, if not known, the fact to be so stated, and the sum due to each creditor; also the nature of each debt or demand, whether founded on written security, obligation, contract, or otherwise, and also the true cause and consideration of such indebtedness in each case, and the place where such indebtedness accrued, and a statement of any existing mortgage, pledge, lien, judgment, or collateral or other security given for the payment of the same;

And shall also annex to his petition an accurate inventory,† verified in like manner, of all his estate, both real and personal, assignable under this Act, describing the same, and stating where it is situated, and whether there are any, and, if so, what encumbrances thereon;

The filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt;

Provided, That all citizens of the United States petitioning to be declared bankrupt shall, in filing such petition, and before any proceedings thereon, take and subscribe an oath of allegiance and fidelity to the United States, which oath shall be filed and recorded with the proceedings in bankruptcy.

And the judge of the District Courts, or, if there be no opposing party, any register of said court, to be designated by the judge, shall forthwith, if he be satisfied that the debts due from the petitioner exceed three hundred dollars, issue a warrant, to be signed by such judge or register, directed to the marshal of said district, authorizing him forthwith, as messenger, to publish notices in such newspapers as the warrant specifies; to serve written or printed notice, by mail or personally, on all creditors upon the schedule filed with the debtor's petition, or whose names may be given to him in addition by the debtor, and to give such personal or other notice to any persons concerned as the warrant specifies, which notice shall state:

First. That a warrant in bankruptcy has been issued against the estate of the debtor.

Second. That the payment of any debts and the delivery of any property belonging to such debtor to him or for his use, and the transfer of any property by him, are forbidden by law.

Third. That a meeting of the creditors of the debtor, giving the names, residences, and amounts, so far as known, to prove their debts and choose one or more assignees of his estate, will be held at a court of bankruptcy, to be holden at a time and place designated in the warrant, not less than ten nor more than ninety days after the issuing of the same.

(‡ But whenever the creditors of the bankrupt are so numerous as to make any notice now required by law to them, by mail or otherwise, a great and disproportionate expense

* So added by act of 22 June, 1874, ch. 390, sec. 18, 18 Stat. 184.

† "And valuation," so amended Act of June 22, 1874.

‡ So amended by act of 22 June, 1874, ch. 390, sec. 5, 18 Stat. 179.

to the estate, the court may, in lieu thereof, in its discretion, order such notice to be given by publication in a newspaper, or newspapers, to all such creditors, whose claims, as reported, do not exceed the sums, respectively, of fifty dollars.)

OF ASSIGNMENTS AND ASSIGNEES.

§ 12. *And be it further enacted*, That at the meeting held in pursuance of the notice, one of the registers of the court shall preside, and the messenger shall make return of the warrant and of his doings thereon; and if it appears that the notice to the creditors has not been given as required in the warrant, the meeting shall forthwith be adjourned, and a new notice given as required.

If the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived.

§ 13. *And be it further enacted*, That the creditors shall, at the first meeting held after due notice from the messenger, in presence of a register designated by the court, choose one or more assignees of the estate of the debtor; the choice to be made by the greater part in value and in number of the creditors who have proved their debts.

If no choice is made by the creditors at said meeting, the judge, or, if there be no opposing interest, the register, shall appoint one or more assignees.

If an assignee, so chosen or appointed, fails within five days to express in writing his acceptance of the trust, the judge or register may fill the vacancy.

All elections or appointments of assignees shall be subject to the approval of the judge; and when in his judgment it is for any cause needful or expedient, he may appoint additional assignees, or order a new election.

The judge at any time may, and upon the request in writing of any creditor who has proved his claim shall require the assignee to give good and sufficient bond to the United States, with a condition for the faithful performance and discharge of his duties;

The bond shall be approved by the judge or register by his endorsement thereon, shall be filed with the record of the case, and inure to the benefit of all creditors proving their claims, and may be prosecuted in the name and for the benefit of any injured party.

If the assignee fails to give the bond within such time as the judge orders, not exceeding ten days after notice to him of such order, the judge shall remove him and appoint another in his place.

§ 14. *And be it further enacted*, That as soon as said assignee is appointed and qualified, the judge, or, where there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto; and such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, although the same is then attached on *mesne* process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings:

Provided, however, That there shall be excepted from the operation of the provisions of this section—

The necessary household and kitchen furniture, and such other articles and necessities of such bankrupt as the said assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars;

And also the wearing apparel of such bankrupt, and that of his wife and children;

And the uniform, arms, and equipments of any person who is or has been a soldier in the militia or in the service of the United States;

And such other property as now is, or hereafter shall be exempted from attachment, or seizure, or levy on execution by the laws of the United States;

And such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process, or order of any court, by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such State exemption laws in force in the year eighteen hundred and sixty-four:

Provided, That the foregoing exception shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignees;

And in no case shall the property hereby excepted pass to the assignees, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this Act;

And the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of the said court:

And provided further, That no mortgage of any vessel or of any other goods or chattels, made as security for any debt or debts, in good faith and for present considerations, and otherwise valid, and duly recorded, pursuant to any statute of the United States or of any State, shall be invalidated or affected hereby.

And all the property conveyed by the bankrupt in fraud of his creditors;

All rights in equity, choses in action, patents and patent rights and copyrights;

All debts due him, or any person for his use, and all liens and securities therefor;

And all his rights of action for property or estate, real or personal, and for any cause of action which the bankrupt had against any person arising from contract or from the unlawful taking or detention or of injury to the property of the bankrupt; and all his rights of redeeming such property or estate, with the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might or could have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee;

And he may sue for and recover the said estate, debts, and effects, and may prosecute and defend all suits at law or in equity, pending at the time of the adjudication of bankruptcy, in which such bankrupt is a party in his own name, in the same manner and with the like effect as they might have been presented or defended by such bankrupt.

And a copy, duly certified by the clerk of the court, under the seal thereof, of the assignment made by the judge or register, as the case may be, to him as assignee, shall be conclusive evidence of his title as such assignee to take, hold, sue for, and recover the property of the bankrupt, as hereinbefore mentioned; but no property held by the bankrupt in trust shall pass by such assignment.

No person shall be entitled to maintain an action against an assignee in bankruptcy for anything done by him as such assignee, without previously giving him twenty days' notice of such action, specifying the cause thereof, to the end that such assignee may have an opportunity of tendering amends, should he see fit to do so.

No person shall be entitled, as against the assignee, to withhold from him possession of any books of account of the bankrupt, or claim any lien thereon;

And no suit in which the assignee is a party shall be abated by his death or removal from office, but the same may be prosecuted and defended by his successors, or by the surviving or remaining assignee, as the case may be.

The assignee shall have authority, under the order and direction of the court, to redeem or discharge any mortgage or conditional contract, or pledge or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same subject to such mortgage, lien, or other encumbrances.

The debtor shall also, at the request of the assignee, and at the expense of the estate, make and execute any instruments, deeds, and writings which may be proper, to enable the assignee to possess himself fully of all the assets of the bankrupt.

The assignee shall immediately give notice of his appointment by publication, at least once a week for three successive weeks, in such newspaper as shall, for that purpose, be designated by the court, due regard being had to their general circulation in the district or in that portion of the district in which the bankrupt and his creditors shall reside;

And shall, within six months, cause the assignment to him to be recorded in every registry of deeds or other office within the United States where a conveyance of any lands owned by the bankrupt ought by law to be recorded;

And the record of such assignment, or a duly certified copy thereof, shall be evidence thereof in all courts.

§ 15. *And be it further enacted*, That the assignee shall demand and receive from any and all persons holding the same, all the estate assigned, or intended to be assigned, under the provisions of this Act;

And he shall sell all such unencumbered estate, real and personal, which comes to his hands, on such terms as he thinks most for the interest of the creditors;

(R. S., sec. 5062a (22 June, 1874, ch. 390, sec. 1, 18 Stat. 178).) — That the court may, in its discretion, on sufficient cause shown, and upon notice and hearing, direct the re-

ceiver or assignee to take possession of the property, and carry on the business of the debtor, or any part thereof, under the direction of the court, when in its judgment, the interest of the estate as well as of the creditors will be promoted thereby, but not for a period exceeding nine months from the time the debtor shall have been declared a bankrupt. *Provided*, That such order shall not be made until the court shall be satisfied that it is approved by a majority in value of the creditors.)

But upon petition of any person interested, and for cause shown, the court may make such order concerning the time, place, and manner of sale, as will, in its opinion, prove to the interest of the creditors;

And the assignee shall keep a regular account of all money received by him as assignee, to which every creditor shall, at reasonable times, have free resort.

(R. S., sec. 5062b (22 June, 1874, ch. 390, sec. 4, 18 Stat. 178.) — That, unless otherwise ordered by the court, the assignee shall sell the property of the bankrupt, whether real or personal, at public auction, in such parts or parcels, and at such times and places, as shall be best calculated to produce the greatest amount with the least expense. All notices of public sales under this act by any assignee or officer of the court shall be published once a week for three consecutive weeks in the newspaper or newspapers to be designated by the judge, which, in his opinion, shall be best calculated to give general notice of the sale. And the court on application of any party in interest, shall have complete supervisory power over such sales, including the power to set aside the same and to order a resale, so that the property sold shall realize the largest sum. And the court may, in its discretion, order any real estate of the bankrupt, or any part thereof, to be sold for one-fourth cash at the time of sale, and the residue within eighteen months, in such installments as the court may direct, bearing interest at the rate of seven per centum per annum, and secured by proper mortgage or lien upon the property so sold. And it shall be the duty of every assignee to keep a regular account of all moneys received or expended by him as such assignee, to which account every creditor shall, at reasonable times, have free access. If any assignee shall fail or neglect to well and faithfully discharge his duties in the sale or disposition of property as above contemplated, it shall be the duty of the court to remove such assignee, and he shall forfeit all fees and emoluments to which he might be entitled in connection with such sale. And if any assignee shall in any manner, in violation of his duty aforesaid, unfairly or wrongfully sell, or dispose of, or in any manner, fraudulently or corruptly combine, conspire, or agree with any person or persons, with intent to unfairly or wrongfully sell, or dispose of the property committed to his charge, he shall, upon proof thereof, be removed, and forfeit all fees or other compensation for any and all services, in connection with such bankrupt's estate, and upon conviction thereof, before any court of competent jurisdiction, shall be liable to a fine of not more than ten thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both fine and imprisonment, at the discretion of the court. And any person so combining, conspiring, or agreeing with such assignee for the purpose aforesaid, shall, upon conviction, be liable to a like punishment. That the assignee shall report under oath, to the court, at least as often as once in three months, the condition of the estate in his charge and the state of his accounts in detail, and at all other times when the court, on motion or otherwise, shall so order. And on any settlement of the account of any assignee, he shall be required to account for all interest, benefit or advantage received, or in any manner agreed to be received, directly or indirectly, from the use, disposal or proceeds of the bankrupt's estate. And he shall be required, upon such settlement, to make and file in court an affidavit declaring, according to the truth, whether he has or has not, as the case may be, received, or is or is not, as the case may be, to receive, directly or indirectly, any interest, benefit, or advantage from the use or deposit of such funds; and such assignee may be examined orally upon the same subject, and if he shall wilfully swear falsely, either in such affidavit or examination, or to his report provided for in this section, he shall be deemed to be guilty of perjury, and on conviction thereof, be punished by imprisonment in the penitentiary not less than one and not more than five years.)

§ 16. *And be it further enacted*, That the assignee shall have the like remedy to recover all said estate, debts, and effects in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered, and no assignment had been made.

If, at the time of the commencement of the proceedings in bankruptcy an action is pending in the name of the debtor for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall, if he requires it,

be admitted to prosecute the action in his own name, in like manner and with like effect as if it had been originally commenced by him.

No suit pending in the name of the assignee shall be abated by his death or removal; but upon the motion of the surviving, or remaining, or new assignee, as the case may be, he shall be admitted to prosecute the suit, in like manner and with like effect as if it had been originally commenced by him.

In suits prosecuted by the assignee a certified copy of the assignment made to him by the judge or register shall be conclusive evidence of his authority to sue.

§ 17. *And be it further enacted*, That the assignee shall, as soon as may be after receiving any money belonging to the estate, deposit the same in some bank in his name as assignee, or otherwise keep it distinct, and apart from all other money in his possession; and shall, as far as practicable, keep all goods and effects belonging to the estate separate and apart from all other goods in his possession, or designated by appropriate marks, so that they may be easily and clearly distinguished, and may not be exposed or liable to be taken as his property or for the payment of his debts.

When it appears that the distribution of the estate may be delayed by litigation or other cause, the court may direct the temporary investment of the money belonging to such estate in securities to be approved by the judge or a register of said court, or may authorize the same to be deposited in any convenient bank, upon such interest, not exceeding the legal rate, as the bank may contract with the assignee to pay thereon.

He shall give written notice to all known creditors, by mail or otherwise, of all dividends, and such notice of meetings, after the first, as may be ordered by the court.

He shall be allowed, and may retain, out of money in his hands, all the necessary disbursements made by him in the discharge of his duty, and a reasonable compensation for his services, in the discretion of the court.

He may, under the direction of the court, submit any controversy arising in the settlement of demands against the estate, or of debts due to it, to the determination of arbitrators, to be chosen by him and the other party to the controversy, and may, under such direction, compound and settle any such controversy by agreement with the other party, as he thinks proper and most for the interest of the creditors.

§ 18. *And be it further enacted*, That the court, after due notice and hearing, may remove an assignee for any cause which, in the judgment of the court, renders such removal necessary or expedient.

At a meeting called by order of the court in its discretion for the purpose, or which shall be called upon the application of a majority of the creditors in number and value, the creditors may, with consent of the court, remove any assignee by such a vote as is hereinbefore provided for the choice of assignee.

An assignee may, with the consent of the judge, resign his trust, and be discharged therefrom.

Vacancies caused by death, or otherwise, in the office of assignee may be filled by appointment of the court, or, at its discretion, by an election by the creditors, in the manner hereinbefore provided, at a regular meeting, or at a meeting called for the purpose, with such notice thereof, in writing, to all known creditors, and by such person as the court shall direct.

The resignation or removal of an assignee shall in no way release him from performing all things requisite on his part for the proper closing up of his trust and the transmission thereof to his successors, nor shall it affect the liability of the principal or surety on the bond given by the assignee.

When, by death, or otherwise, the number of assignees is reduced, the estate of the debtor not lawfully disposed of shall vest in the remaining assignee or assignees, and the persons selected to fill vacancies, if any, with the same powers and duties relative thereto as if they were originally chosen.

Any former assignee, his executors or administrators, upon request, and at the expense of the estate, shall make and execute to the new assignee all deeds, conveyances, and assurances, and do all other lawful acts requisite to enable him to recover and receive all the estate.

And the court may make all orders which it may deem expedient to secure the proper fulfillment of the duties of any former assignee, and the rights and interests of all persons interested in the estate.

No person who has received any preference contrary to the provisions of this Act shall vote for or be eligible as assignee.

But no title to property, real or personal, sold, transferred, or conveyed by an assignee, shall be affected or impaired by reason of his ineligibility.

An assignee refusing or unreasonably neglecting to execute an instrument when lawfully required by the court, or disobeying a lawful order or decree of the court in the premises, may be punished as for a contempt of court.

OF DEBTS AND PROOF OF CLAIMS.

§ 19. *And be it further enacted*, That all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of contract, may be proved against the estate of the bankrupt.

All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted, or withheld by him, may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest.

If the bankrupt shall be bound as drawer, indorser, surety, bail, or guarantor upon any bill, bond, note, or any other specialty or contract, or for any debt of another person, and his liability shall not have become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability shall have become fixed, and before the final dividend shall have been declared.

In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained.

Any person liable as bail, surety, guarantor, or otherwise for the bankrupt, who shall have paid the debt or any part thereof in discharge of the whole, shall be entitled to prove such debt, or to stand in the place of the creditor if he shall have proved the same, although such payments shall have been made after the proceedings in bankruptcy were commenced.

And any person so liable for the bankrupt, and who has not paid the whole of said debt, but is still liable for the same or any part thereof, may, if the creditor shall fail or omit to prove such debt, prove the same, either in the name of the creditor or otherwise, as may be provided by the rules, and subject to such regulations and limitations as may be established by such rules.

Where the bankrupt is liable to pay rent, or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods.

If any bankrupt shall be liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted, or withheld, the Court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate.

No debts other than those above specified shall be proved or allowed against the estate.

§ 20. *And be it further enacted*, That in all cases of mutual debts or mutual credits between the parties the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate: *Provided*, That no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition.

(*Or in cases of compulsory bankruptcy, after the act of bankruptcy upon or in respect of which the adjudication shall be made, and with a view of making such set-off.)

When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct:

Or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt.

* So added by act of 22 June, 1874, ch. 390, sec. 6, 18 Stat. 179.

If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor for bankrupt's right of redemption therein on receiving such excess; or he may sell the property, subject to the claim of the creditor thereon; and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt.

§ 21. *And be it further enacted*, That no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt, and all proceedings already commenced, or unsatisfied judgments already obtained thereon, shall be deemed to be discharged and surrendered thereby.

(* But a creditor proving his debt or claim shall not be held to have waived his right of action or suit against the bankrupt where a discharge has been refused or the proceedings have been determined without a discharge.)

And no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined.

And any such suit or proceeding shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge: *Provided*, There be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge: *And provided, also*, That if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed as aforesaid.

If any bankrupt shall, at the time of adjudication, be liable upon any bill of exchange, promissory note, or other obligation in respect of distinct contracts as a member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as a sole trader, and also as a member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof and receipt of dividend in respect of such distinct contracts against the estates respectively liable upon such contracts.

§ 22. *And be it further enacted*, That all proofs of debts against the estate of the bankrupt, by or in behalf of creditors residing within the judicial district where the proceedings in bankruptcy are pending, shall be made before one of the registers of the court in said district, and by or in behalf of non-resident debtors before any register in bankruptcy in the judicial districts where such creditors, or either of them, reside, or before any commissioner of the Circuit Court authorized to administer oaths in any district.

(Sec. 5076 a (22 June 1874, ch. 390, sec. 20, 18 Stat. 186).—That in addition to the officers now authorized to take proof of debts against the estate of a bankrupt, notaries public are hereby authorized to take such proof, in the manner and under the regulations provided by law: such proof to be certified by the notary and attested by his signature and official seal.)

(Sec. 5076 b (Act of August 15, 1876, ch. 304, 19 Stat. 206).—*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That notaries public of the several States, Territories, and the District of Columbia be, and they are hereby, authorized to take depositions, and do all other acts in relation to taking testimony to be used in the courts of the United States, take acknowledgments and affidavits, in the same manner and with the same effect as commissioners of the United States Circuit Court may now lawfully take or do.)

To entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing on oath, or solemn affirmation, before the proper register or commissioner, setting forth—

The demand;

The consideration thereof;

Whether any and what securities are held therefor

And whether any and what payments have been made thereon;

That the sum claimed is justly due from the bankrupt to the claimant;

* So added by act of 22 June, 1874, ch. 390, sec. 7, 18 Stat. 179.

That the claimant has not, nor has any other person for his use, received any security or satisfaction whatever other than that by him set forth;

That the claim was not procured for the purpose of influencing the proceedings under this act;

And that no bargain or agreement, express or implied, has been made or entered into, by or on behalf of such creditor, to sell, transfer, or dispose of the said claim, or any part thereof, against such bankrupt, or take or receive, directly or indirectly, any money, property, or consideration whatever, whereby the vote of such creditor for assignee, or any action on the part of such creditor or any other person in the proceedings under this act, is or shall be in any way affected, influenced, or controlled;

And no claim shall be allowed unless all the statements set forth in such deposition shall appear to be true.

Such oath, or solemn affirmation shall be made by the claimant testifying of his own knowledge, unless he is absent from the United States, or prevented by some other good cause from testifying, in which cases the demand may be verified in like manner by the attorney or authorized agent of the claimant testifying to the best of his knowledge, information, and belief, and setting forth his means of knowledge, or, if in a foreign country, the oath of the creditor may be taken before any minister, consul, or vice-consul of the United States; and the court may, if it shall see fit, require or receive further pertinent evidence, either for or against the admission of the claim.

Corporations may verify their claims by the oath or solemn affirmation of their president, cashier, or treasurer.

If the proof is satisfactory to the register or commissioner, it shall be signed by the deponent, and delivered or sent by mail to the assignee, who shall examine the same and compare it with the books and accounts of the bankrupt, and shall register, in a book to be kept by him for that purpose, the names of creditors who have proved their claims, in the order in which such proof is received, stating the time and receipt of such proof, and the amount and nature of the debts, which books shall be open to the inspection of all the creditors.

The court may, on the application of the assignee, or of the bankrupt, or without any application, examine upon oath the bankrupt, or any person tendering or who has made proof of claims, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality, or mistake.

§ 23. *And be it further enacted*, That when a claim is presented for proof before the election of the assignee, and the judge entertains doubts of its validity, or of the right of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen.

Any person who, after the approval of this act, shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom until he shall first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference.

The court shall allow all debts duly proved, and shall cause a list thereof to be made and certified by one of the registers;

And any creditor may act at all meetings by his duly constituted attorney the same as though personally present.

§ 24. *And be it further enacted*, That a supposed creditor who takes an appeal to the Circuit Court from the decision of the District Court rejecting his claim, in whole or in part, shall, upon entering his appeal in the Circuit Court, file in the clerk's office thereof a statement in writing of his claim, setting forth the same substantially, as in a declaration for the same cause of action at law, and the assignee shall plead or answer thereto in like manner, and like proceedings shall thereupon be had in the pleadings, trial, and determination of the cause, as in an action at law commenced and prosecuted, in the usual manner, in the courts of the United States, except that no execution shall be awarded against the assignee for the amount of a debt found due to the creditor. The final judgment of the court shall be conclusive, and the list of debts shall, if necessary, be altered to conform thereto. The party prevailing in the suit shall be entitled to costs

against the adverse party, to be taxed and recovered as in suits at law; if recovered against the assignee, they shall be allowed out of the estate.

A bill of exchange, promissory note, or other instrument used in evidence upon the proof of a claim, and left in court, or deposited in the clerk's office, may be delivered, by the register or clerk having the custody thereof, to the person who used it, upon his filing a copy thereof, attested by the clerk of the court, who shall endorse upon it the name of the party against whose estate it has been proved, and the date and amount of any dividend declared thereon.

§ 25. *And be it further enacted*, That when it appears to the satisfaction of the court that the estate of the debtor or any part thereof, is of a perishable nature, or liable to deteriorate in value, the court may order the same to be sold in such manner as may be deemed most expedient, under the direction of the messenger or assignee, as the case may be, who shall hold the funds received in place of the estate disposed of;

And whenever it appears to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant, his agent, or attorney, as the court shall deem reasonable, order it to be sold, under the direction of the assignee, who shall hold the funds received in place of the estate disposed of;

And the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any courts.

But this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders the sale.

§ 26. *And be it further enacted*, That the court may, on the application of the assignee in bankruptcy, or of any creditor, or without any application, at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination, on oath, upon all matters relating —

To the disposal or condition of his property;

To his trade and dealings with others, and his accounts concerning the same;

To all debts due to or claimed from him;

And to all other matters concerning his property and estate, and the due settlement thereof according to law;

Which examination shall be in writing, and shall be signed by the bankrupt, and be filed with the other proceedings.

And the court may, in like manner, require the attendance of any other person as a witness; and if such person shall fail to attend on being summoned thereto, the court may compel his attendance by warrant directed to the marshal, commanding him to arrest such person, and bring him forthwith before the court, or before a register in bankruptcy for examination as such witness.

If the bankrupt is imprisoned, absent, or disabled from attendance, the court may order him to be produced by the jailor, or any officer in whose custody he may be; or may direct the examination to be had, taken, and certified, at such time and place and in such manner as the court may deem proper, and with like effect as if such examination had been in court.

The bankrupt shall, at all times until his discharge, be subject to the order of the court, and shall, at the expense of the estate, execute all proper writings and instruments, and do and perform all acts required by the court touching the assigned property or estate, and to enable the assignee to demand, recover, and receive all the property and estate assigned, wherever situated; and for neglect or refusal to obey any order of the court, such bankrupt may be committed and punished as for a contempt of court.

If the bankrupt is without the district, and unable to return and personally attend at any of the times, or do any of the acts which may be specified or required pursuant to this section, and if it appears that such absence was not caused by wilful default, and, if, as soon as may be after the removal of such impediment, he offers to attend and submit to the order of the court in all respects, he shall be permitted so to do with like effect as if he had not been in default.

He shall also be at liberty, from time to time, upon oath, to amend and correct his schedule of creditors and property so that the same shall conform to the facts.

For good cause shown, the wife of any bankrupt may be required to attend before the

court, to the end that she may be examined as a witness; and if such wife do not attend at the time and place specified in the order, the bankrupt shall not be entitled to a discharge unless he shall prove to the satisfaction of the court that he was unable to procure the attendance of his wife.

No bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy in any civil action unless the same is founded on some debt or claim from which his discharge or bankruptcy would not release him.

§ 27. *And be it further enacted*, That all creditors whose debts are duly proved and allowed shall be entitled to share in the bankrupt's property and estate *pro rata*, without any priority or preference whatever, except that wages due from him to any operative, or clerk, or house servant, to an amount not exceeding fifty dollars, for labors performed within six months next preceding the adjudication of bankruptcy, shall be entitled to priority, and shall be first paid in full;

Provided, That any debt proved by any person liable as bail, surety, guarantor, or otherwise for the bankrupt, shall not be paid to the person so proving the same until satisfactory evidence shall be produced of the payment of such debt by such person so liable, and the share to which such debt would be entitled may be paid into court, or otherwise held for the benefit of the party entitled thereto, as the court may direct.

At the expiration of three months from the date of the adjudication of bankruptcy in any case, or as much earlier as the court may direct, the court, upon request of the assignee, shall call a general meeting of the creditors, of which due notice shall be given;

And the assignee shall then report and exhibit to the court and to the creditors just and true accounts of all his receipts and payments, verified by his oath;

And he shall also produce and file vouchers for all payments for which vouchers shall be required by any rule of the court;

He shall also submit the schedule of the bankrupt's creditors and property as amended, duly verified by the bankrupt, and a statement of the whole estate of the bankrupt, as then ascertained, of the property recovered and of the property outstanding, specifying the cause of its being outstanding, also what debts or claims are yet undetermined, and stating what sum remains in his hands.

At such meeting the majority in value of the creditors present shall determine whether any and what part of the net proceeds of the estate, after deducting and retaining a sum sufficient to provide for all undetermined claims which, by reason of the distant residence of the creditor, or for other sufficient reason, have not been proved, and for other expenses and contingencies, shall be divided among the creditors; but unless at least one-half in value of the creditors shall attend such meeting, either in person or by attorney, it shall be the duty of the assignee so to determine.

In case a dividend is ordered the register shall, within ten days after such meeting, prepare a list of creditors entitled to dividend, and shall calculate and set opposite to the name of each creditor who has proved his claim, the dividend to which he is entitled out of the net proceeds of the estate set apart for dividend, and shall forward by mail to every creditor a statement of the dividend to which he is entitled, and such creditor shall be paid by the assignee in such manner as the court may direct.

§ 28. *And be it further enacted*, That the like proceedings shall be had at the expiration of the next three months, or earlier if practicable, and a third meeting of creditors shall then be called by the court, and a final dividend then declared, unless any action at law or suit in equity be pending, or unless some other estate or effects of the debtor afterwards come to the hands of the assignee, in which case the assignee shall, as soon as may be, convert such estate or effects into money, and within two months after the same shall be so converted the same shall be divided in manner aforesaid.

Further dividends shall be made in like manner as often as occasion requires;

And after the third meeting of creditors no further meeting shall be called, unless ordered by the court.

If at any time there shall be in the hands of the assignee any outstanding debts or other property, due or belonging to the estate, which cannot be collected and received by the assignee without unreasonable or inconvenient delay or expense, the assignee may, under the direction of the court, sell and assign such debts or other property in such manner as the court shall order.

No dividend already declared shall be disturbed by reason of debts being subsequently proved, but the creditors proving such debts shall be entitled to a dividend equal to those already received by the other creditors before any further payment is made to the latter.

Preparatory to the final dividend, the assignee shall submit his account to the court, and file the same, and give notice to the creditors of such filing, and shall also give notice that he will apply for a settlement of his account, and for a discharge from all liability as assignee, at a time to be specified in such notice, and at such time the court shall audit and pass the accounts of the assignee, and such assignee shall, if required by the court, be examined as to the truth of such account, and, if found correct, he shall thereby be discharged from all liability as assignee to any creditor of the bankrupt.

The court shall thereupon order a dividend of the estate and effects, or of such part thereof as it sees fit, among such of the creditors as have proved their claims, in proportion to the respective amount of their said debts.

In addition to all expenses necessarily incurred by him in the execution of his trust, in any case, the assignee shall be entitled to an allowance for his services in such case, on all moneys received and paid out by him therein, for any sum not exceeding one thousand dollars, five per centum thereon; for any larger sum, not exceeding five thousand dollars, two and a half per centum on the excess over one thousand dollars; and for any larger sum, one per centum on the excess over five thousand dollars; and if, at any time, there shall not be in his hands a sufficient amount of money to defray the necessary expenses required for the further execution of his trust, he shall not be obliged to proceed therein until the necessary funds are advanced or satisfactorily secured to him.

If, by accident, mistake, or other cause, without fault of the assignee, either or both of the said second and third meetings should not be held within the times limited, the court may, upon motion of an interested party, order such meetings, with like effect as to the validity of the proceedings as if the meeting had been duly held.

In the order for a dividend, under this section, the following claims shall be entitled to priority or preference, and to be first paid in full in the following order: —

First. The fees, costs, and expenses of suits, and the several proceedings in bankruptcy under this act, and for the custody of property, as herein provided.

Second. All debts due to the United States, and all taxes and assessments under the laws thereof.

Third. All debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws of such State.

Fourth. Wages due to any operative, clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.

Fifth. All debts due to any persons who, by the laws of the United States, are or may be entitled to a priority or preference, in like manner as if this act had not been passed: *Always provided,* That nothing contained in this act shall interfere with the assessment and collection of taxes by the authority of the United States or any State.

OF THE BANKRUPT'S DISCHARGE AND ITS EFFECT.

§ 29. *And be it further enacted,* That at any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proven against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days,* and within one year from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts, and the court shall thereupon order notice to be given by mail to all creditors who have proved their debts, and by publication at least once a week in such newspapers as the court shall designate, due regard being had to the general circulation of the same in the district, or in that portion of the district in which the bankrupt and his creditors shall reside, to appear on a day appointed for that purpose, and show cause why a discharge should not be granted to the bankrupt.

No discharge shall be granted, or, if granted, be valid —

If the bankrupt has wilfully sworn falsely in his affidavit annexed to his petition, schedule, or inventory, or upon any examination in the course of the proceedings in bankruptcy, in relation to any material fact concerning his estate or his debts, or to any other material fact;

Or if he has concealed any part of his estate or effects, or any books or writings relating thereto;

* Amended so as to read "and before the final disposition of the cause." (Act of July 26, 1876, ch. 234, sec. 1.)

Or if he has been guilty of any fraud or negligence in the care, custody, or delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, excepting such property as he is permitted to retain under the provisions of this act;

Or if he has caused, permitted, or suffered any loss, waste, or destruction thereof;

Or if, within four months before the commencement of such proceedings, he has procured his lands, goods, money, or chattels to be attached, sequestered, or seized, on execution;

Or if, since the passage of this act, he has destroyed, mutilated, altered, or falsified any of his books, documents, papers, writings, or securities;

Or has made or been privy to the making of any false or fraudulent entry in any book of account or other document with intent to defraud his creditors;

Or has removed, or caused to be removed, any part of his property from the district with intent to defraud his creditors;

Or if he has given any fraudulent preference contrary to the provisions of this act;

Or made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property;

Or has lost any part thereof in gaming;

Or has admitted a false or fictitious debt against his estate;

Or if, having knowledge that any person has proved such false or fictitious debt, he has not disclosed the same to his assignee within one month after such knowledge;

Or if, being a merchant or tradesman, he has not, subsequently to the passage of this act, kept proper books of account;

Or if he, or any person in his behalf, has procured the assent of any creditor to the discharge, or influenced the action of any creditor at any stage of the proceedings by any pecuniary consideration or obligation;

Or if he has, in contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment, or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed under this act in satisfaction of his debts;

Or if he has been convicted of any misdemeanor under this act, or has been guilty of any fraud whatever contrary to the true intent of this act;

And before any discharge is granted, the bankrupt shall take and subscribe an oath to the effect that he has not done, suffered or been privy to any act, matter, or thing specified in this act as a ground for withholding such discharge, or as invalidating such discharge if granted.

§ 30. *And be it further enacted*, That no person who shall have been discharged under this act, and shall afterwards become bankrupt, on his own application, shall be again entitled to a discharge, whose estate is insufficient to pay seventy per centum of the debts proved against it, unless the assent in writing of three-fourths in value of his creditors who have proved their claims, is filed at or before the time of application for discharge.

But a bankrupt, who shall prove to the satisfaction of the court that he has paid all the debts owing by him at the time of any previous bankruptcy, or who has been voluntarily released therefrom by his creditors, shall be entitled to a discharge in the same manner and with the same effect as if he had not previously been bankrupt.

§ 31. *And be it further enacted*, That any creditor opposing the discharge of any bankrupt may file a specification in writing of the grounds of his opposition, and the court may in its discretion order any question of fact so presented to be tried at a stated session of the District Court.

§ 32. *And be it further enacted*, That if it shall appear to the court that the bankrupt has in all things conformed to his duty under this act, and that he is entitled, under the provisions thereof, to receive a discharge, the court shall grant him a discharge from all his debts except as hereinafter provided, and shall give him a certificate thereof under the seal of the court, in substance as follows:

District Court of the United States, District of ———.

: Whereas ———, has been duly adjudged a bankrupt under the Act of Congress establishing a uniform system of bankruptcy throughout the United States, and appears

to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said ——— be forever discharged from all debts and claims which by said act are made provable against his estate, and which existed on the ——— day of ———, on which day the petition for adjudication was filed by or [or against] him excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy.

Given under my hand and the seal of the court at ———, in the said district, this ——— day of ———, A. D. ———.

[Seal.]

———, Judge.

§ 33. *And be it further enacted*, That no debt created by the fraud or embezzlement of the bankrupt or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act; but the debt may be proved, and the dividend thereon shall be a payment on account of said debt;

And no discharge granted under this act shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint-contractor, indorser, surety, or otherwise.

And in all proceedings in bankruptcy commenced after one year from the time this act shall go into operation, no discharge shall be granted to a debtor whose assets do not pay fifty per centum of the claims against his estate, ("upon which he is liable as the principal debtor." So amended, Act of July 27, 1868, ch. 258, sec. 1), unless the assent in writing of a majority in number and value of his creditors who have proved their claims, is filed in the case at or before the time of application for discharge.

(R. S., sec. 5112 a (22 June, 1874, ch. 390, sec. 9, 18 Stat. 180).)—That in cases of compulsory or involuntary bankruptcy, the provisions of said act, and any amendment thereof, or of any supplement thereto, requiring the payment of any proportion of the debts of the bankrupt, or the assent of any portion of his creditors, as a condition of his discharge from his debts, shall not apply; but he may, if otherwise entitled thereto, be discharged by the court in the same manner and with the same effect as if he had paid such per centum of his debts, or as if the required proportion of his creditors had assented thereto. And in cases of voluntary bankruptcy, no discharge shall be granted to a debtor whose assets shall not be equal to thirty per centum of the claims proved against his estate, upon which he shall be liable as principal debtor without the assent of at least one-fourth of his creditors in number, and one-third in value. And the provision in section five thousand one hundred and twelve (thirty-three of said act of March second, eighteen hundred and sixty-seven) requiring fifty per centum of such assets is hereby repealed.)

§ 34. *And be it further enacted*, That a discharge duly granted under this act shall, with the exceptions aforesaid, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy, and may be pleaded, by a simple averment that on the day of its date such discharge was granted to him, setting the same forth *in hæc verba*, as a full and complete bar to all suits brought on any such debts, claims, liabilities, or demands, and the certificate shall be conclusive evidence in favor of such bankrupt of the fact and the regularity of such discharge;

Always provided, That any creditor or creditors of said bankrupt, whose debt was proved or provable against the estate in bankruptcy, who shall see fit to contest the validity of said discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to set aside and annul the same.

Said application shall be in writing; shall specify which, in particular, of the several acts mentioned in section twenty-nine it is intended to give evidence of against the bankrupt, setting forth the grounds of avoidance, and no evidence shall be admitted as to any other of the said acts; but said application shall be subject to amendment at the discretion of the court.

The court shall cause reasonable notice of said application to be given to said bankrupt, and order him to appear and answer the same, within such time as to the court shall seem fit and proper.

If, upon the hearing of said parties, the court shall find that the fraudulent acts, or any of them, set forth as aforesaid by said creditor or creditors against the bankrupt, are proved, and that said creditor or creditors had no knowledge of the same until after

the granting of said discharge, judgment shall be given in favor of said creditor or creditors, and the discharge of said bankrupt shall be set aside and annulled. But if said court shall find that said fraudulent acts, and all of them, set forth as aforesaid, are not proved, or that they were known to said creditor or creditors before the granting of said discharge, then judgment shall be rendered in favor of the bankrupt, and the validity of his discharge shall not be affected by said proceedings.

PREFERENCES AND FRAUDULENT CONVEYANCES DECLARED VOID.

§ 35. *And be it further enacted*, That if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally—the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent* (and that such attachment, payment, pledge, assignment, or conveyance, is made in fraud of the provisions of this act—the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited).

And if any person being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and † that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this act, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt. And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud.

Any contract, covenant, or security made or given by the bankrupt or other person with, or in trust for, any creditor, for securing the payment of any money as a consideration for, or with intent to induce the creditor to forbear opposing the application for discharge of the bankrupt, shall be void;

And if any creditor shall obtain any sum of money or other goods, chattels, or security from any person as an inducement for forbearing to oppose, or consenting to such application for discharge, every creditor so offending shall forfeit all right to any share or dividend in the estate of the bankrupt, and shall also forfeit double the value or amount of such money, goods, chattels, or security so obtained, to be recovered by the assignee for the benefit of the estate.

(R. S., sec. 5130 *a* (22 June, 1874, ch. 390, sec. 10, 18 Stat. 180).—That in cases of involuntary or compulsory bankruptcy, the period of four months mentioned in section five thousand one hundred and twenty-eight (thirty-five) of the act to which this is an amendment, is hereby changed to two months, but this provision shall not take effect until two months after the passage of this act, and in the cases aforesaid, the period of six months mentioned in said section five thousand one hundred and twenty-nine (thirty-five) is hereby changed to three months, but this provision shall not take effect until three months after the passage of this act.)

* Amended so as to read: "Knowing that such attachment, sequestration, seizure, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this Title, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited. And nothing in said section five thousand one hundred and twenty-eight (thirty-five) shall be construed to invalidate any loan of actual value, or the security therefor, made in good faith, upon a security taken in good faith on the occasion of the making of such loan."—Act of June 22, 1874. R. S. § 5128.

† (The word "knowing" inserted by act of June 22, 1874, ch. 390, sec. 11.)

BANKRUPTCY OF PARTNERSHIPS AND OF CORPORATIONS.

§ 36. *And be it further enacted*, That where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue in the manner provided by this act, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted;

And all the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts;

And the assignee shall be chosen by the creditors of the company, and shall also keep separate accounts of the joint stock or property of the copartnership, and of the separate estate of each member thereof;

And after deducting out of the whole amount received by such assignee the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors;

And if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors;

And if there shall be any balance of the joint stock after payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners, according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy;

And the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts;

And the certificate of discharge shall be granted or refused to each partner as the same would or ought to be if the proceedings had been against him alone under this act;

And in all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone.

If such copartners reside in different districts, that court in which the petition is first filed shall retain exclusive jurisdiction over the case.

§ 37. *And be it further enacted*, That the provisions of this act shall apply to all moneyed, business, or commercial corporations and joint-stock companies, and that upon the petition of any officer of any such corporation or company duly authorized by a vote of a majority of the corporators present, at any legal meeting called for the purpose, or upon the petition of any creditor or creditors of such corporation or company, made and presented in the manner hereinafter provided in respect to debtors, the like proceedings shall be had and taken as are hereinafter provided in the case of debtors;

And all the provisions of this Act which apply to the debtor, or set forth his duties in regard to furnishing schedules and inventories, executing papers, submitting to examinations, disclosing, making over, secreting, concealing, conveying, assigning, or paying away his money or property, shall in like manner, and with like force, effect, and penalties, apply to each and every officer of such corporation or company in relation to the same matters concerning the corporation or company, and the money and property thereof.

All payments, conveyances, and assignments declared fraudulent and void by this Act, when made by a debtor, shall in like manner, and to the like extent, and with like remedies, be fraudulent and void when made by a corporation or company. No allowance or discharge shall be granted to any corporation or joint-stock company, or to any person, or officer, or member thereof;

Provided, That whenever any corporation by proceedings under this Act shall be declared bankrupt, all its property and assets shall be distributed to the creditors of such corporation in the manner provided in this Act in respect to natural persons.

OF DATES AND DEPOSITIONS.

§ 38. *And be it further enacted*, That the filing of a petition for adjudication in bankruptcy, either by a debtor in his own behalf, or by any creditor against a debtor, upon which an order may be issued by the court, or by a register, in the manner provided in

section four, shall be deemed and taken to be the commencement of proceedings in bankruptcy under this act;

The proceedings in all cases of bankruptcy shall be deemed matters of record, but the same shall not be required to be recorded at large, but shall be carefully filed, kept, and numbered in the office of the clerk of the court, and a docket only, or short memorandum thereof, kept in books to be provided for that purpose, which shall be open to public inspection.

Copies of such records, duly certified under the seal of the court, shall in all cases be *prima facie* evidence of the facts therein stated.

Evidence of examination in any of the proceedings under this Act may be taken before the court, or a register in bankruptcy, *viva voce* or in writing, before a commissioner of the Circuit Court, or by affidavit, or on commission, and the court may direct a reference to a register in bankruptcy, or other suitable person, to take and certify such examination, and may compel the attendance of witnesses, the production of books and papers, and the giving of testimony, in the same manner as in suits in equity in the Circuit Court.

INVOLUNTARY BANKRUPTCY.

§ 39. *And be it further enacted*, That any person residing and owing debts as aforesaid, who, after the passage of this Act,

Shall depart from the State, district, or territory of which he is an inhabitant, with intent to defraud his creditors;

Or, being absent, shall, with such intent, remain absent;

Or shall conceal himself to avoid the service of legal process in any action for the recovery of a debt or demand provable under this Act;

Or shall conceal or remove any of his property to avoid its being attached, taken, or sequestered on legal process.

Or shall make any assignment, gift, sale, conveyance, or transfer of his estate, property rights, or credits, either within the United States or elsewhere, with intent to delay, defraud, or hinder his creditors;

Or who has been arrested and held in custody under or by virtue of mesne process or execution issued out of any court of any State, district or Territory within which such debtor resides or has property, founded upon a demand in its nature provable against a bankrupt's estate under this Act, and for a sum exceeding one hundred dollars, and such process is remaining in force and not discharged by payment, or in any other manner provided by the law of such State, district, or Territory applicable thereto. for a period of seven days;

Or has been actually imprisoned for more than* (seven) days in a civil action, founded on contract, for the sum of one hundred dollars or upwards.

Or who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency shall make any payment, gift, grant, sale, conveyance,† (or transfer of money, or other property, estate, rights, or credits, or give any warrant to confess judgment, or procure or suffer his property to be taken on legal process), with intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, sureties, or otherwise, or with the intent, by such disposition of his property, to defeat or delay the operation of this Act;

‡ (Or who, being a banker, merchant, or trader, has stopped or suspended and not resumed payment of his commercial paper, within a period of fourteen days);

Shall be deemed to have committed an act of bankruptcy, and, subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt, on the petition of one or more of his creditors,* (the aggregate of whose debts provable under this Act amount to at least

* (Amended to "twenty." R. S., sec 5021; Act of June 22, 1874.)

† Amended so as to read, "Or transfer of money or other property, estate rights, or credits, or confess judgment, or give any warrant to confess judgment, or procure his property to be taken on legal process."

‡ Words in parentheses amended so as to read, "or who, being a bank, banker, broker, merchant, trader, (j) manufacturer, or miner, has fraudulently stopped payment, or who, being a bank, banker, broker, merchant, trader, manufacturer, or miner, has stopped, or suspended and not resumed payment, within a period of forty days of his commercial paper, (made or passed in the course of his business as such), or who, being a bank or banker, shall fail for forty days, to pay any depositor upon demand of payment lawfully made. R. S., sec. 5021, Act of June 22, 1874.)

§ Words in parentheses amended so as to read, "who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts (1) provable under this act amounts to at least one-third of the debts so provable. R. S. sec. 5021, Act of June 22, 1874.

two hundred and fifty dollars, provided such petition is brought within six months after the act of bankruptcy shall have been committed.)

* And if such person shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, sold, assigned, or transferred contrary to this Act: *Provided*, the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this Act was intended, or that the debtor was insolvent;

And such creditor shall not be allowed to prove his debt in bankruptcy.

§ 40. *And be it further enacted*, That upon the filing of the petition authorized by the next preceding section, if it shall appear that sufficient grounds exist therefor, the court shall direct the entry of an order requiring the debtor to appear and show cause, at a court of bankruptcy to be holden at a time to be specified in the order, not less than five days from the service thereof, why the prayer of the petition should not be granted;

And may also, by its injunction, restrain the debtor, and any other person, in the meantime, from making any transfer or disposition of any of the debtor's property not excepted by this Act from the operation thereof, and from any interference therewith;

And if it shall appear that there is probable cause for believing that the debtor is about to leave the district, or to remove or conceal his goods and chattels or his evidence of property, or make any fraudulent conveyance, or disposition thereof, the court may issue a warrant to the marshal of the district, commanding him to arrest the alleged bankrupt and him safely keep, unless he shall give bail to the satisfaction of the court for his appearance from time to time, as required by the court, until the decision of the court upon the petition or the further order of the court, and forthwith to take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court.

* In the Revised Statutes, section 5021, the following was inserted before and instead of this paragraph: *Provided*, also, That no voluntary assignment by a debtor or debtors of all his or their property, heretofore or hereafter made in good faith for the benefit of all his or their creditors, ratably and without creating any preference, and valid, according to the law of the State where made, shall of itself, in the event of his or their being subsequently adjudicated bankrupts in a proceeding of involuntary bankruptcy, be a bar to the discharge of such debtor or debtors. And the provisions of this section shall apply to all cases of compulsory or involuntary bankruptcy commenced since the first day of December, eighteen hundred and seventy-three, as well as to those commenced hereafter. And in all cases commenced since the first day of December, eighteen hundred and seventy-three, and prior to the passage of this Act, as well as those commenced hereafter, the court shall, if such allegation as to the number or amount of petitioning creditors be denied by the debtor by a statement in writing to that effect, require him to file in court forthwith a full list of his creditors, with their places of residence and the sums due them respectively, and shall ascertain, upon reasonable notice to the creditors, whether one-fourth in number and one-third in amount thereof, as aforesaid, have petitioned that the debtor be adjudged a bankrupt. But if such debtor shall, on the filing of the petition, admit in writing that the requisite number and amount of creditors have petitioned, the court (if satisfied that the admission was made in good faith), shall so adjudge, which judgment shall be final, and the matter proceed without further steps on that subject. And if it shall appear that such number and amount have not so petitioned, the court shall grant reasonable time, not exceeding in cases heretofore commenced, twenty days, and in cases hereafter commenced ten days, within which other creditors may join in such petition. And if, at the expiration of such time so limited, the number and amount shall comply with the requirements of this section, the matter of bankruptcy may proceed; but if, at the expiration of such limited time, such number and amount shall not answer the requirements of this section, the proceedings shall be dismissed, and in cases hereafter commenced, with costs. And if such person shall be adjudged a bankrupt, the assignee may recover back the money (m) or property so paid, conveyed, sold, assigned, or transferred contrary to this act: *Provided*, That the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on this act was intended; and such person, if a creditor, shall not, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt; and this limitation on the proof of debts shall apply to cases of voluntary as well as involuntary bankruptcy. And the petition of creditors under this section may be sufficiently verified by the oaths of the first five signers thereof, if so many there be. And if any of said first five signers shall not reside in the district in which such petition is to be filed, the same may be signed and verified by the oath or oaths of the attorney or attorneys, agent or agents, of such signers. And in computing the number of creditors, as aforesaid, who shall join in such petition, creditors whose respective debts do not exceed two hundred and fifty dollars shall not be reckoned. But if there be no creditors whose debts exceed said sum of two hundred and fifty dollars, or if the requisite number of creditors holding debts exceeding two hundred and fifty dollars fail to sign the petition, the creditors having debts of a less amount shall be reckoned for the purpose aforesaid. So amended by act of July 26, 1876, ch. 234, sec. 1, 19 Stat. 102.

A copy of the petition and of such order to show cause shall be served on such debtor by delivering the same to him personally, or leaving the same at his last or usual place of abode;

Or, if such debtor cannot be found, or his place of residence ascertained, service shall be made by publication, in such manner as the judge may direct.

No further proceedings, unless the debtor appear and consent thereto, shall be had until proof shall have been given, to the satisfaction of the court, of such service or publication;

* And if such proof be not given on the return day of such order, the proceedings shall be adjourned and an order made that the notice be forthwith so served or published.

§ 41. *And be it further enacted*, That on such return day, or adjourned day, if the notice has been duly served or published, or shall be waived by the appearance and consent of the debtor, the court shall proceed summarily to hear the allegations of the petitioner and debtor, and may adjourn the proceedings from time to time, on good cause shown, and shall, if the debtor on the same day so demand in writing, order a trial by jury at the first term of the court at which a jury shall be in attendance, to ascertain the fact of such alleged bankruptcy;

† (Or, at the election of the debtor, the court may, in its discretion, award a *venire facias* to the marshal of the district returnable within ten days before him, for the trial of the facts set forth in the petition, at which time the trial shall be had, unless adjourned for cause.)

And if, upon such hearing or trial, the debtor proves to the satisfaction of the court or of the jury, as the case may be, that the facts set forth in the petition are not true, or that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens were the sole ground of the proceeding, the proceedings shall be dismissed and the respondent shall recover his costs.

§ 42. *And be it further enacted*, That if the facts set forth in the petition are found to be true, or if default be made by the debtor to appear pursuant to the order, upon due proof of service thereof being made, the court shall adjudge the debtor to be a bankrupt, and, as such, subject to the provisions of this act, and shall forthwith issue a warrant to take possession of the estate of the debtor.

The warrant shall be directed, and the property of the debtor shall be taken thereon, and shall be assigned and distributed in the same manner and with similar proceedings to those hereinbefore (See amendment, Act June 22, 1874), providing for the taking possession, assignment, and distribution of the property of the debtor upon his own petition.

The order of adjudication of bankruptcy shall require the bankrupt forthwith, or within such number of days, not exceeding five after the date of the order, or notice thereof, as shall by the order be prescribed, to make and deliver, or transmit by mail, post-paid, to the messenger, a schedule‡ of the creditors and an inventory of his estate in the form, and verified in the manner required of a petitioning debtor by section thirteen.

If the debtor has failed to appear in person, or by attorney, a certified copy of the adjudication shall be forthwith served on him by delivery or publication in the manner hereinbefore provided for the service of the order to show cause;

And if the bankrupt is absent or cannot be found, such schedule and inventory shall be prepared by the messenger and the assignee from the best information they can obtain.

If the petitioning creditor shall not appear and proceed on the return day, or adjourned day, the court may, upon the petition of any other creditor to the required amount, proceed to adjudicate on such petition, without requiring a new service or publication of notice to the debtor.

* Amended by act of 22 June, 1874, ch. 390, sec. 13, 18 Stat. 182, to read:

"And if, on return day of the order to show cause as aforesaid the court shall be satisfied that the requirement of section five thousand and twenty-one (thirty-nine) of said act, as to the number and amount of petitioning creditors, has been complied with, or if within the time provided for in section five thousand and twenty-one (thirty-nine) of this act, creditors sufficient in number and amount shall sign such petition so as to make a total of one-fourth in number of the creditors, and one-third in the amount of the provable debts against the bankrupt, as provided in said section, the court shall so adjudge, which judgment shall be final; otherwise it shall dismiss the proceedings, and, in cases hereafter commenced, with costs."

† So amended by act of 22 June, 1874, ch. 390, sec. 14, 18 Stat. 182.

‡ Words "and valuation" added, Act of June 22, 1874.

§ 43. *And be it further enacted*, That if, at the first meeting of creditors, or at any meeting of creditors to be specially called for that purpose, and of which previous notice shall have been given for such length of time and in such manner as the court may direct, three-fourths in value of the creditors whose claims have been proved shall determine and resolve that it is for the interest of the general body of the creditors that the estate of the bankrupt should be wound up and settled, and distribution made among the creditors by trustees; under the inspection and direction of a committee of the creditors, it shall be lawful for the creditors to certify and report such resolution to the court, and to nominate one or more trustees to take, and hold, and distribute the estate, under the direction of such committee.

If it shall appear to the court, after hearing the bankrupt and such creditors as may desire to be heard, that the resolution was duly passed and that the interests of the creditors will be promoted thereby, it shall confirm the same;

And upon the execution and filing; by or on behalf of three-fourths in value of all the creditors whose claims have been proved, of a consent that the estate of the bankrupt be wound up and settled by said trustees, according to the terms of such resolution, the bankrupt, or his assignee in bankruptcy, if appointed, as the case may be, shall, under the direction of the court, and under oath, convey, transfer, and deliver all the property and estate of the bankrupt to the said trustee or trustees, who shall, upon such conveyance and transfer, have and hold the same in the same manner, and with the same powers and rights, in all respects, as the bankrupt would have had or held the same if no proceedings in bankruptcy had been taken, or as the assignee in bankruptcy would have done had such resolution not been passed;

And such consent and the proceedings thereunder shall be as binding in all respects on any creditor, whose debt is provable, who has not signed the same, as if he had signed it, and on any creditor whose debt, if provable, is not proved, as if he had proved it;

And the court, by order, shall direct all acts and things needful to be done to carry into effect such resolution of the creditors; and the said trustees shall proceed to wind up and settle the estate under the direction and inspection of such committee of the creditors, for the equal benefit of all such creditors;

And the winding up and settlement of any estate under the provisions of this section shall be deemed to be proceedings in bankruptcy under this Act; and the said trustees shall have all the rights and powers of assignees in bankruptcy.

The court, on the application of such trustees, shall have power to summon and examine, on oath or otherwise, the bankrupt and any creditor, and any person indebted to the estate, or known or suspected of having any of the estate in his possession, or any other person whose examination may be material or necessary to aid the trustees in the execution of their trust, and to compel the attendance of such persons and the production of books and papers, in the same manner as in other proceedings in bankruptcy under this act;

And the bankrupt shall have the like right to apply for and obtain a discharge after the passage of such resolution and the appointment of such trustees as if such resolution had not been passed, and as if all the proceedings had continued in the manner provided in the preceding sections of this Act.

If the resolution shall not be duly reported, or the consent of the creditors shall not be duly filed, or if, upon its filing, the court shall not think fit to approve thereof, the bankruptcy shall proceed as though no resolution had been passed, and the court may make all necessary orders for resuming the proceedings;

And the period of time which shall have elapsed between the date of the resolution and the date of the order for resuming proceedings shall not be reckoned in calculating periods of time prescribed by this Act.

(R. S., sec. 5103 a (22 June, 1874, ch. 390, sec. 17, 18 Stat. 182).—That in all cases of bankruptcy now pending, or to be hereafter pending, by or against any person, whether an adjudication in bankruptcy shall have been had or not, the creditors of such alleged bankrupt may, at a meeting called under the direction of the court, and upon not less than ten days' notice to each known creditor, of the time, place, and purpose of such meeting, such notice to be personal or otherwise, as the court may direct, resolve that a composition proposed by the debtor shall be accepted in satisfaction of the debts due to them from the debtor. And such resolution shall, to be operative, have been passed by a majority in number and three-fourths in value of the creditors of the debtor assembled at such meeting either in person or by proxy, and shall be confirmed by the signatures thereto of the debtor and two-thirds in number and one-half in value of all the creditors

of the debtor. And in calculating a majority for the purpose of a composition under this section, creditors whose debts amount to sums not exceeding fifty dollars shall be reckoned in the majority in value, but not in the majority in number; and the value of the debts of secured creditors above the amount of such security, to be determined by the court, shall, as nearly as circumstances admit, be estimated in the same way. And creditors whose debts are fully secured shall not be entitled to vote upon or assign such resolution without first relinquishing such security for the benefit of the estate.

The debtor, unless prevented by sickness or other cause satisfactory to such meeting, shall be present at the same, and shall answer any inquiries made of him; and he, or, if he is so prevented from being at such meeting, some one in his behalf, shall produce to the meeting a statement showing the whole value of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due.

Such resolution, together with the statement of the debtor as to his assets and debts, shall be presented to the court; and the court shall, upon notice to all the creditors of the debtor of not less than five days, and upon hearing, inquire whether such resolution has been passed in the manner directed by this section; and if satisfied that it has been so passed, it shall, subject to the provisions hereinafter contained, and upon being satisfied that the same is for the best interest of all concerned, cause such resolution to be recorded and statement of assets and debts to be filed; and until such record and filing shall have taken place, such resolution shall be of no validity. And any creditor of the debtor may inspect such record and statement at all reasonable times.

The creditors may, by a resolution passed in the matter and under the circumstances aforesaid, add to or vary the provisions of, any composition previously accepted by them, without prejudice to any person taking interest under such provisions who do not assent to such addition or variation. And any such additional resolution shall be presented to the court in the same manner and proceeded with in the same way and with the same consequences as the resolution by which the composition was accepted in the first instance. The provisions of a composition accepted by such resolution in pursuance of this section shall be binding on all the creditors whose names and addresses and the amounts of the debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors.

Where a debt arises on a bill of exchange or promissory note, if the debtor shall be ignorant of the holder of any such bill of exchange or promissory note he shall be required to state the amount of such bill or note, the date on which it falls due, the name of the acceptor and of the person to whom it is payable, and any other particulars within his knowledge respecting the same; and the insertion of such particulars shall be deemed a sufficient description by the debtor in respect to such debt.

Any mistake made inadvertently by a debtor in the statement of his debts may be corrected upon reasonable notice and with the consent of a general meeting of his creditors.

Every such composition shall, subject to priorities declared in said act, provide for a *pro rata* payment or satisfaction in money, to the creditors of such debtor in proportion to the amount of their unsecured debts, or their debts in respect to which any such security shall have been duly surrendered and given up.

The provisions of any composition made in pursuance of this section may be enforced by the court, on motion made in a summary manner by any person interested, and on reasonable notice; and any disobedience of the order of the court made on such motion shall be deemed to be a contempt of court. Rules and regulations of court may be made in relation to proceedings of composition herein provided for in the same manner and to the same extent as now provided by law in relation to proceedings in bankruptcy.

If it shall at any time appear to the court, on notice, satisfactory evidence, and hearing, that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may refuse to accept and confirm such composition, or may set the same aside; and, in either case, the debtor shall be proceeded with as a bankrupt in conformity with the provisions of law, and proceedings may be had accordingly; and the time during which such composition shall have been in force shall not, in such case be computed in calculating periods of time prescribed by said act.)

PENALTIES AGAINST BANKRUPTS.

§ 44. And be it further enacted, That from and after the passage of this act, if any debtor or bankrupt shall, after the commencement of proceedings in bankruptcy,—
 Secrete or conceal any property belonging to his estate;

Or part with, conceal, or destroy, alter, mutilate, or falsify, or cause to be concealed, destroyed, altered, mutilated, or falsified, any book, deed, document, or writing relating thereto, or remove, or cause to be removed, the same, or any part thereof, out of the district, or otherwise dispose of any part thereof, with intent to prevent it from coming into the possession of the assignee in bankruptcy, or to hinder, impede, or delay either of them in recovering or receiving the same;

Or make any payment, gift, sale, assignment, transfer, or conveyance of any property belonging to his estate with the like intent;

Or spend any part thereof in gaming;

Or shall, with intent to defraud, wilfully and fraudulently conceal from his assignee, or omit from his schedule, any property or effects whatsoever;

Or if, in case of any person having, to his knowledge or belief, proved a false or fictitious debt against his estate, he shall fail to disclose the same to his assignees within one month after coming to the knowledge or belief thereof;

Or shall attempt to account for any of his property by fictitious losses or expenses;

Or shall, within three months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtain on credit from any person any goods or chattels with intent to defraud;

Or shall with intent to defraud his creditors, within three months next before the commencement of proceedings in bankruptcy, pawn, pledge, or dispose of, otherwise than by *bona fide* transactions in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for;

He shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any court of the United States, shall be punished by imprisonment, with or without hard labor, for a term not exceeding three years.

§ 45. *And be it further enacted*, That if any judge, register, clerk, marshal, messenger, assignee, or any other officer of the several courts of bankruptcy shall, for anything done or pretended to be done under this Act, or under color of doing anything thereunder, wilfully demand or take, or appoint or allow any person whatever to take for him or on his account, or for or on account of any other person, or in trust for him or for any other person, any fee, emolument, gratuity, sum of money, or anything of value whatever, other than is allowed by this act, or which shall be allowed under the authority thereof, such person, when convicted thereof, shall forfeit and pay the sum of not less than three hundred dollars, and not exceeding five hundred dollars, and be imprisoned not exceeding three years.

§ 46. *And be it further enacted*, That if any person shall forge the signature of a judge, register, or other officer of the court, or knowingly concur in using any such forged or counterfeit signature or seal for the purpose of authenticating any proceeding or document,

Or shall tender in evidence any such proceeding or document with a false or counterfeit signature of any such judge, register, or other officer, or a false or counterfeit seal of the court, subscribed or attached thereto, knowing such signature or seal to be false or counterfeit, any such person shall be guilty of felony, and upon conviction thereof shall be liable to a fine of not less than five hundred dollars, and not more than five thousand dollars, and to be imprisoned not exceeding five years, at the discretion of the court.

FEEES AND COSTS.

§ 47. *And be it further enacted*, That in each case there shall be allowed and paid, in addition to the fees of the clerk of the court as now established by law, or as may be established by general order, under the provisions of this Act, for fees in bankruptcy, the following fees, which shall be applied to the payment for the services of the registers:

For issuing every warrant, two dollars.

For each day in which a meeting is held, three dollars.

For each order for a dividend, three dollars.

For every order substituting an arrangement by trust deed for bankruptcy, two dollars.

For every bond with sureties, two dollars.

For every application for any meeting in any matter under this Act, one dollar.

For every day's service while actually employed under a special order of the court, a sum not exceeding five dollars, to be allowed by the court.

For taking depositions, the fees now allowed by law.

For every discharge where there is no opposition, two dollars.

Such fees shall have priority of payment over all other claims out of the estate, and before a warrant issues, the petitioner shall deposit with the senior register of the court, or with the clerk, to be delivered to the register, fifty dollars as security for the payment thereof; and if there are not sufficient assets for the payment of the fees, the person upon whose petition the warrant is issued shall pay the same, and the court may issue an execution against him to compel payment to the register.

Before any dividend is ordered the assignee shall pay out of the estate to the messenger the following fees, and no more:

First.—For service of warrant, two dollars.

Second.—For all necessary travel, at the rate of five cents a mile, each way.

Third.—For each written note to creditor named in the schedule, ten cents.

Fourth.—For custody of property, publication of notices, and other services, his actual and necessary expenses upon returning the same in specific items, and making oath that they had been actually incurred and paid by him, and are just and reasonable, the same to be taxed or adjusted by the court, and the oath of the messenger shall not be conclusive as to the necessity of said expenses.

For cause shown, and upon hearing thereon, such further allowance may be made as the court, in its discretion, may determine.

The enumeration of the foregoing fees shall not prevent the judges, who shall frame general rules and orders in accordance with the provisions of section ten, from prescribing a tariff of fees for all other services of the officers of courts of bankruptcy, or from reducing the fees prescribed in this section in classes of cases to be named in their rules and orders.

(R. S., sec. 5127 *a* (22 June, 1874, ch. 390, sec. 18, 18 Stat. 184).—That from and after the passage of this act, the fees, commissions, charges, and allowances, excepting actual and necessary disbursements, of, and to be made by the officers, agents, marshals, messengers, assignees, and registers in cases of bankruptcy, shall be reduced to one-half of the fees, commissions, charges, and allowances heretofore provided for or made in like cases: *Provided*, That the preceding provision shall be and remain in force until the justices of the Supreme Court of the United States shall make and promulgate new rules and regulations in respect to the matters aforesaid, under the powers conferred upon them by sections four thousand nine hundred and ninety (ten) and five thousand one hundred and twenty-seven (forty-seven) of said act, and no longer, which duties they shall perform as soon as may be.

§ 5127 *b* (22 June, 1874, ch. 390, sec. 19, 18 Stat. 184).—That it shall be the duty of the marshal of each district, in the month of July of each year, to report to the clerk of the district court of such district, in a tabular form, to be prescribed by the justices of the Supreme Court of the United States, as well as such other or further information as may be required by said justices.

First, the number of cases in bankruptcy in which the warrant prescribed in section five thousand and nineteen (eleven) of said act has come to his hands during the year ending June thirtieth, preceding;

Secondly, how many such warrants were returned, with the fees, costs, expenses, and emoluments thereof, respectively and separately;

Thirdly, the total amount of all other fees, costs, expenses, and emoluments, respectively and separately, earned or received by him during such year, from or in respect of any matter in bankruptcy;

Fourthly, a summarized statement of such fees, costs, and emoluments, exclusive of actual disbursements in bankruptcy, received or earned for such year;

Fifthly, a summarized statement of all actual disbursements in such cases for such year.

And in like manner every register shall, in the same month, and for the same year, make a report to such clerk; of

First, the number of voluntary cases in bankruptcy coming before him during said year;

Secondly, the amount of assets and liabilities, as nearly as may be, of the bankrupt;

Thirdly, the amount and rate per centum of all dividends declared;

Fourthly, the disposition of all such cases;

Fifthly, the number of compulsory cases in bankruptcy coming before him, in the same way;

Sixthly, the amount of assets and liabilities, as nearly as may be, of such bankrupts;

Seventhly, the disposition of all such cases;

Eighthly, the amounts and rate per centum of all dividends declared in such cases;

Ninthly, the total amount of fees, charges, costs, and emoluments of every sort, received or earned by such register during said year, in each class of cases above stated.

And in like manner every assignee shall, during said month make like return to such clerk; of,

First, the number of voluntary and compulsory cases, respectively and separately, in his charge during said year;

Secondly, the amount of assets and liabilities therein, respectively and separately;

Thirdly, the total receipts and disbursements therein, respectively and separately;

Fourthly, the amount of dividends paid or declared, and the rate per centum thereof, in each class respectively and separately;

Fifthly, the total amount of all his fees, charges and emoluments of every kind therein, earned or received.

Sixthly, the total amount of expenses incurred by him for legal proceedings and counsel fees;

Seventhly, the disposition of the cases respectively;

Eighthly, a summarized statement of both classes as aforesaid;

And in like manner, the clerk of said court, in the month of August in each year, shall make up a statement for such year, ending June thirtieth, of,

First, all classes in bankruptcy pending at the beginning of the said year;

Secondly, all of such cases disposed of;

Thirdly, all dividends declared therein;

Fourthly, the number of reports made from each assignee therein;

Fifthly, the disposition of all such cases;

Sixthly, the number of assignees' accounts filed and settled;

Seventhly, whether any marshal, register, or assignee has failed to make and file with such clerk the reports by this act required, and if any have failed to make such report, their respective names and residences.

And such clerk shall report in respect of all cases begun during said year.

And he shall make a classified statement, in tabular form, of all his fees, charges, costs, and emoluments, respectively, earned or accrued during said year, giving each head under which the same accrued, and also the sum of all moneys paid into and disbursed out of court in bankruptcy, and the balance in hand or on deposit.

And all the statements and reports herein required shall be under oath, and signed by the persons respectively making the same.

And said clerk shall in said month of August, transmit every such statement and report so filed with him, together with his own statement and report as aforesaid, to the attorney-general of the United States.

Any person who shall violate the provisions of this section shall on motion made, under the direction of the attorney-general, be by the district court dismissed from his office, and shall be deemed guilty of a misdemeanor, and, on conviction thereof, be punished by a fine of not more than five hundred dollars, or by imprisonment not exceeding one year.)

OF MEANING OF TERMS AND COMPUTATION OF TIME.

§ 48. *And be it further enacted*, That the word "assignee" and the word "creditor" shall include the plural also; and the word "messenger" shall include his assistant or assistants, except in the provision for the fees of that officer. The word "marshal" shall include the marshal's deputies; the word "person" shall also include "corporation;" and the word "oath" shall include "affirmation."

And in all cases in which any particular number of days is prescribed by this Act, or shall be mentioned in any rule or order of court, or general order which shall at any time be made under this Act, for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless the last day shall fall on a Sunday, Christmas day, or on any day appointed by the President of the United States as a day of public fast or thanksgiving, or on the Fourth of July, in which case the time shall be reckoned exclusive of that day also.

§ 49. *And be it further enacted*, That all the jurisdiction, power, and authority conferred upon and vested in the District Court of the United States by this act in cases in bankruptcy are hereby conferred upon and vested in the Supreme Court of the District of Columbia.

And in and upon the Supreme Courts of the several Territories of the United States, when the bankrupt resides in the said District of Columbia or in either of the said Territories.

And in those judicial districts which are not within any organized circuit of the United States, the power and jurisdiction of a Circuit Court in bankruptcy may be exercised by the district judge.

§ 50. *And be it further enacted*, That this act shall commence and take effect, as to the appointment of the officers created hereby and the promulgation of rules and general orders, from and after the date of its approval: *Provided*, That no petition or other proceeding under this act shall be filed, received, or commenced before the first day of June, Anno Domini eighteen hundred and sixty-seven.

III. THE BANKRUPTCY ACT OF 1841.

An Act to establish a uniform System of Bankruptcy throughout the United States.

(Passed August 19th, 1841, repealed March 3rd, 1843.)

SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and hereby is, established throughout the United States a uniform system of bankruptcy, as follows: All persons whatsoever, residing in any State, District or Territory of the United States, owing debts which shall not have been created in consequence of a defalcation as a public officer; or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity, who shall, by petition, setting forth to the best of his knowledge and belief a list of his or their creditors, their respective places of residence, and the amount due to each, together with an accurate inventory of his or their property, rights and credits, of every name, kind and description, and the location and situation of each and every parcel and portion thereof, verified by oath, or, if conscientiously scrupulous of taking an oath, by solemn affirmation, apply to the proper court, as hereinafter mentioned, for the benefit of this act, and therein declare themselves to be unable to meet their debts and engagements, shall be deemed bankrupts within the purview of this act, and may be so declared accordingly by a decree of such court. All persons, being merchants, or using the trade of merchandise, all retailers of merchandise, and all bankers, factors, brokers, underwriters or marine insurers, owing debts to the amount of not less than two thousand dollars, shall be liable to become bankrupts within the true intent and meaning of this act, and may, upon the petition of one or more of their creditors, to whom they owe debts amounting in the whole to not less than five hundred dollars, to the appropriate court, be so declared accordingly, in the following cases, to wit: whenever such person, being a merchant, or actually using the trade of merchandise, or being a retailer of merchandise, or being a banker, factor, broker, underwriter, or marine insurer, shall depart from the State, District or Territory, of which he is an inhabitant, with intent to defraud his creditors; or shall conceal himself to avoid being arrested, or shall willingly and fraudulently procure himself to be arrested, or his goods and chattels, lands or tenements; to be attached, distrained, sequestered, or taken in execution; or shall remove his goods, chattels and effects, or conceal them to prevent their being levied upon or taken in execution, or by other process; or make any fraudulent conveyance, assignment, sale, gift or other transfer of his lands, tenements, goods or chattels, credits or evidence of debt: Provided, however, That any person so declared a bankrupt, at the instance of a creditor, may, at his election, by petition to such court within ten days after its decree, be entitled to a trial by jury before such court, to ascertain the fact of such bankruptcy; or if such person shall reside at a great distance from the place of holding such court, the said judge, in his discretion, may direct such trial by jury to be had in the county of such person's residence; in such manner and under such directions as the court may prescribe and give; and all such decrees passed by such court, and not so re-examined, shall be deemed final and conclusive as to the subject-matter thereof.

SEC. 2. And be it further enacted, that all future payments, securities, conveyances, or transfers of property, or agreement made or given by any bankrupt in contemplation of bankruptcy, to any person or persons whatever, not creditor, indorser, surety, or other person, any preference or priority over the general creditors of such bankrupts; and all other payments, securities, conveyances, or transfers of property, or agreements made or given by such bankrupt in contemplation of bankruptcy, to any person or persons whatever, not being a bona-fide creditor or purchaser, for a valuable consideration, without notice, shall be deemed utterly void, and a fraud upon this act; and the assignee under the bankruptcy shall be entitled to claim, sue for, recover, and receive, the same as part of the assets of the bankruptcy; and the person making such unlawful preferences and payments shall receive no discharge under the provisions of this act: Provided, That all dealings and transactions by and with any bankrupt, bona-fide made and entered into more than two months before the petition filed against him or by him, shall not be invalidated or affected by this act: Provided, That the other party to any such dealings or

transactions had no notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act. And in case it shall be made to appear to the court, in the course of the proceedings in bankruptcy, that the bankrupt, his application being voluntary, has, subsequent to the first day of January last, or at any other time, in contemplation of the passage of a bankrupt law, by assignments or otherwise, given or secured any preference to one creditor over another, he shall not receive a discharge unless the same be assented to by a majority in interest of those of his creditors who have not been so preferred: And provided also, That nothing in this act contained shall be construed to annul, destroy or impair, any lawful rights of married women, or minors, or any liens, mortgages, or other securities, on property, real or personal, which may be valid by the laws of the States respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act.

SEC. 3. And be it further enacted, That all the property, and rights of property, of every name and nature, and whether real, personal or mixed, of every bankrupt, except as is hereinafter provided, who shall, by a decree of the proper court, be declared to be a bankrupt within this act, shall, by mere operation of law, ipso facto, from the time of such decree, be deemed to be divested out of such bankrupt, without any other act, assignment or other conveyance whatsoever; and the same shall be vested, by force of the same decree, in such assignee as from time to time shall be appointed by the proper court for this purpose, which power of appointment and removal such court may exercise at its discretion, toties quoties; and the assignee so appointed shall be vested with all the rights, titles, powers and authorities to sell, manage and dispose of the same, and to sue for and defend the same, subject to the orders and directions of such court, as fully, to all intents and purposes, as if the same were vested in or might be exercised by such bankrupt before or at the time of his bankruptcy declared as aforesaid; and all suits in law or in equity then pending, in which such bankrupt is a party, may be prosecuted and defended by such assignee to its final conclusion, in the same way and with the same effect as they might have been by such bankrupt; and no suit commenced by or against any assignee shall be abated by his death or removal from office, but the same may be prosecuted or defended by his successor in the same office: Provided, however, That there shall be excepted from the operation of the provisions of this section the necessary household and kitchen furniture, and such other articles and necessities of such bankrupt as the said assignee shall designate and set apart, having reference in the amount to the family, condition and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of three hundred dollars; and, also, the wearing apparel of such bankrupt, and that of his wife and children; and the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of said court.

SEC. 4. And be it further enacted, That every bankrupt who shall bona-fide surrender all his property, and rights of property, with the exception before mentioned, for the benefit of his creditors, and shall fully comply with and obey all the orders and directions which may from time to time be passed by the proper court, and shall otherwise conform to all the requisitions of this act, shall (unless a majority in number and value of his creditors who have proved their debts shall file their written dissent thereto) be entitled to a full discharge from all his debts, to be decreed and allowed by the court which has declared him a bankrupt, and a certificate thereof granted him by such court accordingly, upon his petition filed for such purpose; such discharge and certificate not, however, to be granted until after seventy days' notice in some public newspaper, designated by such court, to all creditors who have proved their debts, and other persons in interest, to appear at a particular time and place, to show cause why such discharge and certificate shall not be granted; at which time and place any such creditors, or other persons in interest, may appear and contest the right of the bankrupt thereto: Provided, That in all cases where the residence of the creditor is known, a service on him personally, or by letter addressed to him at his known usual place of residence, shall be prescribed by the court, as in their discretion shall seem proper, having regard to the distance at which the creditor resides from such court. And if any such bankrupt shall be guilty of any fraud or wilful concealment of his property or rights of property, or shall have preferred any of his creditors contrary to the provisions of this act, or shall wilfully omit or refuse to comply with any orders or directions of such court, or to conform to any other requisites of this act, or shall, in the proceedings under this act, admit a false or fictitious debt against his estate, he shall not be entitled to any such discharge or certificate; nor shall any person, being a merchant, banker, factor,

underwriter, broker, or marine insurer, be entitled to any such discharge or certificate, who shall become bankrupt, and who shall not have kept proper books of account, after the passing of this act; nor any person who, after the passing of this act, shall apply trust funds to his own use: Provided, That no discharge of any bankrupt under this act shall release or discharge any person who may be liable for the same debt as a partner, joint contractor, indorser, surety, or otherwise, for or with the bankrupt. And such bankrupt shall at all times be subject to examination, orally, or upon written interrogatories, in and before such court, or any commission appointed by the court therefor, on oath, or, if conscientiously scrupulous of taking an oath, upon his solemn affirmation, in all matters relating to such bankruptcy, and his acts and doings, and his property and rights of property, which, in the judgment of such court, are necessary and proper for the purposes of justice; and if, in any such examination, he shall wilfully and corruptly answer, or swear, or affirm, falsely, he shall be deemed guilty of perjury, and shall be punishable therefor in like manner as the crime of perjury is now punishable by the laws of the United States; and such discharge and certificate, when duly granted, shall in all courts of justice be deemed a full and complete discharge of all debts, contracts and other engagements of such bankrupt which are provable under this act, and shall be and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever, and the same shall be conclusive evidence of itself in favor of such bankrupt, unless the same shall be impeached for some fraud or wilful concealment by him of his property or rights of property, as aforesaid, contrary to the provisions of this act, on prior reasonable notice specifying in writing such fraud or concealment; and if, in any case of bankruptcy, a majority in number and value of the creditors who shall have proved their debts at the time of hearing of the petition of the bankrupt for a discharge, as hereinbefore provided, shall at such hearing file their written dissent to the allowance of a discharge and certificate to such bankrupt, or if, upon such hearing, a discharge shall not be decreed to him, the bankrupt may demand a trial by jury upon a proper issue to be directed by the court, at such time and place and in such manner as the court may order; or he may appeal from that decision at any time within ten days thereafter to the circuit court next to be held for the same district, by simply entering in the district court, or with the clerk thereof, upon record, his prayer for an appeal. The appeal shall be tried at the first term of the circuit court after it be taken, unless, for sufficient reason, a continuance be granted; and it may be heard and determined by said court summarily, or by a jury, at the option of the bankrupt; and the creditors may appear and object against a decree of discharge and the allowance of the certificate, as hereinbefore provided. And if, upon a full hearing of the parties, it shall appear to the satisfaction of the court, or the jury shall find, that the bankrupt has made a full disclosure and surrender of all his estate, as by this act required, and has in all things conformed to the directions thereof, the court shall make a decree of discharge, and grant a certificate, as provided in this act.

SEC. 5. And be it further enacted, That all creditors coming and proving their debts under such bankruptcy, in the manner hereinafter prescribed, the same being bona fide debts, shall be entitled to share in the bankrupt's property and effects, pro rata, without any priority or preference whatsoever, except only for debts due by such bankrupt to the United States, and for all debts due by him to persons who, by the laws of the United States, have a preference, in consequence of having paid monies as his sureties, which shall be first paid out of the assets; and any person who shall have performed any labor as an operative in the service of any bankrupt shall be entitled to receive the full amount of the wages due to him for such labor, not exceeding twenty-five dollars: Provided, That such labor shall have been performed within six months next before the bankruptcy of his employer; and all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurances, sureties, indorsers, bail, or other persons, having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts or claims under this act, and shall have a right, when their debts and claims become absolute, to have the same allowed them; and such annuities and holders of debts payable in future may have the present value thereof ascertained, under the direction of such court, and allowed them accordingly, as debts in present; and no creditor or other person coming in and proving his debt or other claim shall be allowed to maintain any suit at law or in equity therefor, but shall be deemed thereby to have waived all right of action and suit against such bankrupt; and all proceedings already commenced, and all unsatisfied judgments already obtained thereon, shall be deemed to be surrendered thereby; and in all cases where there are mutual debts or mutual credits between the

parties, the balance only shall be deemed the true debt or claim between them, and the residue shall be deemed adjusted by the set-off; all such proof of debts shall be made before the court decreeing the bankruptcy, or before some commissioner appointed by the court for that purpose; but such court shall have full power to disallow and set aside any debt, upon proof that such debt is founded in fraud, imposition, illegality, or mistake; and corporations to whom any debts are due may make proof thereof by their president, cashier, treasurer, or other officer, who may be specially appointed for that purpose; and in appointing commissioners to receive proof of debts, and perform other duties under the provisions of this act, the said court shall appoint such persons as have their residence in the county in which such bankrupt lives.

SEC. 6. And be it further enacted, That the district court in every district shall have jurisdiction in all matters and proceedings in bankruptcy arising under this act, and any other act which may hereafter be passed upon the subject of bankruptcy; the said jurisdiction to be exercised summarily, in the nature of summary proceedings in equity; and for this purpose the said district court shall be deemed always open. And the district judge may adjourn any point or question arising in any case in bankruptcy into the circuit court for the district, in his discretion, to be there heard and determined; and for this purpose the circuit court of such district shall also be deemed always open. And the jurisdiction hereby conferred on the district court shall extend to all cases and controversies in bankruptcy arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to all cases and controversies between such creditor or creditors and the assignee of the estate, whether in office or removed; to all cases and controversies between such assignee and the bankrupt, and to all acts, matters and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy. And the said courts shall have full authority and jurisdiction to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent the circuit courts may now do in any suit pending therein in equity. And it shall be the duty of the district court in each district, from time to time to prescribe suitable rules and regulations, and forms of proceedings, in all matters of bankruptcy; which rules, regulations and forms, shall be subject to be altered, added to, revised, or annulled, by the circuit court of the same district, and other rules and regulations and forms substituted therefor; and in all such rules, regulations and forms it shall be the duty of the said courts to make them as simple and brief as practicable, to the end to avoid all unnecessary expenses, and to facilitate the use thereof by the public at large. And the said courts shall, from time to time, prescribe a tariff or table of fees and charges to be taxed by the officers of the court or other persons for services under this act, or any other on the subject of bankruptcy; which fees shall be as low as practicable, with reference to the nature and character of such services.

SEC. 7. And be it further enacted, That all petitions by any bankrupt for the benefit of this act, and all petitions by a creditor against any bankrupt under this act, and all proceedings in the case to the close thereof, shall be had in the district court within and for the district in which the person supposed to be a bankrupt shall reside, or have his place of business, at the time when such petition is filed, except where otherwise provided in this act. And upon every such petition, notice thereof shall be published in one or more public newspapers printed in such district, to be designated by such court, at least twenty days before the hearing thereof; and all persons interested may appear at the time and place where such hearing is thus to be had, and show cause, if any they have, why the prayer of the said petitioner should not be granted; all evidence by witnesses to be used in all hearings before such court shall be under oath, or solemn affirmation, when the party is conscientiously scrupulous of taking an oath, and may be oral or by deposition, taken before such court, or before any commissioner appointed by the court, or before any disinterested State judge of the State in which the deposition is taken; and all proof of debts or other claims, by creditors entitled to prove the same under this act shall be under oath or solemn affirmations, as aforesaid, before such court or commissioner appointed thereby, or before some disinterested State judge of the State where the creditors live, in such form as may be prescribed by the rules and regulations hereinbefore authorized to be made and established by the courts having jurisdiction in bankruptcy. But all such proofs of debts and other claims shall be open to contestation in the proper court having jurisdiction over the proceedings in the particular case in bankruptcy; and as well the assignee as

the creditor shall have a right to a trial by jury upon an issue to be directed by such court, to ascertain the validity and amount of such debts or other claims; and the result therein, unless a new trial shall be granted, if in favor of the claims, shall be evidence of the validity and amount of such debts or other claims. And if any person or persons shall falsely and corruptly answer, swear or affirm, in any hearing or on trial of any matter, or in any proceeding in such court in bankruptcy, or before any commissioner, he and they shall be deemed guilty of perjury, and punishable therefor in the manner and to the extent provided by law for other cases.

SEC. 8. And be it further enacted, That the circuit court within and for the district where the decree of bankruptcy is passed shall have concurrent jurisdiction with the district court of the same district of all suits at law and in equity which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to, or vested in, such assignee; and no suit at law or in equity shall, in any case, be maintainable by or against such assignee or by or against any person or persons claiming an adverse interest touching the property and rights of property aforesaid, in any court whatsoever unless the same shall be brought within two years after the declaration and decree of bankruptcy, or after the cause of suit shall first have accrued.

SEC. 9. And be it further enacted, That all sales, transfers and other conveyances of the assignee of the bankrupt's property and rights of property shall be made at such times and in such manner as shall be ordered and appointed by the court in bankruptcy; and all assets received by the assignee in money shall, within sixty days afterwards, be paid into the court, subject to its order respecting its future safe-keeping and disposition; and the court may require of such assignee a bond, with at least two sureties, in such sum as it may deem proper, conditioned for the due and faithful discharge of all his duties, and his compliance with the orders and directions of the court; which bond shall be taken in the name of the United States, and shall, if there be any breach thereof, be sued and suable, under the order of such court, for the benefit of the creditors and other persons in interest.

SEC. 10. And be it further enacted, That in order to insure a speedy settlement and close of the proceedings in each case in bankruptcy, it shall be the duty of the court to order and direct a collection of the assets and a reduction of the same to money, and a distribution thereof at as early periods as practicable, consistently with a due regard to the interests of the creditors; and a dividend and distribution of such assets as shall be collected and reduced to money, or so much thereof as can be safely disposed of, consistently with the rights and interests of third persons having adverse claims thereto, shall be made among the creditors who have proved their debts, as often as once in six months from the time of the decree declaring the bankruptcy; notice of such dividends and distribution to be given in some newspaper or newspapers in the district, designated by the court, ten days at least before the order therefor is passed; and the pendency of any suit at law or in equity, by or against such third persons, shall not postpone such division and distribution, except so far as the assets may be necessary to satisfy the same; and in all the proceedings in bankruptcy in each case shall, if practicable, be finally adjusted, settled and brought to a close by the court, within two years after the decree declaring the bankruptcy. And where any creditor shall not have proved his debt until a dividend or distribution shall have been made and declared, he shall be entitled to be paid the same amount, pro rata, out of the remaining dividends or distributions thereafter made, as the other creditors have already received, before the latter shall be entitled to any portion thereof.

SEC. 11. And be it further enacted, that the assignee shall have full authority, by or under the order and direction of the proper court in bankruptcy, to redeem and discharge any mortgage or other pledge, or deposit, or lien upon any property, real or personal, whether payable in present or at a future day, and to tender a due performance of the conditions thereof. And such assignee shall also have authority, by and under the order and direction of the proper court in bankruptcy, to compound any debts or other claims, or securities due or belonging to the estate of the bankrupt; but no such order or direction shall be made until notice of the application, is given in some public newspaper in the district, to be designated by the court, ten days at least before the hearing, so that all creditors and other persons in interest may appear and show cause, if any they have, at the hearing, why the order or direction should not be passed.

SEC. 12. And be it further enacted, That if any person who shall have been discharged under this act, shall afterward become bankrupt, he shall not again be entitled to a discharge under this act, unless his estate shall produce (after all charges) sufficient to pay every creditor seventy-five per cent. on the amount of the debt which shall have been allowed to each creditor.

SEC. 13. And be it further enacted, That the proceedings in all cases in bankruptcy shall be deemed matters of record; but the same shall not be required to be recorded at large, but shall be carefully filed, kept and numbered in the office of the said court, and a docket only, or short memorandum thereof, with the numbers, kept in a book by the clerk of the court; and the clerk of the court, for affixing his name and the seal of the court to any form, or certifying a copy thereof, when required thereto, shall be entitled to receive, as compensation, the sum of twenty-five cents, and no more. And no officer of the court, or commissioner, shall be allowed by the court more than one dollar for taking the proof of any debt or other claim of any creditor or other person against the estate of the bankrupt; but he may be allowed, in addition, his actual travel expenses for that purposes.

SEC. 14. And be it further enacted, That where two or more persons, who are partners in trade, become insolvent, an order may be made in the manner provided in this act, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, upon which order all the joint stock and property of the company, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are herein exempted; and all the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts; and the assignees shall also keep separate accounts of the joint stock or property of the company, and of the separate estate of each member thereof; and after deducting out of the whole amount received by such assignees the whole of the expenses and disbursements paid by them, the net proceeds of the joint stock shall be appropriated to pay the creditors of the company, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors; and if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors; and if there shall be any balance of the joint stock, after payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners according to their respective rights and interests therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts; and the certificate of discharge shall be granted or refused to each partner, as the same would or ought to be if the proceedings had been against him alone under this act; and in all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone.

SEC. 15. And be it further enacted, That a copy of any decree of bankruptcy, and the appointment of assignees, as directed by the third section of this act, shall be recited in every deed of lands belonging to the bankrupt, sold and conveyed by any assignees under and by virtue of this act; and that such recital, together with certified copy of such order, shall be full and complete evidence both of the bankruptcy and assignment therein recited, and supersede the necessity of any other proof of such bankruptcy and assignment to validate the said deed; and all deeds containing such recital, and supported by such proof, shall be as effectual to pass the title of the bankrupt, of, in and to, the lands therein mentioned and described, to the purchaser, as fully to all intents and purposes, as if made by such bankrupt himself immediately before such order.

SEC. 16. And be it further enacted, That all jurisdiction, power and authority, conferred upon and vested in the district court of the United States by this act, in cases in bankruptcy, are hereby conferred upon and vested in the circuit court of the United States for the District of Columbia, and in and upon the supreme or superior courts of any of the Territories of the United States, in cases in bankruptcy, where the bankrupt resides in the said District of Columbia, or in either of the said Territories.

SEC. 17. And be it further enacted, That this act shall take effect from and after the first day of February next.

IV. THE BANKRUPTCY ACT OF 1800.

An Act to establish a uniform System of Bankruptcy throughout the United States.

(Passed April 4th, 1800; repealed December 19th, 1803.)

SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the first day of June next, if any merchant or other person residing within the United States, actually using the trade of merchandise, by buying and selling in gross, or by retail, or dealing in exchange, or as a banker, broker, factor, underwriter or marine insurer, shall, with intent unlawfully to delay or defraud his or her creditors, depart from the State in which such person usually resides, or remain absent therefrom, or conceal him or herself therein, or keep his or her house, so that he or she cannot be taken, or served with process, or willingly or fraudulently procure him or herself to be arrested, or his or her lands, goods, money or chattels to be attached, sequestered or taken in execution, or make or cause to be made any fraudulent conveyance of his or her lands, or chattels, or make or admit any false or fraudulent security or evidence of debt, or being arrested for debt, or having surrendered him or herself in discharge of bail, shall remain in prison two months or more, or escape therefrom, or whose lands or effects being attached by process issuing out of, or returnable to, any court of common law, shall not, within two months after written notice thereof, enter special bail and dissolve the same, or in districts in which attachments are not dissolved by the entry of special bail, being arrested for debt after his or her lands and effects, or any part thereof, have been attached for a debt or debts amounting to one thousand dollars or upwards, shall not, upon notice of such attachment, give sufficient security for the payment of what may be recovered in the suit in which he or she shall be arrested, at or before the return-day of the same, to be approved by the judge of the district, or some judge of the court out of which the process issued upon which he is arrested, or to which the same shall be returnable, every such person shall be deemed and adjudged a bankrupt: Provided, that no person shall be liable to a commission of bankruptcy if the petition be not preferred, in manner hereinafter directed, within six months after the act of bankruptcy committed.

SEC. 2. And be it further enacted, That the judge of the district court of the United States, for the district where the debtor resides, or usually resided, at the time of committing the act of bankruptcy, upon petition in writing against such person or persons being bankrupt, to him to be exhibited by any one creditor; or by a greater number, being partners, whose single debt shall amount to one thousand dollars, or by two creditors whose debts shall amount to one thousand, five hundred dollars, or by more than two creditors whose debts shall amount to two thousand dollars, shall have power, by commission under his hand and seal, to appoint such good and substantial persons, being citizens of the United States, and resident in such district, as such judge shall deem proper, not exceeding three, to be commissioners of the said bankrupt, and in case of vacancy or refusal to act, to appoint others from time to time as occasion may require: Provided always, that before any commission shall issue, the creditor or creditors, petitioning shall make affidavit or solemn affirmation before the said judge of the truth of his, her or their debts, and give bond, to be taken by the said judge, in the name and for the benefit of the said party so charged as a bankrupt, and in such penalty, and with such surety, as he shall require, to be conditioned for the proving of his, her or their debts, as well before the commissioners as upon a trial at law, in case the due issuing forth of the said commission shall be contested, and also for proving the party a bankrupt, and to proceed on such commission in the manner herein prescribed. And if such debt shall not be really due, or after such commission taken out it cannot be proved that the party was a bankrupt, then the said judge shall upon the petition of the party aggrieved, in case there be occasion, deliver such bond to the said party, who may sue thereon, and recover such damages under the penalty of the same, as, upon trial at law, he shall make appear he has sustained, by reason of any breach of the condition thereof.

SEC. 3. And be it further enacted, That before the commissioners shall be capable of

acting, they shall respectively take and subscribe the following oath or affirmation, which shall be administered by the judge issuing the commission, or by any of the judges of the Supreme Court of the United States, or any judge, justice or chancellor of any State court, and filed in the office of the clerk of the district court: "I, A. B., do swear, or affirm, that I will faithfully, impartially and honestly, according to the best of my skill and knowledge, execute the several powers and trusts reposed in me, as a commissioner, in a commission of bankruptcy against _____, and that without favor or affection, prejudice or malice." And the commissioners, who shall be sworn, as aforesaid, shall proceed, as soon as may be, to execute the same; and upon due examination, and sufficient cause appearing against the party charged, shall and may declare him or her to be a bankrupt: Provided, that before such examination be had, reasonable notice thereof, in writing, shall be delivered to the person charged as a bankrupt; or if he or she be not found at his or her usual place of abode, to some person of the family above the age of twelve years, or if no such person appear, shall be fixed at the front or other public door of the house in which he or she usually resides, and thereupon it shall be in the power of such person, so charged as aforesaid, to demand before, or at the time appointed for such examination, that a jury be empanelled to inquire into the fact or facts alleged as the causes for issuing the commission, and on such demand being made the inquiry shall be had before the judge granting the commission, at such time as he may direct, and in that case such person shall not be declared bankrupt, unless, by the verdict of the jury, he or she shall be found to be within the description of this act, and shall be convicted of some one of the acts described in the first section of this act: Provided also, that any commission which shall be taken out as aforesaid, and which shall not be proceeded in as aforesaid, within thirty days thereafter, may be superseded by the said judge who shall have granted the same, upon the application of the party thereby charged as a bankrupt, or of any creditor of such person, unless the delay shall have been unavoidable or upon a just occasion.

SEC. 4. And be it further enacted, That the commissioners so to be appointed shall have power forthwith, after they have declared such person a bankrupt, to cause to be apprehended, by warrant under their hands and seals, the body of such bankrupt, whosoever to be found within the United States: Provided, they shall think that there is reason to apprehend that the said bankrupt intends to abscond or conceal him or herself, and in case it be necessary in order to take the body of said bankrupt, shall have power to cause the doors of the dwelling-house of such bankrupt to be broken, or the doors of any other house in which he or she shall be found.

SEC. 5. And be it further enacted, That it shall be the duty of the commissioners so to be appointed, forthwith, after they have declared such person a bankrupt, and they shall have power to take into their possession all the estate, real and personal, of every nature and description, to which the said bankrupt may be entitled, either in law or equity, in any manner whatsoever, and cause the same to be inventoried and appraised to the best value, (his or her necessary wearing apparel, and the necessary wearing apparel of the wife and children, and necessary beds and bedding of such bankrupt only excepted) and also to take into their possession, and secure, all deeds and books of account, papers and writings belonging to such bankrupt; and shall cause the same to be safely kept, until assignees shall be chosen or appointed, in manner hereafter provided.

SEC. 6. And be it further enacted, That the said commissioners shall forthwith, after they have declared such person a bankrupt, cause due and sufficient public notice thereof to be given, and in such notice shall appoint some convenient time and place for the creditors to meet, in order to choose an assignee or assignees of the said bankrupt's estate and effects; at which meeting the said commissioners shall admit the creditors of such bankrupt to prove their debts; and where any creditor shall reside at a distance from the place of such meeting, shall allow the debt of such creditor to be proved by oath or affirmation, made before some competent authority, and duly certified, and shall permit any person duly authorized by letter of attorney from such creditor, due proof of the execution of such letter of attorney being first made, to vote in the choice of an assignee or assignees of the bankrupt's estate and effects in the place and stead of such creditor: and the said commissioners shall assign, transfer or deliver over, all and singular, the said bankrupt's estate and effects, aforesaid, with all muniments and evidences thereof, to such person or persons as the major part in value of such creditors, according to the

several debts then proved, shall choose as aforesaid: Provided always, That in such choice, no vote shall be given by, or in behalf of, any creditor whose debt shall not amount to two hundred dollars.

SEC. 7. Provided always, and be it further enacted, That it shall be lawful for the said commissioners, as often as they shall see cause, for the better preserving and securing of the bankrupt's estate, before assignees shall be chosen as aforesaid, immediately to appoint one or more assignee or assignees of the estate and effects aforesaid, or any part thereof; which assignee or assignees aforesaid, or any of them, may be removed at the meeting of the creditors, so to be appointed as aforesaid for the choice of assignees, is such creditors, entitled to vote as aforesaid, or the major part in value of them, shall think fit; and such assignee or assignees as shall be so removed, shall deliver up all the estate and effects of such bankrupt which shall have come to his or their hands or possession, unto such other assignee or assignees as shall be chosen by the creditors as aforesaid; and all such estate and effects shall be, to all intents and purposes, as effectually and legally voted in such new assignee or assignees as if the first assignment had been made to him or them by the said commissioners; and if such first assignee or assignees shall refuse or neglect, for the space of ten days next after notice, in writing, from such new assignee or assignees of their appointment, as aforesaid, to deliver over as aforesaid, all the estate and effects as aforesaid, every such assignee or assignees shall, respectively, forfeit a sum not exceeding five thousand dollars, for the use of the creditors, and shall moreover be liable for the property so detained.

SEC. 8. And be it further enacted, That at any time previous to the closing of the accounts of the said assignee or assignees so chosen as aforesaid, it shall be lawful for such creditors of the bankrupt as are hereby authorized to vote in the choice of assignees, or the major part of them in value, at a regular meeting of the said creditors, to be called for that purpose by the said commissioners, or by one-fourth in value of such creditors, to remove all or any of the assignees chosen as aforesaid, and to choose one or more in his or their place and stead; and such assignee or assignees as shall be so removed shall deliver up all the estate and effects of such bankrupt which shall have come into his or their hands or possession, unto such new assignee or assignees as shall be chosen by the creditors at such meeting; and all such estate and effects shall be, to all intents and purposes, as effectually and legally vested in such new assignee or assignees as if the first assignment had been made to him or them by the said commissioners: and if such former assignee or assignees shall refuse or neglect, for the space of ten days next after notice, in writing from such new assignee or assignees of their appointment, as aforesaid, to deliver over, as aforesaid, all the estate and effects aforesaid, every such former assignee or assignees shall respectively forfeit a sum not exceeding five thousand dollars for the use of the creditors, and moreover shall be liable for the property so detained.

SEC. 9. And be it further enacted, That whenever a new assignee or assignees shall be chosen as aforesaid, no suit at law or in equity shall be thereby abated; but it shall and may be lawful for the court in which any suit may depend, upon the suggestion of the removal of a former assignee or assignees, and of the appointment of a new assignee or assignees, to allow the name of such new assignee or assignees, to be substituted in place of the name or names of the former assignee or assignees, and thereupon the suit shall be prosecuted in the name or names of the new assignee or assignees, in the same manner as if he or they had originally commenced the suit in his or their own names.

SEC. 10. And be it further enacted, That the assignment or assignments of the commissioners of the bankrupt's estate and effects as aforesaid, made as aforesaid, shall be good at law or in equity against the bankrupt, and all persons claiming by, from or under such bankrupt, by any act done at the time, or after, he shall have committed the act of bankruptcy upon which the commission issued: Provided always, that in case of a bona-fide purchase made before the issuing of the commission from or under such bankrupt, for a valuable consideration, by any person having no knowledge, information or notice of any act of bankruptcy committed, such purchase shall not be invalidated or impeached.

SEC. 11. And be it further enacted, That the said commissioners shall have power, by deed or deeds, under their hands and seals, to assign and convey to the assignee or

assignees to be appointed or chosen as aforesaid, any lands, tenements or hereditaments which such bankrupt shall be seized of or entitled to, in fee tail, at law, or in equity, in possession, remainder or reversion, for the benefit of the creditors; and all such deeds being duly executed and recorded, according to the laws of the State within which such lands, tenements or hereditaments may be situated, shall be good and effectual against all persons whom the said bankrupt, by common recovery, or other means, might or could bar of any estate, right, title of or in the said lands, tenements or hereditaments.

SEC. 12. And be it further enacted, That if any bankrupt shall have conveyed or assured any lands, goods or estate, unto any person, upon condition or power of redemption, by payment of money or otherwise, it shall be lawful for the commissioners, or for any person by them duly authorized for that purpose, by writing, under their hands and seals, to make tender of money or other performance according to the nature of such condition, as fully as the bankrupt might have done; and the commissioners, after such performance or tender, shall have power to assign such lands, goods and estate for the benefit of the creditors, as fully and effectually as any other part of the estate of such bankrupt.

SEC. 13. And be it further enacted, That the commissioners aforesaid shall have power to assign, for the use aforesaid, all the debts due to such bankrupt, or to any other person for his or her use or benefit; which assignment shall vest the property and right thereof in the assignee or assignees of such bankrupt, as fully as if the bond, judgment, contract or claim had originally belonged or been made to the said assignees; and after the said assignment, neither the said bankrupt nor any person acting as trustee for him or her, shall have power to recover or discharge the same, nor shall the same be attached as the debt of the said bankrupt; but the assignee or assignees aforesaid shall have such remedy to recover the same, in his or their own name or names, as such bankrupt might or could have had if no commission of bankruptcy had issued. And when any action in the name of such bankrupt shall have been commenced, and shall be pending for the recovery of any debt or effects of such bankrupt, which shall be assigned, or shall or might become vested in the assignee or assignees of such bankrupt as aforesaid, then such assignee or assignees may claim to be, and shall be thereupon, admitted to prosecute such action in his or their name, for the use and benefit of the creditors of such bankrupt; and the same judgment shall be rendered in such action, and all attachments and other security taken therein shall be in like manner holden and liable, as if the said action had been originally commenced in the name of said assignee or assignees, after the original plaintiff therein had become a bankrupt as aforesaid: Provided, that where a debtor shall have, bona-fide, paid his debt to any bankrupt, without notice that such person was bankrupt, he or she shall not be liable to pay the same to the assignee or assignees.

SEC. 14. And be it further enacted, That if complaint shall be made or information given to the commissioners, or if they shall have good reason to believe or suspect, that any of the property, goods, chattels, or debts, of the bankrupt are in the possession of any other person, or that any person is indebted to or for the use of the bankrupt, then the said commissioners shall have power to summon, or to cause to be summoned, by their attorney or other person duly authorized by them, all such persons before them, or the judge of the district where such person shall reside, by such process, or other means, as they shall think convenient, and upon their appearance to examine them by parole or by interrogatories, in writing, on oath or affirmation, which oath or affirmation they are hereby empowered to administer, respecting the knowledge of all such property, goods, chattels and debts; and if such person shall refuse to be sworn or affirmed, and to make answer to such questions or interrogatories as shall be administered, and to subscribe the said answers, or upon examination shall not declare the whole truth, touching the subject-matter of such examination, then it shall be lawful for the commissioners or judge to commit such person to prison, there to be detained until they shall submit themselves to be examined in manner aforesaid, and they shall, moreover, forfeit double the value of all the property, goods, chattels and debts by them concealed.

SEC. 15. And be it further enacted, That if any of the aforesaid persons shall, after legal summons to appear before the commissioners or judge, to be examined, refuse to attend, or shall not attend at the time appointed, having no such impediment as shall be allowed of by the commissioners or judge it shall be lawful for the said commissioners

or judge to direct their warrants to such person or persons as by them shall be thought proper, to apprehend such person as shall refuse to appear, and to bring them before the commissioners or judge to be examined, and upon their refusal to come, to commit them to prison, until they shall submit themselves to be examined according to the directions of this act: Provided, that such witnesses as shall be so sent for shall be allowed such compensation as the commissioners or judge shall think fit, to be ratably borne by the creditors; and if any person, other than the bankrupt, either by subornation of others, or by his or her own act, shall wilfully or corruptly commit perjury, shall on conviction thereof be fined not exceeding four thousand dollars and imprisoned not exceeding two years, and moreover shall, in either case, be rendered incapable of being a witness in any court of record.

SEC. 16. And be it further enacted, That if any person or persons shall fraudulently or collusively claim any debts, or claim or detain any real or personal estate of the bankrupt, every such person shall forfeit double the value thereof, to and for the use of the creditors.

SEC. 17. And be it further enacted, That if any person, prior to his or her becoming a bankrupt, shall convey to any of his or her children, or other persons, any lands or goods, or transfer his or her debts or demands into other persons' names, with intent to defraud his or her creditors, the commissioners shall have power to assign the same in as effectual a manner as if the bankrupt had been actually seized or possessed thereof.

SEC. 18. And be it further enacted, That if any person or persons who shall become bankrupt within the intent and meaning of this act, and against whom a commission of bankruptcy shall be duly issued, upon which commission such person or persons shall be declared bankrupt, shall not, within forty-two days after notice thereof, in writing, to be left at the usual place of abode of such person or persons, or personal notice in case such person or persons be then in prison, and notice given in some gazette, that such commission hath been issued, and of the time and place of meeting of the commissioners, surrender him or herself to the said commissioners, and sign or subscribe such surrender, and submit to be examined, from time to time, upon oath or solemn affirmation, by and before such commissioners, and in all things conform to the provisions of this act, and also upon such his or her examination fully and truly disclose and discover all his or her effects and estate, real and personal, and how, and in what manner, to whom and upon what consideration, and at what time or times, he or she hath disposed of, assigned or transferred, any of his or her goods, wares or merchandise, monies or other effects and estate, and of all books, papers and writings relating thereunto of which he or she was possessed, or in or to which he or she was in any way interested or entitled, or which any person or persons shall then have, or shall have had in trust for him or her, or for his or her use, at any time before or after the issuing of the said commission, or whereby such bankrupt, or his or her family then hath or may have or expect any profit, possibility of profit, benefit or advantage whatsoever, except only such part of his or her estate and effects as shall have been really and bona-fide before sold and disposed of in the way of his or her trade and dealings, and except such sums of money as shall have been laid out in the ordinary expenses of his or her family, and also upon such examination, execute in due form of law such conveyance, assurance and assignment of his or her estate, whatsoever and wheresoever, as shall be devised and directed by the commissioners, to vest the same in the assignees, their heirs, executors, administrators and assigns forever, in trust, for the use of all and every the creditors of such bankrupt, who shall come in and prove their debts under the commission; and deliver up unto the commissioners all such part of his or her, the said bankrupt's goods, wares, merchandise, money, effects and estate, and all books, papers and writing thereunto relating, as at the time of such examination shall be in his or her possession, custody or power, his or her necessary wearing apparel, and the necessary wearing apparel of the wife and children, and necessary beds and bedding of such bankrupt only excepted, then he or she the said bankrupt, upon the conviction of any wilful default or omission in any of the matters or things aforesaid, shall be adjudged a fraudulent bankrupt, and shall suffer imprisonment for a term not less than twelve months, nor exceeding ten years, and shall not at any time after be entitled to the benefits of this act: Provided always, that in case any bankrupt shall be in prison or custody at the time of issuing such commission, and is willing to surrender and submit to be examined according to the directions of this act, and can be brought

before the said commissioners and creditors for that purpose, the expense thereof shall be paid out of the said bankrupt's effects, and in case such bankrupt is in execution, or cannot be brought before the commissioners, that then the said commissioners, or some one of them, shall from time to time attend the said bankrupt in prison or custody, and take his or her discovery as in other cases, and the assignees or one of them, or some person appointed by them, shall attend such bankrupt in prison or custody, and produce his or her books, papers and writings, in order to enable him or her to prepare his or her discovery; a copy whereof the said assignees shall apply for, and the said bankrupt shall deliver to them or their order within a reasonable time after the same shall have been required.

SEC. 19. And be it further enacted, That the said commissioners shall appoint, within the said forty-two days, so limited as aforesaid, for the bankrupt to surrender and conform as aforesaid, not less than three several meetings for the purposes aforesaid, the third of which meetings shall be on the last of the said forty-two days: Provided always, that the judge of the district within which such commission issues shall have power to enlarge the time so limited as aforesaid, for the purposes aforesaid, as he shall think fit, not exceeding fifty days, to be computed from the end of the said forty-two days, so as such order for enlarging the time be made at least six days before the expiration of said term.

SEC. 20. And be it further enacted, That it shall be lawful for the commissioners, or any other person or officers by them to be appointed, by their warrant, under their hands and seals, to break open in the day time the houses, chambers, shops, warehouses, doors, trunks or chests, of the bankrupt, where any of his or her goods or estate, deeds, books of account or writings, shall be, and to take possession of the goods, money and other estate, deeds, books of account or writings of such bankrupt.

SEC. 21. And be it further enacted, That if the bankrupt shall refuse to be examined, or to answer fully, or to subscribe his or her examination as aforesaid, it shall be lawful for the commissioners to commit the offender to close imprisonment until he or she shall conform him or herself; and if the said bankrupt shall submit to be examined, and upon his or her examination it shall appear that he or she hath committed wilful or corrupt perjury, he or she may be indicted therefor, and being thereof convicted shall suffer imprisonment for a term not less than two years, nor exceeding ten years.

SEC. 22. And be it further enacted, That every bankrupt having surrendered, shall, at all seasonable times before the expiration of the said forty-two days, as aforesaid, or of such further time as shall be allowed to finish his or her examination, be at liberty to inspect his or her books and writings, in the presence of some person to be appointed by the commissioners, and to bring with him or her, for his or her assistance, such persons as he or she shall think fit, not exceeding two at one time, and to make extracts and copies to enable him or her to make a full discovery of his or her effects; and the said bankrupt shall be free from arrest, in coming to surrender, and after having surrendered to the said commissioners for the said forty-two days, or such farther time as shall be allowed for the finishing his or her examination; and in case such bankrupt shall be arrested for debt, or taken on any escape warrant or execution, coming to surrender, or after his or her surrender within the time before mentioned, then on producing such summons or notice under the hands of the commissioners, and giving the officer a copy thereof, he or she shall be discharged; and in case any officer shall afterwards detain such bankrupt, such officer shall forfeit to such bankrupt, for his or her own use, ten dollars for every day he shall detain the bankrupt.

SEC. 23. And be it further enacted, That every person who shall knowingly or wilfully receive or keep concealed any bankrupt so as aforesaid summoned to appear, or who shall assist such bankrupt in concealing him or herself, or in absconding, shall suffer such imprisonment, not exceeding twelve months, or pay such fine to the United States, not exceeding one thousand dollars, as upon conviction thereof shall be adjudged.

SEC. 24. And be it further enacted, That the said commissioners shall have power to examine, upon oath or affirmation, the wife of any person lawfully declared a bankrupt, for the discovery of such part of his estate as may be concealed or disposed of by such wife, or by any other person; and the wife shall incur such penalties for not appearing

before the said commissioners, or refusing to be sworn or affirmed or examined, and to subscribe her examination, or for not disclosing the truth, as by this act is provided against any other person in like cases.

SEC. 25. And be it further enacted, That in case any person shall be committed by the commissioners for refusing to answer, or for not fully answering any question, or for any other cause, the commissioners shall in their warrant specify such question or other cause of commitment.

SEC. 26. And be it further enacted, That if after the bankrupt shall have finished his or her final examination, any other person or persons shall voluntarily make discovery of any part of such bankrupt's estate, before unknown to the commissioners, such person or persons shall be entitled to five per cent. out of the effects so discovered, and such further reward as the commissioners shall think proper; and any trustee having notice of the bankruptcy, wilfully concealing the estate of any bankrupt for the space of ten days after the bankrupt shall have finished his final examination, as aforesaid, shall forfeit double the value of the estate so concealed, for the benefit of the creditors.

SEC. 27. And be it further enacted, That if any bankrupt, after the issuing any commission against him or her, pay to the person who sued out the same, or give or deliver to such person, goods, or any other satisfaction or security for his or her debt, whereby such person shall privately have and receive a greater proportion of his or her debt than the other creditors, such preference shall be a new act of bankruptcy, and on good proof thereof such commission may and shall be superseded, and it shall and may be lawful for either of the judges having authority to grant the commission as aforesaid, to award any creditor petitioning another commission, and such person, so taking such undue satisfaction as aforesaid, shall forfeit and lose, as well his or her whole debts, as the whole he or she shall have taken and received, and shall pay back or deliver up the same, or the full value thereof, to the assignee or assignees who shall be appointed or chosen under such commission, in manner aforesaid, in trust for, and to be divided among, the other creditors of the said bankrupt, in proportion to their respective debts.

SEC. 28. And be it further enacted, That if any bankrupt, after the issuing any commission against him or her, pay to the person who sued out the same, or give or deliver to such person, goods, or any other satisfaction or security, for his or her debt, whereby such person shall privately have and receive a greater proportion of his or her debt than the other creditors, such preference shall be a new act of bankruptcy, and on good proof thereof, such commission shall and may be superseded, and it shall and may be lawful for either of the judges, having authority to grant the commission as aforesaid, to award any creditor petitioning another commission; and such person, so taking such undue satisfaction as aforesaid, shall forfeit and lose, as well his or her whole debts, as the whole he or she shall have taken and received, and shall pay back, or deliver up the same, or the full value thereof, to the assignee or assignees who shall be appointed or chosen under such commission in manner aforesaid, in trust for, and to be divided amongst the other creditors of the said bankrupt, in proportion to their respective debts.

SEC. 29. And be it further enacted, That every person who shall be chosen assignee of the estate and effects of a bankrupt shall, at some time after the expiration of four months, and within twelve months from the time of issuing the commission, cause at least thirty days public notice to be given of the time and place the commissioners and assignees intend to meet, to make a dividend or distribution of the bankrupt's estate and effects; at which time the creditors who have not before proved their debts shall be at liberty to prove the same; and upon every such meeting the assignee or assignees shall produce to the commissioners and creditors then present fair and just accounts of all his or their receipts and payments, touching the bankrupt's estate and effects, and of what shall remain outstanding, and the particulars thereof, and shall, if the creditors then present, or a major part of them, require the same, be examined upon oath or solemn affirmation before the same commissioners, touching the truth of such accounts; and in such accounts the said assignee or assignees shall be allowed and retain all such sum and sums of money as they shall have paid or expended in suing out and prosecuting the commission, and all other just allowances on account of or by reason or means of their being assignee or assignees; and the said commissioners shall order such part of the

net produce of the said bankrupt's estate as by such accounts or otherwise shall appear to be in the hands of the said assignees, as they shall think fit, to be forthwith divided among such of the bankrupt's creditors as have duly proved their debts under such commission, in proportion to their several and respective debts; and the commissioners shall make such their order for a dividend in writing, under their hands, and shall cause one part of such order to be filed amongst the proceedings under the said commission, and shall deliver to each of the assignees under such commission a duplicate of such their order, which order of distribution shall contain an account of the time and place of making such order, and the sum total or quantum of all the debts proved under the commission, and the sum total of the money remaining in the hands of the assignee or assignees to be divided, and how many per cent. in particular is there ordered to be paid to every creditor of his debt; and the said assignee or assignees, in pursuance of such order, and without any deed or deeds of distribution to be made for the purpose, shall forthwith make such dividend and distribution accordingly, and shall take receipts in a book to be kept for the purpose, from each creditor, for the part or share of such dividend or distribution which he or they shall make and pay to each creditor respectively; and such order and receipt shall be a full and effectual discharge to such assignee for so much as he shall fairly pay, pursuant to such order as aforesaid.

SEC. 30. And be it further enacted, That within eighteen months next after the issuing of the commission the assignee or assignees shall make a second dividend of the bankrupt's estate and effects, in case the same were not wholly divided upon the first dividend, and shall cause due public notice to be given of the time and place the said commissioners intend to meet to make a second distribution of the bankrupt's estate and effects, and for the creditors who shall not before have proved their debts to come in and prove the same; and at said meeting the said assignees shall produce, on oath or solemn affirmation as aforesaid, their account of the bankrupt's estate and effects, and what upon the balance thereof shall appear to be in their hands shall, by like order of the commissioners, be forthwith divided amongst such of the bankrupt's creditors as shall have made due proof of their debts, in proportion to their several and respective debts, which second dividend shall be final, unless any suit at law or in equity be pending, or any part of the estate standing out that could not have been disposed of, or that the major part of the creditors shall not have agreed to be sold or disposed of, or unless some other or future estate or effects of the bankrupt shall afterwards come to or vest in the said assignees, in which cases the said assignees shall, as soon as may be, convert such future or other estate and effects into money, and shall within two months after the same be converted into money, by like order of the commissioners, divide the same among such bankrupt's creditors as shall have made due proof of their debt under such commission.

SEC. 31. And be it further enacted, That in the distribution of the bankrupt's effects there shall be paid to every one of the creditors a portion-rate according to the amount of their respective debts, so that every creditor having security for his debt by judgment, statute, recognizance, or specialty, or having an attachment under any of the laws of the individual States, or of the United States, on the estate of such bankrupt, (Provided, there be no execution executed upon any of the real or personal estate of such bankrupt before the time he or she became bankrupt) shall not be relieved upon any such judgment, statute, recognizance, specialty or attachment, for more than a ratable part of his debt, with the other creditors of the bankrupt.

SEC. 32. And be it further enacted, That the assignees shall keep one or more distinct book or books of account, wherein he or they shall duly enter all sums of money or effects which he or they shall have received or got into his or their possession, of the said bankrupt's estate, to which books of account every creditor who shall have proved his or her debt shall, at all reasonable times, have free resort and inspect the same as often as he or she shall think fit.

SEC. 33. And be it further enacted, That every bankrupt, not being in prison or custody, shall at all times after his surrender be bound to attend the assignees upon every reasonable notice, in writing, for that purpose, given or left at the usual place of his or her abode, in order to assist in making out the accounts of the said bankrupt's estate and effects, and to attend any court of record, to be examined touching the same, or such other business as the said assignee shall judge necessary, for which he shall receive three dollars per day.

SEC. 34. And be it further enacted, That all and every person and persons who shall become bankrupt as aforesaid, and who shall within the time limited by this act surrender him or herself to the commissioners, and in all things conform as in and by this act is directed, shall be allowed five per cent. upon the net produce of all the estate that shall be recovered in and received, which shall be paid unto him or her by the assignee or assignees, in case the net produce, to be paid as aforesaid so as such ten per cent. shall not, in the whole, creditors of said bankrupt who shall have proved their debts under such commission the amount of fifty per cent. on their said debts, respectively, and so as the said five per cent. shall not exceed, in the whole, the sum of five hundred dollars; and in case the net produce of the said estate shall, over and above the allowance hereafter mentioned, be sufficient to pay the said creditors seventy-five per cent. on the amount of their said debts, respectively, that then the said bankrupt shall be allowed ten per cent. on the amount of such net produce, to be paid as aforesaid so as such ten per cent. shall not, in the whole, exceed the sum of eight hundred dollars; and every such bankrupt shall be discharged from all debts by him or her due or owing at the time he or she became bankrupt, and all which were or might have been proved under the said commission; and in case any such bankrupt shall afterwards be arrested or prosecuted or impleaded, for or on account of any of the said debts, such bankrupt may appear without bail, and may plead the general issue, and give this act and the special matter in evidence. And the certificate of such bankrupt's conforming, and the allowance thereof, according to the directions of this act, shall be, and shall be allowed to be, sufficient evidence, *prima facie* of the party's being a bankrupt within the meaning of this act, and of the commission and other proceedings precedent to the obtaining such certificate, and a verdict shall thereupon pass for the defendant, unless the plaintiff in such action can prove the said certificate was obtained unfairly and by fraud, or unless he can make appear any concealment of estate or effects by such bankrupt to the value of one hundred dollars. Provided, That no such discharge of a bankrupt shall release or discharge any person who was a partner with such bankrupt at the time he or she became bankrupt, or who was then jointly held or bound with such bankrupt for the same debt or debts from which such bankrupt was discharged as aforesaid.

SEC. 35. Provided always, and be it further enacted, That if the net proceeds of the bankrupt's estate, so to be discovered, recovered and received, shall not amount to so much as will pay all and every of the creditors of the said bankrupt who shall have proved their debts under the said commission, the amount of fifty per cent. on their debts respectively, after all charges first deducted, that then and in such case the bankrupt shall not be allowed five per centum on such estate as shall be recovered in, but shall have and be paid by the assignees so much money as the commissioners shall think fit to allow, not more than three hundred dollars, nor exceeding three per centum on the net proceeds of the said bankrupt's estate.

SEC. 36. Provided also, and be it further enacted, That no person becoming a bankrupt according to the intent and provisions of this act shall be entitled to a certificate of discharge, or to any of the benefits of the act, unless the commissioners shall certify under their hands to the judge of the district within which such commission issues that such bankrupt hath made a full discovery of his or her estate and effects, and in all things conformed him or herself to the directions of this act, and that there doth not appear to them any reason to doubt of the truth of such discovery, or that the same was not a full discovery of the said bankrupt's estate and effects, or unless the said judge should be of opinion that the said certificate was unreasonably denied by the commissioners; and unless two-thirds, in number and in value, of the creditors of the bankrupt, who shall be creditors for not less than fifty dollars respectively, and who shall have duly proved their debts under the said commission, shall sign such certificate to the judge, and testify their consent to the allowance of a certificate of discharge in pursuance of this act; which signing and consent shall be also certified by the commissioners; but the said commissioners shall not certify the same till they have proof by affidavit or affirmation, in writing, of such creditors, or of the persons respectively authorized for that purpose signing the said certificate; which affidavit or affirmation, together with the letter or power of attorney to sign, shall be laid before the judge of the district within which such commission issues, in order for the allowing the certificate of discharge, and the said certificate shall not be allowed unless the bankrupt make oath or affirmation in writing that the certificate of the commissioners and consent of the creditors thereunto were obtained fairly and without fraud; and any of

the creditors of the said bankrupt are allowed to be heard, if they shall think fit before the respective persons aforesaid, against the making or allowing of such certificates by the commissioners or judge.

SEC. 37. And be it further enacted, That if any creditor, or pretended creditor, of any bankrupt shall exhibit to the commissioners any fictitious or false debt or demand, with intent to defraud the real creditors of such bankrupt, and the bankrupt shall refuse to make discovery thereof and suffer the fair creditors to be imposed upon, he shall lose all title to the allowance upon the amount of his effects and to a certificate of discharge as aforesaid, nor shall he be entitled to the said allowance or certificate if he has lost at any one time fifty dollars, or in the whole three hundred dollars, after the passing of this act and within twelve months before he became a bankrupt, by any manner of gaming or wagering whatever.

SEC. 38. And be it further enacted, That if any bankrupt who shall have obtained his certificate shall be taken in execution or detained in prison on account of any debts owing before he became a bankrupt, by reason that judgment was obtained before such certificate was allowed, it shall be lawful for any of the judges of the court wherein judgment was so obtained, or for any court, judge or justice, within the district in which such bankrupt shall be detained, having powers to award or allow the writ of habeas corpus, on such bankrupt producing his certificate so as aforesaid allowed, to order any sheriff or gaoler who shall have such bankrupt in custody to discharge such bankrupt without fee or charge, first giving reasonable notice to the plaintiff, or his attorney, of the motion for such discharge.

SEC. 39. And be it further enacted, That every person who shall have bona-fide given credit to or taken securities, payable at future days, from persons who are or shall become bankrupts, not due at the time of such persons becoming bankrupt, shall be admitted to prove their debts and contracts as if they were payable presently, and shall have a dividend in proportion to the other creditors, discounting, where no interest is payable, at the rate of so much per centum per annum, as is equal to the lawful interest of the State where the debt was payable, and the obligee of any bottomry or respondentia bond, and the assured in any policy of insurance, shall be admitted to claim, and after the contingency or loss to prove the debt thereon, in like manner as if the same had happened before issuing the commission; and the bankrupt shall be discharged from such securities as if such money had been due and payable before the time of his or her becoming bankrupt; and such creditors may petition for a commission, or join in petitioning.

SEC. 40. And be it further enacted, That in case any person committed by the commissioners' warrant shall obtain a habeas corpus, in order to be discharged and there shall appear any insufficiency in the form of the warrant, it shall be lawful for the court or judge before whom such party shall be brought by habeas corpus, by rule or warrant, to commit such persons to the same prison, there to remain until he shall conform as aforesaid, unless it shall be made to appear that he had fully answered all lawful questions put to him by the commissioners; or in case such person was committed for not signing his examination, unless it shall appear that the party had good reason for refusing to sign the same or that the commissioners had exceeded their authority in making such commitment; and in case the gaoler to whom such person shall be committed shall wilfully or negligently suffer such person to escape, or go without the doors or walls of the prison, such gaoler shall for such offense, being convicted thereof, forfeit a sum not exceeding three thousand dollars, for the use of the creditors.

SEC. 41. And be it further enacted, That the gaoler shall, upon the request of any creditor having proved his debt and showing a certificate thereof under the hands of the commissioners, which the commissioners shall give without fee or reward, produce the person so committed; and in case such gaoler shall refuse to show such person to such creditor requesting the same, such person shall be considered as having escaped, and the gaoler or sheriff so refusing shall be liable as for a wilful escape.

SEC. 42. And be it further enacted, That where it shall appear to the said commissioners that there hath been mutual credit given by the bankrupt and any other person, or mutual debts between them at any time before such person became bankrupt, the assignee or

assignees of the estate shall state the account between them, and one debt may be set off against the other, and what shall appear to be due on either side on the balance of such account after such set off, and no more, shall be claimed or paid on either side respectively.

SEC. 43. And be it further enacted, That it shall and may be lawful to and for the assignee or assignees of any bankrupt's estate and effects, under the direction of the commissioners, and by and with the consent of the major part in value of such of the said bankrupt's creditors as shall have duly proved their debts under the commission, and shall be present at any meeting of the said creditors, to be held in pursuance of due and public notice for that purpose given, to submit any difference or dispute for, on account of, or by reason or means of, any matter, cause, or thing whatsoever, relating to such bankrupt, or to his or her estate or effects, to the final end and determination of arbitrators to be chosen by the said commissioners, and the major part in value of such creditors as shall be present at such meeting as aforesaid, in such manner as the said assignee or assignees, under the direction and with the consent aforesaid, shall think fit and can agree; and the same shall be binding on the several creditors of the said bankrupt, and the said assignee or assignees are hereby indemnified for what they shall fairly do, according to the directions aforesaid.

SEC. 44. And be it further enacted, That the assignees shall be, and hereby are, vested with full power to dispose of all the bankrupt's estate, real and personal, at public auction or vendue, without being subject to any tax, duty, imposition, or restriction, any law to the contrary notwithstanding.

SEC. 45. And be it further enacted, That if after any commission of bankruptcy sued forth, the bankrupt happen to die before the commissioners shall have distributed the effects, or any part thereof, the commissioners shall nevertheless proceed to execute the commission as fully as they might have done if the party were living.

SEC. 46. And be it further enacted, That where any commission of bankruptcy shall be delivered to the commissioners therein named, to be executed, it shall and may be lawful for them before they take the oath or affirmation of qualification, to demand and take from the creditor or creditors prosecuting such commission a bond with one good security, if required, in the penalty of one thousand dollars, conditioned for the payment of the costs, charges and expenses which shall arise and accrue upon the prosecution of the said commission: Provided always, that the expenses so as aforesaid to be secured and paid by the petitioning creditor or creditors shall be repaid to him or them by the commissioner or assignees out of the first monies arising from the bankrupt's estate or effects, if so much be received therefrom.

SEC. 47. And be it further enacted, That the district judges in each district respectively shall fix a rate of allowance to be made to the commissioners of bankruptcy, as compensation of services to be rendered under the commission, and it shall be lawful for any creditor, by petition to the district judge, to except to any charge contained in the account of the commissioners: and the said judge, after hearing the commissioners, may in a summary way decide upon the validity of such exception.

SEC. 48. And be it further enacted, That all penalties given by this act for the benefit of the creditors shall be recovered by the assignee or assignees by action of debt, and the money so recovered, the charges of suit being deducted, shall be distributed towards payment of the creditors.

SEC. 49. And be it further enacted, That if any action shall be brought against any commissioner, or assignee or other person, having authority under the commission, for anything done and performed by force of this act, the defendant may plead the general issue, and give this act and the special matter in evidence; and in case of a non-suit, discontinuance, or verdict or judgment for him, he shall recover double costs.

SEC. 50. And be it further enacted, That if any estate, real or personal, shall descend, revert to, or become vested in any person after he or she shall be declared a bankrupt, and before he or she shall obtain a certificate signed by the judge as aforesaid, all such estate shall, by virtue of this act, be vested in the said commissioners, and shall be by them

assigned and conveyed to the assignee or assignees in fee simple or otherwise, in like manner as above directed, with the estate of the said bankrupt, at the time of the bankruptcy, and the proceeds thereof shall be divided among the creditors.

SEC. 51. And be it further enacted, That the said commissioners shall, once in every year, carefully file in the clerk's office of the district court all the proceedings had in every case before them, and which shall have been finished, including the commissions, examinations, dividends, entries and other determinations of the said commissioners, in which office the final certificate of the said bankrupt may also be recorded; all which proceedings shall remain of record in the said office, and certified copies thereof shall be admitted as evidence in all courts, in like manner as the copies of the proceedings of the said district court are admitted in other cases.

SEC. 52. And be it further enacted, That it shall and may be lawful for any creditor of such bankrupt to attend all or any of the examinations of said bankrupt, and the allowance of the final certificate, if he shall think proper, and then and there to propose interrogatories to be put by the judge or commissioners to the said bankrupt and others, and also to produce and examine witnesses and documents before such judge or commissioners, relative to the subject-matter before them. And in case either the bankrupt or creditor shall think him or herself aggrieved by the determination of the said judge or commissioners, relative to any material fact in the commencement or progress of the said proceedings, or in the allowance of the certificate aforesaid, it shall and may be lawful for either party to petition the said judge, setting forth such facts and the determination thereon, with the complaint of the party, and a prayer for trial by jury to determine the same, and the said judge shall, in his discretion, make order thereon, and reward a venire facias to the marshal of the district, returnable within fifteen days before him, for the trial of the facts mentioned in the said petition, notice whereof shall be given to the commissioners and creditors concerned in the same; at which time the trial shall be had, unless, on good cause shown, the judge shall give farther time, and judgment being entered on the verdict of the jury shall be final on the said facts, and the judge or commissioners shall proceed agreeably thereto.

SEC. 53. And be it further enacted, That the commissioners before the appointment of assignees, and the assignees after such appointment, may from time to time make such allowance out of the bankrupt's estate until he shall have obtained his final discharge, as in their opinion may be requisite for the necessary support of the said bankrupt and his family.

SEC. 54. And be it further enacted, That it shall be lawful for the major part in value of the creditors, before they proceed to the choice of assignees, to direct in what manner, with whom and where the monies arising by and to be received from time to time out of the bankrupt's estate shall be lodged, until the same shall be divided among the creditors, as herein provided; to which direction every such assignee and assignees shall conform as often as three hundred dollars shall be received.

SEC. 55. And be it further enacted, That every matter and thing by this act required to be done by the commissioners of any bankrupt shall be valid to all intents and purposes, if performed by a majority of them.

SEC. 56. And be it further enacted, That in all cases where the assignee shall prosecute any debtor of the bankrupt for any debt, duty or demand, the commission, or a certified copy thereof, and the assignment of the commissioners of the bankrupt's estate, shall be conclusive evidence of the issuing the commission and of the person named therein being a trader and bankrupt at the time mentioned therein.

SEC. 57. And be it further enacted, That every person obtaining a discharge from his debts, by certificate as aforesaid, granted under a commission of bankruptcy, shall not on any future commission be entitled to any other certificate than a discharge of his person only; unless the net proceeds of the estate and effects of such person so becoming bankrupt a second time shall be sufficient to pay seventy-five per cent. to his or her creditors on the amount of their debts respectively.

SEC. 58. And be it further enacted, That any creditor of a person against whom a commission of bankruptcy shall have been sued forth, and who shall lay his claim before the commissioners appointed in pursuance of this act, may at the same time declare his unwillingness to submit the same to the judgment of the said commissioners, and his wish that a jury may be impanelled to decide thereon: And in like manner the assignee or assignees of such bankrupt may object to the consideration of any particular claim by the commissioners, and require that the same should be referred to a jury. In either case such objection and request shall be entered on the books of the commissioners, and thereupon an issue shall be made up between the parties, and a jury shall be impanelled, as in other cases, to try the same in the circuit court for the district in which such bankrupt has usually resided. The verdict of such jury shall be subject to the control of the court, as in suits originally instituted in the said court, and when rendered, if not set aside by the said court, shall be certified to the commissioners, and shall ascertain the amount of any such claim, and such creditor or creditors shall be considered in all respects as having proved their debts under the commission.

SEC. 59. And be it further enacted, That the lands and effects of any person becoming bankrupt may be sold on such credit, and on such security, as a major part in value of the creditors may direct: Provided, nothing herein contained shall be allowed so to operate as to retard the granting the bankrupt's certificate.

SEC. 60. And be it further enacted, That if any person becoming bankrupt shall be in prison, it shall be lawful for any creditor or creditors, at whose suit he or she shall be in execution, to discharge him or her from custody, or if such creditor or creditors shall refuse to do so, the prisoner may petition the commissioners to liberate him or her, and thereupon, if in the opinion of the commissioners the conduct of such bankrupt shall have been fair, so as to entitle him or her in their opinion to a certificate, when by law such certificate might be given, it shall be lawful for them to direct the discharge of such prisoner, and to enter the same in their books, which being notified to the keeper of the gaol in which such prisoner may be confined shall be a sufficient authority for his or her discharge: Provided, that in either case, such discharge shall be no bar to another execution, if a certificate shall be refused to such bankrupt: And provided also, that it shall be no bar to a subsequent imprisonment of such bankrupt by order of the commissioners, in conformity with the provisions of this act.

SEC. 61. And be it further enacted, That this act shall not repeal or annul, or be construed to repeal or annul, the laws of any State now in force, or which may be hereafter enacted, for the relief of insolvent debtors, except so far as the same may respect persons who are or may be clearly within the purview of this act, and whose debts shall amount in the cases specified in the second section thereof to the sums herein mentioned. And if any person within the purview of this act shall be imprisoned for the space of three months, for any debt or upon any contract, unless the creditors of such prisoner shall proceed to prosecute a commission of bankruptcy against him or her, agreeably to the provisions of this act, such debtor may and shall be entitled to relief, under any such laws for the relief of insolvent debtors, this act notwithstanding.

SEC. 62. And be it further enacted, That nothing contained in this law shall in any manner affect the right of preference to prior satisfaction of debts due to the United States as secured or provided by any law heretofore passed, nor shall be construed to lessen or impair any right to, or security for, money due to the United States or to any of them.

SEC. 63. And be it further enacted, That nothing contained in this act shall be taken or construed to invalidate or impair any lien existing at the date of this act upon the lands or chattels of any person who may have become a bankrupt.

SEC. 64. And be it further enacted, That this act shall continue in force during the term of five years, and from thence to the end of the next session of congress thereafter, and no longer: Provided, that the expiration of this act shall not prevent the complete execution of any commission which may have been previously thereto issued.

An Act to provide for the more convenient organization of the Courts of the United States.

(February 13, 1801.)

SEC. 12. The said circuit courts respectively shall have cognizance, concurrently with the district courts, of all cases which shall arise, within their respective circuits, under the act to establish an uniform system of bankruptcy throughout the United States; and each circuit judge, within his respective circuit, shall and may perform, all and singular, the duties enjoined by the said act upon a judge of a district court: and the proceedings under a commission of bankruptcy which shall issue from a circuit judge shall, in all respects, be conformable to the proceedings under a commission of bankruptcy which shall issue from a district judge, *mutatis mutandis*.

An Act to amend the judicial system of the United States.

(April 29, 1802.) .

SEC. 11. In all cases in which proceedings shall, on the said first day of July next, be pending under a commission of bankruptcy issued in pursuance of the aforesaid act, entitled "An act to provide for the more convenient organization of the courts of the United States," the cognizance of the same shall be, and hereby is, transferred to, and vested in, the district judge of the district within which such commission shall have issued, who is hereby empowered to proceed therein in the same manner and to the same effect as if such commission of bankruptcy had been issued by his order.

GENERAL INDEX

[To Bankruptcy Act; text, General Orders and Forms.]

[1565]

GENERAL INDEX

[This index covers the entire work, including the Bankruptcy Act, General Orders, Forms and text of the treatise. It does not include the Appendix.]

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